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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1887

J. C. BANCROFT DAVIS

REPORTER

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1888

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

———— ———— ————, Chief Justice.[1]

SAMUEL FREEMAN MILLER, Associate Justice.

STEPHEN JOHNSON FIELD, Associate Justice.

JOSEPH P. BRADLEY, Associate Justice.

JOHN MARSHALL HARLAN, Associate Justice.

STANLEY MATTHEWS, Associate Justice.

HORACE GRAY, Associate Justice.

SAMUEL BLATCHFORD, Associate Justice.

LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

AUGUSTUS HILL GARLAND, Attorney General.

GEORGE AUGUSTUS JENKS, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

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[1] The final judgments in these cases were entered after the death of Chief Justice Waite. On page 476 an interlocutory decision, announced by him, is reported.

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(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1887.

CALIFORNIA *v.* CENTRAL PACIFIC RAILROAD CO.

SAME *v.* SOUTHERN PACIFIC RAILROAD CO.

SAME *v.* NORTHERN RAILWAY CO.

SAME *v.* CALIFORNIA PACIFIC RAILROAD CO.

SAME *v.* CENTRAL PACIFIC RAILROAD CO.

SAME *v.* CENTRAL PACIFIC RAILROAD CO.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Nos. 660, 661, 662, 663, 664, 1157. Argued January 11, 12, 13, 1888. — Decided April 30, 1888.

By the constitution of California two modes of assessment for taxation are prescribed: one, by a state board of equalization; the other, by county boards and local assessors. All property is directed to be assessed in the county, city, etc., in which it is situated, except that the franchise, roadway, road-bed, rails, and rolling-stock of any railroad operated in more than one county, are to be assessed by the state board, and apportioned to the several counties, etc. By an act of the legislature the state board is required to include in their assessment steamers engaged in transporting passengers and freights across waters which divide a railroad. This act was held by the Supreme Court of California, in *San Francisco* v. *Central Pacific Railroad Co.*, 63 Cal. 469, to be contrary to the constitution, and steamboats were held to be assessable by the county

board, and not by the state board. This court, following that decision, and that of *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394, *holds* that the assessment of the steamers of a railroad company by the state board is in violation of the constitution of California, and void; and, being inseparably blended with the other property assessed, it makes the whole assessment void.

The State Board of Equalization of California having included in their assessment all the franchises of a railroad company, amongst which were franchises conferred by the United States, of constructing a railroad from the Pacific Ocean across the State as well as across the Territories of the United States, and of taking toll thereon; *held*, that the assessment of these franchises was repugnant to the Constitution and laws of the United States and the power given to Congress to regulate commerce among the several States.

Franchises conferred by Congress cannot, without its permission, be taxed by the States.

Congress has authority, in the exercise of its power to regulate commerce among the several States, to construct, or authorize individuals or corporations to construct, railroads across the States and Territories of the United States.

THESE cases were argued together. They all involved the constitutionality of tax laws of the State of California, in many respects the same constitutional questions being presented as those which were argued (and not decided) in *Santa Clara County* v. *Southern Pacific Railroad Company*, 118 U. S. 394.

Each action was brought by the people of the State of California to recover a tax assessed upon the property and franchises of the defendant.

The provisions of the constitution and laws of the State of California, authorizing the suits, and which were relied upon to sustain the validity of the taxes, were stated in the brief of the Attorney General as printed in the margin.[1]

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[1] Sections 1, 2, 4, 9, and 10, of Article 13, of the constitution of California, provide as follows:

"Section 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State.

The answers of the defendants, although varying according to the facts in each case, substantially agreed in setting up in

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shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust-deed, for a deduction from credits of debts due to bona fide residents of this State.

"Section 2. Land and the improvements thereon shall be separately assessed, etc.

"Section 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroads and other *quasi*-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed, and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

"Section 9. A State Board of Equalization, consisting of one member from each Congressional District in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office, after those first elected, shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex-officio* a member of the Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe, as to the county assessments, and under such rules of notice as the State Board may prescribe as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll. [This section was amended May 20, 1884,

addition to general denials, that the tax as assessed against each of them was not assessed in the same mode, and with

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and one of the Central Pacific cases was commenced after the amendment took effect. But the counsel on both sides cited the section as here printed.]

"Section 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

Statutory Provisions.

Sections 3617, 3627, 3628, 3629, 3664, 3665, 3669, 3670, 3671, 3672, 3673, 3674, 3676, 3692, and 3693 of the Political Code of California provide as follows:

Section 3617, third subdivision:

"The term 'improvements,' includes — 1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land."

"Section 3627. All taxable property must be assessed at its full cash value. Land and improvements thereon shall be separately assessed. Cultivated and uncultivated land, of the same quality and similarly situated, shall be assessed at the same value. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other *quasi*-public corporations. In case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof. If any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year; and every contract by which a debtor is obliged to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein,

the same exemptions of their mortgaged property that was allowed to private individuals and other corporations, and

and as to such tax or assessment, be null and void. [In effect March 7, 1881.]

"Section 3628. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county, within which they were granted; if granted by any other authority they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. All other taxable property shall be assessed in the county, city, city and county, town, township, or district in which it is situated. Land shall be assessed in parcels or subdivisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, shall be assessed by sections or fractions of sections. The assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock M. of the first Monday of March next preceding; but no mistake in the name of the owner or supposed owner of real property, shall render the assessment thereof invalid. In assessing solvent credits, not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to *bona-fide* residents of this State. [In effect March 22, 1880.]

"Section 3629. He must exact from each person a statement under oath, setting forth specifically all the real and personal property owned by such person, or in his possession or under his control, at 12 o'clock M. on the first Monday in March," etc. [In effect March 7, 1881.]

"Section 3664. The president, secretary, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said Board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year:

"1. The whole number of miles of railway in the State, and, when the line is partly out of the State, the whole number of miles without the State, and the whole number within the State, owned or operated by such corporation, person, or association;

"2. The value of the roadway, road-bed, and rails of the whole railway, and the value of the same within the State;

that consequently they were denied the equal protection of the laws; and further that it was assessed without the notice

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"3. The width of the right of way;

"4. The number of each kind of all rolling-stock used by such corporation, person, or association in operating the entire railway, including the part without the State;

"5. Number, kind, and value of rolling-stock owned and operated in the State;

"6. Number, kind, and value of rolling-stock used in the State, but owned by the party making the returns;

"7. Number, kind, and value of rolling-stock owned, but used out of the State, either upon divisions of road operated by the party making the returns, or by and upon other railways.

"Also showing, in detail, for the year preceding the first of January:

"1. The gross earnings of the entire road;

"2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental;

"3. The cost of operating the entire [road], exclusive of sinking-fund, expenses of land department, and money paid to the United States;

"4. Net income for such year, and amount of dividend declared;

"5. Capital stock authorized;

"6. Capital stock paid in;

"7. Funded debt;

"8. Number of shares authorized;

"9. Number of shares of stock issued;

"10. Any other facts the State Board of Equalization may require;

"11. A description of the road, giving the points of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given, no other annual description thereafter is necessary unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold, for taxes, either state or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, power, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same. If such statement is not furnished, as above provided, the assessment made by the State Board of Equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final. [In effect March 9, 1883.]

"Section 3665. The State Board of Equalization must meet at the state capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons

given to individuals, and consequently that their property was taken without due process of law. Some of them set up that

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owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August the Board must apportion the total assessment of the franchise, roadway, road-bed, rails, and rolling-stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The Board must also, within said time, transmit by mail, to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement, showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way, by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway within the State, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment-roll or book of the county, city and county, and where the county is divided into assessoral townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the first Monday in October the Board of Supervisors must make, and cause to be entered in the proper record book, an order, stating and declaring the length of main track of the railway assessed by the State Board of Equalization within the county; the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road districts, or lesser taxing district in the county, or city and county, through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the assessed value of said property for taxable purposes in such city, town, township, school, road, or other district, and the clerk of the Board of Supervisors must transmit a copy of each order or equalization to the city council or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same

they enjoyed franchises conferred by the United States, not taxable without the assent of Congress; and others that

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purposes as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provisions of section thirty-six hundred and ninety-two of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the Board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the change made, and the auditor must note such change upon the assessment book or roll of the county, as directed by the Board. [In effect March 9, 1883.]

"Section 3669. Each corporation, person, or association assessed by the State Board of Equalization, must pay to the state treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said Board. Any corporation, person, or association, dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the five per cent added, if to be added on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday in February, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento. The attorney general must defend the action. The provisions of the code of civil procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated; and the controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct

property had been included in the valuation in violation of the provisions of the constitution of California, thereby invalidating the whole assessment.

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such proportion from any money then, or to become, due said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. [In effect March 9, 1883.]

"Section 3670. After the first Monday of February of each year, the controller must begin an action in the proper court, in the name of the people of the State of California, to collect the delinquent taxes upon the property assessed by the State Board of Equalization; such suit must be for the taxes due the State, and all the counties, and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the 'Duplicate Report of Apportionment of Railway Assessments.' The demands for state and county and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

"(Title of court.)

The People of the State of California }
v. }
(Naming the Defendant) }

"Plaintiff avers that on the — day of — in the year (naming the year), the State Board of Equalization assessed the franchise, roadway, road-bed, rails, and rolling-stock of the defendant at the sum of (naming it) dollars. That the Board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on, naming each county).

"That the defendant is indebted to plaintiff for state and county taxes for the year eighteen — in the following sums: For state taxes, in the sum of (naming it) dollars, for county taxes of the county of (naming it), in the sum of (naming it) dollars, etc., with five per cent added for non-payment of taxes. Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as presented in section five hundred and forty of the Code of Civil Procedure.

"(Signed by the controller or his attorney.)

"On the filing of such complaint the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If on such action the plaintiff recover judgment there shall be included in the judgment as counsel fees, and in case of judgment of taxes, after suit brought but before judgment, the defendant must pay as counsel fees such sums as the court may determine to be reasonable and just. Payment of the taxes on the amount of the judgment in the case must be made to the state treasurer. In such actions

All the suits were commenced in a court of the State, and were removed on petition of the defendants to the Circuit

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the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the controller, showing unpaid taxes against any corporation, person, or association for property assessed by the State Board of Equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State, and counties, or cities and counties, therein named, and that the corporation, person, or association is indebted to the people of the State of California, in the amount of taxes, state and county, and city and county, therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. [In effect March 9, 1883.]

"Section 3671. The assessment made by the county assessor, and that of the State Board of Equalization, as apportioned by the Board of Supervisors to each city, town, township, school, road, or other district in their respective counties, shall be the only basis for taxation for the county, or any subdivision thereof, except in incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect. All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes. [In effect March 9, 1883.]

"Section 3672. The Board of Supervisors of each county must meet on the first Monday of July in each year to examine the assessment book and equalize the assessment of property in the county. It must continue in session for that purpose from time to time until the business of equalization is disposed of, but not later than the fourth Monday in July. [In effect January 1, 1873.]

"Section 3673. The Board has power, after giving notice in such manner as it may, by rule, prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money. [In effect March 22, 1880.]

"Section 3674. No reduction must be made in the valuation of property, unless the party affected thereby, or his agent, makes and files with the Board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made. [In effect January 1, 1873.]

"Section 3676. Upon the hearing of the application the Board may subpœna such witnesses, hear and take such evidence in relation to the subject pending, as in its discretion it may deem proper. [In effect January 1, 1873.]

"Section 3692. The powers and duties of the State Board of Equalization are as follows:

"1. To prescribe rules for its own government, and for the transaction of its business.

Court of the United States for what is now the Northern District of California. In each, judgment was rendered for

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"2. To prescribe rules and regulations, not in conflict with the constitution and laws of the State, to govern supervisors when equalizing, and assessors when assessing.

"3. To make out, prepare, and enforce the use of forms in relation to the assessment of property.

"4. To hold regular meetings at the state capitol on the second Monday in each month, and such special meetings as the chairman may direct.

"5. To annually assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State, at their actual value, on the first Monday in March, at 12 o'clock M., and to apportion such assessment to the counties, and cities and counties, in which such railroads are located in proportion to the number of miles of railway laid in such counties, and cities and counties, in the manner provided for in section 3664 of said code.

"6. To equalize the assessment of each mortgage, deed of trust, contract, or other obligation by which a debt is secured, and which affects property situate in two or more counties, and to apportion the assessment thereof to each of said counties.

"7. To transmit to the assessor of each county, or city and county, its apportionment of the assessments made by said Board upon the franchises, roadways, road-beds, rails, and rolling-stock of railroads; and also its apportionment of the assessments made by such Board upon mortgages, deeds of trust, contracts, and other obligations by which debts are secured, in the manner provided for in § 3664 of said code.

"8. To meet at the state capitol on the third Monday in August, and remain in session from day to day (Sundays excepted) until the third Monday in September.

"9. At such meeting to equalize the valuation of the taxable property of the several counties in this State for the purpose of taxation; and to that end, under such rules of notice to the clerk of the Board of Supervisors of the county affected thereby as it may prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value in money of the property assessed, and to fix the rate of state taxation, and to do the things provided in § 3693 of said code.

"10. To visit as a Board, or by the individual members thereof, whenever deemed necessary, the several counties of the State, for the purpose of inspecting the property and learning the value thereof.

"11. To call before it or any member thereof, on such visit, any officers of the county, and to require them to produce any public records in their custody.

"12. To issue subpœnas for the attendance of witnesses or the production

the defendant, to review which the plaintiff below, in each case sued out a writ of error.

Mr. J. M. Wilson for plaintiffs in error. *Mr. Samuel Shellabarger* was with him on the brief. *Mr. G. A. Johnson*, Attorney General of California, filed a brief for same.

The principal questions presented by these records are the following:

First. Inasmuch as the constitution of California provides that in assessing property held by individuals for taxation the amount of encumbrances by mortgage is declared to be an interest in the property, and shall be assessed against the mortgage, and the value in excess of the mortgage shall be assessed against the owner; and inasmuch, as in cases of such corporations as the defendant, operating a railroad in more than one county of the State, no such division is provided for

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of books before the Board, or any member thereof, which subpœnas must be signed by a member of the Board, and may be served by any person.

"14. To appoint a clerk, prescribe and enforce his duties. The clerk shall hold his office during the pleasure of the Board.

"15. To report to the governor, annually, a statement showing:

"*First.* The acreage of each county in the State that is assessed.

"*Second.* The amount assessed per acre.

"*Third.* The aggregate value of all town and city lots.

"*Fourth.* The aggregate value of all real estate in the State.

"*Fifth.* The kinds of personal property in each county, and the value of each kind.

"*Sixth.* The aggregate value of all personal property in the State.

"*Seventh.* Any information relative to the assessment of property and the collection of revenue.

"*Eighth.* Such further suggestions as it shall deem proper.

"16. To keep a record of all its proceedings. [In effect April 3, 1880.]

"Section 3693. When, after a general investigation by the Board, the property is found to be assessed above or below its full cash value, the Board may, without notice, so determine, and must add to or deduct from the valuation:

"1. The real estate.

"2. Improvements upon such real estate.

"3. The personal property, except money, such per centum respectively as is sufficient to raise or reduce to its full cash value." [In effect April 3, 1880.]

or permitted; — is this a denial to that company of the equal protection of the laws as contemplated by the Fourteenth Article of Amendment to the Constitution of the United States?

Second. Inasmuch as neither the *constitution of the State* of California, nor any law of that State, (as is claimed by the defendant,) provides for any special notice to be given to the defendant, of such assessment, and makes no specific provision for a hearing before the Board of Equalization, but only such notice and right to be heard as might be implied from the existence of the laws making it the duty of the property owners to make returns, and the officers to assess and apportion; — does this amount to a taking of the defendant's property, in the shape of taxes, without "due process of law," as contemplated by the Fourteenth Article of Amendment to the Constitution of the United States?

Third. Is the property in question exempt from taxation because of its relations to the government of the United States?

Fourth. Is this tax void because the franchise was blended with the roadway, road-bed, etc., in making the assessment?

In the beginning of this discussion we desire to call the attention of the court to the fact that the assessment in question is upon the franchise, road-bed, roadway, rails, and rolling-stock of the defendant exclusively; that it does not embrace the value of the fences along the road, nor does it embrace any steamers used in connection with the business of said road, nor does it embrace any of the outlying lands granted to the company by the United States in aid of the construction of the road, and which are covered by the land-grant mortgage mentioned in the answer and findings of fact. The question, therefore, as to whether or not the method that may have been pursued by the State in assessing these outlying lands was a valid method, or whether the constitution and laws of the State of California in relation to and affecting the taxation of such lands are valid, is not involved in this record. And we have, therefore, to consider, in the discussion of this case, simply the question whether or not what has been done

under, or provided for, by the constitution and laws of California in respect to the assessment and taxation of the roadbed, roadway, rails, and rolling stock of corporations such as the defendant, is a violation of the provisions of the Fourteenth Amendment to the Constitution in the particulars referred to in the propositions hereinbefore stated. And it is to these that we invite the attention of the court.

When the constitution of the State was adopted, in 1879, this railroad company existed with its road completed, and with mortgages upon it quite equal to, if not in excess of, the assessable value of the property. And we venture to assume that the court will take judicial notice of so notorious a fact as that there were thousands of miles of railroad in that State, heavily mortgaged, many of the bonds of which were held outside of said State, and that could not be reached for taxation by assessments against the holders.

This property aggregated in value many millions of dollars — in this particular case alone, judging by the assessments, amounting to more than $20,000,000.

The aggregate of the assessments in the cases now before the court amounts to more than $50,000,000.

That this enormous amount of property should bear its fair proportion of the expenses of government will not be denied.

The Right to tax and the Right to classify Property for Taxation.

Unless it can be maintained that the Fourteenth Article of Amendment has destroyed it, the State, in the exercise of its sovereign power, has the right not only to tax according to its discretion, but also to classify property for assessment and taxation.

What the State may do in that behalf has been stated by this court in *The Railroad Company* v. *Peniston*, 18 Wall. 5. See also, to the same effect, *Williams* v. *Supervisors of Albany*, 122 U. S. 154, 163, 164.

In the light of these opinions, the sovereign and absolute power of a State to impose taxes, and to determine the extent, the subjects upon, and the mode in which it shall be

exercised, cannot be disputed. If the right to classify ever could have been the subject of reasonable disputation, it has been set at rest by the decision of this court in the *Kentucky Railroad Tax Cases,* 115 U. S. 321, in which this very question was presented and disposed of. See also *State Railroad Tax Cases*, 92 U. S. 575, at page 611.

It being, then, settled that the State may divide property into classes for the purposes of taxation — may make farming lands, city and town lots one class, and railroads, their franchises, roadway, etc., another class — it necessarily follows that if the State of California has made such a division or classification, she has not exceeded her sovereign authority by so doing. And it equally follows from this that the State must be the judge, and the *sole* judge, as to what classification shall be made within the limit of the power to classify. It can only become subject to legal criticism when what is done, or provided for, operates *unequally* upon different persons belonging to the *same class. Missouri* v. *Lewis*, 101 U. S. 22.

Now what has the State done? Its constitution and its laws in this respect cover "property." They provide for assessing in one class property not owned by railroads operating in more than one county, in the doing of which mortgages are to be deemed an interest in the property, and so assessed, and the value in excess of the mortgage is to be deemed an interest in the same property, and so assessed; and in another class "property" *owned* by railroad companies operating in more than one county, as to which no such division is to be made. It is a distinct classification of "property," and not a classification of persons.

The railroad property is not taxed beyond its value, but, in taxing, it is not divided as property between the mortgagor (the company) and the mortgagee (the bondholder), and each taxed separately for his interest. Or, to state it yet differently, the mortgage in this case is not declared to be an interest in the railroad property, and the assessment is against the owner as to the entire value. Is this an unlawful discrimination?

The answer to this question, we submit, is found in the principles of law which control the powers and rights of sovereign

States to classify the property within the State for purposes of taxation. See *Stuart* v. *Palmer*, 74 N. Y. 189; *Wilkinson* v. *Leland*, 2 Pet. 627, 657, 658; *Terret* v. *Taylor*, 9 Cranch, 43; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550; *Sinking Fund Cases*, 99 U. S. 700, 719; *Bank* v. *Moher*, 20 Blatchford, 341; Cooley Const. Lim. 175, note 5, and cases there collected.

What is meant, therefore, to be designated by, and included in, this sovereign and unfettered power, discretion and right of choice, which is held by every State in making classification of property for taxation, is not the power to disregard the fundamental principles of free government and of private property rights; but this power does mean that the legislature, in making classification and imposing taxes, is (aside from limitations in the state constitution) subject to *no other* restraints, in the exercise of these high discretions, than those limitations which make the boundaries of the legislative power in every constitutional government — such limitations, for example, as that property shall not be taken without due process of law; that one man's property shall not be taken to be bestowed upon another man; that the ends of taxation shall be public and not private; that the apportionment of taxation shall not be arbitrary merely, and the like. Or, stated in another way, this sovereign power of classification for taxation is one whose boundaries are such, to here adopt the words of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 428, that "the security against abuse of the power is found in the *structure* of the government itself."

The plain result of the proposition that the State's power and right of choice, in making classifications for taxation, is (aside from restraints in the state constitution) bounded only by the limitations which restrain the powers of legislation in every free government, is: that the classification of railroad property for taxation by itself, and without the right of deducting mortgage debts, is not in excess of legitimate classification for taxation, unless so to classify and tax is such a flagrant usurpation and injustice as to make it violative of the fundamental principles of property right as protected by all free governments.

Now, is the law of California, which the defence in the present case assails, of this flagrantly unjust character, or, on the other hand, is this discrimination complained of sanctioned by reason and justice?

Before answering the question, it is important to notice a common error — that these tax laws regard and deal with the natural persons, and their separate and private property, which make up these corporations, in their natural and individual, as distinguished from their associated and artificial, character and capacity, and that the legislature, in the very nature of the subject-matter, cannot, in imposing these taxes, regard the property invested in the corporations as in any other legal predicament or *status* than is an equivalent amount of similar property held by individuals as natural persons. The very opposite of this is the truth. These corporations are endowed by the State with most exceptional powers, rights, and franchises, and it is not just that their property should be classified for purposes of taxation precisely like all other property. For these corporations possess in connection with their holdings a species of property intangible, but of immense value, specially granted to them by legislative enactment, known as "franchises," which individuals do not have in respect to their holdings. It carries with it advantages of succession, perpetuity, etc., not enjoyed by individuals. It is the very life of these artificial persons.

They have the right of eminent domain; they have the privileges and immunities of common carriers; they come into being to conduct a special business intimately associated with the trade and commerce of the country, and the property they hold other than the franchise is only an incident to, or an instrumentality used as a means of making useful, this intangible yet most important part of their property, the "franchise." This franchise is inseparable from its ties, rails, etc., and it is impossible, certainly impracticable, to separate the one from the other in reaching its value; yet the fact that they were assessed together is one of the complaints made in this case. What it has in the shape of property has associated with it and inseparable from it that most valuable ele-

ment, the "franchise"; franchise and road-bed and rails, and so on, go to make up the property of this artificial person. And thus it is made necessary to group them all together for the purpose of assessment; and other property, having no such element, and no such condition, justly occupies a place as a distinct class.

Again: The State in the exercise of its sovereign power could not do otherwise than make this a distinctive class without doing one of two things, viz.: it must tax its citizens to the full value of the property held by them, respectively, irrespective of mortgages; or it must permit to escape taxation all railroad property embraced in franchises, road-bed, etc., that is mortgaged to its full value.

Such property of a railroad company, it cannot be denied, should be subjected to a tax, but it could not be liable to a tax upon the principle of making a division, such as is provided for, above referred to, because the holdings of the bonds secured render the collection of such a tax, if so assessed, impracticable, indeed impossible. These bonds are sold and held all over the world, as is shown by the history of such railroad bonds the world over, and are in this respect unlike all private mortgages. And so the alternative was presented either to oppress the citizen by imposing a tax on property that he only in part owned, or dividing property held under such dissimilar conditions into classes in their nature and constituent elements wholly distinct, and thereby making subject to taxation, property, which it in large part created by granting the franchise, and which without such classification would escape taxation.

Who can justly say that property, thus brought into being, can be relieved from all taxation because it has been mortgaged to its full value, unless citizens whose property is the result of their own endeavors, and in no part the gift of the sovereign, shall also be taxed to the full value regardless of encumbrances?

The contention of the defendant in this respect is, it seems to us, most conclusively answered by the court in the *State Railroad Tax Cases*, 92 U. S. 575; *Society for Savings* v. *Coite*,

6 Wall. 594; *State Freight Tax Cases*, 15 Wall. 232; *State Tax on Gross Receipts*, 15 Wall. 284. In this connection we also invite attention to the twenty-eighth finding, it being in substance set up in the answer. It is attempted by this to show a discrimination against the defendant by attempting to show that there are other corporations similarly situated where deductions are allowed. But an examination of the facts as alleged in the answer, and as found in this finding, shows that it falls very far short of accomplishing this.

The next Question is, Is the Assessment an Attempt to take the Property of the Defendant without "Due Process of Law"?

This contention of the defendant rests upon the assertion that there is no notice given of the assessment; and that while in case of individuals in respect to assessment of their property notice and a hearing are provided for before the local or county Board of Equalization, no notice of assessment by or hearing is provided for, before the State Board of Equalization, which makes the assessment against corporations such as the defendant.

There is no complaint that all corporations of the same class as the defendant are not treated alike in this regard. The complaint is, that while notice is given to one class no notice is given to the other. *One class* is not dealt with precisely as property of corporations and individuals belonging to *another class.*

What constitutes notice, due process of law, has been fully considered by this court in *State Railroad Tax Cases*, 92 U. S. 575; *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97; *Kentucky Railroad Tax Cases*, 115 U. S. 321.

Without entering into details here, it is sufficient to say that the statutes on which these decisions were made are, in all essential features, the same as the constitution and laws of California, in respect of making assessments. Undoubtedly, if the State has the right to make classes of property, it has the right to fix the methods of assessing property in these

respective classes, and it cannot be required to make these methods the same for all classes.

Did the Defendant have Notice, etc.?

1. The Constitution, § 1, article 13, provides that "'all property' in the State shall be taxed in proportion to its value, to be ascertained as provided by law."

2. Section 9 creates a State Board of Equalization.

3. Section 10 provides that the franchise, etc., of railroads operated in more than one county shall be assessed by the State Board.

So here was notice in the constitution that this property of this company would be assessed by this board as the legislature might provide.

Under the provisions of the law there was not only notice to the company, but an actual appearance by the company before the Board, in the fact that it made answer as required by law, and not only an appearance as a party but in effect an appearance as a witness at a hearing, because it not only returned the amount of property it held, but also testified under oath as to the *value of the railway* as to which the return was made.

We most respectfully submit that to assert in the face of all this that the company had no notice and no opportunity to be heard, has no substantial foundation upon which to rest, either in fact or law. The cases cited place it beyond controversy that this is notice — "*due process of law.*"

Does the Fourteenth Amendment affect this Case?

That the classification that was made by the State is one that it could lawfully make if the Fourteenth Amendment had not been adopted must, we think, in the light of the authorities, be conceded, and therefore the next question is, Has that amendment destroyed that right to thus classify?

We insist that that amendment has no relation to this power of the State to impose taxes; that it does not *enlarge* the *restrictions* upon the State, which we have above stated; that,

so far as the power to tax is concerned, the amendment leaves the power of the State just where it found it.

What led to the adoption of this amendment and what it was intended to accomplish, its "pervading spirit," never can be more forcibly stated than in the language of this court in the *Slaughter House Cases*, 16 Wall. 36. The substance of that "pervading spirit," as there declared by the court, is to confer citizenship on the negro race, just released from bondage, and to prohibit hostile discrimination against the race; and that this amendment might be safely trusted to prohibit such slavery as Mexican peonage or Chinese cooley labor, and that "in any fair and just construction" of any phrase or section of the amendments this "pervading spirit" must be looked to. See also *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Elk* v. *Wilkins*, 112 U. S. 94.

Assuming after the declaration of the Chief Justice in the *Santa Clara Case*, 118 U. S. 396, that the Fourteenth Amendment applies to these corporations, the question still remains whether they are to be considered as standing precisely on the same footing as natural persons. They are endowed with some qualities that a natural person cannot have, and they cannot be endowed with some qualities possessed by natural persons. They cannot hold office, nor vote, nor sit on juries, and the like, and the withholding of these privileges could not be depriving them of the equal protection of the laws, although these are conferred upon all other "persons."

And therefore, even if they are persons, they are only persons of their own class, and as such they are entitled only to have all, *of that class*, treated alike when the conditions are the same, or to be treated the same as natural persons when the conditions are the same.

And, if corporations are embraced as persons, there still remains the further question, is it a denial of the equal protection of the laws, if, having provided for notice as to assessments against individuals by county boards, the same notice is not provided in case of assessment of corporations by the State Board? and is it a denial of the equal protection of the laws to

allow a division between mortgagor and mortgagee in case of the individuals and deny it in case of corporations, for the purposes of taxation?

We insist that they are not embraced in this Amendment for any such purposes or considerations. Nothing could have been farther from the minds of the makers of that Amendment than the thought that it was in any way to interfere with the power of a State to regulate after its own methods, and according to its own discretion, the assessment and collection of taxes.

But it is contended now by this defendant that this language is so elastic that it can be stretched over all the affairs of corporations, and control the State in the exercise of its right of taxation as to such corporations.

We have already seen by the adjudications of this court how supreme and absolute is the power of a State as to taxation.

That it was a known and thoroughly recognized right, a right indispensable to its existence, a right which cannot be hampered or trammelled, except by the clearest prohibition by its only superior, the Constitution of the United States has been already established. And we most respectfully submit that the language well known to have been intended to subserve one purpose, "the pervading spirit" of which is to accomplish the purpose stated by the court, cannot, without violence, be used *to strike down a sovereign right of a State.*

Certainly such right of the State would not be held to be trespassed upon by the Constitution of the United States without the clearest provision. No doubtful or uncertain language could have that effect, and this is especially so in the matter now under consideration, because it is a right of such supreme importance, and because of the express reservation in favor of the States of all power not expressly delegated.

An analysis of the defence shows that it includes in it the following elements:

First. That owing to the prohibition in the Fourteenth Amendment against denying equal protection, no State can extend or deny to any owner or class of owners of property, held for private purposes, any exemption on account of the ability,

or lack of ability, of the owner to pay, or on account of the wants or condition of his family, or on *any* account which relates to the condition of the owner, which is not extended to all owners of private property.

Second. That in exercising its sovereign right of discretion and choice, regarding the subject, method, and rules of taxation, no State of the Union, since the adoption of the Fourteenth Amendment, holds any power to regard or treat any railroad property, not actually used in operating the road, as being, for the purposes of taxation, "*affected*" by the supremely valuable franchises and powers bestowed, by the State, upon such railroads.

Third. That although the States may, notwithstanding the Fourteenth Amendment, exempt from taxation all property held by private owners for the purposes of education, religion, or charity, this because the benefits which these do to the State may be received as equivalent to the taxes remitted, yet the State may not deny to railroads any exemption from taxations on account of the enormously valuable franchises, rights, privileges, and immunities which these derive, by gift, from the State; nor yet on account of the exceptional burdens, damages, etc., which these roads inflict upon the State and its citizens.

That each of these three propositions is in conflict with reason, the practices of all the States, and with authority, seems to be exceedingly plain.

Take, for example, the matter of the right and the propriety of the legislature, looking to the *condition* of the taxpayer, in determining upon his taxation and his exemptions.

All States have found it wise to encourage the immigration of skilled artisans, artificers, manufacturers, and the like by securing to them exemption from certain classes of taxation which the State has found necessary to impose upon the majority of the people. Now it is alleged that the Fourteenth Amendment has rendered this also unlawful. All States have found it wise to encourage the professions of teachers in literature and the useful arts and in religion; and have accordingly exempted these from certain taxes which are

imposed upon the majority of the people. This discrimination in favor of teachers and professors and ministers of religion, it is alleged, is now rendered unlawful by this Fourteenth Amendment. The States have found it wise to assess against certain very lucrative pursuits and professions exceptional taxes, and have therefore subjected the profession of the law, and many other exceptionally lucrative pursuits, to taxation not imposed upon other pursuits. This, too, it is alleged, the Fourteenth Amendment has rendered unlawful. Most, if not all, new States have found it wise to exempt from taxation the newcomers settling in such States for a period of time, this on account of the hardships incident to the beginning of life in new places. All this is rendered unlawful by this Fourteenth Amendment. All States have found it essential to exempt from certain taxes persons who are in exceptionally dependent or helpless or necessitous conditions, such as the poor, having not exceeding a designated amount of property, widows having dependent upon them for support children, and the like. Now this exemption is declared to be rendered unlawful by the Fourteenth Amendment.

All States which have granted to any of its citizens specially valuable monopolies or privileges, such as rights of wharfage, ferries, bridges and the like, have found it wise to assess against the owners of these, special and heavy contributions, in the nature of taxes, to the State. These taxes are alleged to be prohibited by the Fourteenth Amendment.

These are examples of the consequences which are to result from holding that the Fourteenth Amendment prohibits all discriminations, in taxation, based wholly or mainly on the character or condition of the owner of the property. And these illustrations also apply to the second proposition above named, to wit, that the Fourteenth Amendment prohibits discrimination, in taxing railroad property not actually used in exercising the corporate franchise. The laws taxing corporations as such, to which we have just alluded, have usually, and as a matter of practice, taxed the *entire* corporate property by the same rule of assessment, whether used in connection with the franchise or not.

The general rule upon this subject is thus stated in Cooley on Taxation, 145: "The general right to make exemptions is involved in the right to apportion taxes, and *must be understood to exist wherever it is not forbidden.*"

Reduced to its last analysis, the position taken here by the defendant, that the clause in the Fourteenth Amendment, securing equal protection, is one which *forbids* taxation of railroad property in a class by itself, and upon a mode of assessment different from that applied to natural persons, is a position which inserts in the constitution of every State of this Union a prohibition restraining the state legislatures from making just such classifications of property, for taxation, as have been made during the entire history of these States, and compels the legislature to adhere to one fixed iron rule in taxing all property, and this without regard to the dissimilarity of the subjects of taxation in the matters of the condition of the ownership thereof, the special emoluments, profits, and privileges enjoyed by such ownership, and regardless of all other differences in the condition of the property and of its ownership.

How radical will be the revolution which the insertion of such a provision in the constitutions of the States would be, becomes apparent by a glance at the tax systems of the States and at the kind of exemptions and distinctions which have been and are now tolerated by such tax systems.

The question presented by this record, whether or not this property is subject to taxation by the State by reason of its relations to the United States, can hardly, we submit, now be considered a debatable one.

This case certainly is not distinguishable from *Thomson* v. *Pacific Railroad Company*, 9 Wall. 579; *Peniston* v. *Railroad Company*, 18 Wall. 5; and *United States* v. *Union Pacific Railroad*, 98 U. S. 569, 619.

Upon the decision of this court in these cases we rely to maintain the right of the State to tax this property of the defendant involved in these assessments.

As to the point that the franchise was blended with the roadway, etc., in making the assessment in question, we reply:

1st. That it was a franchise granted by the State and not by Congress.

2d. That such a franchise is subject to taxation. *State Railroad Tax Cases*, 92 U. S. 603.

3d. And may be blended with capital stock. *Ibid.*

4th. If it may be blended with capital stock it may be blended with road-bed, roadway, etc., without which it is valueless, and without the franchise the road-bed, roadway, etc., have only the value of wood and iron. *Ibid.*

The usefulness of these depends upon the use of them in connection with each other — as a whole, and the wisdom of dealing with them as a unit has always been recognized. It was approved in the *Tax Cases*, in 92 U. S. If this defendant railroad property were to be sold under a foreclosure, no court would for a moment entertain the proposition to sell the road-bed, the roadway, the rolling-stock and the franchise separately, and especially would a proposition to sell the franchise apart from the road-bed, etc., not be entertained.

Mr. George F. Edmunds, *Mr. William M. Evarts*, and *Mr. Creed Haymond* for defendants in error.

Mr. Harvey S. Brown also filed briefs and an argument for defendants in error in Nos. 660, 661, 662, and 663.

Mr. George A. Johnson, Attorney General of California, closed for plaintiff in error.

Mr. Justice Bradley delivered the opinion of the court.

These cases are substantially similar to those of *Santa Clara County* v. *The Southern Pacific Railroad Company*, and the other cases decided at the same time, and reported in 118 U. S. 394. It will be unnecessary, therefore, to set out many provisions of the Constitution and laws of the United States and of California which are involved in the present cases in common with those referred to. The actions were brought by the State of California in the Superior Court for the county of San Francisco, and were removed into the Circuit Court of

the United States, where a jury was waived in each case, and the causes were tried by the court, whose findings of fact and conclusions of law are contained in the respective records. One of the cases (No. 660 on the docket) was brought against The Central Pacific Railroad Company for the recovery of the state and county taxes due upon the assessment of the company's property made by the State Board of Equalization for the year 1883; said assessment being $18,000,000, and the taxes amounting to $276,865.10, sixty per cent of which was tendered and paid without prejudice to either party after the suit was brought. Another case (No. 1157) is an action against the same company for the taxes of 1884, due upon a like assessment of $24,000,000. A third (No. 664), against the same company, is for the taxes of 1884, upon an assessment of $22,000,000. No 661 is a similar action against The Southern Pacific Railroad Company for the taxes of 1883. No. 662 is a similar action against the Northern Railway Company for the taxes of 1883. No. 663 is a similar action against The California Pacific Railroad Company for the taxes of 1883. Tender and payment of sixty per cent of the taxes were made in all the cases except 1157, in which the amount tendered and paid was fifty per cent. Similar defences were set up in these cases as in the cases reported in 118 U. S. It was claimed, as in those cases, that in making the assessments no deduction was made for the mortgages on the companies' property, whilst such deduction was made on the property of other citizens, by assessing to the mortgagees the amount of the mortgages as an interest in real estate; thus discriminating against the company and denying to it the equal protection of the laws, contrary to the Fourteenth Amendment of the constitution. It was also alleged in defence that the Board of Equalization included in the assessments a valuation of rights, franchises and property which they had no authority to assess; as, for example, franchises granted to the companies by the United States, and ferry boats, fences and other property subject to be assessed by the local county boards and not by the state board; and that the assessments were for aggregate amounts, not showing on their face what part of the valuation

represented the property illegally included therein; thus rendering the entire assessment in each case void. It was on this latter ground that the judgments for the defendants in the former cases were affirmed. If these defences, or either of them, are supported by the facts, it is unnecessary for us to decide the question raised under the Fourteenth Amendment of the constitution. The questions arising under that amendment are so numerous and embarrassing, and require such careful scrutiny and consideration, that great caution is required in meeting and disposing of them. By proceeding step by step, and only deciding what it is necessary to decide, light will gradually open upon the whole subject, and lead the way to a satisfactory solution of the problems that belong to it. We prefer not to anticipate these problems when they are not necessarily involved.

The ground on which it is alleged that the assessments in question were made to include property which the state board had no authority to assess, is to be found in article XIII, sections 9 and 10, of the state constitution. Those sections are as follows :

"SEC. 9. A State Board of Equalization, consisting of one member from each congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office, after those first elected, shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex-officio* a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation : *Provided*, such state and county Boards of Equalization are hereby authorized and empowered under such rules of notice as the county boards may prescribe, as to the county assessments, and under such rules of notice as the state board may prescribe, as to the action of the state board, to increase or lower

the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll.

"SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts, in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

The last section shows explicitly that, in regard to a railroad, the state board has power to assess only five things, the franchise, roadway, road-bed, rails and rolling-stock; the county boards are authorized to assess all the rest of the property. If the state board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void. If the unlawful part can be separated from that which is lawful, the former may be declared void, and the latter may stand; but if the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal. This is so well settled that it needs no citation of authorities farther than to refer to the opinion of this court in the former cases: (118 U. S.) In the present assessments, all parts of the property are blended together and are inseparable. If it be true, therefore, that property not authorized to be included in the assessments is included therein, the assessments must be declared void.

The legislature of California, in passing laws for carrying out the principles and methods of taxation laid down in the Constitution, has deviated from its words, and has adopted some provisions which would seem to be a departure from it.

As the State Board of Equalization in making the assessments in question undertook to follow the law, it will be necessary to examine it. By § 3628 of the Political Code as amended in 1880, it was provided as follows:

"The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority, they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. All other taxable property shall be assessed in the county, city, city and county, town, township, or district in which it is situated. . . . The assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock of the first Monday next preceding."

By § 3665 of the same code, as amended by the act of March 9th, 1883, it is, amongst other things, provided as follows:

"The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board must assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters

which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August, the board must apportion the total assessment of the franchise, roadway, road-beds, rails, and rolling-stock of each railway to the counties or cities and counties in which such railway is located, in proportion to the number of miles of railway laid in such counties and cities and counties."

Here, it will be perceived, that the legislature undertakes to define what things are and what are not, comprised within the five categories of railroad property assessable by the state board, and declares that they include not only the entire railway within the State, the right of way, bridges and culverts, but also the "wharves and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. This is clearly an enlargement of the terms of the constitution. Steamers, at least, are not, and have been held by the Supreme Court of California not to be, embraced in the five categories.

Now, one of the grounds of defence set up by the Central Pacific Railroad Company in Nos. 660 and 1157, by the Northern Railway Company in No. 662, and by the California Pacific Railroad Company in No. 663, is, that the value of their steam ferry-boats was blended by the State Board of Equalization with the other values contained in the assessments. The Central Pacific Company, in its answers, (and the others contain similar averments,) says:

"The western terminus of the said railroad of defendant is in the city of San Francisco, on the west side of the Bay of San Francisco. The distance across said bay is five miles, and the whole thereof is part of the navigable waters of said bay. The cars of the company are transported from the end of the railroad track of said road on the eastern side of said bay to the end of the railroad track on the western side of said bay on steam ferry-boats belonging to the defendant, built, owned, and constructed for that purpose, and are of great

value. For more than four years past the defendant has been the owner of two steam ferry-boats, one of the tonnage of 1566 tons and one of the tonnage of 1012 tons, and during the whole of that time has used said boats for the purposes aforesaid. Said boats now are, and for more than four years last past have been, of a class which are by law required to be registered, and now are, and for more than four years last past have been, duly registered and enrolled in the city and county of San Francisco, State of California.

"The State Board of Equalization, in making said pretended assessment of the said roadway, road-bed, rails, and rolling-stock of defendant, did wilfully and designedly include in the valuation thereof the value of said boats, and the value of said boats is blended in said pretended assessment with the value of said roadway, rails, road-bed, rails, and rolling-stock, and there is no means by which such value can be separated from the valuation placed by said board upon said roadway, road-bed, rails, and rolling-stock, or either of them."

This allegation is sustained by the court below in its findings of facts in the cases referred to. The finding in 660, and substantially the same in the other cases, is as follows:

"That on the 18th day of August, 1883, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by § 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling-stock of said railroad against defendant. Said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling-stock, or any properties of said railroad, but all of said property was blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year. Said assessment included all property and kinds

of property mentioned in § 3665 of the Political Code of California as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by local assessors.

This is a clear affirmation of the allegation of the answer. Section 3665 of the Political Code, as amended March 9, 1883, requires the State Board of Equalization to include in their assessment of railroad property "all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road." It is a matter of public notoriety, as much so as the existence of the railroad itself, or that of the Sierra Nevada, or any other geographical feature on the route, that the railroad companies in the cases referred to have steam ferry-boats engaged in the transportation of passengers and freight across the bay of San Francisco and the straits of Carquinez; and that without such means of transportation those waters could not be crossed.

The question whether steamers and ferry-boats should be included in the property assessed by the State Board of Equalization, or in that assessed by the county board, was distinctly raised in the case of *San Francisco* v. *Central Pacific Railroad Company*, 63 Cal. 467, 469, and decided in favor of the county board. That was an action brought by the city and county of San Francisco against the company to recover taxes imposed upon it by virtue of an assessment made by the county board upon the same ferry-boats now assessed by the state board. The company resisted the tax on the ground that these boats were assessable by the state board, and not by the county board. The Supreme Court of California decided against the company. Its finding of facts was as follows, namely: "That the defendant is a corporation existing under the law of the United States, and of this State, . . . owner of a line of railroad known as the Central Pacific Railroad, extending from a point in the city of San Francisco . . . to Ogden in the Territory of Utah; that the length of said road in the city and county of San Francisco is four miles from a

point within said city to the eastern shore of the southern arm of the bay of San Francisco; that from said point on the eastern shore . . . to a point on the western shore of said bay, where the railway of defendant again commences, is about twelve miles; that across said bay no line of railroad has been constructed; and freight and passengers carried upon said road are taken across said bay upon steam ferry-boats; . . . that upon the decks of said vessels are laid railroad tracks, etc." After giving judgment for the plaintiff upon these facts, the court says: "The sole question presented for decision herein is whether the steamers Thoroughfare and Transit, mentioned in the above findings, are to be assessed by the assessor of the city and county of San Francisco or by the State Board of Equalization. The property to be assessed by the board is defined in the 10th section of article IX [XIII] of the constitution of 1879. It is the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in the State. All property other than the above-mentioned is to be assessed by the local assessors. Are the steamers above named embraced within the category of property named in the section above referred to? The relation of such steamers to the Central Pacific Railroad Company is set forth in the findings." The court then proceeds to show that the ferry-boats cannot be included in either of the five categories mentioned in the constitution, namely, in either the franchise, roadway, road-bed, rails, or rolling-stock; and concludes as follows: "We are of opinion that the assessment of the steamers above mentioned pertained to the local assessor, and was properly made by the assessor of the city and county of San Francisco." This decision was made in June, 1883, and is a construction of the constitution of California. It follows, that the act of March 9th, 1883, as reproduced in § 3665 of the Political Code, departs from the constitutional provision; and that the assessments, in following the act, are also unconstitutional and void.

In No. 1157, one of the cases against the Central Pacific Railroad Company, being for the taxes of the year 1884, the court finds that the State Board of Equalization, in making

the assessment, did knowingly and designedly include in the valuation of the roadway, the value of fences erected upon the line between said roadway and the land of coterminous proprietors. This brings that case precisely within the decision made in the former cases reported in 118th United States Reports.

Another defence set up by the Central Pacific Railroad Company in the three cases against it, namely, Nos. 660, 664, and 1157, and by the Southern Pacific Railroad Company, in No. 661, is, that the State Board of Equalization included in their assessments in said cases the value of the franchises conferred upon said companies by the United States, which, it is contended, is repugnant to the constitution and laws of the United States, and therefore void. Thus, in No. 660, The Central Pacific Railroad Company, in its answer, after reciting the various acts of Congress conferring franchises and privileges and imposing duties upon the company, avers that it is a federal corporation, and holds its corporate powers and franchises under the government of the United States, and that the said government has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of the company. Similar averments are made in the other cases, 664, 1157, and 661. The court finds in each of these cases that the assessment made by the State Board of Equalization included the full value of all franchises and corporate powers held and exercised by the defendant. The first question, then, is, whether the defendants in these cases held any franchises granted to them by the government of the United States. Of this there can hardly be a doubt.

The Central Pacific Railroad Company was constituted by the consolidation of two state corporations of California, but derived many of its franchises and privileges from the government of the United States. The findings of the court below on this subject are as follows, to wit:

"That on the 28th day of June, 1861, a corporation was formed and organized, under the laws of the State of California, under the corporate name of The Central Pacific Railroad Company of California. Said corporation was formed

for the purpose of constructing, owning, and operating a line of railroad and telegraph, commencing at the city of Sacramento in said State and running thence through the counties of Sacramento, Placer, Sierra and Nevada to the eastern boundary of said State, in the expectation that its proposed railroad would when constructed constitute part of a line of railroad extending from the Missouri River to the Pacific Ocean, which line it was then supposed was about to be constructed under the legislative supervision and authority of the government of the United States, and which line of railroad was afterwards so constructed.

"That on or about the 1st day of July, 1862, the government of the United States undertook to construct, or to cause to be constructed, a line of railroad from the Missouri River to the Pacific Ocean, and to that end Congress passed an act entitled 'An act to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes.' 12 Stat. 489, c. 120.

"That to facilitate the construction of said road the government of the United States, by said act of Congress, conferred upon the said Central Pacific Railroad Company of California the same powers and clothed it with the same privileges and immunities which it conferred upon and clothed with the said Union Pacific Railroad Company, except that the said Central Pacific Railroad Company of California was to commence the construction of said railroad at the Pacific Ocean and build east until it met the said Union Pacific Railroad building west.

"That on or about the 2d day of July, 1864, Congress passed an act entitled 'An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government of the United States the use of the same for postal, military and other purposes,' approved July 1, 1862. 13 Stat. 356, c. 216.

"That said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the

terms and conditions of said act of Congress of July 1st, 1862, within the time therein designated.

"That on or about the 31st day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights under the aforesaid acts to a corporation then existing under the laws of the State of California, and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San José and Sacramento, in said State of California. Said assignment was ratified and confirmed by the United States by an act of Congress passed on the 3d day of March, 1865, entitled 'An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes, approved July 1st, 1862, and to amend an act amendatory thereof, approved July 2d, 1864.' 13 Stat. 504, c. 88.

"That the said line of railroad from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation, and the whole of the railroad mentioned in the said acts of Congress has long since been completed, and is now, in accordance with the spirit and intent of said acts of Congress, operated as one continuous line from the Missouri River to the Pacific Ocean, and is so operated and maintained for the uses and purposes mentioned in said acts.

"That in August, 1870, acting under the said acts of Congress, said Central Pacific Railroad Company of California and the said Western Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said company is the defendant herein, and has, from the completion of said railroad as aforesaid until the present time owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said acts of Congress and for the uses and purposes therein mentioned."

If we turn to the acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred on this company. Originally, the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the State. Congress, by the act of 1862, authorized the company (in the words of the act) "to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned [the Union Pacific], and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California." Sec. 9. In the following section it was enacted, that, after the completion of its road to the eastern boundary of California, the Central Pacific might unite upon equal terms with the Union Pacific Railroad Company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines through the Territories, from the State of California to the Missouri River, as should then remain to be constructed, on the same terms and conditions as provided in relation to the Union Pacific Railroad Company. Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the acts of 1862 and the subsequent acts, to construct a railroad from the Pacific Ocean across the State of California and the Federal Territories until it should meet the Union Pacific; which it did meet at Ogden in the Territory of Utah. This important grant, though in part collateral to, was independent of, that made to the company by the State of California, and has ever since been possessed and enjoyed. The present company has it by transfer from, and consolidation of, the original companies, by which its existence and capacities were constituted. Such consolidation was authorized by the 16th section of the act of Congress of July 1st, 1862, and the 16th section of the act of July 2d, 1864, taken in connection with the 2d section of

the act of March 3d, 1865, referred to in the findings of the court. The last named act ratified the transfer by the Central Pacific to the Western Pacific of a portion of its road extending from San José to Sacramento, and conferred upon the latter company all the privileges and benefits of the several acts of Congress relating thereto, and subject to all the conditions thereof. If, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden city, were conferred upon it by Congress.

It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisible therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the

Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations. See *Pacific Railroad Removal Cases*, 115 U. S. 1, 14, 18.

Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue

of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* v. *Maryland*, "the power to tax involves the power to destroy." Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *The Bank of the United States*, 9 Wheat. 738; and *Brown* v. *Maryland*, 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson* v. *Pacific Railroad*, 9 Wall. 579, and *Railroad Co.* v. *Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall. 35, 37.

The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without

any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.

It only remains to consider whether the Southern Pacific Railroad Company, as well as the Central Pacific, was invested with any franchises derived from the government of the United States. Of this we think there can be no question. The court below, in its findings of fact in the Southern Pacific case, (No. 661,) finds that the defendant is a corporation existing under the laws of California, except in so far as its existence, rights, privileges, duties and obligations have been affected by various acts of Congress. It then describes the course of the defendant's road, which commences on the waters of the Pacific Ocean, in the city of San Francisco, and extends thence southerly to Tres Pinos, in the county of San Benito, from which place to Huron, a distance of forty or fifty miles, a portion of the road is yet unfinished, and the road of the Central Pacific company is temporarily used in its stead. From Huron the route of the road extends easterly to Goshen, and thence southerly to Mojave. At Mojave it separates into two main branches, one extending in an easterly direction to the Colorado River, near the 35th parallel of north latitude, where it meets and connects with the Atlantic and Pacific Railroad, leading to Springfield, in the State of Missouri: the other branch extends southerly to Los Angeles and thence easterly to Fort Yuma, and connects with the Southern Pacific Railroad of Arizona, and by means of other roads forms a continuous line to New Orleans. The findings then continue to state as follows, namely:

"That on the 27th day of July, 1866, the government of the United States undertook to construct or cause to be constructed a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route to the Colorado River at such point as might be selected, and thence by the most practicable and eligible route to the Pacific Ocean, and to that end Congress passed an act entitled

'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Ocean,' which act was approved on said 27th day of July, 1866, 14 Stat. 292, c. 278. By said act certain persons therein named were made and erected into a corporation under the name and style of the 'Atlantic and Pacific Railroad Company.'

"That to facilitate the construction of said road the government of the United States, by said act of Congress, adopted the defendant, [the Southern Pacific Railroad Company,] as the instrument or agent of the United States, and conferred upon defendant the same powers and clothed defendant with the same privileges and immunities which it conferred upon and clothed the Atlantic and Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado River and the city and county of San Francisco.

"That said Atlantic and Pacific Railroad Company organized under said act, . . . and said company and defendant, immediately after the passage of said act, accepted the terms and conditions thereof and have duly complied therewith.

"That said Atlantic and Pacific Company has fully completed the whole of said road from Springfield to the Colorado River, and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out.

"That on the 3d day of March, 1871, the government of the United States undertook to construct or cause to be constructed a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado River to construct or cause to be constructed a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the act of Congress of July 27th, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city of San Francisco, and to that end Congress passed an act entitled 'An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other pur-

poses,' approved March 3d, 1870, and subsequently, on the 2d day of May, 1872, passed an act entitled 'An act supplementary to an act entitled An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes,' approved March 3d, 1871. 16 Stat. 573, c. 122; 17 Stat. 59, c. 132.

"That immediately after the passage of said act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance thereof, and it and defendant accepted all the terms and conditions of each of said acts of 1871 and 1872, and have fully and in every respect complied therewith and under them, and in compliance with the spirit and intent of said acts, have completed the roads mentioned in the third finding": [to wit, the line of the defendant's railroads hereinbefore described.]

An examination of the acts referred to in these findings shows that Congress authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad, at such point near the boundary line of the State of California, as it should deem most suitable for a railroad line to San Francisco, and, to aid in the construction of such a railroad line, Congress declared that the company should have similar grants of land, and should be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific. Like powers were also given to the Southern Pacific Railroad Company to construct a line of railroad from Tehachapa Pass, by way of Los Angeles, to the Texas Pacific road at the Colorado River (Fort Yuma). The Southern Pacific Company was not authorized by its original charter to extend its railroad to the Colorado River, as we already know by other cases brought before us, and as appears by the act of the state legislature passed April 4th, 1870, which assumed to authorize the company to change the line of its railroad so as to reach the eastern boundary line of the State; thus duplicating the power given to it by the act of Congress. (See the state act quoted in 118 U. S., p. 399.) This state legislation was probably procured to remove all doubts with regard to the company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by

Congress, and that franchise was accepted, and the roads have been constructed in conformity thereto.

It conclusively appears, therefore, that the Southern Pacific Railroad Company did receive from the United States government, and still enjoys, important franchises connected with its railroads.

It follows that in each one of the cases now before us, the assessment made by the State Board of Equalization comprised the value of franchises or property which the board was prohibited by the constitution of the State or of the United States from including therein; and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are, therefore, void. This renders it unnecessary to express any opinion on the application of the Fourteenth Amendment, as the result would not be different whatever view we might take on that subject.

The judgments in all the cases are affirmed.

PROVIDENCE AND STONINGTON STEAMSHIP COMPANY *v.* CLARE'S ADMINISTRATRIX.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 265. Argued April 26, 1888. — Decided May 14, 1888.

In this case, which was an action for damages for a death caused, in a collision, by the alleged negligence of the owner of a vessel on which it was claimed the deceased was a passenger, the judgment below is reversed for error in refusing to direct a verdict for the defendant on the ground that there was no evidence that the deceased lost his life by reason of the collision, or by the negligence of the defendant, and in refusing to grant the request of the defendant to go to the jury on the question whether the deceased lost his life by reason of the collision.

THIS was an action to recover damages for injuries resulting to the widow and children of Charles C. Clare by reason of

his death, alleged to have been caused by the negligence of the steamship company as common carriers, while he was a passenger on one of their steamers. Verdict for plaintiff and judgment on the verdict. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. Wheeler H. Peckham for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought in the Supreme Court of the State of New York, by Almira R. Clare, as administratrix of the estate of Charles C. Clare, deceased, against the Providence and Stonington Steamship Company, a Rhode Island corporation, to recover the sum of $5000, with interest from June 11, 1880, as statutory damages, for the death of Charles C. Clare. The plaintiff is his widow, and he left four minor children, his heirs at law and next of kin.

The complaint alleges that the defendant was the owner of two steamboats, the Narragansett and the Stonington, running between Stonington, Connecticut, and New York City; that, on or about the 11th of June, 1880, the defendant received Clare on the Narragansett for the purpose of conveying him therein as a passenger from New York City to Stonington, for a reasonable compensation paid to it by Clare; that the Narragansett, under the management and direction of the defendant, having Clare on board as a passenger, and proceeding through the waters of Long Island Sound, met the Stonington proceeding on her way to New York City; that, by the negligence of the defendant, the two vessels came into collision, whereby the Narragansett was so injured that fire immediately broke out on her, and she sank within a few moments, and Clare, without any neglect on his part, was drowned; that the collision occurred either in the State of New York or in the State of Connecticut; that § 9, of c. 6, title 19, of the Laws of 1875 of the State of Connecticut, provides that all damages resulting in death, recovered in an

action brought by an executor or administrator, shall inure to the benefit of the husband or widow and heirs of the deceased person; and that § 1, c. 78, of the Laws of 1877 of the State of Connecticut, provides that, in all actions by an executor or administrator, for injuries resulting in death from negligence, such executor or administrator may recover from the party legally in fault for such injuries just damages, not exceeding $5000, to be distributed as provided in § 9 of c. 6, title 19, of the Laws of 1875, but such action must be brought within one year from the neglect complained of. This suit was brought within the year.

By the Code of Civil Procedure of the State of New York, § 1902, it is provided as follows: "The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued." It is provided by § 1904, that in the case of a trial by jury, "the damages awarded to the plaintiff may be such a sum, not exceeding five thousand dollars, as the jury . . . deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought;" and that, "when final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment."

The action was removed by the defendant into the Circuit Court of the United States for the Southern District of New York, on the ground that the plaintiff was a citizen of New Jersey and the defendant a citizen of Rhode Island. The answer, put in in the Circuit Court, contains a denial in the prescribed form, covering the allegation of the complaint that the defendant received Clare on the Narragansett for the purpose of conveying him therein as a passenger from New York City to Stonington, for a reasonable compensation paid to it by Clare. It also denies the negligence alleged, and

denies all liability to the plaintiff. It also sets up, that it had, by proper proceedings in the District Court of the United States for the Southern District of New York, taken the benefit of the statute of the United States for the limitation of the liability of ship-owners, in respect to the Narragansett, by a transfer of its interest in her to a trustee appointed by that court.

At the trial, before a jury, a verdict was, by direction of the court, rendered for the sum of $5000, on the 20th of April, 1885; the interest was, under the statute of New York, computed by the clerk at the sum of $1522.50; the plaintiff's costs were taxed at $78.25; and a judgment was rendered for the plaintiff for the damages, interest, and costs, amounting in all to $6600.75.

At the trial, the plaintiff called as witnesses the master of the Narragansett, and the pilot and the engineer of the Stonington, for the purpose of showing negligence on the part of the Stonington. The plaintiff also called as a witness one Fisher, who testified as follows: "In June, 1880, I resided in Jersey City. I knew Charles C. Clare; he was a friend of mine. On the Sunday following the 11th of June, 1880, I went to Stonington and found the body of Charles C. Clare, and brought the same to Jersey City for burial. What first led me to go to Stonington was newspaper reports, and then information coming to me, that Mr. Clare had lost his life by this accident. I found his body in the lower part of a furniture establishment, which was being temporarily used as a morgue." The defendant then called as a witness a steamboat captain, and examined him on the general question as to whether the Stonington, at the speed at which she was running, was going at a moderate speed in a fog, under the requirement of Rule 21 of § 4233 of the Revised Statutes, which provides that "every steam-vessel shall, when in a fog, go at a moderate speed." The defendant also called as a witness the bow watchman of the Stonington. After both sides had rested, the plaintiff moved for a direction to the jury to find a verdict for the plaintiff for $5000. The defendant then moved that the court direct the jury to find a verdict for the defend-

ant, because there was no evidence that the intestate went on or in the Narragansett, the evidence being that he was dead, but there being no evidence as to how he died. The court then suggested to the counsel for the plaintiff that he had better prove, if he could, that the deceased was on the Narragansett. The plaintiff was then sworn as a witness, and testified that, on the afternoon of June 11, 1880, she crossed over, with her son Charles, by a ferry-boat, to New York, to take him to his father, and left him with his father on the New York side of the ferry-bridge, and did not herself go outside of the ferry or to the Narragansett. The plaintiff then called the son Charles as a witness, who testified that, on that afternoon, he went with his father on board of the Narragansett, and went out on her, and was on her at the time of the collision; that his father was with him shortly before the collision; and that he did not see his father after the collision. The defendant then asked the court to direct the jury to find a verdict for the defendant, on the ground that there was no evidence in the case that the father and son went as passengers on the boat, or that they had bought a ticket, or that they had any room, or that there was any contract made between the parties; that there was no evidence that the intestate lost his life in consequence of the accident; that he was seen dead in Stonington; but that there was no evidence that any life was lost on the Narragansett, or that anything happened to the intestate. The court remarked that it thought that the evidence then in, in the case, was sufficient, and that it must deny the defendant's motion and grant the plaintiff's motion. The defendant then asked the court to direct a verdict for the defendant, on the ground that there was no evidence that the intestate lost his life by reason of the collision, or by the negligence of the defendant. The court denied the motion, and the defendant excepted. The defendant conceded that, if the plaintiff could recover at all, the damages were $5000. The defendant then asked to go to the jury on the questions (1) whether the plaintiff's intestate had lost his life by reason of the collision of the two vessels; and (2) whether the defendant or its servants had been guilty of any negligence in the navigation of the

Stonington, contributing to the collision. The court denied each of these requests, and to each denial the defendant excepted. The jury then returned a verdict for the plaintiff, by direction of the court, for $5000. The defendant has brought a writ of error to review the judgment.

There has been no appearance or argument or brief in this court for the defendant in error, but the case has been orally argued and a brief submitted for the plaintiff in error. A citation was issued and duly served on the attorney for the plaintiff.

We think that the court erred at the trial, in refusing to grant the motion to direct a verdict for the defendant on the ground that there was no evidence that the plaintiff's intestate lost his life by reason of the collision or by the negligence of the defendant, and in refusing to grant the request of the defendant to go to the jury on the question whether the plaintiff's intestate had lost his life by reason of the collision. The only evidence of the death of the intestate was that of the witness Fisher, who testified that he saw the dead body of the intestate in Stonington, on the Sunday following the 11th of June, 1880, which was the 13th of June, 1880. There is no evidence to sustain the allegation of the complaint that the intestate was drowned as a consequence of the collision, or as to what caused his death, or as to how his body came to be found in Stonington. The question as to whether the intestate lost his life in consequence of the collision was, at least, one for the jury, and the evidence was not sufficient to warrant the direction of a verdict for the plaintiff on that point.

We express no opinion on the question of negligence in the navigation of the Stonington, contributing to the collision, or on the question of her rate of speed in the fog. Different testimony on these questions may be given on a new trial, from that which was given on the trial now under review. Nor do we express any opinion on the question of the sufficiency of the evidence to show, as alleged in the complaint, that the intestate was a passenger on the Narragansett, for a reasonable compensation paid by him to the defendant.

The judgment of the Circuit Court is reversed, and the case is remanded to that court with a direction to award a new trial.

UNITED STATES *v.* WELD.

APPEAL FROM THE COURT OF CLAIMS.

No. 1366. Submitted March 20, 1888. — Decided April 16, 1888.

In order to make a claim against the United States one arising out of a treaty within the meaning of Rev. Stat. § 1066, excluding it from the jurisdiction of the Court of Claims, the right itself, which the petition makes to be the foundation of the claim, must derive its life and existence from some treaty stipulation.

A claim against the United States made under the provisions of the act of June 5, 1882, 22 Stat. 98, c. 195, "reëstablishing the Court of Commissioners of Alabama Claims and for the distribution of unappropriated moneys of the Geneva Award," is not a claim growing out of the treaty of Washington within the sense of the word "treaty," as used in Rev. Stat. § 1066.

The payment of the expenses of the Geneva Arbitration has not been charged by Congress upon the fund received under the award made there.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Howard for appellant.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, for appellees.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is an appeal from the Court of Claims. The suit was brought in that court by the appellees, who were plaintiffs below, to recover from the United States the sum of $5306.71, which sum they alleged, was an unsatisfied part of a judgment recovered by them in the Court of Commissioners of Alabama Claims that had been improperly and illegally withheld from them by the Secretary of the Treasury of the United States and the accounting officers of that Department.

The petition was filed October 4, 1887, and sets forth that on the 24th of October, 1883, the appellees recovered a judg-

ment in the Court of Commissioners of Alabama Claims, including interest, for the sum of $346,982.46, the case in which the said judgment was rendered being one of the second class, of which the said court was given jurisdiction by the act of Congress approved June 5, 1882, 22 Stat. 98, c. 195, entitled "An act reëstablishing the Court of Commissioners of Alabama Claims and for the distribution of unappropriated moneys of the Geneva Award;" that the aggregate amount of judgments of the second class rendered by said court, under the said act of June 5, 1882, including interest, was $16,292,607.26, and of judgments of the first class, including interest, was $3,350,947.51; that under and in pursuance of the provisions of the act approved June 2, 1886, 24 Stat. 77, c. 416, entitled "An act to provide for closing up the business and paying the expenses of the Court of Commissioners of Alabama Claims, and for other purposes," after crediting to the amount of the said Geneva Award fund named in section 5 of said act, to wit, $10,089,064.96, the amounts authorized by said act, charging it with the amounts in said act directed and specified and deducting from it the amount of the judgments on claims of the first class, to wit, $3,350,947.51, as aforesaid, there remained to satisfy *pro rata* the judgments on claims of the second class the sum of $5,988,663.82; that instead of distributing said last-named sum *pro rata* among the judgment creditors of the second class, as they were required to do under the said act of June 2, 1886, the Secretary of the Treasury and the accounting officers of his Department wrongfully and in violation of said statute first deducted therefrom the sum of $249,168.48, which sum was claimed by them to be available under the act for the purpose of reimbursing the United States for the expenses of the Tribunal of Arbitration at Geneva, which expenditures had been already paid by the United States under and in pursuance of an act of Congress approved December 21, 1871, entitled "An act to make appropriations for expenses that may be incurred under articles 1 to 9, inclusive, of the said treaty between the United States and Great Britain, concluded at Washington, May 8, 1871," 17 Stat. 24, c. 3, and only distributed among said judgment

creditors the sum of $5,739,495.41; that by reason of such deduction the said claimants have been deprived of their proportionate share of the said sum of $249,168.41, to wit, the sum of $5306.71; and that no assignment or transfer of said claim, or any part thereof, or interest therein, has been made by claimants, and that they are justly entitled to the said sum of $5306.71, after allowing all just credits and set-offs, for which said sum they demand judgment.

The answer of the United States consisted of a general denial of all the material allegations in claimants' petition, and the case having been heard before the Court of Claims, the court, upon the evidence, found the facts to be substantially as follows:

(1) October 24, 1883, the plaintiffs recovered judgment in the Court of Commissioners of Alabama Claims for $229,637.63, together with interest, aggregating the sum of $346,982.46, such judgment being one of the second class named in the act of Congress, entitled "An act reëstablishing the Court of Commissioners of Alabama Claims, and for the distribution of the unappropriated moneys of the Geneva Award, approved June 5, 1882," 22 Stat. 98, and duly certified and transmitted to the Secretary of the Treasury as provided by said act.

(2) The aggregate amount of judgments of the second class rendered by said court, reëstablished by said act, including interest, was $16,292,607.26, and the aggregate amount of judgments of the first class, including interest, was $3,350,947.51.

(3) The Secretary of State, in pursuance of the provisions of the fourth section of the act of June 2, 1886, entitled "An act to provide for closing up the business and paying the expenses of the Court of Commissioners of Alabama Claims, and for other purposes," 24 Stat. 77, found and estimated the value of the furniture named in said section to be $800, and the same was credited to the fund to be distributed under said act; and the Secretary of State, with the assistance of the clerk of said court, under the provisions of said section 4 of said act, estimated the cost and expenses therein mentioned at $15,000, and the same was charged to said fund.

(4) Under the provisions of section 4 of said act of 1886 the accounting officers of the Treasury, for the purpose of making distribution of the balance of the Geneva Award fund to the judgment creditors, as therein required, stated the account, allowing the proper credits and charging the fund with the amounts directed and specified therein, including therein as chargeable to said fund and deducting therefrom the "expenses of the Tribunal of Arbitration at Geneva" ($249,168.41).

(5) The claimants were paid their proportion of said balance as so stated by the accounting officers, being 35.22760549 per cent of their said judgment, but have received no part of that portion of said fund, which was so retained to reimburse the expenses of the Tribunal of Arbitration at Geneva, $249,168.40. If said last-named sum is not legally chargeable to said fund, the claimants' proportion thereof would be $5306.53, which the defendants have not paid and which they refuse to pay.

The court thereupon decided, as a conclusion of law, that the claimants were entitled to recover the sum of $5306.53, and rendered judgment accordingly.

The main question in this case is a jurisdictional one. On behalf of the United States it is claimed that this is a case growing out of, and dependent upon, the Treaty of Washington, concluded May 8, 1871, between the United States and Great Britain, and proclaimed July 4, 1871, 17 Stat. 863, and that therefore by the express provisions of § 1066, Revised Statutes of the United States, the Court of Claims was prohibited from taking jurisdiction of it. On behalf of the appellees, it is contended that this case is not embraced within the class of cases of which the Court of Claims is prohibited by § 1066, Rev. Stat., from taking jurisdiction. But if that contention cannot be sustained, then it is insisted by appellees that said § 1066 has been repealed by the act of Congress approved March 3, 1887, 24 Stat. 505, c. 359, and is no longer law.

There is no dispute, apparently, as to the correctness of the finding of the court below on the facts in the case; neither is

there any very great contention as to the correctness of the judgment below, if it be found that that court had jurisdiction.

To sustain the view of the case contended for on behalf of the United States, much reliance is placed on the decisions of this court in *Great Western Insurance Company* v. *United States*, 112 U. S. 193, and *Alling* v. *United States*, 114 U. S. 562. We are of opinion, however, that a very broad distinction exists between those cases and this one. In the first case cited, by the allegations of the petition itself, the claim was declared to grow directly out of the treaty, and was thus clearly dependent upon it. The petition based the right of recovery on the provisions of the treaty itself. No statute was invoked, nor was it charged that the United States was directly and primarily liable on the claim. In the language of the court below, which we approve: "In that case the claimant corporation was not seeking to recover under any law of Congress, but was attempting to enforce an alleged implied assumpsit on the part of the United States, growing out of and dependent upon the treaty of Washington, notwithstanding the laws of Congress, which expressly excluded its claim from consideration and from payment out of the fund in controversy. Instead of founding its claim on any law of Congress, as do the present claimants, the company invoked the jurisdiction of this court to set aside and annul the statute provisions."

The Alling case is, in principle, the same as the Great Western Insurance case. In that case the claim on which the suit was based was alleged in the petition to be founded on a treaty stipulation. It had been submitted to the commission authorized and created in accordance with the provisions of the Treaty of July 4, 1868, between the United States and Mexico, 15 Stat. 569, for the adjustment of claims of the citizens of the respective countries against the government of the other for injuries to persons and property, and the award of that commission was that the Mexican government should pay to the United States on account of the claim a specific sum of money out of which the United States might retain a certain amount

on account of certain duties originally paid by claimants but subsequently refunded to them by the United States. The claimants having received the sum specifically awarded to them by the commission, and having been refused the sum retained by the United States, on account of the duties aforesaid, by the Secretary of the Treasury, brought an action in the Court of Claims to recover the amount of said duties. This court held that the Court of Claims had no jurisdiction to entertain such a suit, and ordered the dismissal of the petition, because the claim was founded on and grew out of the treaty with Mexico and was therefore clearly within the provisions of § 1066, Rev. Stat. The reason of the ruling by this court in that decision is plain. The claim there in controversy was expressly recognized as a specific claim by the commission organized under the provisions of the treaty with Mexico, and was, therefore, dependent upon the treaty, and grew directly out of it.

In this case the reverse is true. The treaty of Washington did not recognize this claim as a specific claim. The award of $15,500,000, directed to be paid by Great Britain, was to the United States as a nation. The text of the treaty itself speaks of the "claims on the part of the United States," and in Article 7 the gross sum was "to be paid by Great Britain to the United States." It is not necessary to discuss whether, in the absence of any action by Congress as to the distribution of this fund, there could have been any legal or equitable right in any person or corporation to any portion of it. The fact that the Congress of the United States undertook to dispose of this fund, and to administer upon it, in accordance with its own conceptions of justice and equality, precludes, at least for the purposes of this decision, judicial inquiry into such questions. The claimants had to rely upon the justice of the government, in some of its departments, for compensation in satisfaction of their respective claims; and this compensation the various acts of Congress, heretofore mentioned, provided. The claimant in this case does not seek to recover upon any supposed obligation created by the treaty of Washington, but upon the specific appropriation made in the act of

June 2, 1886. It is under this act that a means of satisfaction of this claim was provided. The claim may, therefore, be said to be "founded upon a law of Congress" within the meaning of § 1059, Rev. Stat., and therefore clearly one of which the Court of Claims could take jurisdiction.

It may be said, in opposition to this view of the case, that, had there been no treaty of Washington, there would have been no fund of $15,500,000 to distribute, the act of June 5, 1882, would never have been passed, and therefore, that the treaty is the basis of all the subsequent legislation, and consequently the basis of this claim; in other words, that, therefore, this claim is "dependent upon and grows out of" the treaty of Washington.

We are of opinion, however, that such a *dependency upon* or *growing out of*, is too remote to come within the meaning of § 1066, Rev. Stat. In our view of the case, the statute contemplates a *direct* and *proximate* connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the Court of Claims by § 1066, Rev. Stat. In order to make the claim one arising out of a treaty within the meaning of § 1066, Rev. Stat., the *right itself*, which the petition makes to be the foundation of the claim, must have its origin — derive its life and existence — from some treaty stipulation. This ruling is analogous to that of the ancient and universal rule relating to damages in common-law actions; namely, that a wrongdoer shall be held responsible only for the *proximate*, and not for the *remote*, consequences of his action.

This disposition of this question renders it unnecessary to consider whether § 1066 has been repealed by the subsequent act of Congress, approved March 3, 1887, (*supra*,) since, if there has been such repeal, it is admitted, on all hands, that the Court of Claims would have jurisdiction of the case.

On the merits of the case, we think there can be no doubt that the accounting officers of the Treasury Department were in error in charging to, and deducting from, the fund the expenses of the Tribunal of Arbitration at Geneva. The payment of those expenses had already been provided for by

Statement of the Case.

Congress by the act of December 21, 1871, 17 Stat. 24, and was never chargeable to this fund.

In the language of the court below: "Section five of the act of June 2, 1886, (*supra*,) fixes the amount of the fund and specifies exactly what shall be deducted from it, and provides that the balance shall be distributed to the judgment creditors. The item thus deducted was not among those thus specified."

We are of the opinion that the claimants are entitled to their share of the amount thus improperly deducted, and the decision of the Court of Claims is therefore

Affirmed.

ROBARDS *v.* LAMB.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 1088. Submitted March 20, 1888. — Decided April 16, 1888.

The Statute of Missouri which, as construed by the Supreme Court of that State, authorizes a special administrator, having charge of the estate of a testator pending a contest as to the validity of his will, to have a final settlement of his accounts, conclusive against distributees, without giving notice to them, is not repugnant to the clause of the Constitution of the United States which forbids a State to deprive any person of his property without due process of law.

THIS case was brought before the court on the following motions made by defendant in error's counsel.

The court is moved to dismiss the writ of error or to affirm the judgment herein on the following grounds:

1. This court is without jurisdiction under § 709 of the Revised Statutes.

2. If any question cognizable under that section was in fact decided, such decision was not necessary, and the judgment rendered is supported on grounds which this court has no jurisdiction to review.

G. G. VEST,
For Defendant in Error.

Statement of the Case.

The case, as stated by the court, was as follows:

By the statutes of Missouri, relating to the granting of letters testamentary and of administration, it is provided: "If the validity of a will be contested, or the executor be a minor or absent from the State, letters of administration shall be granted, during the time of such contest, minority or absence, to some other person, [other or different from the one charged with the execution of the will, 56 Missouri, 432,] who shall take charge of the property and administer the same, according to law, under the direction of the court, and account for and pay and deliver all the money and property of the estate to the executor or regular administrator, when qualified to act." Gen. Stat. Missouri, 1865, c. 120, § 13; Rev. Stat. Missouri, 1879, c. 1, art 1, § 14.

The present suit was brought in behalf of distributees to falsify a final settlement, made in one of the probate courts of Missouri, of the accounts of a special administrator, who was appointed, under the authority of the above statute, to take charge of and administer the property of a testator pending a contest as to the validity of his will. The plaintiff claims that at that settlement the distributees were not represented, and did not have actual or constructive notice thereof. After the contest as to the will ended, the probate court passed an order stating the balance in the hands of the special administrator, directing him to turn the same over to the executors of the estate, and providing for the discharge of himself and sureties, upon his filing in that court the receipt of the executors for such balance. The executors having given their receipt for all the property held by him, as shown by his final settlement, and the same having been filed, an order was passed by the probate court for the final discharge of the special administrator.

The Supreme Court of Missouri held, in the present case, that while the laws of that State (Gen. Stat. 1865, c. 124, § 16, to 19; Rev. Stat. 1879, § 238 to 241,) required notice by publication of the final settlement of executors and administrators, notice was not required in respect to settlements of special

administrators in whose hands the property of a testator is placed pending a contest as to the validity of his will. Its language was:

"As was said in *Lamb, Adm'r*, v. *Helm, Adm'x*, 56 Missouri, 433, 'such special administrators occupy more nearly the position of a receiver who acts under the direction of the court than they do the position of a general administrator.' The special administrator is appointed for temporary purposes only, (*Hawkins* v. *Cunningham*, 67 Missouri, 415,) and when the contest as to the will is over and the nominated executor qualified, his functions are at an end, and he must settle his accounts and turn over the property in his hands to the regular executor or administrator. This accounting is his final accounting, it is true, but it is not a final settlement of the estate contemplated when notice is required to be given. There is no need of any notice, for there is then a regular representative of the estate with whom the settlement is made under the direction of the probate court. The statute which provides for notice on final settlements therefore has no application to settlements made by an administrator *pendente lite*, and notice is not required.

"As to § 47, c. 120, which provides that if any administrator die, resign, or his letters be revoked, he or his legal representatives shall account to the successor, &c., it is sufficient to say the section has no application to this case, for here the special administrator neither resigned nor were his letters revoked, but his powers ceased by operation of law and the express terms of the appointment. We do not intimate that in these cases notice of the settlement must be given, though when an administrator desires to resign, notice of his intention to make application to that end must be given.

"It follows that the judgment of the probate court discharging the special administrator is final and conclusive even as against the plaintiff, for there is no saving clause as to minors or married women. The petition does not seek relief on the ground of fraud." *RoBards* v. *Lamb*, 89 Missouri, 303, 311, 312.

Opinion of the Court.

Mr. George G. Vest for the motion cited: *Detroit City Railway Co.* v. *Guthard*, 114 U. S. 133; *Chouteau* v. *Gibson*, 111 U. S. 200; *Murdock* v. *Memphis*, 20 Wall. 590; *Brown* v. *Colorado*, 106 U. S. 95; *McManus* v. *O'Sullivan*, 91 U. S. 578; *Brown* v. *Atwell*, 92 U. S. 327; *Simmerman* v. *Nebraska*, 116 U. S. 54; *Adams County* v. *Burlington & Missouri River Railroad*, 112 U. S. 123, 126, 127; *Chapman* v. *Goodnow*, 123 U. S. 540; *Brooks* v. *Missouri*, 124 U. S. 394; *New York Life Insurance Co.* v. *Hendren*, 92 U. S. 286; *Dugger* v. *Bocock*, 104 U. S. 596; *San Francisco* v. *Scott*, 111 U. S. 768; *Grame* v. *Insurance Co.*, 112 U. S. 273; *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140.

Mr. James Carr opposing, on the question of jurisdiction cited: *Webster* v. *Reid*, 11 How. 437; *Lessee of Walden* v. *Craig's Heirs*, 14 Pet. 145, 154; *Hollingsworth* v. *Barbour*, 4 Pet. 466; *Thatcher* v. *Powell*, 6 Wheat. 119; *Des Moines Navigation &c. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Kennard* v. *Morgan*, 92 U. S. 480; *Foster* v. *Kansas*, 112 U. S. 201; *Chapman* v. *Goodnow*, 123 U. S. 540; *Hall* v. *Finch*, 104 U. S. 261; *Railroad* v. *National Bank*, 102 U. S. 14: and as to what constitutes "due process of law"; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Davidson* v. *New Orleans*, 96 U. S. 97; *Foster* v. *Kansas*, 112 U. S. 201; *Kennard* v. *Louisiana*, 92 U. S. 480; *Slaughter House Cases*, 16 Wall. 36; *Pennoyer* v. *Neff*, 95 U. S. 714; *Boswell's Lessee* v. *Otis*, 9 How. 336; *Webster* v. *Reid*, 11 How. 437; *Nations* v. *Johnson*, 24 How. 195; *Murray's Lessee* v. *Hoboken Co.*, 18 How. 272.

MR. JUSTICE HARLAN, after stating the facts in the above language, delivered the opinion of the court.

The only question, among those presented, of which this court can take cognizance, is whether the statute of Missouri, which authorizes a special administrator having charge of the estate of a testator pending a contest as to the validity of his

will, to have a final settlement of his accounts, without giving notice to distributees, and which settlement, in the absence of fraud, is deemed conclusive as against such distributees, is repugnant to the clause of the Constitution of the United States forbidding a State to deprive any person of his property without due process of law. We have no difficulty in answering this question in the negative. Without stating all the grounds upon which this conclusion might be rested, it is sufficient to say that, in matters involved in the accounts of such special administrator, the executor or administrator with the will annexed represents all claiming under the will. The regular representative of the estate, before passing his receipt to the special administrator, has an opportunity to examine this settlement, and, if it is not satisfactory, to contest its correctness by some appropriate proceeding. When an executor or administrator with the will annexed proposes to make a final settlement of his own accounts, he is required to give notice to creditors and distributees; for there are no other representatives of the estate. But when a special administrator ceases to act as such, that is, when his functions cease by operation of law, he must account for the property and estate in his hands to the executor or administrator with the will annexed, who, in receiving what had been temporarily in the charge of the former, acts for all interested in the distribution of the estate. As, therefore, the regular representative of the estate has an opportunity to contest the final settlement of the special administrator, before giving him an acquittance, it cannot be said that the absence of notice to the distributees of such settlement amounts to a deprivation of their rights of property without due process of law.

The judgment is affirmed.

MORGAN *v.* EGGERS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 200. Argued April 2, 1888. — Decided April 16, 1888.

Plaintiffs' complaint in ejectment sought to recover "all the north part of lot 2, in section 36, township 38 N. of range 10 W. of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot 2, and 753 feet south therefrom." Defendant denied every allegation. The record showed that after the parties had submitted the cause to the court, "the court, having heard the evidence, and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of the defendant the possession of so much of said lot 2 as lies south of the south line of lot number 1, as indicated by a fence constructed and maintained by the defendant as and on said south line . . . which the plaintiffs shall recover of the defendant." *Held*,

(1) That though the order embraced both a finding and a judgment, it was not for that reason a nullity;

(2) That it was not a general finding for the plaintiffs, but a finding for them as to the part of the land described in the order, and that the judgment for the possession of this part of the premises was in accordance with the local law of the district in which the cause was tried, Rev. Stat. Indiana, 1881, § 1060;

(3) That this court is bound to assume from the record that the tract described in the order was a part of the premises described in the complaint.

THE case as stated by the court was as follows:

This is an action of ejectment. The complaint, framed in accordance with the local law, describes the premises sought to be recovered as follows: "All of the north part of lot two, in section thirty-six, township thirty-eight north, of range ten west, of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot two, and seven hundred and fifty-three feet south therefrom." The answer contains a denial of each allegation in the complaint.

Statement of the Case.

On the 20th of January, 1883, during the November Term of the court below, the following proceedings were had:

"Come the parties, by counsel, and by agreement this cause is submitted to the court for trial, and the court having heard the evidence, and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two as lies south of the south line of lot number one, as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the state line easterly to Lake Michigan, and assess the damages at $1.00 and costs, taxed at $——, which the plaintiffs shall recover of defendant.

"All of which is finally ordered, adjudged, and decreed."

During the same term, February 5, 1883, the plaintiffs moved that the decision and finding be set aside and annulled, and a new trial granted, for the following reasons: 1. They were contrary to the law and the evidence. 2. The plaintiffs were surprised by a case falsely made by the defendant at the trial, which they had no reason to expect, and therefore did not come prepared to answer at the trial, namely, by his claim, supported only by the testimony of his son, that Jacob Forsyth and the surveyor, Wait, pointed out and agreed upon the line occupied by the fence of defendant mentioned in said decision as the true line of said Eggers' land; by his claim, supported by his testimony alone, that George W. Clarke agreed with him that the line occupied by said fence was the line between his and said Clarke's land; by his claim, supported by his own testimony and that of his son only, that a fence had been maintained on the line occupied by the fence, in said decision mentioned, for more than twenty years last past; and by his claim, supported by the testimony of his son only, that for twenty years past he had occupied all the land as far south as said fence. 3. The court admitted evidence for the defendant against the objection of plaintiffs, and the decision of the court was based on such irrelevant evidence.

On the 6th of March, 1883, the following order was made: "Came the parties by counsel, and the court being fully

advised, now overrules plaintiffs' motion for a new trial; to which the plaintiffs except, and the court allows plaintiffs thirty days in which to file bill of exceptions." No bill of exceptions, showing what occurred at the trial, was filed.

On the 23d of April, 1884, the plaintiffs moved the court, upon written grounds filed, to amend and reform the judgment of January 20, 1883, so that it "shall conform to the complaint in said cause, and to the finding or verdict of the court rendered upon the trial in said cause."

At a subsequent term of the court, June 27, 1884, the motion to amend and reform the judgment of the court, was overruled. To that ruling the plaintiffs excepted, and took a bill of exceptions embodying only the motion to amend and reform the judgment, the order overruling that motion, and the opinion of the court thereon. The court, among other things, said: "It was competent for the court, under the issue, to find to what extent the defendant was guilty or had held unlawful possession of the premises described; and, if under the evidence it appeared that a fence had become or was the boundary of such occupation, it was proper that the fact should be stated in the finding and judgment of the court. The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning, however, is clear. It is as if the entry read in this way: And the court, having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendants, etc."

The errors assigned upon the record are, that the judgment does not pursue the issue and finding thereon rendered and entered of record as the law directs and requires, and that the court erred in refusing to amend and reform the judgment.

Mr. Edward Roby for plaintiffs in error.

Mr. William H. Calkins for defendant in error. *Mr. A. C. Harris* was with him on the brief.

Mr. Justice Harlan, after stating the facts in the above language, delivered the opinion of the court.

More than a year elapsed after the refusal of the court to grant a new trial before the motion to amend and reform the judgment was made. If the court had authority to entertain that motion after the expiration of the term at which the judgment was entered, it was properly denied. By the local statute, applicable to the case, the plaintiffs were entitled to recover against the defendants, or either of them, the whole of the premises in controversy, or any part thereof, or any interest therein, according to the rights of the parties. Revised Statutes of Indiana, 1881, § 1060; Revised Statutes of the United States, § 914. The plaintiffs contend that there was, in effect, a general finding for them, as to all the land in dispute, and that the judgment should have been in their favor for the whole of the premises described in the complaint. But the record, fairly interpreted, does not show any such finding. The order of January 20, 1883, embraces both a finding and a judgment. But they are not, for that reason, nullities. *O'Reilly* v. *Campbell*, 116 U. S. 418, 420. That order plainly indicates a general finding for the plaintiffs only as to a part of the land in controversy, that is, as to the part described in the order. The judgment is for the recovery only of the possession of the premises so described. Such a judgment was proper, if the plaintiffs failed to show title to the remaining part of the premises in dispute. As there was no special finding of facts bearing upon the question of title, we must assume that the evidence authorized the finding as to the particular premises awarded to the plaintiffs. They cannot complain that judgment was not rendered in their favor for the part not shown to belong to them.

It was said in argument that the judgment was for land not embraced in the description given in the complaint; that the plaintiffs got a judgment for land not sued for. But this cannot be made to distinctly appear from a comparison of the description in the complaint with the description in the judgment, of the premises recovered.

If the description, in the judgment, of the land recovered was not sufficiently full or accurate, it was in the power of the plaintiffs, at the time the finding was made, or during the same

term, to procure such a reformation of the judgment as would have been proper. Instead of pursuing that course, they preferred to claim — contrary to what, it seems to us, was the manifest purpose of the court — that there was a general finding, without qualification, in their behalf, which should have been followed by a judgment for the whole land. As, however, the finding was in fact and in legal effect, for only a part of the premises in dispute, and as we are bound to assume, from the record, that that part is embraced in the description given in the complaint, the judgment must be

Affirmed.

PAGE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1387. Submitted April 2, 1888. — Decided April 16, 1888.

Under § 51 of the Revised Statutes, a person elected a representative in Congress, to fill a vacancy, caused by a resolution of the House that the sitting member was not elected and that the seat was vacant, the sitting member having received the proper credentials, and been placed on the roll, and been sworn in, and taken his seat, and voted, and served on committees and drawn his salary and mileage, is entitled to compensation only from the time the compensation of such sitting member ceased.

THE case is stated in the opinion.

Mr. Allan Rutherford for claimant.

Mr. Attorney General and *Mr. Heber J. May* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the claimant from a judgment of the Court of Claims, dismissing his petition, on the following facts found by that court: An election was held on the 4th of November, 1884, in the Second Congressional District of Rhode Island, for the purpose of electing by the people a

Representative in the 49th Congress, for that district. William A. Pirce was declared by the proper authority to have been elected, received a certificate of election from the governor of the State, and was sworn in and took his seat in the Congress of the United States on the 4th of March, 1885. His election was contested by Charles H. Page. On the 25th of January, 1887, the House of Representatives of the 49th Congress agreed to the following resolution, to wit: "Resolved, That William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the Second Congressional District of Rhode Island, and that the seat be declared vacant." An election was thereafter held in Rhode Island to fill such vacancy, and, on the 25th of February, 1887, Charles H. Page presented to the House of Representatives a certificate from the governor of Rhode Island, setting forth that he was, on the 21st of February, 1887, regularly elected a Representative from that State in the 49th Congress, to fill the vacancy caused by the action of the House of Representatives in declaring the seat of William A. Pirce vacant. Thereupon, Page was sworn in and took his seat. Pirce occupied the seat from March 4, 1885, to January 25, 1887, was recognized as the sitting member, voted, served on committees, and drew the salary for that time, amounting to $9468.18, and also received mileage in the sum of $344. Page occupied the seat from February 25, 1887, to March 3, 1887, was recognized as the sitting member for that time, voted, served on committees, and drew the salary from January 25, 1887, to March 3, 1887, amounting to $531.82, and also received mileage in the sum of $175.20.

Page, by his petition to the Court of Claims, claimed that he was entitled to the full pay of $5000 a year for the two years from March 3, 1885, to March 3, 1887, and that, therefore, he was entitled to the further payment of $9468.18. The contention of Page is that, on the facts found, Pirce, not having been elected a member of the 49th Congress, was never such member; that, therefore, he was not the predecessor of Page, within the meaning of § 51 of the Revised Statutes; and that the member of the House of Representatives

from the Second Congressional District of Rhode Island in the 48th Congress was such predecessor.

Section 51 of the Revised Statutes provides as follows: "Whenever a vacancy occurs in either House of Congress, by death or otherwise, of any member or delegate elected or appointed thereto, after the commencement of the Congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the compensation of his predecessor ceased." The argument made is that, under this section, no person could have been the predecessor of Page, unless he was a member elected for the 49th Congress; and that Pirce was declared by the House of Representatives not to have been elected such member. But, although Pirce may not have been so elected, it does not follow that he was not the predecessor of Page, within the meaning of § 51, or that the Representative in the 48th Congress was such predecessor.

The proper construction of § 51 is that the predecessor of the person elected to fill a vacancy must be a person who was the predecessor in the same Congress. If no such person is to be found, because no such person was duly elected, Page had no predecessor in the sense of § 51, and that section does not apply to his case. But we think that, under the proper construction of § 51, Pirce was the predecessor of Page, as to compensation or salary. His credentials showed that he was regularly elected; he must have been placed on the roll of Representatives-elect, under § 31 of the Revised Statutes; he was sworn in, took his seat, voted, served on committees, and drew the salary and the mileage. Under §§ 38 and 39, he was entitled to his salary, because his credentials, in due form of law, had been duly filed with the clerk, under § 31, and because he took the required oath. Section 51 refers only to a vacancy occurring after the commencement of a particular Congress, and in the membership of that Congress; and the reference to a "predecessor" is plainly intended to apply only to a predecessor in that Congress. If there was any such predecessor of Page it was Pirce. If there was no predecessor of Page in that Congress, § 51 does not apply to that case.

The judgment of the Court of Claims is affirmed.

Syllabus.

MORE *v.* STEINBACH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

No. 176. Submitted February 9, 1888. — Decided April 16, 1888.

The act of Congress of March 3, 1851, "to ascertain and settle the private land claims in the State of California," 9 Stat. 631, c. 41, created a board of commissioners to which all persons, claiming land by virtue of any right or title derived from the Spanish or Mexican government, were required to present their claims for examination and determination within two years from its date, with such documentary evidence and testimony of witnesses as they relied upon to support their claims, and provided, in substance, that if upon examination they were found by the board, and by the courts of the United States, to which an appeal could be taken, to be valid, the claims should be confirmed and surveyed, and patents issued therefor to the claimants; but that all lands, the claims to which were not presented to the board within that period, should be considered as a part of the public domain of the United States. *Held*,

(1) That this provision requiring the presentation of their claims was obligatory on claimants, and that they were bound by the judgment of the board, if confirmed by the courts of the United States on appeal, and by the survey and location of the claim by the officers of the Land Department, following the final decree of confirmation.

(2) That the patent of the United States, issued after the claim was surveyed and located, is conclusive, both as to the validity of the title of the claimant and the extent and boundaries of his claim, as against all parties not claiming by superior title, such as would enable them to contest the action of the government respecting the property.

In order that a perfect title to land might vest under a grant from the Mexican government a delivery of possession by its officers was necessary. The proceeding was termed a judicial delivery of possession.

The authority and jurisdiction of Mexican officials in California terminated on the 7th of July, 1846. No alcalde appointed or elected subsequent to that date was empowered to give judicial possession of land granted by the previous government.

The doctrine that the laws of a conquered or ceded country, except so far as affected by the political institutions of the new government, remain in force after conquest or cession until changed by it, does not apply to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new government over public property could be taken, except in pursuance of its authority on the subject.

Statement of the Case.

Under the Code of Civil Procedure of California a plaintiff asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate, or interest in the premises.

THE case as stated by the court was as follows:

This is a suit in equity to determine the adverse claims of the defendants below, appellants here, to certain lands in the county of Ventura, in the State of California. One of the plaintiffs, Rudolph Steinbach, is an alien and a subject of the Emperor of Germany. The other plaintiff, Horace W. Carpentier, is a citizen of the State of New York. The defendants are all citizens of the State of California. In their complaint the plaintiffs allege that they are the owners in fee of the premises, which are fully described; that the defendants claim an estate therein adverse to them; that such claim is wholly unfounded and invalid in law or equity; and that its assertion depreciates the value of their title and property, and prevents them from using or selling the property, and otherwise harasses and annoys them in its possession and ownership. They therefore pray that the defendants may be required to set forth the grounds and nature of their claims and pretensions, that the court may determine each of them; and that it may be adjudged that they are unfounded in law and equity, and that the plaintiffs are the owners of the premises and entitled to their possession, and may have a writ of assistance for the possession of such portions as may be found to be in the occupation of the defendants, and for such other and further relief as may be just.

In their answer the defendants disclaim all interest in a portion of the premises, and deny that the plaintiffs have any estate in the residue. As to such residue, they admit that they claim an estate in fee simple therein, and aver that the defendant A. P. More is now, and his grantors have been since 1843, the owners thereof in fee by virtue of a grant made April 28, 1840, by Alvarado, then governor of the Department of California under the Mexican government; that the grant was approved by the Departmental Assembly on the 26th of May, 1840; and that thereafter, on the 1st of April,

1843, Micheltorena, then governor of the Department, ratified and confirmed the grant; and that, on the 17th and 18th of November, 1847, the grant was duly surveyed, and the grantee placed in possession by the First Alcalde of the district in presence of the neighboring proprietors, who consented to the lines thus established.

The answer further alleges that the grant was adjudged to be valid and confirmed under the act of Congress of March 3, 1851, "to ascertain and settle the private land claims in the State of California," 9 Stat. 631, c. 41, and that the defendant A. P. More, on the 4th of March, 1858, succeeded by proper conveyances to all the interests of the grantee in the premises, and still remains the owner thereof, except as to a portion not in dispute here, which he has alienated, and as to portions which are described as belonging to the other defendants, all of whom assert title to the parcels held by them under conveyances from him.

A replication being filed, proofs were taken, from which it appears that the plaintiffs claimed under a patent of the United States, issued to one Manuel Antonio Rodrigues de Poli, bearing date on the 24th of August, 1874. It is conceded that whatever title was acquired by Poli under the patent had passed by proper mesne conveyances to them. The patent recites the proceedings taken by Poli before the Land Commissioners under the act of March 3, 1851; the filing of his petition in March, 1852, asking for the confirmation of his title to a tract of land known as the mission of San Buenaventura, his claim being founded upon a sale made on the 8th of June, 1846, by the then governor of the Department of California; the decree of confirmation rendered by the Board of Commissioners in May, 1855; the affirmation of said decree by the District Court of the United States for the Southern District of California in April, 1861, to the extent of eleven square leagues, and by the Supreme Court of the United States, as shown by its mandate issued in December, 1868; and the subsequent depositing in the General Land Office of a plat of the survey of the claim confirmed, authenticated by the signature of the Surveyor General of the United

States for California, the descriptive notes and plat of the survey being set forth in full.

The land of which the plaintiffs claim to be the owners is embraced in this patent, and upon its efficacy in transferring the title they rely.

The defendants, as stated in their answer, claim under a grant made by Governor Alvarado to Manuel Jimeno on the 28th of April, 1840, which was confirmed under the act of Congress of March 3, 1851, to ascertain and settle private land claims in California. It appeared in evidence, a fact not averred in the answer, that the claim thus confirmed was subsequently surveyed as required by that act, and on the 22d of April, 1872, a patent of the United States therefor was issued to the claimants, Davidson and others, who had acquired by proper conveyances whatever rights Manuel Jimeno possessed under the grant. The defendants afterwards succeeded to the rights and title of these claimants.

The patent to Davidson and others recites the various proceedings taken by them for the confirmation of the claim to the land covered by the grant to Manuel Jimeno, issued by Governor Alvarado on the 28th of April, 1840, and approved in a subsequent instrument by Governor Micheltorena on the 1st of April, 1843, which two instruments are described as separate grants; the confirmation of the claim by the Board of Land Commissioners on the 22d of May, 1855, and that, an appeal having been taken to the District Court of the United States for the Southern District of California, the Attorney General of the United States gave notice that it was not the intention of the United States to prosecute it, and thereupon, at its December Term, 1857, it was dismissed by the court.

The patent also recites the subsequent proceedings taken for the location and survey of the claim, by which it appears that two surveys were made, both of which were brought before the District Court of the United States under the act of 1860; and that the one made under instructions of the United States Surveyor General in December, 1860, and approved by him in February, 1861, was adopted by the court "as the correct and true location of the lands confirmed." The descrip-

tive notes of the survey approved are set forth in full in the patent with a plat of the lands.

This patent does not embrace the premises to which adverse claims are asserted by the defendants. Their contention is that the grant followed by the judicial possession given by the alcalde of the vicinity in 1847, vested in the grantee a perfect title to the lands within such judicial possession, which does embrace these lands; and that their right to such lands is not lost by reason of the fact that they are not included in the subsequent survey of the claim under the act of 1851, and the patent of the United States. The court below held against their contention, and adjudged that the plaintiffs were owners in fee of the described premises, and that the adverse claims of the defendants to an estate or interest therein were unfounded in law or equity, and gave a decree, as prayed, for the plaintiffs. From this decree the defendants have appealed to this court.

Mr. George Flournoy and *Mr. John B. Mhoon* for appellants.

I. If the court be of opinion that the patent to De Poli is admissible in evidence we still claim that it did not vest title in the patentee, either as against (1) claimants under a complete Mexican title, or (2) the United States. If Mexico had invested Jimeno with a complete title she had no title to cede to the United States in 1848, and did, in fact, only cede, as to this parcel of land, territorial sovereignty. The United States could not convey by its patent, or otherwise, that which she never had. And if the sale to Jose Arnaz was void, the patent issued thereon is clearly void. The United States can only patent its domain and convey its territory pursuant to law. Any acts of even the highest officers of the United States, contrary to law, will not estop the government from denying that act. Story on Agency, § 307 *a*; *Hunter* v. *United States*, 5 Pet. 173, 188.

II. The appellants' title to the land described in the answer was complete and perfect in all respects prior to the cession

of California to the United States; and the United States cannot, either by an act of Congress, or patent of the Executive, or decree of the Judicial Department, in contravention of that treaty, divest the appellants.

[Counsel then stated the various steps in their chain of title upon which they relied, and continued:]

We submit, without fear of contradiction, that in no case in California, Florida, Louisiana or Texas has any Mexican or Spanish grantee shown a more perfect and complete title than the grantee in the case at bar. And we confidently claim that unless the fact that the juridical survey being made after July 6, 1846, vitiates said survey, Jimeno's title to the land described in that survey was in all respects perfect and complete. *Minturn* v. *Brower*, 24 California, 644; *Schmitt* v. *Giovanari*, 43 California, 617; *Malarin* v. *United States*, 1 Wall. 282; *United States* v. *Castro*, 5 Sawyer, 625; Rancho Corte de Madera del Presidio; Copp's Pub. Land Laws, p. 532.

That Pablo de la Guerra had jurisdiction to make the survey cannot be doubted. *Cohas* v. *Raisin*, 3 California, 443; *White* v. *Moses*, 21 California, 34; *Merryman* v. *Bourne*, 9 Wall. 592, 602; *Palmer* v. *Low*, 2 Sawyer, 248; *Pico* v. *United States*, 1 Hoffman Land Cas. 279.

"The laws of a conquered or ceded country remain in force till altered by the new sovereign." *Mitchell* v. *United States*, 9 Pet. 711, 749.

Now, if we have shown a perfect title from Mexico in Jimeno prior to the treaty of cession, the United States must protect it. The treaty of cession stipulated for such protection, and as to perfect titles so acquired, they could not be lawfully required to be presented for adjudication under the act of 1851. *Beard* v. *Federy*, 3 Wall. 478, 490. The treaty was the law of the title.

There can be no estoppel by the patent to Davidson as in favor of respondents, for the reason that there could be none against them arising out of a proceeding to which neither they nor their grantor was a party.

Neither the United States patent to De Poli nor the United States patent to Davidson can affect the rights of the other

party in a suit for said claims under Mexican grants, because a United States patent on a Mexican grant is a quit claim deed from the government, and does not enlarge or abridge pre-existing titles. *United States* v. *Arredondo*, 6 Pet. 691, 736; *New Orleans* v. *De Armas*, 9 Pet. 224; *Langdeau* v. *Hanes*, 21 Wall. 521; *Nelson* v. *Moon*, 3 McLean, 319.

The appellants are not estopped by a quit claim deed under which they do not claim. *Kidder* v. *Blaisdell*, 45 Maine, 461.

Under the rule in *Cassidy* v. *Carr*, 48 California, 339, and *Boyles* v. *Hinds*, 2 Sawyer, if these respondents derived their title by grant from the United States, as, for instance, under the preëmption or other valid act by which the United States disposes of *its* lands, then the patent to Davidson would estop these appellants for the sole reason that appellants would have litigated their rights in a proceeding to which respondents' grantor was a party, and the decree in that case would be an estoppel on both parties to this suit. The case at bar presents no such facts. The United States is not respondents' grantor, nor is it appellants' grantor. It never had the title to the land described in either patent. If so, both patents are void, for under the act of 1851 the United States could issue patents only on lands the right to which came from Mexico to claimants.

The land in dispute is embraced in the De Poli patent, that patent issued in a proceeding to which appellants (and their grantors) were not parties. By that patent the United States declared that it had no title or rights to the land therein described and that, as against the United States, De Poli had derived title from Mexico.

By its patent to Davidson the United States did not undertake to do more than segregate Davidson's land from the *public domain*. It had no power to establish lines which would determine the rights of private parties *inter sese*, because those private parties were not parties in the proceedings under which such patents issued. The land in dispute here never was public domain. It either belonged to De Poli or Jimeno at the time of the cession to the United States, and nothing the United States has since done, or can now do,

should estop those who have succeeded to De Poli or Jimeno from showing to whom it did then belong. "In such a case the United States has no interest." *United States* v. *White*, 23 How. 249.

As was said in *Bissell* v. *Henshaw*, 1 Sawyer, 553, 583: As if aware of the confusion which must follow such proceedings, the act of 1851 provides expressly that neither the final decree of the Board of Commissioners, or of the District, or the Supreme Court, or any patent to be issued under that act, shall be conclusive against any one but the claimants and the United States. . . . *Rodrigues* v. *United States*, 1 Wall. 582, 588."

If there were a contest between the United States and either of these patentees, or a grantee of the United States and either of the patentees, the patent would clearly be conclusive. But how can such a rule apply when both parties claim the land under a title paramount to the United States?

The land in question does not belong to the United States. It is the property of either appellants or respondents. The title came from Mexico to its present owners — not from the United States. The determination of the suit will depend upon the question: To whom did Mexico convey? If Mexico conveyed the property to appellants, the United States cannot convey it to respondents; and, on the other hand, if she conveyed it to respondents, the United States cannot convey it to appellants. The United States has, by its Executive Department, segregated it from the public domain, and it now remains for the Judicial Department of the government, as the last duty of the government under the treaty, to determine to whom Mexico did convey, and to then protect the Mexican grantee in his property.

III. But if the Pico sale, upon which the De Poli patent issued, is valid, and the juridical survey of November, 1847, is void, the respondents are estopped from now objecting to the lines then established and agreed upon by Anguisola, in charge of the Mission.

The recital in the juridical survey, that the neighboring owners were present and consented to that survey and the

lines then established, and that Anguisola was then in charge of the Mission lands, and was present and satisfied with said lines, is presumptively true. California Code of Civil Procedure, § 1963, Subd. 15; *Stinson* v. *Hawkins*, 13 Fed. Rep. 833.

Respondents are estopped by their assent from denying the division line between themselves and defendants. *Stowe* v. *United States*, 19 Wall. 13.

The line established by agreement controls as between the parties or their privies: *Bronson's Executor* v. *Chappell*, 12 Wall. 681; *Spring* v. *Hewston*, 52 California, 442; *Carpentier* v. *Thurston*, 24 California, 281; *Alviso* v. *United States*, 8 Wall. 337; *Higueras* v. *United States*, 5 Wall. 824; *Fossatt's Case*, 2 Wall. 649, 715. "Acquiescence in error takes away the right of objecting to it." California Civil Code, § 3516.

Mr. E. S. Pillsbury for appellees.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

The question presented for determination in this case relates to the effect of proceedings taken under the act of March 3, 1851, to ascertain and settle private land claims in California, upon the claims of parties holding concessions of lands in that State under the Spanish or the Mexican government. By the cession of California to the United States, the rights of the inhabitants to their property were not affected. They remained as before. Political jurisdiction and sovereignty over the territory and public property alone passed to the United States. *United States* v. *Percheman*, 7 Pet. 51, 87. Previous to the cession numerous grants of land in California had been made by the Spanish and Mexican governments to private parties. Some of these were of tracts with defined boundaries; some were for specific quantities of land to be selected from areas containing a much larger quantity; and others were of lands known only by particular names, without any designated boundaries. To ascertain what rights had thus passed, and to

carry out the obligation which the government of the United States had assumed to protect all rights of property of those who remained citizens of the country, Congress passed the act of March 3, 1851. By it a board of commissioners was created, to which all persons claiming land by virtue of any right or title derived from the Mexican or Spanish governments could present their claims and have them examined and their validity determined; and the claimants could appear by counsel and produce documentary evidence and witnesses in support of their claims. The act required all persons thus claiming lands in California to present their claims to the board within two years from its date, and declared in substance, that if, upon examination, they were found by the board, and by the courts of the United States to which an appeal was allowed, to be valid, the claims should be confirmed and surveyed, and patents issued therefor to the claimants. But the act also declared that all lands the claims to which were not presented to the board within that period, should be considered as part of the public domain of the United States. In *Beard* v. *Federy*, 3 Wall. 478, 490, this court, whilst stating that it was unnecessary to express any opinion as to the validity of the legislation in respect to perfect titles acquired under the former government, held that it was not subject to any constitutional objection, so far as it applied to grants of an imperfect character, which required further action of the political department to render them perfect. The grant to Manuel Jimeno, under which the defendants claim, was one of an imperfect character. Upon the cession of the country there remained a further proceeding to be had with respect to that grant before an indefeasible title could vest in the grantee. A formal transfer of the property to the grantee by officers of the government was necessary. The proceeding was termed a judicial delivery of possession. Until it was had the grant was an imperfect one. As preliminary to, or as a part of the official delivery, the boundaries of the land were to be established, after summoning the neighboring proprietors as witnesses to the proceeding. *Malarin* v. *United States*, 1 Wall. 282, 289. No such official delivery of possession was had under the former government

to the grantee, Jimeno, though the grant to him contains these conditions: "He shall petition the proper judge to be put in judicial possession by him in virtue of this document, by whom the boundaries shall be marked out, on the limits of which he shall place the proper land marks. The land now granted is of the extent of four square leagues, more or less, as shown by the map which accompanies the espediente. The judge who shall give him possession shall have it measured in conformity with the evidence, the surplus that results remaining in the nation for its proper use."

The authority and jurisdiction of Mexican officials terminated on the 7th of July, 1846. On that day the forces of the United States took possession of Monterey, the capital of California, and soon afterwards occupied the principal portions of the country, and the military occupation continued until after the treaty of peace. The political department of the government designated that day as the period when the conquest of California was complete and the authority of the officials of Mexico ceased. In this matter the judiciary follows the political department. *United States* v. *Yorba*, 1 Wall. 412, 423; *United States* v. *Pico*, 23 How. 321, 326; *Hornsby* v. *United States*, 10 Wall. 224, 239. After that date no alcaldes elected by the citizens had any jurisdiction to deliver judicial possession. This was distinctly held in the case of *Fremont* v. *United States*, 17 How. 542, 563. In answer to the objection there taken that there was no survey or judicial possession of the land granted to Alvarado, under whom Fremont claimed, the court said: "The alcalde had no right to survey the land or deliver judicial possession, except by the permission of the American authorities. He could do nothing that would in any degree affect the rights of the United States to the public property; and the United States could not justly claim the forfeiture of the land for a breach of these conditions, without showing that there were officers in California, under the military government, who were authorized by a law of Congress to make this survey, and deliver judicial possession to the grantee. It is certain that no such authority existed after the overthrow of the Mexican government."

The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defence. That doctrine has no application to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject. The cases in the Supreme Court of California and in this court which recognize as valid grants of lots in the Pueblo or City of San Francisco by alcaldes appointed or elected after the occupation of the country by the forces of the United States, do not militate against this view. Those officers were agents of the pueblo or city, and acted under its authority in the distribution of its municipal lands. They did not assume to alienate or affect the title to lands which was in the United States. *Welch* v. *Sullivan*, 8 California, 165; *White* v. *Moses*, 21 California, 34; *Merryman* v. *Bourne*, 9 Wall. 592.

It follows from what is thus said that it would be a sufficient answer to the contention of the defendants, that the grant under which they claim to have acquired a perfect title conferred none. The grantees were not invested with such title, and could not be, without an official delivery of possession under the Mexican government, and such delivery was not had, and could not be had, after the cession of the country, except by American authorities acting under a law of Congress. But independently of this consideration, and assuming that the title under the grant was perfect, the obligation of the grantee was none the less to present his claim to the Board of Land Commissioners for examination. The ascertainment of existing claims was a matter of vital importance to the government in the execution of its policy respecting the public lands; and Congress might well declare that a failure to present a claim should be deemed an abandonment of it, and that the lands covered by it should be considered a part of the public domain. Certain it is that a claimant presenting his

claim to the Board for examination and confirmation, in order that he might subsequently acquire a patent from the government, is bound by the adjudication of the Board. After submitting his claim to its examination and judgment, he cannot afterwards be heard to say that in adjudicating upon his title the Board erred, or that the Land Department in determining the boundaries of his claim erred, in order that he may claim outside of the survey and patent other lands which he considers covered by his grant. He cannot repudiate a jurisdiction to which he has appealed; and the estoppel extends to parties claiming under him. *Boyle* v. *Hinds*, 2 Sawyer, 527; *Cassidy* v. *Carr*, 48 California, 339.

In determining claims under Mexican grants the Board of Land Commissioners was required by the act under which it was created, to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim was derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they were applicable. And in *United States* v. *Fossatt*, 21 How. 445, 448, 449, this court, in considering what was involved in the inquiry into the validity of a claim to land under that act, said: "It is obvious that the answer to this question must depend, in a great measure, upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or, it may involve an inquiry into the authority of the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or, it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of conditions. Questions of each kind here mentioned have been considered by the court in cases arising under this law. But, in addition to these questions upon the vitality of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim. In affirming a claim to land under a Spanish or

Mexican grant, to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal and translative of property. We affirm that the ownership and possession of land of definite boundaries rightfully attach to the grantee."

Trust relations respecting the property between the patentee and others may be enforced equally with such relations between him and others respecting any other property, but until the patent is set aside or modified by proceedings taken at the instance of the government, all the questions necessarily involved in the determination of a claim to land under a Spanish or Mexican grant, and in establishing its boundaries, are concluded by it in all courts and proceedings, except as against parties claiming by superior title, such as would enable them to resist successfully any action of the government in disposing of the property. The confirmation takes effect, by relation, as of the date of the first proceeding commenced before the Land Commissioners; and an adjudication that at that date it was valid is also an adjudication that it was valid at the date it was made. And the patent which follows the confirmation and approved survey and is a matter of record, is itself evidence of the regularity of preliminary proceedings. As was said in *Beard* v. *Federy*, 3 Wall. 478, 492, "by it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie."

It remains to consider two other positions taken by the appellants; first, that the sale to Poli of the ex-mission of San Buenaventura was illegal and void, and hence that no

title passed to the patentee on its confirmation; second, the want of any allegation in the complaint, or any evidence in the proofs, that the plaintiffs were in possession of the premises when this suit was commenced. In support of the first position the appellants cite *United States* v. *Workman*, 1 Wall. 745. In that case it was held that the Departmental Assembly of California had no power to authorize the governor to alienate any public lands of the department, and that its own power was restricted to that conferred by the laws of colonization, which was simply to approve or disapprove of the grants made by the governor under those laws. But it does not follow that there were not exceptional circumstances with reference to the sale to Poli, which authorized the governor to make it. We are bound to suppose that such was the case, in the absence of any evidence to the contrary, from the fact that the validity of his claim under it was confirmed by the Board of Land Commissioners, by the District Court of the United States, and by this court on appeal. The question of its validity was thereby forever closed, except as against those who might be able to show a prior and better title to the premises. The defendants show no title whatever; but, on the contrary, the grant under which they assert title has been, by the adjudication of the Board of Land Commissioners and by the survey and patent, confined to other land. Second, as to the want of any allegation in the complaint of possession by the plaintiffs, or any evidence of that fact in the proofs, it is sufficient to say that, by § 738 of the Code of Civil Procedure of California, a plaintiff asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate, or interest in the premises. *People* v. *Center*, 66 California, 551. A statute of Nebraska, authorizing a similar suit by a plaintiff out of possession, was before this court for consideration in *Holland* v. *Challen*, 110 U. S. 15, and the jurisdiction of a court of equity to grant the relief prayed in such case was sustained. See, also, *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 411; *Chapman* v. *Brewer*, 114 U. S. 158, 170, 171; *United States* v. *Wilson*,

118 U. S. 86, 89; *Frost* v. *Spitley*, 121 U. S. 552, 557. We see no error in the decree of the court below, and it is accordingly

Affirmed.

RUCKER *v* WHEELER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 1306. Submitted January 9, 1888. — Decided April 16, 1888.

In the courts of the United States the presiding judge may, in submitting a case to the jury, express his opinion on the facts; and when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the jury, such expression is not reviewable on writ of error.

In this case there was no error in the charge of the court to the jury.

THE case as stated by the court was as follows:

The cause of action set out in the first count of the complaint is, that the defendant in error, who was the defendant below, agreed with the plaintiff in error that if the latter assisted the former and his agents, in purchasing the interest of Julia Webber in the Emma lode mining claim at a price not exceeding forty thousand dollars, he should receive for his services the sum of ten thousand dollars, but only five thousand dollars if the defendant was compelled to pay more than forty thousand dollars for said interest. The complaint alleges that, in consequence of services rendered by the plaintiff under that agreement, the defendant was, on the 22d of November, 1884, enabled to buy said interest at a sum exceeding forty thousand dollars, whereby the latter became indebted to plaintiff in the sum of five thousand dollars.

The defendant in his answer denies that he made any such agreement as that alleged, or that he was enabled to purchase the interest of Julia Webber, by reason of any services rendered by the plaintiff.

The second count of the complaint sets forth the following cause of action:

Statement of the Case.

On the 29th of November, 1882, one Henry Webber was the owner of an undivided $\frac{20}{60}$ of the Emma lode mining claim in Colorado, one Archie C. Fisk being the owner of $\frac{28}{60}$, and Charles F. Abbey the owner of the remaining $\frac{12}{60}$. In 1883 Fisk commenced proceedings under the statutes of the United States in advertising the interest of Webber "out of said claim" on account of alleged non-payment of assessment work done by Fisk on said claim in 1882. After the period of the publication of said advertisement, Fisk asserted ownership of $\frac{48}{60}$ of said mining claim.

On the 20th of November, 1883, Fisk leased to Abbey said $\frac{48}{60}$. Webber, desiring to secure possession of said claim, procured from Abbey, November 26, 1883, a lease in the name of Nevitt, his brother-in-law, of an undivided $\frac{16}{60}$, the latter being the nominal and Webber the real owner of the lease. On the 18th of April, 1884, the defendant, Wheeler, by conveyances, had become the owner of all the interest claimed by Fisk. During the same month Webber commenced suit against the grantor of Wheeler, and the administrator and heirs-at-law of Abbey, to recover his interest of $\frac{20}{60}$ in said premises.

On the 28th of April, 1884, Webber gave to the plaintiff, Rucker, a quit-claim deed in and to an undivided one-twelfth interest ($\frac{5}{60}$) in said mining claim, as his compensation for legal services rendered and to be rendered in the prosecution of said action. In the same year Wheeler and the administrator and heirs-at-law of Abbey commenced an action against Nevitt for the possession of said premises, and to restrain him and his agents from working and mining the same.

At the time the quit-claim deed was made to Rucker, it was agreed between him and Webber that Rucker's interest would not be subject to the burden of the lease made by Abbey to Nevitt. In consideration of that deed and agreement the plaintiff entered upon the performance of the legal services necessary to establish Webber's title to said interest of $\frac{20}{60}$.

On the 26th of September, 1884 — the defendant being then the owner of both the Abbey and Fisk interests in said claim — the plaintiff, for and on behalf of Webber, and acting

nominally for Webber, together with the defendant's attorney, prepared a written agreement, which was signed and executed by Webber, Nevitt, and the defendant. It had for its object the compromise of the pending litigation between the parties. That agreement was as follows:

"This agreement, made and entered into on this 26th day of September, A.D. 1884, by and between J. B. Wheeler, of the first part, and C. E. Nevitt, of the second part, and Henry Webber.

"Witnesseth, That whereas the said party of the first part is the owner of certain interests in the Emma mine, situate in Pitkin County, State of Colorado, and a suit is now pending in the District Court of said county on behalf of said Webber against said party of the first part and others for a one-third ($\frac{1}{3}$) interest in said mine; and whereas another suit is pending in said court in behalf of the said J. B. Wheeler and others against the said second party to recover possession of said mine; and the said second party in his defence thereto claims to hold a lease of said mine expiring on the 20th day of November, 1884, in which said suit the District Judge of said court has made an order allowing the possession of said property to remain in the hands of said second party during the period of said lease, two-thirds ($\frac{2}{3}$) of the proceeds thereof to be paid to John Hulbert, receiver, to be held by him to await the determination of said suit or the further order of the court, less a royalty of fifteen (15) per cent; and whereas said party of the second part has been for some time in the possession of said mine and has extracted a large quantity of ore, a greater portion of which is now on hand undisposed of; and whereas said second party, being desirous of compromising and settling said actions, it is agreed, in consideration of the premises, the said first party will, upon the ensealing of these presents, make, execute, and deliver a sufficient deed of quit-claim to said Webber, his grantees or assigns, for an undivided one-fourth ($\frac{1}{4}$) interest in said mine, and said Webber, on receipt of said deed, agrees to release, waive, and does hereby release and waive, unto said party of the first part all claims which he may have to any further or other interest in said property.

"And the suit aforesaid between the said parties to be dismissed upon each party paying their own costs therein. That the suit aforesaid between said first party and said second party shall likewise be dismissed upon the same terms, and the said second party hereby releases and waives to said first party all right and title as to said lease, save and except a one-third ($\frac{1}{3}$) interest therein, and at the end of said term to release and surrender the whole thereof and possession thereunder peaceably to said owners, their grantees or assigns.

"It is further agreed that the proceeds of the ore now on hand, after payment of the cost of production and after the payment of the costs of hauling and treatment, shall be divided as follows: The said party of the second part to receive one-third ($\frac{1}{3}$) thereof, less a royalty of fifteen per cent on said one-third interest, according to the terms set forth in his said lease, and the said party of the first part to receive three-fourths ($\frac{3}{4}$) of the remaining two-thirds ($\frac{2}{3}$), and the said Webber, his grantees or assigns, one-fourth ($\frac{1}{4}$) of the said remaining two-thirds ($\frac{2}{3}$), and during the remainder of the term of said lease, namely, up to and inclusive of the 20th day of November, A.D. 1884, the proceeds of the mine to be divided in the same manner and in the same proportions aforesaid, such division also to apply to and include the said royalty to be paid by the second party as aforesaid.

"And it is mutually agreed by and between the parties hereto that during the remainder of the term of said lease the said mine shall be under the superintendence of Joseph Ruse, who shall operate, work, and develop the said property for the mutual interest of all the parties hereto, and with a view to developing and preserving the said property as a workable mine as well as the production of ore therefrom, said work to be done by said Joseph Ruse in as economical a manner as possible, and to limit the production therefrom so as to correspond to the expense incident to mining, and the price for which said ore can be sold, and any failure upon the part of said Joseph Ruse to comply with the conditions herein mentioned shall be the cause for removal from such position of superintendent.

"The said Joseph Ruse during his continuance as superin-

tendent shall be under the advisory control of said first party. And the said second party and the said Webber shall have the right at all times to make suggestions in the matter of the authority of the said party of the first part respecting the management of the said mine.

"In witness whereof we hereto set our hands and seals on the day and year first herein above written.

"J. B. WHEELER. [SEAL.]
"C. E. NEVITT. [SEAL.]
"HENRY WEBBER. [SEAL.]"

At the time this agreement was executed the defendant, the complaint alleges, "knew that said Nevitt was representing the said Webber, and that said lease was in fact owned by the said Webber, and that plaintiff was entitled to $\frac{5}{10}$ of the proceeds of said mine out of the $\frac{1}{60}$ thereof awarded to said Webber under and in virtue of said agreement; that in pursuance of said agreement the management and control of the working of said mine was given over to the said defendant, who recovered the proceeds thereof and placed the same in his banking-house to the credit of the mine."

On the 21st of October, 1884, the defendant purchased said leasehold interest from Nevitt, who was acting for Webber as aforesaid, and took an assignment thereof to himself; that by virtue of said purchase he became entitled to $\frac{2}{60}$ more of the ore then on hand, and $\frac{2}{60}$ of that produced thereafter and until November 21, 1884.

On the 17th of November, 1884, Henry Webber sold his interest, $\frac{1}{60}$, to his wife, who, November 22, 1884, sold and conveyed to the defendant. Up to the time of Mrs. Webber's sale to the defendant a large sum of money was realized from the sale of the ore, and there was on hand, unsold, a large quantity taken from the mine subsequent to September 26, 1884, the money thus realized being in defendant's bank to the credit of the mine. The plaintiff claims that at the time the defendant purchased said leasehold interest there was due to him, on account of his $\frac{5}{60}$ out of the $\frac{1}{60}$ of the proceeds of the mine accorded to Webber and his grantees and assigns by the

agreement of September 26 a balance of $2262.30; that on the same basis there was due him $2630.66 at the time of defendant's purchase of Mrs. Webber's interest; which sums the defendant placed to his own account and converted to his own use.

The complaint further alleges:

"That at the time of the purchase of said leasehold interest and at the time of the purchase of said Julia Webber's title by the defendant the said defendant well knew that the plaintiff and the said Henry Webber had agreed at the time of the plaintiff obtaining his title aforesaid that plaintiff's interest was not subject to the burden of said lease, and that he, the said plaintiff, was to receive out of the interest of the said Webber, as the grantee of said Webber, his full one-twelfth share and interest in the ore produced and to be produced from said mine, and he well knew that by virtue of the terms of said agreement of the 26th day of September, 1884, plaintiff was entitled to his five-sixtieths of the proceeds of all ores extracted from said mine out of the ten-sixtieths aforesaid accorded to the said Webber by virtue of said agreement.

"That by virtue of the sale made by said Henry Webber to the said Julia Webber no part of the proceeds of said mine theretofore produced were sold to said Julia Webber, and that when said Julia Webber received said conveyance she also knew that plaintiff's five-sixtieths interest in the proceeds of the ore theretofore extracted from said mine was to come out of the ten-sixtieths thereof accorded to said Henry Webber under and by virtue of said agreement of the 26th of September, 1884, and that she also knew and understood that by virtue of said agreement made between the plaintiff and said Henry Webber at the time of his conveyance to said plaintiff that his, said plaintiff's, interest was not subject to the burden of said leasehold interest, and that said leasehold interest was owned and controlled by said Henry Webber."

Such is the case made by the complaint.

The defendant in his answer admits many of the allegations of the complaint, but denies that at the time of the making of the deed to him by Webber, or at any other time, it was

agreed between them that the plaintiff's interest would not be subject to the burden of the lease made by Abbey to Nevitt, or that he, defendant, knew, either at the time of the signing and execution of the agreement of September 26, 1884, or at any other time, that Nevitt was representing Webber, or that said lease was owned by Webber, or that the plaintiff was entitled to $\frac{5}{60}$ of the proceeds of the mine out of the $\frac{10}{60}$ awarded to Webber under said agreement.

He admits that up to the time of the sale to him by Julia Webber of the interest previously held by her husband, "there had been a large sum of money realized from the sale of ore taken from the said mine, together with a large amount unsold," and that "the moneys belonging to said interests were by him purchased with the said interests, and that he consequently realized the amount thereof." But he denies that any part or portion of the said proceeds of ores belonging to the plaintiff were ever withheld from him. He denies that at the time of his purchase from Julia Webber he ever knew, or that Henry Webber and plaintiff ever agreed at the time the latter got his title, "that plaintiff's interest was not subject to the burden of said lease, or that plaintiff was to receive out of the interest of said Webber, as the grantee of said Webber, his full $\frac{1}{12}$ share or interest of the ore produced or to be produced from said mine." He denies that "he well knew, or knew at all, either by virtue of the terms of said agreement of the 26th of September, 1884, or at any other time, that the plaintiff was entitled to $\frac{5}{60}$ or any other amount of the proceeds of ores extracted from said mine out of the $\frac{10}{60}$ accorded to said Webber by virtue of said agreement, or any other sum; but, on the contrary, alleges that the said plaintiff was to receive his proportion, to wit, $\frac{5}{60}$ of the proceeds of all the said ores, less the proportion which the $\frac{5}{60}$ interest should bear of the burden of the said lease upon the said $\frac{1}{3}$ interest in said mine." He denies that Julia Webber knew or understood that by virtue of the agreement of September 26, 1884, or of any agreement, the plaintiff's interest was not subject to the burden of the said leasehold interest, or that said interest was owned or controlled by said Henry Webber.

Verdict for defendant, and judgment on the verdict. Defendant sued out this writ of error.

Mr. A. W. Rucker in person for plaintiff in error.

Mr. T. M. Patterson and *Mr. C. S. Thomas* for defendant in error.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

1. We perceive no error in the court's charge to the jury upon the cause of action set out in the first count of the complaint, namely, as to whether any such agreement as that alleged was ever made between the plaintiff and the defendant.

The court properly said:

"On the cause of action as stated here, in order to show any right upon the part of the plaintiff to the commission for which he sues, in making the sale, the proof must be of a sale made to the defendant, or an agreement for a sale to be made to the defendant, not a sale to Judkins and Devereux, not a sale to Judkins and the defendant, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join in the payment of the commission — that is to say, Judkins and Devereux, if they purchase, Devereux acting on his own behalf, Judkins and the defendant, if they purchase jointly, would pay it. If some other man was brought into the purchase — some one not named at that time or referred to in any way — then it would be that other man and Judkins who would pay the plaintiff the commission; furthermore, it does not appear — in fact the evidence tends to prove that Devereux had no authority from Wheeler at that time to make any purchase of this property or any other, and, of course, an agreement by Devereux on behalf of the defendant to purchase this property would not be binding on the defendant unless afterwards with full knowledge of the situation and circumstances, and of what had been done by Devereux in

his behalf, he should ratify and confirm what had been done by Devereux. I do not see that this evidence proves, taking all that is said about it by these witnesses, a contract on behalf of the defendant to purchase this property through the plaintiff. I say now generally upon this branch of the case that it must appear to you from the evidence, that there is an agreement between the plaintiff and defendant — Mr. Rucker and Mr. Wheeler — to the effect that Mr. Rucker was to secure the property for him and that he was to pay him for that service. The agreement, which appears to be stated by Judkins and by Devereux, is not of this character — that is, that was an agreement that Judkins would purchase with somebody else, and of course Judkins would be chargeable with the commission if it was carried out."

It is insisted by the plaintiff that the court went too far in its expressions of opinion upon the evidence bearing upon this issue, and that what was said had practically the effect of taking the case from the jury. It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that "when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury," such expressions of opinion are not reviewable on writ of error. *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545, 553; *St. Louis &c. Railway* v. *Vickers*, 122 U. S. 360; *U. S.* v. *Reading Railroad*, 123 U. S. 113, 114. Whether the parties made such an agreement for compensation to the plaintiff as that alleged was the only issue made by the first count of the complaint; and that was a question of fact to be determined by the jury. Their right to determine it was distinctly recognized in that part of the charge which immediately followed the court's expression of opinion as to certain portions of the evidence, namely: "If you can find anything in the evidence to support the conclusion that the defendant made an agreement with plaintiff to pay this commission, and that the property was afterwards purchased by him in pursuance of that agreement, then the plaintiff is entitled to recover; otherwise he is not entitled to recover."

Indeed, we are not sure but that the court might properly have given a peremptory instruction in favor of the defendant upon this branch of the case.

2. In reference to the cause of action set out in the second count of the complaint, it is manifest that the plaintiff bases his right to recover upon the agreement alleged to have been made between him and Henry Webber, at the time the latter executed the quit-claim deed of April 28, 1884, to the effect that plaintiff's interest would not be subject to the burden of the lease made by Abbey to Nevitt; of which agreement, it is further alleged, Julia Webber had knowledge when she purchased from her husband, and defendant had knowledge at the time he purchased from her.

Upon this part of the case the court said to the jury:

"Now, the position of the plaintiff is that he comes in under the designation of a grantee or assignee of Webber for one-half of the amount reserved to Webber by this agreement — that is $\frac{5}{60}$ths; this agreement reserves to Webber $\frac{10}{60}$ths; and the position of the plaintiff is that he must be regarded as an assignee and grantee of Webber in virtue of his deed of the preceding April for half of that amount which was reserved to Webber. He has brought this suit to recover that. Now, as I said before, in the deed there is nothing about that, and the question is, what was the intention of the parties at the time this deed was made? The plaintiff testifies that it was his intention that he should have the interest accruing under this lease as it went along, and was not to be postponed to the lease. I understand Mr. Webber to deny that proposition. Some comments have occurred between counsel as to the meaning of Mr. Webber's testimony, whether he has denied it or not. Mr. Webber could, if he chose to, by the terms of the agreement, reserve this entire interest to himself — that is, all that was accruing under the lease; if it was his intention to keep it to himself, and there was no agreement of the parties in respect to it, the deed constitutes no agreement. He could reserve it to himself, and if he did reserve it to himself, if nothing was said about it at that time, in the absence of any agreement between them that it should go to the plaintiff,

then it would go to Webber; and under these circumstances it remained in him up to the time that he made the sale to the defendant in this case. After the agreement of September 26th, and some time in October, Nevitt sold, as you remember, through the negotiations of Mr. Judkins, to Mr. Devereux or to the defendant directly — I don't remember much about that transaction — and subsequently Mrs. Webber, in a conveyance which she made to the defendant, assumed to convey all right and interest accruing to her under the lease. Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become effectual at once upon the execution of the deed, and that he should be entitled to whatever should come under the lease to Webber — that is, to his part of it, $\frac{1}{12}$th, $\frac{5}{60}$ths, of the whole amount — and if Nevitt was taking the whole preceeds of the mine, and I believe he was — at least it seems that he did so or assumed the right to do so after the mine became fruitful, and that was only in August, I think, of the same year — there were no proceeds of the mine, nothing that could be divided amongst them — among the several parties — until that time, and nothing was in fact divided until after this agreement of the 26th of September was made. So that the question must be whether there was an agreement between the plaintiff and defendant, or between the plaintiff and Webber, that he should be entitled to these proceeds from the time of the conveyance to him; that is a question of fact for your consideration. If you find that there was such an agreement; that the parties understood and intended that Mr. Rucker should be entitled to whatever should arise under the lease according to the proportion and interest conveyed to him by this deed from and after the time of the deed until the end of the lease, then my understanding is that he is entitled to recover the sum specified in this stipulation between the parties. They have agreed upon the amount. In the absence of such an agreement, then, he is not entitled to recover."

There was no error in this charge. It contained all that need have been said. It fairly submitted to the jury the question as to the existence or non-existence of the agreement upon

which the plaintiff relied. That the plaintiff did rely upon that agreement is perfectly clear, not only from the complaint, but from his second request for instructions, as follows:

"2. The court is asked to instruct the jury that if they believe from the evidence that the lease of a portion of the lode, though made nominally to Nevitt, was in fact owned by Mr. Henry Webber, and that the same Webber sold and conveyed a one-twelfth interest to the plaintiff after the making and delivery of the lease, and if they also believe from the evidence that at the time of the execution of the deed from Webber to plaintiff it was mutually agreed between Webber and plaintiff that this one-twelfth should be exempt from the operation of said lease, then plaintiff is entitled to the proceeds of the one-twelfth, and upon these facts they should find for the plaintiff to the amount fixed by the stipulation of the parties read to the jury, and interest at the rate of ten per cent per year from August 24th, 1885, the date the suit was brought."

The jury having found, under appropriate instructions as to the legal rights of the parties, that there was no such agreement, and the parties having stipulated that nothing was due to the plaintiff if the interest he acquired from Henry Webber was subject to the burden of the Nevitt lease, the judgment is *Affirmed.*

BLACKLOCK *v.* SMALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 148. Argued April 10, 11, 1888. — Decided April 23, 1888.

Two plaintiffs, citizens of Georgia, brought a suit in equity, in the Circuit Court of the United States for the District of South Carolina, against S., a citizen of South Carolina, and H., a sister of the plaintiffs, also a citizen of South Carolina, to set aside the alleged payment by S. to R., another defendant, of a bond and mortgage given by him to B., the father of the plaintiffs and of H., and to have the satisfaction of the

Statement of the Case.

mortgage annulled, and the bond and mortgage delivered up by S., and the bond paid, and the mortgaged premises sold. Before the alleged payment to R., B. had assigned the bond to R., in trust for the three children. When the suit was brought, B was a citizen of South Carolina: *Held*, that, as B. could not have brought the suit, the Circuit Court was forbidden to take cognizance of it, by § 1 of the act of March 3, 1875, c. 137, 18 Stat. 470.

This suit was a suit founded on contract, in favor of an assignee, and was not a suit founded on the wrongful detention by S. of the bond and mortgage.

The defendant H., by answer, joined in the prayer of the bill, and asked to have the bond and mortgage declared valid in the hands of R., as trustee, for the benefit of H. and the plaintiffs, and for a decree that S. pay to H. and the plaintiffs the amount secured by the bond and mortgage: *Held*, that as H. and S. were, when the suit was brought, both of them citizens of South Carolina, the Circuit Court had no jurisdiction.

As that court had dismissed the bill on the merits, with costs, and the plaintiffs and H. had appealed to this court, the decree was reversed, with costs in this court against the appellants, and the case was remanded, with a direction to dismiss the bill for want of jurisdiction, without costs of that court.

This was a bill in equity, filed on the 8th of October, 1879, in the Circuit Court of the United States for the District of South Carolina, by Emma Jane Blacklock and Mary Blacklock, citizens of Georgia, against Jacob Small, a citizen of South Carolina, Alexander Robertson, a citizen of North Carolina, and Helen Robertson Blacklock, a citizen of South Carolina.

The substance of the allegations of the bill was that, on the 20th of March, 1860, John F. Blacklock, the father of the plaintiffs, owning a house and lot in the city of Charleston, in the State of South Carolina, sold and conveyed it to the defendant Small, who, on the same day, gave back to Blacklock a bond and mortgage, the mortgage covering the house and lot, and being given to secure the payment on the bond of the sum of $10,600, by three equal and successive annual instalments, the first one payable on the 20th of March, 1861, with interest from the date of the bond and mortgage, payable annually; that the purchase money of the house and lot was $16,000, of which $5400 was paid in cash at the time; that Blacklock, the mortgagee, after receiving from Small, on the

19th of March, 1861, $742 for one year's interest, at 7 per cent, on the bond, indorsed on it the following assignment: "For value received, I hereby assign, transfer, and set over all my right, title, and interest in this bond to Alexander Robertson, in trust for children of J. F. Blacklock. J. F. Blacklock;" that the assignee was the defendant Robertson, and the "children of J. F. Blacklock" were the plaintiffs and the defendant Helen Robertson Blacklock; that Small pretended to pay the bond by making payments to Robertson as follows: On the 19th of October, 1861, $3600 on account of principal and $147 for interest; on the 4th of April, 1862, $2000 on account of principal and $490 for interest; and, on the 10th of April, 1862, the balance of the principal and interest; making such payments in the treasury notes of the Confederate States; that upon the receipt thereof Robertson satisfied the mortgage and delivered up the bond to Small; that, at the time of the creation of the trust in the hands of Robertson, the children of Blacklock were infants; that in May, 1861, Blacklock went with the children to England, and remained there until the close of the war; that Robertson, in receiving such payments in the treasury notes of the Confederate States, violated his duty and was guilty of a breach of trust; that Small, in attempting to pay the debt in an illegal currency, with full notice of the trust, had not paid the debt; that the satisfaction of the mortgage was void, and its lien was still subsisting; and that Small was still liable for the amount due on the bond, with interest.

The prayer of the bill was, that the payment of the bond in Confederate treasury notes may be disallowed; that the satisfaction of the mortgage may be annulled and the mortgage be reëstablished and declared a subsisting lien on the land; that Small may be ordered to deliver up the bond and mortgage to the plaintiffs; and that the plaintiffs may have a decree for the payment to them by Small of the amount due and for a sale of the mortgaged premises.

Small appeared in the suit and interposed a plea that the court had no jurisdiction of the cause, because the plaintiffs as well as himself were citizens of South Carolina when the bill

was filed. On issue joined on this plea, it was overruled, and Small put in an answer to the bill, as did also Robertson.

The defendant Helen Robertson Blacklock put in an answer, admitting the allegations of the bill, and averring that Robertson held the bond and mortgage as a trustee for herself and her sisters, in whom was the real and actual interest therein; that the attempted payment by Small was without legal effect; that the bond and mortgage were still the property of the defendant and her sisters; and that she joins in the prayer of the bill that the pretended payments of the bond, by Small to Robertson, and the satisfaction entered on the mortgage, be declared null and void, that the bond and mortgage be declared valid and subsisting obligations of Small to Robertson, as the trustee of a trust for the benefit of the defendant and her sisters, and that Small be decreed to pay the defendant and the plaintiffs the amount of money secured by the bond and mortgage.

Under replications to the answers, proofs were taken by the several parties. The case was heard on its merits, and a decree was made dismissing the bill, with costs. From this decree the plaintiffs and the defendant Helen Robertson Blacklock appealed to this court.

Mr. B. H. Rutledge (with whom was *Mr. James Lowndes*) for appellants contended, on the question of jurisdiction, as follows:

I. "The distinction, as it respects the application of the 11th section of the Judiciary Act to a suit, concerning a chose in action is this — when the suit is brought *to enforce the contract*, the assignee is disabled unless it might have been brought in the court if no assignment had been made; *but if brought for a tortious taking or wrongful detention* of the chattel, *then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal property.*" *Deshler* v. *Dodge*, 16 How. 622, 631.

"The assignee of a chose in action may maintain a suit in

the Circuit Court to recover possession of the specific thing; or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by assignors." *Bushnell* v. *Kennedy*, 9 Wall. 391.

What is the fundamental character of this suit? To recover possession and control of specific papers — tortiously taken and wrongfully detained — by virtue of an act apparently legal on the face of the papers, but totally illegal and without effect. If "founded on contract," the court is without jurisdiction. If founded on tort, it has jurisdiction. The question is purely technical.

(*a*) There is no essential difference in principle between Deshler's and the present case. *In each* the assignee sues when the assignor could not. *In each* the critical contention is to obtain possession of a specific personal chattel — bank-notes in one — bond and mortgage in the other — of which the defendant had possession under an apparent claim of right, viz., an unlawful distress in the one, and an unlawful payment in the other. *In each* the crucial point is whether the act under which the defendant claims is lawful or not. If lawful, the possession is lawful; if unlawful, it is tortious.

There are slight differences in the facts of the cases. Deshler proceeded by replevin. The Blacklocks by bill in equity. Either course is correct. The latter is the most approved. The same doctrine applies to other instruments and securities, and other evidences of property which are improperly withheld from the persons who have an equitable or legal interest in them, or who have a right to have them preserved. This redress, a court of common law is for the most part incapable of affording, since the prescribed forms of its remedies rarely enable it to pronounce a judgment *in rem* in such cases which is or can be made effectual. It is true that an action of detinue or even replevin might in some few cases lie and give the proper remedy if the thing could be found; but generally in actions at law damages only are recoverable, and such a remedy must in many cases be wholly inadequate. This constitutes the true ground for the prompt interposition of courts of equity for the recovery of the specific deeds or other instruments.

(*b*) But it may be said — the ulterior object — to obtain payment of the bond — determines it to be "founded on contract." It was not so considered in Deshler's case. It is true if the contract of the bond and mortgage had not been made, this suit could not exist. But it is equally true, if Small had not got these papers into his possession by an illegal and tortious act, this suit could not exist. It is most natural and appropriate for the plaintiffs to set aside the tort before they attempt to proceed on the contract.

(*c*) Also that the structure of the bill shows contract to be its foundation. *Prima facie* there is no contract remaining. Small says there is not, that it has been discharged by a given act, and is as if it had never been, and the papers are his. Who is to determine this? It stands until it is annulled by the court. The bill asks that it be annulled — the lien of the mortgage declared existing — and the papers delivered into the custody of the owners. Why not? If the act was illegal, the rest follows *ex necessitate.*

(*d*) Also that the bill prays foreclosure, and this shows the true inwardness of the case. The practice of equity is thus stated by this court: "Having obtained rightful jurisdiction of the parties and the subject matter of the action *for one purpose*, the court will make its jurisdiction effectual for complete relief." *Ober* v. *Gallagher*, 93 U. S. 199, 206; *Tayloe* v. *Marine Ins. Co.*, 9 How. 390; *Ward* v. *Todd*, 103 U. S. 327; *Quattlebaum* v. *Black*, 24 So. Car. 55.

The rulings of *Deshler* v. *Dodge* and *Bushnell* v. *Kennedy* are not denied, nor are those of *Ober* v. *Gallagher;* but it is said the rule of the last case does not apply *because*, "although the court has obtained rightful jurisdiction *of the parties and subject matter* of the action for one purpose, *it cannot* proceed to adjudicate *another subject matter embraced in the suit*, of which it is expressly forbidden to take cognizance." But Chief Justice Marshall says in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 822, if jurisdiction is once obtained, "then all other questions must be decided as incidental to this, which gives that jurisdiction — These other questions cannot arrest the proceedings."

Argument for Appellants.

The analogy between this proceeding and bills for discovery, where general relief is given, although the right of discovery alone gives jurisdiction, is instructive. And further, the subject matters of the suit are, although distinct in one aspect, intimately connected. The tort is the root of the suit, and gives it its fundamental and jurisdictional character; and it is necessary that it shall be first declared before a right of action accrues on the mortgage or bond.

In *fact* and in law, the foreclosure or further proceedings can and will be simply "in addition to, and continuance of" — ancillary to the original suit — and such proceedings are maintainable "without reference to the citizenship or residence of the parties." *Krippendorf* v. *Hyde*, 110 U. S. 276; *Jones* v. *Andrews*, 10 Wall. 327; *Pacific Railroad* v. *Missouri Railroad*, 111 U. S. 505; *Dewey* v. *Gas Coal Co.*, 123 U. S. 329.

II. If the parties on the record — plaintiffs and defendants respectively — are citizens of *different* States — and thus far the jurisdiction is unobjectionable, *is it ousted* by the fact that one defendant, who has a *like* but *several* interest with the plaintiffs — is a citizen of the *same* State, *with the defendant* against whom the plaintiffs make their contention?

The plaintiffs have a constitutional right to sue in the Federal courts. In all the cases where this right is denied, *either* a citizen of the *same* State with defendant has joined in the suit as plaintiff; *or* has made a formal — not a substantial release to the plaintiffs — by such means to juggle into the jurisdiction; *or* otherwise sought to trick themselves into the jurisdiction. *Removal Cases*, 100 U. S. 457; *Barney* v. *Baltimore*, 6 Wall. 283; *Williams* v. *Nottawa*, 104 U. S. 209; *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631; *Sewing Machine Companies' Case*, 18 Wall. 553.

If the principle contended for is admitted, the rights of citizens dependent *on the Constitution* are eliminated: and in its place the volition of one or more persons is substituted as the basis of jurisdictional right.

Mr. James Simons and *Mr. Samuel Lord* for appellees.

Opinion of the Court.

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

It appears by the proofs in the record that John F. Blacklock, the assignor of the bond, was, at the time of the assignment, a citizen of South Carolina, and continued to be such until this suit was commenced, and that the defendant Small was, when this suit was commenced, a citizen of South Carolina. Under these circumstances, the provision of the 1st section of the act of Congress of March 3, 1875, c. 137, (18 Stat. 470,) applies to this case. That provision is as follows: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

The present suit is a suit against Small, founded on contract, namely, his bond and mortgage in favor of the plaintiffs, who claim only under the assignment made by their father, John F. Blacklock, to the defendant Robertson. John F. Blacklock could not have prosecuted this suit in the Circuit Court of the United States for the District of South Carolina, to recover on the bond and mortgage against Small, if he had made no assignment of the bond to Robertson, for the reason that he and Small were not citizens of different States when the suit was commenced, but were both of them at that time citizens of South Carolina.

In answer to this objection, it is contended by the appellants, that this suit is not to be regarded as a suit founded on the contract of Small, to recover thereon, but is to be regarded as a suit for the delivery of the bond and mortgage by Small to the plaintiffs, founded on their wrongful detention, and that the rest of the relief prayed by the bill is ancillary and incidental; and the cases of *Deshler* v. *Dodge*, 16 How. 622, and *Bushnell* v. *Kennedy*, 9 Wall. 387, are cited as authorities; but they do not apply.

The case of *Deshler* v. *Dodge* was an action of replevin, brought by a citizen of New York against a citizen of Ohio,

in the Circuit Court of the United States for the District of Ohio, to recover possession of a package of bank bills. The title of the plaintiff to the contents of the package was derived by the assignment from corporations of Ohio. This court held that the action could be maintained, although the assignors could not have brought the suit, and that the suit was not one to recover the contents of a *chose in action* within the meaning of § 11 of the Judiciary Act of September 24, 1789.

In *Bushnell* v. *Kennedy* it was said, though not determined, because not necessary to that case, that the provision of the 11th section of the Judiciary Act of 1789 did not apply to a naked right of action founded on a wrongful act or a neglect of duty, to which the law attached damages.

In the present case, the bill is clearly one for a decree against Small for the amount of the bond, and for a foreclosure of the mortgage and a sale of the mortgaged premises.

There is another difficulty in the case, on the question of jurisdiction. The bond was a unit; the mortgage was a unit; and the assignment of the bond by Blacklock to Robertson in trust for the children of Blacklock was a unit. The bond cannot be enforced against Small, nor can the mortgaged premises be sold, in favor of the two plaintiffs alone. The relief asked in the suit must necessarily be for the benefit of the defendant Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as, by her answer, she ranges herself on the side of the plaintiffs as against Small, joins in the prayer of the bill, and asks that the payment of the bond and the satisfaction of the mortgage be declared void, and that the bond and mortgage be declared valid in the hands of Robertson, as trustee, for the benefit of herself and the plaintiffs, and that Small be decreed to pay to herself and the plaintiffs the amount of money secured by the bond and mortgage, with interest. The suit is, therefore, shown to be one substantially by and for the benefit of Helen Robertson Blacklock, and the proofs show that, at the time of the commencement of the suit, she was, and has since then always continued to be, a citizen of South Carolina, of which State Small was and

is a citizen. *Ayres* v. *Wiswall*, 112 U. S. 187; *Thayer* v. *Life Association*, 112 U. S. 717; *New Jersey Central Railroad Co.* v. *Mills*, 113 U. S. 249; *Louisville & Nashville Railroad* v. *Ide*, 114 U. S. 52.

The Circuit Court ought, therefore, to have dismissed the bill for want of jurisdiction, and not upon the merits. For this error, its decree is reversed, with costs in this court against the appellants, because the reversal takes place on account of their fault, in invoking the jurisdiction of the Circuit Court when they had no right to resort to it, *Mansfield, Coldwater & Lake Michigan Railroad* v. *Swan*, 111 U. S. 379, 388, 389, and

The case is remanded to the Circuit Court, with a direction to dismiss the bill for want of jurisdiction, without costs of that court.

SMITH *v.* BOURBON COUNTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 193. Submitted February 17, 1888. — Decided April 23, 1888.

The complainant's bill alleged that he was a judgment creditor of a railroad company; that the Board of Commissioners of Bourbon County had subscribed to the stock of the railroad company, and had voted upon it at meetings of the corporation, and had thereby become bound to the company to issue to it bonds of the county equal to the par value of the stock; that the bonds had not been issued; and that the obligation was still outstanding. The remedies sought for were, (1) that the company should be ordered to assign to the complainant its claim against the county; and (2) a decree against the county ordering it to issue the bonds, and to deliver them to the complainant, to be credited upon his judgment at their face value. *Held*,

(1) That the right to proceed against the county and its officers to compel the issue of the bonds was a purely legal right, to be prosecuted at law, in mandamus, whether the proceeding was in the name of the railroad company or of its privy by assignment;

(2) That the equitable nature of the complainant's rights against the company furnished no ground for the support of such a bill in equity against the county; and

(3) That the bill should be dismissed as to the county without prejudice to the complainant's right to proceed at law to obtain the issue of the bonds, after acquiring the rights of the railroad.

Statement of the Case.

THIS was a bill in equity filed January 28, 1880, in the nature of a creditor's bill. The appellant was the complainant below, and in December, 1879, recovered a judgment at law in the Circuit Court of the United States for the District of Kansas for $267,113.19, besides costs, against the Fort Scott, Humboldt and Western Railroad Company, on which judgment an execution has been issued and returned unsatisfied, the defendant corporation being insolvent. The object of the bill was to subject to the satisfaction of this judgment an alleged indebtedness of Bourbon County, Kansas, to the judgment debtor, the Fort Scott, Humboldt and Western Railroad Company. That indebtedness consisted in a supposed legal obligation on the part of the Board of Commissioners of Bourbon County to issue and deliver to the Fort Scott, Humboldt and Western Railroad Company municipal bonds of the county in payment of a subscription of stock in the sum of $150,000. The obligation to issue and deliver these bonds was alleged to arise upon the following facts:

On July 23, 1869, the Board of Commissioners of Bourbon County made an order, submitting a proposition to the voters of the county for the subscription of stock and the issuing of bonds of said county in the sum of $150,000, to secure the construction of a railroad from Fort Scott westwardly, north of the Marmaton River, in the general direction of Humboldt, in Allen County.

This order directed "that there be subscribed in the name and for the benefit of the county of Bourbon, in the State of Kansas, one hundred and fifty thousand dollars to the capital stock of any railroad company now organized, or that shall be organized hereafter, that shall construct a railroad commencing at the city of Fort Scott, in the county and State aforesaid, running from thence west, north of the Marmaton River, upon the most practical route in the general direction of Humboldt, Allen County, Kansas, and that the bonds of said county be issued to said company for the payment of said subscription, said bonds to be payable within thirty years from the date thereof, and bearing interest payable semiannually at the rate of seven per centum per annum: *Provided*,

That said bonds shall not be issued until the question shall have been submitted to a vote of the qualified electors of the county of Bourbon aforesaid, and shall have received a majority of the votes cast upon said proposition in favor thereof, in pursuance of the provisions of the statutes in such cases made and provided, and that said question shall be submitted to said electors at a special election on Tuesday the 24th day of August, A.D. 1869. At said election the votes shall be cast 'for railroad bonds' and 'against railroad bonds,' and if it shall appear, upon a canvass of the votes cast at said election, by proper officers according to law, that a majority of the votes cast upon said election are in favor of said subscription, then the said order shall be carried into practical operation by the issuing of said bonds to the said company whenever the County Commissioners of Bourbon County are satisfied that the bonds herein provided for, with the other resources of the said company, shall be sufficient and adequate to complete the construction of the road-bed ready for the iron from the city of Fort Scott to the west line of Bourbon County," etc.

There was no record of the notice of the election preserved or filed in the clerk's office, but as a fact the proof showed that the notice of the election was first given on July 28, 1869, by publication in the Fort Scott Monitor, a weekly newspaper published at Fort Scott, in said county, and for three successive weeks thereafter, the last publication being on August 18th, and the election on the 24th day of August. On August 27th the vote was duly canvassed by the board of commissioners, and was ascertained to be in favor of the subscription and issuing of bonds by a majority of over 700. In October, 1870, more than a year after the bonds were voted, the Fort Scott and Allen County Railroad Company was organized under the general laws of the State of Kansas for the purpose of building a railroad from Fort Scott westwardly, on the north of the Marmaton River, in the general direction named in the order under which the election was held. The corporators and directors of this railroad were composed largely of citizens of Bourbon County.

Soon after the organization of said railroad company, the commissioners of Bourbon County appointed Joseph S. Emmert agent for the county to subscribe for and in the name of the county $150,000 of stock in said company, under the authority of the election held August 24th, 1869, with the proviso that the company complete its road-bed ready for the iron from Fort Scott to the western line of the county by the 1st day of July, 1872. This agent subscribed to the capital stock of the company in the amount above stated in the name of the county, as authorized by said order of appointment, and the said 1500 shares of stock were at various meetings of the stockholders of the company represented and voted, either by the chairman of the county board or by some other person authorized thereto. On June 6, 1871, Franklin C. Smith, the complainant, made a contract with the railroad company to grade the road-bed from Fort Scott to Humboldt, about 23 miles, and to construct all necessary bridges, culverts, etc., for which he was to be paid in part by $125,000 of the bonds of Bourbon County to be issued in payment of its subscription. Before making the contract, he had assurances from two of the county commissioners that the bonds had been legally and regularly voted, and that they would be issued on the completion of his contract. On July 28, 1871, on application of the railroad company, the Board of County Commissioners ordered the bonds to be prepared, and signed by the chairman, and deposited in the safe of the treasurer's office to await further order, which was accordingly done. The road-bed was completed ready for the iron, in substantial compliance with the terms of the subscription, by the time named, to wit, July 1, 1872. In June, 1872, after the work was done, the railroad company demanded the bonds of the county board, which demand was not granted. In August following another demand was made by the railroad company, which was refused. The commissioners then ordered the bonds to be destroyed, which was in fact done. The county commissioners made no objection to the delivery of the bonds on the ground that the resources of the company, together with these bonds, were not sufficient to construct the road-bed. The name of the railroad com-

pany, after its organization, was changed to the Fort Scott, Humboldt and Western Railroad Company. The company never filed any profile or map of its route in the clerk's office of the county, nor did it secure or pay for the right of way along its line, with the exception of about eight miles.

The Circuit Court dismissed the bill, holding that the county commissioners were under no legal obligation to issue the bonds to the railroad company, and were not indebted to the railroad company by reason of its failure to issue them, because, 1st, the order of submission, under which the election was had, was illegal and void, for the reason that no railroad company was named in the order, nor was the company at that time in existence; 2d, the notice of the election was insufficient and illegal, because it was not given thirty days before the election; 3d, the county was not estopped to deny its obligation by the proceedings of the board of commissioners, or the representations and assurances of the individual members. The correctness of this conclusion is questioned by the present appeal.

Mr. H. E. Long and *Mr. A. L. Williams* for appellant.

Mr. E. M. Hulett for appellees.

Mr. Justice Matthews, after stating the case, delivered the opinion of the court.

The prayer of the bill is for a decree, in the first place, against the Fort Scott, Humboldt and Western Railroad Company, which is a defendant, ordering it to assign to the complainant its claim against the county of Bourbon, and, in the second place, for a decree against Bourbon County and its Board of County Commissioners, ordering the latter to sign and issue in due form the bonds of said county in the sum of $150,000, payable in thirty years from the date thereof, with semi-annual interest coupons attached, in accordance with the terms of the subscription to the capital stock of the railroad company, and deliver the same to the complainant to be cred

ited at their face value upon his judgment against the railroad company, and for general relief.

The relief prayed for does not include a decree against the county of Bourbon for the payment of money, and there is no foundation for such a prayer in the allegations of the bill. It does not charge that the county is indebted in any sum of money presently payable by virtue of its subscription to the capital stock of the railroad company. The legal obligation arising on that subscription is purely statutory, if the subscription itself be valid and binding; and the statutory obligation is satisfied by the issue and delivery to the railroad company of the bonds of the county in payment of the subscription. On the supposition that the subscription creates a legal obligation for its payment in bonds, the refusal of the commissioners of the county to issue and deliver the bonds, however wrongful, is not a breach of the obligation of the county which would give rise to an action against it for the recovery of damages. The breach of obligation in such a case would consist simply in the refusal on the part of the commissioners of the county to perform a ministerial duty, the only remedy for which would be a proceeding at law in the name of the railroad company by a writ of mandamus. That writ, if granted in a direct proceeding therefor by a proper judgment, would be directed against the officers of the county, and would command the performance of the specific duty which they had refused to perform, and would give to the company the precise and specific relief to which it would be entitled.

The complainant in the present case has and can have no other or greater rights against the county of Bourbon or its officers than are vested in the railroad company. The object of the bill is to subject to the satisfaction of the complainant's judgment against the railroad company the rights of the latter against the county of Bourbon and its officers. The proceeding for that purpose cannot change these rights, nor convert a right to require the delivery of the bonds into a claim for damages for their non-delivery.

It is clear that such relief as is alone suitable and adequate to the case cannot be granted in equity. If the proceeding

were in the name and on behalf of the railroad company itself, it would, as we have already stated, be at law in mandamus. That the complainant claims to be equitably entitled to be substituted for the railroad company in its rights against Bourbon County may entitle him to a decree against the railroad company for an assignment of its claim, so as to confer upon the complainant the right to use the name of the railroad company in a proceeding against the county and its commissioners; but it does not enlarge the rights of the railroad company against the county and its officers, nor change the remedy so as to enable a court of equity to entertain proceedings in mandamus. The bill might justify a decree against the railroad company for an assignment of its right to the bonds and requiring the railroad company to permit the use of its name for their recovery by the appropriate proceeding at law. The right to proceed against the county and its commissioners remains still a purely legal right, and can only be prosecuted at law, notwithstanding the equitable nature of the complainant's rights as against the railroad company.

As was said in *Hayward* v. *Andrews*, 106 U. S. 672, 675: "If the assignee of the chose in action is unable to assert in a court of law the legal right of the assignor, which in equity is vested in him, then the jurisdiction of a court of chancery may be invoked, because it is the proper forum for the enforcement of equitable interests, and because there is no adequate remedy at law; but when, on the other hand, the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of his assignor, there is no ground for an appeal to equity, because by an action at law in the name of the assignor the disputed right may be perfectly vindicated, and the wrong done by the denial of it fully redressed. To hold otherwise would be to enlarge the jurisdiction of courts of equity to an extent the limits of which could not be recognized, and that in cases where the only matter in controversy would be purely legal rights." "To give a court of equity jurisdiction," as was said by Mr. Justice Woods, delivering the opinion of the court in *Fussell* v. *Gregg*, 113 U. S. 550, 554, "the nature of the relief asked

must be equitable, even when the suit is based on an equitable title." This rule was applied in *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, where it was said that it was entitled to special consideration from the courts of the United States.

It follows from this view that the distinction in the jurisdiction of the courts of the United States between proceedings at law and in equity would limit the relief of the complainant under the present bill to a decree against the railroad company, investing the complainant with its rights and the use of its name in a proceeding to enforce by mandamus the issue and delivery of the bonds alleged to be wrongfully withheld.

The necessity for thus limiting the relief becomes more stringent as well as obvious from another consideration. In the case of *Rosenbaum* v. *Bauer*, 120 U. S. 450, it was decided by this court upon much deliberation, that § 716 of the Revised Statutes, giving power to a Circuit Court to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law, construed in connection with §§ 1 and 2 of the act of 1875, operates to prevent the issuing by the Circuit Court of a writ of mandamus except in aid of a jurisdiction previously acquired by that court. It is perfectly clear, under the decisions of this court, that no application could be entertained in the Circuit Court for a writ of mandamus, directed against the County Commissioners of Bourbon County, at the suit and in the name of the railroad company itself. The Court would be without jurisdiction, and certainly that lack of jurisdiction cannot be supplied by converting the proceeding into a bill in equity, whether the proceeding be in the name of the railroad company for its own use, or in the name of the railroad company for the use of the complainant, its assignee, or in the name of the assignee himself. The objection is one of substance, and not merely of form. It cannot be waived, and it cannot be ignored.

It follows from this view that, so far as the bill sought the relief prayed for against Bourbon County and its commissioners, the Circuit Court was without jurisdiction.

Counsel for Parties.

In point of fact, however, it assumed jurisdiction and decided the case on its merits. This, in our opinion, it had no authority to do. For that reason and to that extent the decree of the Circuit Court dismissing the bill generally must be modified so as to dismiss the bill as against the County of Bourbon and the County Commissioners of that county, without prejudice to the right of the complainant, on obtaining a proper assignment and authority from the railroad company to proceed at law in its name, to obtain the issue and delivery of the bonds described in the bill of complaint; and retaining the bill, if the complainant elects and shows itself entitled, as to the Fort Scott, Humboldt and Western Railroad Company, for relief against it alone, for an assignment of its right to the issue and delivery of the bonds of the county, and to the use of its name in a proceeding against the county and its commissioners for the enforcement of such right. It is accordingly so ordered.

LAWRENCE *v.* MERRITT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 213. Argued April 10, 1888. — Decided April 23, 1888.

Tissue paper, mainly if not exclusively used for making letter-press copies of letters or written matter, when imported into the United States, is not subject to duty as "printing paper," under Schedule M, § 2504 Rev. Stat., but as "other paper not otherwise provided for."

THIS was an action to recover duties alleged to have been exacted in excess of law upon an importation of tissue paper. Judgment for defendant. Plaintiffs sued out this writ of error. The case is stated in the opinion.

Mr. Edwin B. Smith for plaintiffs in error.

Mr. Solicitor General for defendant in error.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The plaintiffs in error, Benjamin and Phineas Lawrence, brought suit in the court below against Edwin A. Merritt, the former collector of the port of New York, for the recovery of an alleged excess of duties levied by him and paid by them upon an importation of what is called "tissue paper." Schedule M of § 2504 of the Revised Statutes provides for the imposition of the following duties: "Paper, sized or glued, suitable only for printing paper, twenty-five per centum ad valorem; printing, unsized, used for books and newspapers exclusively, twenty per centum ad valorem; manufactured of, or of which paper is a component material, not otherwise provided for, thirty-five per centum ad valorem; sheathing paper, ten per centum ad valorem."

The collector classified the paper under the following clause on the same page:

"Paper hangings and paper for screens or fire-boards; paper, antiquarian, demy, drawing, elephant, foolscap, imperial letter, and all other paper not otherwise provided for, thirty-five per centum ad valorem."

The plaintiffs thereupon protested that the paper which they had imported, instead of being assessed as it was by the collector under this latter clause at thirty-five per cent ad valorem, should have been assessed under the former clause as "paper . . . printing, unsized, used for books and newspapers exclusively," at twenty per cent ad valorem. From the testimony it appears that it was what is generally called "tissue paper," and was mainly if not exclusively used for making letter-press copies of letters or written matter. This is a well-known process, by which, after a letter has been written on ordinary paper, it is placed between the leaves of a book filled with this kind of paper, the pages upon which the copy is desired being usually dampened somewhat for that purpose, after which such book is subject to great pressure by means of a hand or other press. One or more impressions

may thus be made of the written matter upon the leaves of this tissue paper.

The judge of the Circuit Court, in speaking of the character of this paper, said to the jury: "I do not think that the words used in the statute have any technical meaning. You must take the statute as you find it and a common sense view of the case, and say whether or not this paper which has been produced here is paper which is used, exclusively for books and newspapers; and whether the law-makers intended, when they used this language, that such paper as has been described to you should come in and pay duty under that clause of the statute which provides for paper used exclusively for books and newspapers."

He also said that if they found that it was not printing paper used exclusively for books and newspapers, and should not come under this clause, then their verdict should be for the defendant. At the request of the attorney for the defendant he also charged the jury that if they found upon the evidence that the phrase "printing paper," as used in the trade, has a technical signification, and if the plaintiffs' importation in this case does not come within that signification, they should find a verdict for the defendant.

The verdict and the judgment were for the defendant.

We are of opinion that the charge of the court was correct, and that the verdict and judgment which followed it are without error. It is very obvious from the face of the statute that "printing paper, unsized, used for books and newspapers exclusively," does not include the kind of paper in question in this case, and it therefore falls within the class of manufactures of other paper not otherwise provided for, so that it was properly chargeable with the duty of thirty-five per centum ad valorem.

An ingenious argument is made by plaintiffs' counsel to show that the process of transferring the writing made upon sheets of the ordinary writing paper used for that purpose, by causing the ink with which it was written to soak or penetrate through one or more thicknesses of the kind of tissue paper which this is said to be, after the same have been prop-

erly dampened, is printing within the meaning of the statute, and therefore this paper, being used for that purpose, is "printing paper." We, however, think it is perfectly clear that this process is not printing, and that the use of this kind of paper, which is in controversy here, for that purpose, does not make it "printing paper."

The words of the statute, "paper, sized or glued, suitable only for printing paper," and "printing, unsized, used for books and newspapers, exclusively," evidently have reference to the various kinds of paper which are used for printing by means of type or plates, which make an impression only upon the face of the paper presented to them, and not to these kinds of tissue paper, so characterized on account of their thinness, used for the purpose of transferring writing by the penetration or soaking through of the liquid used therefor, so that the copy is read upon the side of the paper opposite to that presented to the original writing. The words of the statute cannot comprehend this species of tissue paper, which is merely used for the multiplication or copying of letters or other writings. Not being included within the true meaning of these phrases above quoted, it must then belong to that other and larger class of "all other paper not otherwise provided for." This is taxable at the rate of thirty-five per centum ad valorem, the amount which was actually levied and collected in this case.

We think the charge of the Circuit Judge on this subject, in connection with the testimony, was sound, and that it cannot be made much clearer by amplification.

The judgment of the Circuit Court is therefore

Affirmed.

MARYE *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 223. Argued and Submitted April 12, 1888. — Decided April 23, 1888.

While it is quite competent for the State of Virginia to impose upon the movable personal property of the Baltimore and Ohio Railroad Company, (a corporation organized under the laws of Maryland,) which is brought within its territory and there habitually used and employed, the same rate of taxation which is imposed upon similar property used in like way by its own citizens, it has not done so in the taxing laws of the State which were in force when the tax in controversy was imposed.

The statutes of Virginia relied upon by the plaintiff in error are not applicable to the Baltimore and Ohio Railroad Company, but are confined to corporations which derive their authority from the laws of Virginia.

This was a bill in equity filed by the Baltimore and Ohio Railroad Company against the taxing officer of the State of Virginia, for the purpose of enjoining him from selling certain engines and cars, the property of the complainant, for the payment of a tax alleged to have been illegally assessed thereon. There was a decree in the Circuit Court granting the relief prayed for, from which this appeal was prosecuted.

The material facts in the case were these: The Baltimore and Ohio Railroad Company is a corporation organized under the laws of Maryland, and a citizen thereof, by virtue of whose charter its rolling stock is exempt from taxation. The line of its road does not at any point lie in the State of Virginia. It, however, connects with certain roads belonging to corporations incorporated by various acts of the legislature of Virginia, to wit: the Winchester and Potomac Railroad, the Winchester and Strasburg Railroad, and the Strasburg and Harrisonburg Railroad, the last named being a part of the old Manassas Gap Railroad; and during a portion of the time embraced in the period for which the taxes in question were levied it worked the Valley Railroad from Harrisonburg to

Staunton. All of these roads were operated by the Baltimore and Ohio Railroad Company by virtue of leases or contracts, which company for that purpose furnished and used its own rolling stock, consisting of engines and cars. None of the Virginia corporations owning either of these roads was the owner of any rolling stock. The manner in which this rolling stock was employed for this purpose was thus described: "There is no such rolling stock assigned permanently to the four lines above named, or either of them, in the State of Virginia. The trains in which the rolling stock is used on the four lines above named now start from Lexington, Virginia, and pass through the State of Virginia, over the four lines of railroad above named, into the State of West Virginia, and thence into the State of Maryland to the city of Baltimore, or if any of the cars are destined to western points, thence from Harper's Ferry to the West, but the trains in which the cars are hauled are run solid from Lexington, Virginia, (and formerly before the road was completed to Lexington from Staunton, Virginia,) to Baltimore. None of the rolling stock is assigned permanently to service in the State of Virginia, nor is any of the rolling stock set apart to the four lines in that State, or to the four valley lines above mentioned at all; but such rolling stock is used interchangeably upon the main line and branches of the Baltimore and Ohio Railroad in the States of Maryland and Virginia, and indeed, also, upon the divisions of the Baltimore and Ohio Railroad in Pennsylvania, and in States west of the Ohio River, just as the necessities of the service of the company require. Sometimes this rolling stock will be found on the main line, sometimes on the Pittsburg division, and sometimes on the trans-Ohio divisions, and there is none of it that is permanently set apart for use upon the four valley lines in Virginia above described."

The several Virginia corporations owning these four railroads, respectively, made their annual reports to the auditor of public accounts as required by law, and were by the board of public works duly assessed on their roadways, tracks, depots, and other real estate owned by them. No tax was assessed or levied as against them on account of any rolling stock,

Statement of the Case.

because they were not reported to be the owners of any. In the month of June, 1883, the auditor of public accounts for the State of Virginia assessed the Baltimore and Ohio Railroad Company for taxes on its rolling stock used on these roads for the years from 1870 to 1881, inclusive, amounting in the aggregate for eleven years to the sum of $22,249.25, and placed the assessment in the hands of the treasurer of Augusta County, Virginia, for collection. This officer was proceeding to collect these taxes by a distraint of the rolling stock in question, the property of the complainant, when his proceedings were arrested by the injunction of the Circuit Court, afterward made perpetual by its final decree.

The act of the General Assembly of the State of Virginia, under which the assessment and collection of these taxes were sought to be justified, is contained in § 20, c. 119, of the acts of the Virginia legislature, session of 1881–1882, being part of the taxing laws of the State originally enacted in 1870 and 1871, and continued with amendments to the present time. The material part of the act applicable to this case was as follows:

"19. Every railroad and canal company not exempted from taxation by virtue of its charter shall report annually on the first day of June, to the auditor of public accounts, all of its real and personal property of every description as of the first day of February of each year, showing particularly in what county or corporation such property is located, and classifying the same under the following heads:

"First. Roadway and track, or canal bed.

"Second. Depots, depot grounds and lots, station buildings and fixtures and machine shops.

"Third. Real estate not included in other classes.

"Fourth. Rolling stock, including passenger, freight, cattle, or stock; baggage, mail, express, sleeping, palace, and all other cars owned by or belonging to the company; boats, machinery, and equipments; houses and appurtenances occupied by lock-gate keepers and other employés.

"Fifth. Stores.

"Sixth. Telegraph lines.

"Seventh. Miscellaneous property.

"Every such company shall report, on or before the first day of June of each year, the gross and net receipts of the road or canal for the twelve months preceding the first day of February of each year, and in all cases the report shall be so made as to give the data on which the same is made. If such road or canal is only in part within the Commonwealth, the report shall show what part is within the Commonwealth and what proportion the same bears to the entire length of the road or canal, and shall apportion the receipts accordingly. The reports herein required shall be verified by the oath of the president or other proper officer. Upon the receipt of every such report it shall be the duty of the auditor of public accounts to lay the same before the board of public works, who shall, after thirty days' notice previously given to the president, treasurer, or other proper officer, proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured; and to this end shall be authorized and empowered to send for persons and papers should it be deemed necessary. A certified copy of the assessment, when made, shall be immediately forwarded by the secretary of the board to the president or other proper officer of every railroad or canal company so assessed, whose duty it shall be to pay into the treasury of the State, within sixty days after the receipt thereof, the tax which may be imposed thereon by law. A company failing to make such report, or to pay the tax assessed upon its property, shall be immediately assessed, under the direction of the auditor of the public accounts, by any person appointed by him for the purpose, rating their real estate and rolling stock at twenty thousand dollars per mile; and a tax shall at once be levied on such value at the annual rate levied upon the value of the other property for the year. Such tax so levied, as well as the sum required to be paid upon the report hereinbefore mentioned, if the same be not paid at the time provided herein, shall be collected by the treasurer of some county in which such company owns property, to whom the auditor may deliver the assessment or a copy thereof. The treasurer

may distrain and sell any personal property of such company, and shall pay the taxes into the treasury within three months from the time of the assessment, or a copy as aforesaid may be delivered to him. The compensation of such treasurer to be the same as he receives for collecting other taxes in his county or corporation."

It is admitted that this is the only legislation of the State of Virginia under which the tax in question can be justified; if it does not warrant the proceedings, there is no statute which does. The single question presented in the case is whether the Baltimore and Ohio Railroad Company, as to the property on account of which it is sought to be taxed, is liable to taxation under the provisions of this act.

Mr. R. A. Ayers, Attorney General of Virginia, for plaintiff in error, submitted on his brief, in which he contended as follows:

The issue is a very narrow one, and will be presented to the court in a few words.

The State of Virginia contends that the facts of this case do not fall within the principle, now well established by a continuous line of decisions, that no State has the power of imposing any burden upon interstate commerce or the instruments by which it is carried on between any other State and the State imposing the burden. The State of Virginia did not attempt to impose a tax upon every car or locomotive run into the State during the year, but assessed for taxation the property in *constant* use in the State. There was no hardship in this; the Company enjoyed the constant protection of the laws of Virginia for its property, and it was but fair and just that it should bear its due proportion of the expenses of the government which extended the protection. The Baltimore and Ohio Railroad Company does not run its cars from Baltimore under its Maryland charter, but comes to Virginia and leases lines from Virginia companies, obligates itself to furnish cars and run trains regularly, the right to do which it derives only from the franchises of the Virginia corporations.

The Virginia corporations hold their franchises upon the condition that they perform their duty to the public as common carriers by running trains and furnishing transportation for both freight and passengers.

All these obligations are assumed, agencies are established along the line, the necessary trains are put on and run regularly. The same cars and engines may not always be in the State, but a *certain number* of engines and cars are always in the State.

The Company, by coming to Virginia and leasing these lines of road, and incurring the obligation to operate them with engines and cars and run regular trains upon them, had voluntarily changed the *situs* of so much of its rolling stock as is in constant use upon the lines in Virginia, and it is therefore liable to taxation to that extent in Virginia.

The decree of the Circuit Court is erroneous, and should be reversed.

No authorities are cited, because the general principle that the instruments of interstate commerce are exempt from taxation by any other State than the one in which they have their *situs* is well established, and the question involved here is not whether if the *situs* of the property is in Baltimore is it liable to taxation; but is, whether from the facts proved the *situs* of the property assessed for taxation is not in the State of Virginia.

The acts of the General Assembly under which the assessment was made and the collection of the tax bill were printed with the brief of *Mr. Ayers.*

Mr. Hugh W. Sheffey and *Mr. John K. Cowen*, (with whom was *Mr. Hugh L. Bond, Jr.*, on the brief,) for defendant in error, contended as follows in regard to the *situs* of the property.

The authorities are clear that in the absence of legislation to the contrary, the *situs* for taxation of the personal property of a corporation is at its domicile, which is the State of its creation, and within that State, in the town where it has its

principal office or place of business. Burroughs on Taxation, 186; *Orange & Alexandria Railroad Co.* v. *Alexandria*, 17 Grattan, 176; *Philadelphia, Wilmington, & Baltimore Railroad* v. *Appeal Tax Court*, 50 Maryland, 397, 415; *Appeal Tax Court* v. *Pullman Palace Car Co.*, 50 Maryland, 452; *Appeal Tax Court* v. *Northern Central Railway Co.*, 50 Maryland, 417; *St. Louis* v. *The Ferry Co.*, 11 Wall. 425; *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596; *Pacific Railroad Co.* v. *Cass County*, 53 Missouri, 17, 31, 32.

Mr. Justice Matthews, after stating the case, delivered the opinion of the court.

It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the

property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid. No question on that account arises in this case.

But looking at the statute under which the proceeding in question has been taken for the taxation of this property, we think it quite clear that it has no application to the rolling stock owned by the Baltimore and Ohio Railroad Company employed by it in the manner described in the operation of other railroads in Virginia. The terms of the act, indeed, include "every railroad and canal company not exempted from taxation by virtue of its charter," but that language, according to a general rule of interpretation, must be confined to corporations deriving their authority from the laws of Virginia. It is apparent, also, from the other expressions contained in the law, as well as its whole purview, that it was intended to apply only to such domestic corporations, as in the case of railroad companies, were the owners of railroads and the property usually appurtenant thereto, lying and being within the State. According to the description of the act, the railroad company is supposed to own a roadway and track, and depots, depot grounds, station buildings and fixtures, and machine shops, together with real estate, rolling stock, and telegraph lines. Every such company is required to report its gross and net receipts, and a specific provision is made that if its road is only in part within the Commonwealth the report shall show what part is so, and what proportion the same bears to its entire length, apportioning the receipts accordingly. In case of a failure of the company to make such a report, or to pay the tax assessed upon its property, it is provided that it shall be immediately assessed under the direction of the auditor of public accounts by some person appointed by him for that purpose, rating its real estate and rolling stock at $20,000 per

mile, on which a tax shall be levied at the annual rate levied upon the value of other property for the year. None of these provisions are applicable to the case of the Baltimore and Ohio Railroad Company in respect to its ownership of the rolling stock in question.

It follows from this that it was not liable for the payment of the taxes, the collection of which was enjoined by the decree of the Circuit Court. That decree is accordingly

Affirmed.

UNITED STATES *v.* IRWIN.

UNITED STATES *v.* PERRY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 1384, 1385. Submitted April 2, 1888. — Decided April 23, 1888

A statute entitled "An act referring to the Court of Claims," etc., "for examination and report," and enacting that "the claims" "be, and the same are hereby, referred to the Court of Claims for adjudication according to law, on the proofs heretofore presented, and such other proofs as may be adduced, and report the same to Congress" confers upon that court full jurisdiction to proceed to final judgment, as in the exercise of its ordinary jurisdiction.

A statute conferring upon the Court of Claims power to consider and render judgment for claims "for property claimed to have been taken and impressed into the service of the United States in the year 1857 by orders of Colonel Albert Sidney Johnston in command of the Utah expedition, as well as for property alleged to have been sold to the government" does not authorize that court to consider and give judgment for losses consequent upon the refusal of Colonel Johnston to permit the trains of the claimant to proceed upon their journey, arising from the mere detention and delay occasioned thereby.

It appearing from the findings of the court below that "plaintiff's animals were often used to aid in hauling government trains; and thus did extra work on insufficient food;" and this being a possible ground for recovery to some extent for property taken and impressed into the service of the United States; and it not appearing in the findings what amount is properly allowable therefor, the case is remanded for further proofs and findings in that respect.

Opinion of the Court.

THESE were appeals from judgments rendered against the United States in the Court of Claims. The case is stated in the opinion.

Mr. Attorney General, and *Mr. Assistant Attorney General Howard* for appellant in both cases.

Mr. William E. Earle and *Mr. James L. Pugh, Jr.*, for appellees in both cases.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Congress passed an act, approved July 8, 1886, entitled "An act referring to the Court of Claims the claims for property seized by General Johnston on the Utah expedition for examination and report," which enacts "that the claims of Joseph C. Irwin and Company, and C. A. Perry and Company, freighters, for property claimed to have been taken and impressed into the service of the United States in the year 1857, by orders of Colonel Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the government, be, and the same are hereby, referred, with all the papers relating thereto, to the Court of Claims for adjudication, according to law, on the proofs heretofore presented, and such other proofs as may be adduced, and report to the same to Congress."

In pursuance of this act the parties named therein filed their respective petitions in the Court of Claims, stating the grounds and particulars of their demands for judgment. Judgments were rendered therein in the ordinary form in the case of J. C. Irwin and Company for the recovery of the sum of $21,600, and in the case of Charles A. Perry and Company for the sum of $44,025. From these judgments the United States prosecutes the present appeals.

The facts in the two cases as found by the Court of Claims are substantially the same. The firm of J. C. Irwin and Company, at the time of the occurrences hereinafter set forth, were engaged in freighting across the plains by means of wagon trains, and in June, 1857, were under contract to

transport from Atchison, Kansas, to Salt Lake City 75 wagon loads of merchandise, and late in the summer of that year started their trains on that journey. Charles A. Perry and Company, in August, 1857, were doing a general merchandise business at Salt Lake City, and in that month started three ox trains, two of 20 wagons each, and one of 18 wagons, with five wagons drawn by mules, from Fort Leavenworth, Kansas, to Salt Lake City. All the trains of both parties reached Rocky Ridge early in October, 1857, and were progressing successfully on their journey. The animals were in good condition, and making from 18 to 20 miles per day. At this point they were met by United States troops, under command of Lieutenant-Colonel Smith, who ordered the trains to proceed no further without his permission. Lieutenant-Colonel Smith was under command of Colonel Albert Sidney Johnston. The latter on joining the command issued an order addressed to the parties in interest, as follows:

"Headquarters Army of Utah,
"South Pass, October 19, 1857.

"SIR: The colonel commanding directs me to inform you, in reply to your letter of to-day, that no goods or supplies of any kind will be permitted to pass this army for Salt Lake City, or other points occupied by the Mormons, so long as they maintain a hostile attitude to the government of the United States."

On the 24th of October an order was issued prescribing the order of the march, and designating the position to be maintained on the march and in the camp by the plaintiffs' trains. Plaintiffs did not seek or desire military protection, and requested Colonel Johnston to be allowed to proceed on their journey, as they were not, in their opinion, in danger from the Mormons. This request was denied. Plaintiffs were required to have their teams yoked and ready by ten in the morning, and they often had to stand for two hours in consequence of delay in the general movement. The teams always got into camp late, and consequently were grazed at great disadvantage. They were also limited to a defined and

restricted space assigned them, and were not permitted by the military authorities to go beyond this space. The animals belonging to the army arrived first at camp, and were posted on the best grass. As a necessary result freighters' teams were insufficiently fed. Plaintiffs' animals were often used to aid in hauling the government trains, and thus did extra work on insufficient food. The orders requiring plaintiffs' trains to move with the army column necessarily impeded their progress, and held them back until the bad weather set in. For these reasons the plaintiffs' stock became greatly reduced in flesh, and many died from overwork and starvation. Plaintiffs' trains were loaded with goods and merchandise, notoriously intended for trade with the Mormon inhabitants of the Territory of Utah, who were then in avowed rebellion, and threatened war with the government of the United States, but plaintiffs were ignorant of this state of affairs upon starting, and until arrival at Rocky Ridge. It is also found by the Court of Claims that R. H. and James Porter were also freighters like the plaintiffs, and were detained at the same time under substantially the same circumstances as those already set forth. An act for their relief, passed February 18, 1887, 24 Stat. 900, appropriated the sum of $10,000, less the sum of $750 theretofore paid them "in full for all claims for damages or compensation for property impressed by order of Colonel Johnston, in command of the United States troops en route for Utah in 1857."

Two questions were presented on the part of the United States on the trial of the cases in the Court of Claims, and are renewed in argument here. They are, 1st, that the act of Congress of July 8, 1886, referring these claims to the Court of Claims, does not authorize a final judgment against the United States, but only such findings as, being reported to Congress, shall serve as the basis in its discretion for future legislative action; and, 2d, that, supposing the judgments of the Court of Claims under the act to be final, they are erroneous, because founded on allowances for consequential dam ages to the property of the plaintiffs, by reason of detention and delay, not within the limitation prescribed by the act of

Congress, which authorized judgment only for property taken and impressed into the service of the United States.

In support of the first proposition, it is argued by the Attorney General that the direction contained in the act addressed to the Court of Claims to "report the same to Congress," taken in connection with the title, which describes it as "An act referring to the Court of Claims the claims for property seized by General Johnston on the Utah expedition for examination and report," sufficiently indicates the intention of Congress that the conclusions of the Court of Claims should not be final, but subject to revision at the discretion of Congress. But, in our opinion, the controlling words of the act are those which declare that the claims of the parties are thereby referred to the Court of Claims "for adjudication according to law." The force of this phrase cannot be satisfied by anything less than a formal, regular, and final judgment of the judicial tribunal, to which the matter is submitted, acting upon the acknowledged principles of law applicable to the circumstances of the case. All such judgments were required by existing law to be reported to Congress, and the addition of words to the same effect in this statute, while being perhaps unnecessary, does not change the character of the judgments to be reported.

On the second question, however, we are of the opinion that the Court of Claims has erred. The reference made by the statute is limited by its express language to a judgment "for property claimed to have been taken and impressed into the service of the United States in the year 1857 by orders of Colonel Albert Sidney Johnston, in command of the Utah expedition, as well as for property alleged to have been sold to the government." Of course there would be no doubt as to the legality of so much of the claims as arise upon sales proven to have been made by the plaintiffs to the government of their property for its use; but in point of fact no such sales are found to have been made. So far as the judgments embrace allowances for losses consequent upon the refusal of Colonel Johnston to permit the plaintiffs' trains to proceed upon their journey, arising from the mere detention and delay

occasioned thereby, they go beyond the intention of the act of Congress. It was the clear dictate of military duty on the part of Colonel Johnston to prevent information and supplies from going forward to the public enemy. To effect this, he issued his order "that no goods or supplies of any kind will be permitted to pass this army for Salt Lake City or other points occupied by the Mormons so long as they maintain a hostile attitude to the government of the United States." There is nothing in the terms of this order to require the plaintiffs to keep with the troops; they were only forbidden to pass them in advance. They might have remained at Rocky Ridge, or they might have retraced their steps and returned. This perhaps would also have involved loss in breaking up their venture, and perhaps damage to the property constituting the trains; but it would not have been taking and impressing the property into the service of the United States. So far as appears from the finding of facts, it was the choice of the plaintiffs to remain with Colonel Johnston's column and proceed with it. In making this choice, they elected to submit to the necessary military orders governing the march and the camp, and to any inconveniences and losses necessarily resulting therefrom. The case in that respect does not differ from what it would be on the supposition of their having been ordered and compelled to remain at Rocky Ridge or to return. Even if it be a just inference of fact, that the plaintiffs were under compulsion in keeping with the column of Colonel Johnston, it by no means follows from that alone that their property was taken and impressed into the service of the United States in the sense of the act of Congress of July 8, 1886. However proper it might have been for the legislature to have provided indemnity for the losses occurring by reason simply of the detention thus occasioned, we cannot think it was the intention of the act to go beyond payment for property actually used and employed by the government in its service. To require the plaintiffs' trains to remain with the military force, in order to insure the success of the expedition by preventing the enemy from obtaining information and supplies, cannot be construed as a seizure and impressment of their property into the public service.

In opposition to this conclusion we are referred to the opinion of Mr. Bates while Attorney General (10 Opinions Attorneys General, 21), upon the case of the Porters, mentioned in the statement of facts found by the Court of Claims. It seems their claim was embraced, with those of the plaintiffs in these cases, in the original draft of the act of July 8, 1886, as it passed the Senate, but before final passage was struck out because their claim was pending before the Treasury Department. The accounting officers of the Treasury allowed their claim, presumably upon the strength of the opinion of the Attorney General, who held that they were entitled to an allowance and payment under the provisions of the act of March 3, 1849, providing for the payment for horses and other property lost or destroyed in the military service of the United States. The Attorney General, it is true, expressed the opinion that the order of Colonel Johnston reduced the train of the claimants to military control, and thereby subjected it to the losses proved, for the purpose of depriving the Mormons of any benefit from it, and was therefore an impressment into the military service within the meaning of the act of March 3, 1849. But it is evident that he did not rest his recommendation for the payment of the claimants on that consideration, for the opinion proceeds as follows: "But whatever may have been the legal result of the order of General Johnston, the fact is well proved that the property of the claimants was afterwards actually reduced to military service. The loss of the army cattle compelled a resort to those of the trains, and several witnesses, servants of the government and of the claimants, state that the cattle of Messrs. Porter were used indiscriminately with the army cattle to haul the army wagons. In this service many of them died and many were abandoned, exhausted from overwork and want of forage: many were killed and eaten by the army, and for these I understand the claimants have been already paid under this law. I am unable to see any distinction between the cattle that were eaten and those that were worked in the army trains and lost, for both were certainly impressed within the meaning of the statute. Nor do I see how any distinction

can be made between the cattle that actually died when in the army trains and those that may have been lost between South Pass and Fort Scott; for when they had been once used with the army cattle to haul the trains they were actually employed in the service of the United States, being under military control and liable to be applied to that work when needed. It is too rigid a construction to say that 'actual service' means only the time employed in labor. Possession and the power to use the animal, Judge Black says in Oldham's case (Man's Opinions No. 59), is the test of employment within the meaning of the statute, and these General Johnston undoubtedly had."

The amount found due to the Porters by the accounting officers of the Treasury was appropriated by Congress by the act of February, 1887, heretofore referred to. The facts relied upon by the Attorney General, as justifying the payment in their case, of actual service in the employment of the United States, do not appear in the present cases.

Neither does the conclusion of the Court of Claims derive support from anything said or decided by this court in the case of *Mitchell* v. *Harmony*, 13 How. 115. There the plaintiff was forced against his will to accompany the American troops with his wagons, mules, and goods in a hazardous expedition, and for the purpose of strengthening their military force. His wagons and mules were used in the public service in the battle of Sacramento, and on the march afterwards; when the place was evacuated they were left behind unavoidably, as nearly all of his mules had been lost in the march and the battle; and when the Mexican authorities regained possession of the place his goods were seized and confiscated and totally lost to him. The jury found from the evidence that there was an actual seizure of the plaintiff's property by the officer; and in speaking to that point the court say (p. 136): "We do not see any evidence in the record from which the jury could have found otherwise. From the moment they were taken possession of at San Elisario, they were under the control of Colonel Doniphan, and held subject to his order. They were no longer in the possession or control of the plain-

tiff, and the loss which happened was the immediate and necessary consequence of the coercion which compelled him to accompany the troops. It is true the plaintiff remained with his goods, and took care of them so far as he could during the march, but whatever he did in that respect was by the orders or permission of the military authorities. He had no independent control over them."

As it appears from the findings of the Court of Claims that "plaintiffs' animals were often used to aid in hauling government trains, and thus did extra work on insufficient food," there is perhaps ground for a recovery to some extent under the terms of the act for property taken and impressed into the service of the United States; but we are unable from the findings to determine the amount properly allowable on that account. It becomes necessary, therefore, to reverse the judgments in both cases, and remand them to the Court of Claims for more definite and specific findings; and inasmuch as we have determined that the facts as found by the Court of Claims in the present record do not enable us to determine what property of the plaintiffs was taken and impressed into the service of the United States by Colonel Johnston, the cases may be opened for further proofs on that point.

The judgments are therefore reversed, and the causes remanded to the Court of Claims for further proceedings in accordance with this opinion.

GLEASON *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

No. 216. Argued April 10, 1888. — Decided April 23, 1888.

G. performed work for the District of Columbia, and received therefor in January, 1874, certificates of indebtedness of the Board of Public Works of the District. He pledged these certificates as collateral for a 60-days note for an amount much less than their face, and made a general transfer of them to the pledgee. Before the maturity of the note

his creditor absconded. He then notified the President and the Treasurer of the Board verbally of the transfer, and verbally protested to the Board against payment of the certificates to the persons who had become holders of them. In June, 1874, the Board was abolished, and a Board of Audit was created to examine and audit for settlement the outstanding certificates of indebtedness issued by it. In October, 1874, G. filed a bill in equity for the purpose, among other things, of restraining the Board of Audit from allowing these certificates to their holders. On demurrer a restraining order, which had been made under this bill, was dissolved. The Board of Audit then allowed the certificates to their holders, and 3.65 bonds of the District were issued for them. G. then commenced this action against the District. *Held*, that he had been guilty of gross negligence in the matter, which prevented him from recovering against the District.

The case is stated in the opinion of the court.

Mr. Eppa Hunton and *Mr. V. B. Edwards* for appellant.

Mr. F. P. Dewees for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Court of Claims by the claimant, Andrew Gleason, who brought suit in that court against the District of Columbia, founding his demand upon certain certificates of the Board of Public Works, which were delivered to him, showing an indebtedness due on account of work done for the defendant, the District of Columbia.

It appears that Gleason borrowed money from one Rudolph Blumenburgh, to whom he gave his note for $30,000, due in sixty days, on the 13th of January, 1874, depositing as collateral security the certificates already mentioned, which he indorsed in blank. Before the maturity of that note Blumenburgh absconded. These certificates afterwards turned up, were presented to the Board of Audit for adjudication, and were allowed by it to the full amount expressed on their face, certificates of the Board of Audit being issued for them to the parties presenting them, while the original certificates of the Board of Public Works were cancelled. The holders of these certificates of the Board of Audit afterwards received bonds

of the District of Columbia, called 3.65 bonds, in exchange therefor.

The Court of Claims finds that when Gleason discovered that Blumenburgh had absconded with his certificates of the Board of Public Works he saw Magruder, treasurer of that Board, and notified him that Blumenburgh had these certificates, protested against the payment of them, and also notified Mr. Shepherd, who was president of the Board of Public Works. It is a fair inference from this finding that this notification was given in a conversation, and was not in writing. The opinion of the Court of Claims speaks of it as a verbal notification.

On the 20th of June, 1874, Congress passed an act, 18 Stat. 116, c. 337, abolishing the Board of Public Works and creating a commission to exercise all the power and authority theretofore lawfully vested in the Governor or Board of Public Works of the District, with certain limitations. By the 6th section of that act the First and Second Comptrollers of the Treasury of the United States were constituted a Board of Audit "to examine and audit for settlement," among other things, "the debt purporting to be evidenced and ascertained by certificates of the auditor of the Board of Public Works." In this class of debts were, of course, included the certificates issued to Gleason and by him indorsed to Blumenburgh. The character of this Board and its functions are commented on in the case of *Laughlin* v. *District of Columbia*, 116 U. S. 485.

On the 13th day of October, 1874, four months after the passage of this bill, after the creation of the Board of Audit and after the powers of government in the District of Columbia had been transferred to the Commissioners, Gleason filed his bill in equity in the Supreme Court of the District against the Commissioners, the Board of Audit, the Comptroller of the District of Columbia and the Sinking Fund Commissioners of the District, alleging that he was the owner of the certificates now the subject of controversy. A restraining order was made enjoining the issuing of certificates and Blumenburgh from receiving them, but on the 5th day of November afterwards this restraining order was, at the instance of the

members of the Board of Audit, and on general demurrer, dissolved so far as it affected the members of that Board. There is no finding, nor any evidence in the record, as to what became of that suit, so far as it related to the Commissioners and Comptroller of the District, the Sinking Fund Commissioners, and Blumenburgh.

As the finding shows that 3.65 bonds, negotiable on their face, were issued for the entire amount of the certificates of the Board of Audit, it is clear that if Gleason recovers in this action, the District of Columbia will have to pay twice the amount of his recovery. We think it equally clear, under the facts of the case, that the fault in the matter lies with Mr. Gleason. He placed his original certificates, which were issued by the Board of Public Works, in the hands of Blumenburgh with an unlimited indorsement, when he might have made a statement that they were held as security for the sum which he had borrowed. He knew, as the Court of Claims finds to be the fact, that this class of securities was bought and sold in the open market by the moneyed men of the District of Columbia, and that they were treated and considered as negotiable instruments. Although this court has decided that they were not in the full sense of that term negotiable as commercial paper, yet Gleason must have known that he was placing them in the hands of Blumenburgh in a manner and in a condition which would enable him to perpetrate a fraud, either upon Gleason himself, or upon some other person to whom he might sell them. When he discovered that Blumenburgh had absconded, and that his certificates could not be found, the steps which he took to protect himself, or the District of Columbia, were very inefficient as compared with what he might have taken, since he merely gave a verbal notice of the facts to Shepherd and Magruder, the president and treasurer respectively of the Board of Public Works. He made no representations in writing, giving an accurate and full description of the certificates, as he might have done. He might, also, while the Board of Public Works was an existing body, have brought his suit against them of the same character as the one he afterwards brought against the Com-

missioners and the Board of Audit. This he did not do, but on the contrary when he finally initiated legal proceedings the parties to whom he had given the notice were no longer officers of the District of Columbia, nor is there any evidence that the statement or warning which he gave to Shepherd and Magruder ever came to the knowledge of the Commissioners, or was brought to the attention of the other proper officers of the District, who might have been bound in a decree in the case.

As to the Board of Audit, it is very clear that the Supreme Court of the District could not rightfully, at the instance of Gleason, enjoin it from proceeding to perform the very duty which was appropriate to that condition of affairs then existing, namely, to audit the claims represented by these certificates, to determine whether the District of Columbia was responsible for them, and if so, to whom it was responsible. The Board of Audit, in accordance with the statute under which it was created, gave public notice that it would hear and examine into all these claims. Mr. Gleason seems to have contented himself with the very imperfect notice which he had given to the persons representing the District government. He did not appear before the Board of Audit at any time; he does not seem to have inquired whether these certificates were presented before them, or to have made any effort to ascertain whether they would consider them, or when their examination would be undertaken. He offered no evidence of his interest in or his right to the certificates. They came before that board, as it is fair to presume, with the indorsements and transfers upon them, so that *prima facie* a case was made out entitling the parties who presented them to receive the certificates of the board for their amount.

In thus standing aloof, and supposing, if he did so suppose, that the Board of Audit would hunt up the evidence of the fact that he had an interest in these certificates and take upon itself the business of presenting a case against the certificates as they came before it, of which claim it knew nothing and had no evidence, and which Gleason himself did not come forward to establish, he was guilty of the grossest negligence,

a negligence which must now prevent him from recovering against the District of Columbia the amount of those certificates, or any part of them. Throughout the whole transaction he has shown a want of diligence and care; First, by placing in the possession of Blumenburgh, with an unlimited indorsement, these instruments for which he received an advance of the amount of money agreed upon between them; and, second, by the imperfect notices that he gave when he found that Blumenburgh had absconded with his certificates. The efforts he then made to protect himself, or the District of Columbia, were wholly inefficient and not such as the case required of him. Verbal notice in a conversation with the president and treasurer of the Board of Public Works, even if that body had continued in existence, was not such notice as the case demanded. His entire neglect also to make any appearance before the Board of Audit, or to assert any claim before that body, established especially for the purpose of adjudicating upon such claims as his against the Board of Public Works, and his knowledge of the fact that he had himself placed in the hands of others the means of asserting the claim which he now brings against the District of Columbia, are all evidence of such laches and neglect as in our judgment precludes his right to recover in this action.

The principle on which this case was decided in the Court of Claims was, we think, established by the judgment of this court in *Laughlin* v. *District of Columbia*, already cited. There the court said: "The statute authorizing the Board [of Audit] gave notice to Laughlin [who was in a similar condition to Gleason] that he must himself appear before that tribunal to assert his rights as against the holder of his certificates, or take some other steps to prevent their payment, and, if he did not, that his claim against the District might be lost. The board, even if his letter had been brought to its attention, would not have been compelled to give him any other notice to appear than that which he already had. As he failed to appear at all there was nothing for the board to do but to act upon the evidence which was before it, and decide accordingly." pp. 490, 491.

That is precisely what was done in the present case. We think the judgment of the Court of Claims in the matter was correct, and it is accordingly

Affirmed.

KELLEY *v.* MILAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 206. Argued April 4, 5, 1888. — Decided April 23, 1888.

In this case certain negotiable bonds, issued by the town of Milan, Tennessee, were held to have been issued without lawful authority.

A municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred by a grant from the legislature; and even such power does not carry with it the power to issue negotiable bonds in payment of the subscription, unless the latter power is expressly, or by reasonable implication, conferred by statute.

Certain provisions of the statutes of Tennessee considered and held not to confer power on the town of Milan to issue the bonds in question.

In a suit in chancery, brought by the town authorities to have the bonds declared invalid, a decree had been entered declaring them valid, on a consent to that effect signed by the mayor of the town: *Held*, that the consent of the mayor could give no greater validity to the bonds than they before had, and that the decree was not an adjudication of the question of such validity.

This was an action at law, brought in the Circuit Court of the United States for the Western District of Tennessee, by Albert Kelley and Lawrence D. Alexander, co-partners under the firm name of Kelley & Alexander, citizens of New York, against the mayor and aldermen of Milan, a municipal corporation organized under the laws of Tennessee, to recover the sum of $5040, being the amount of 144 coupons, for $35 each, cut from twelve bonds purporting to have been issued by the defendant, bearing date July 1, 1873, each for the payment of the sum of $1000, payable to —— or bearer, on the 1st of July, 1893, 24 of which coupons matured on the 1st of July, 1876, 24 on the 1st of July, 1877, 24 on the 1st of July, 1878,

24 on the 1st of July, 1879, 24 on the 1st of July, 1880, 24 on the 1st of July, 1881. Interest was claimed on each coupon from its maturity.

Each of the bonds was in the following form, all being alike except as to the numbers:

"No. 1. State of Tennessee, Town of Milan. $1000.

"Be it known that the Town of Milan, by its mayor and aldermen, in consideration of the location of the Mississippi Central Railroad by said town, the citizens thereof, in pursuance of the laws of Tennessee authorizing the same, having agreed to issue bonds, payable on twenty years' time, to the amount of twelve thousand dollars, with annual interest at seven per cent, with coupons attached, in bonds of one thousand dollars each;

"And whereas the people of Milan voted the same by a majority and in the form required by law, the vote being in pursuance of due notice, and in all respects according to the laws of Tennessee, said bonds to be payable to the Mississippi Central Railroad, under lease and control of the Southern Railroad Association:

"Now, be it known, that the Town of Milan, by its mayor and aldermen, in pursuance of the authority given by the people thereof, and in obedience to the duty required of them, issues and delivers this bond, being one of twelve; and said Town of Milan hereby acknowledges itself to owe and be indebted to —— or bearer, in the sum of one thousand dollars, which sum said Town of Milan binds itself to pay, in lawful money of the United States, to the Mississippi Central Railroad Company, or to the order of the Southern Railroad Association, or bearer, in the city of New York, on or before the first day of July, in the year of our Lord one thousand eight hundred and ninety-three, with interest at the rate of seven per cent per annum, payable annually on the first day of July of each year, on presentation of the proper coupons, hereto annexed.

"And the Town of Milan, by its mayor and aldermen, hereby pledges the legal responsibility and the faith of said

town for the payment of said coupons and bond according to the terms and effect hereof.

"In testimony whereof, the mayor and aldermen of the Town of Milan have caused the signature of the mayor to be hereto set, and the seal of the corporation to be affixed, this first day of July, 1873, A.D.

"[L.S.] "A. JORDAN,

"*Mayor of the Town of Milan.*"

The declaration alleged that the twelve bonds constituted the entire number of the issue by the defendant, and that the plaintiffs owned the bonds and coupons, by the purchase of them in good faith. The defendant, for plea, averred that it did not make the bonds or the coupons, nor was any person authorized to make the same for it, and that the coupons were not its act and deed. The plaintiffs, for replication to the plea, averred that theretofore, in the Chancery Court for the county of Gibson, in Tennessee, the defendant instituted suit against the payee of the bonds, and certain other persons, holders thereof, by filing its bill in said Chancery Court against the Mississippi Central Railroad Company, H. S. McComb, and others, alleging that the bonds were invalid, and praying to have the same so adjudged, and to be surrendered to the defendant and cancelled; that thereafter, in January, 1875, in said Chancery Court, a final decree was rendered adjudging that the bonds and coupons were valid obligations against the Town of Milan; and that, therefore, the matter was *res adjudicata*. The defendant put in a rejoinder to the replication, averring that the decree referred to was procured by combination and fraud between the vice-president of the New Orleans, St. Louis, and Chicago Railroad Company, and the agents and attorneys of the defendant, by which a decision of the court in the cause, upon the matters involved, was prevented, and the decree was consented to for the purpose of giving it effect as *res adjudicata*, upon points in litigation not honestly contested; that the decree was not the judgment of the court on the issues involved, but was founded upon the unauthorized consent of certain agents and attorneys of the

defendant, who had no power to give such consent or to bind the defendant in the premises; that the court had no power to bind the defendant by the decree; that the decree was not rendered in favor of a party to the record, but in the interest of a stranger thereto; and that the plaintiffs were not *bona fide* holders, without notice, of the bonds or the coupons. The plaintiffs demurred to the rejoinder, alleging various causes of demurrer. The demurrer was overruled, and the plaintiffs then took issue upon the rejoinder.

The case was then tried by the court, on due waiver in writing of a jury. At the trial, the coupons sued on, and the bonds from which they were detached, were offered in evidence by the plaintiffs, the genuineness of the signatures being admitted. Each coupon was in the following form:

"*Town of Milan.*

"$35. Warrant for thirty-five dollars, being for six months' interest payable on the first day of July, 1880, in the city of New York, on bond No. —. "A. JORDAN,

"*Mayor of the Town of Milan, Tenn.*"

The defendant objected to the admissibility of the coupons and bonds, on the ground that they were signed, sealed, and delivered by the constituted authorities of Milan without any legislative power having been given to them, or to the defendant or its agents, to sign, seal, deliver, or issue the coupons or the bonds. The court, being of opinion that such objection was well taken, sustained it and excluded the coupons and the bonds, and the plaintiffs excepted.

There was a stipulation of facts made by the parties, which is set forth in the bill of exceptions, stipulating (1) that the bonds in question were issued by the defendant in payment of a stock subscription made by it to the Mississippi Central Railroad Company, the subscription being for the sum of $12,000; (2) that, at the time of making the subscription, the railroad company was about to extend its line from Jackson, Tennessee, to Cairo, Illinois, and the subscription was to aid in making such extension and to secure its location through

the defendant's town; (3) that such extension was completed in 1873, the same running through the town limits of the defendant, as is stipulated for, and the extension had been operated ever since that time.

The following facts also appeared by the stipulation: on the 10th of July, 1874, A. Jordan and six other persons, residents and taxpayers of the town, instituted proceedings in the Chancery Court at Humboldt, in Gibson County, Tennessee, against the Mississippi Central Railroad Company, and others, for the purpose of avoiding the liability of the town upon the bonds, the complainants constituting the board of mayor and aldermen of the town. The bill alleged, that, in the record of proceedings of the board, of the date of May 11, 1872, there was the following entry: "The board was convened by order of the mayor. Present: A. Jordan, mayor; W. M. McCall, M. B. Harris, J. H. Dickinson, J. M. Douglas, W. E. Reeves, W. H. Algea, aldermen. On motion, it was ordered that 12 bonds of $1000 each, with coupons attached, payable 20 years after issuance, bearing interest at 7 per cent. per annum, be issued by the corporation of the Town of Milan, Tenn., to the Mississippi Central Railroad Company, upon the following conditions, namely: That the Mississippi Central Railroad Company be extended from Jackson, Tenn., to the Town of Milan, and intersect or cross the Memphis and Louisville railroad at the point agreed upon by Col. Read, chief engineer of the Mississippi Central railroad, and the committee on behalf of the corporate authorities of the Town of Milan, near S. P. Clark's residence, the interest on said bonds to be paid annually, and that the town marshal open and hold an election on the 12th day of June, 1872, within the corporate limits of said town, for a ratification or rejection of said proposition;" that, in such record, were entered the following proceedings as having taken place at a meeting of said board on the 17th of June, 1872: "The board met pursuant to adjournment. Present: A. Jordan, mayor; W. M. McCall, M. B. Harris, J. M. Douglas, W. H. Algea, and W. E. Reeves, aldermen. The minutes of the former meeting were then read and adopted. The election was held on the 12th day of June, 1872, for the

ratification or rejection of the action of the board of mayor and aldermen of the Town of Milan, in regard to the issuance of the $12,000 in bonds to the Mississippi Central Railroad Company upon certain conditions. The returns of said election show a vote of 117 for subscription and 2 no subscription;" "W. M. McCall and W. H. Algea were appointed a committee to correspond with Judge Milton Brown, of Jackson, Tenn., in regard to the proposition of Milan corporation in regard to issuing the $12,000 in bonds to the Mississippi Central Railroad Company;" that the foregoing entries constitute all the proceedings in regard to the subscription of the $12,000 in bonds, and in regard to the election held for ratifying or rejecting the action of the board in directing the issue of the bonds; that there was nothing to show the manner in which the election was held, or by whom the returns were made, or that the required number of votes was polled in favor of the proposition, as required by law; that the order of the board directing the issue of the bonds was without authority, (1) because the order was adopted and the election ordered without any application in writing, or otherwise, to the board for the purpose, as required by section 1144 of the Code of Tennessee; (2) because the election was ordered to be held, and was held, by the town marshal or constable, and not by the sheriff of the county of Gibson, as required by section 1143 of the Code; (3) because the marshal, after the polls were opened, and before they were closed, suffered the box in which the votes were deposited to be removed from the place in the town fixed for receiving ballots, to various other places in the town, and put into the ballot-box votes offered at such places not fixed by law as a place of voting, and without authority; and (4) because, at the time, the entire line of the contemplated road in which the stock was to be taken had not been surveyed by a competent engineer and substantially located by designating the termini and approximating the general direction of the road, and no estimate of the grading, embankment, and masonry had been made by any one authorized to make it, and no such estimate as was required by section 1145 of the Code had ever been filed; that, at the time of ordering

and holding such election, the population of Milan was less than 1000 inhabitants, and, therefore, it was not authorized by law to take stock in railroads, issue bonds, or levy a tax for their payment; that, on the 23d of June, 1873, the said board made the following order: "On motion of W. M. McCall, the mayor was instructed to issue twelve bonds to the said Mississippi Central Railroad Company, of the denomination of $1000 each, with interest from date of issuance at the rate of 7 per cent per annum;" that, thereupon, said mayor prepared twelve bonds, designated as the "Bonds of the Town of Milan," of $1000 each, payable to the Mississippi Central Railroad Company, or bearer, twenty years from the date of issue, and dated July 1, 1873, bearing 7 per cent interest per annum, to which bonds were attached coupons for the payment of such interest on the 1st of July of each year the bonds had to run, each one of the bonds and coupons being signed by A. Jordan, mayor and recorder, and being made payable in the city of New York; that, on the 4th of August, 1883, the bonds and coupons were delivered to the Mississippi Central Railroad Company, through one Hall, its treasurer and cashier; that the bonds, with the coupons, one year's interest being due on July 1, 1874, were still in the possession of Hall, or some other officer or agent of the company, and the company was attempting to collect the interest due on the bonds; that the town was not bound to pay the bonds, their issue being made contrary to law, but, if the company should sell them to innocent purchasers, the town would be bound in law to pay them; that the officers of the company would sell and assign the bonds, with a view to making the town liable, if they had not already done so in part; and that they were attempting to negotiate them, and would do so unless restrained by injunction. The bill prayed that the company and its officers be enjoined perpetually from transferring or disposing of the bonds and coupons, and from collecting the same; and that they be delivered up and cancelled.

On the 10th of July, 1874, (the same day on which the bill was filed,) a temporary injunction, in accordance with its prayer, was issued. The defendants thereafter filed a de-

murrer to the bill, and, on the 9th of January, 1875, the following final decree was entered in the suit:

"A. Jordan, W. I. House, J. Q. Boyd, M. L. Baird, W. Y. Williamson, S. F. Rankin, et als., Mayor and Aldermen of the Town of Milan

v.

"The Mississippi Central Railroad Company, H. S. McComb, and James Hall.

"Be it remembered, that this cause, this 9th of January, 1875, came on to be heard and was heard before Hon. John Somers, chancellor, etc.; and, it appearing that this suit had been settled by the following agreement, to wit: 'Whereas the Board of Mayor and Aldermen of the Town of Milan, in Gibson County, Tennessee, having filed a bill in the Chancery Court at Humboldt against the Mississippi Central Railroad Company, to enjoin the collection of certain bonds issued by the Town of Milan to aid in the construction of said road, to wit, twelve bonds of $1000 each, with coupons attached, and said suit is now pending in said court; and whereas it is agreed by and between said corporation of the Town of Milan and the New Orleans, St. Louis and Chicago Railroad Company, into which said Mississippi Central R. R. Co. has been merged by contract of consolidation between said last-named company and the New Orleans, Jackson and Great Northern R. R. Co., that said suit be compromised as follows, to wit: The said New Orleans, St. Louis and Chicago R. R. Co. is to issue to the Town of Milan certificates of stock in the sum of $500 each, dollar for dollar, for said bonds, and the said Town of Milan on their part agrees, on receipt of said stock, to let a decree be entered in said cause in favor of the validity of said bonds, which are to be redelivered, with the seal of the town affixed, and the costs of said suit to be paid by the said New Orleans, St. Louis and Chicago R. R. Co.

"'In testimony whereof we herewith sign our names and affix our official seal, this December 18th, 1874.

"'A. Jordan, *Mayor.*

"'A. M. West,

"'*2d Vice-President N. O., St. Louis & C. R. R. Co.*'

Statement of the Case.

"In pursuance of this agreement, and by consent of the parties, it is ordered, adjudged, and decreed, that the New Orleans, St. Louis and Chicago R. R. Co. shall issue to the Town of Milan certificates of stock in said company, in sums of $500 each, dollar for dollar, for said twelve bonds of $1000 each, referred to in the bill; and it is further ordered, adjudged, and decreed, that, on the presentation of these certificates of stock, the Town of Milan shall have the corporate seal of said town affixed to each of said twelve bonds, and delivered to H. S. McComb, to whom they rightfully belong, or his authorized agent, and said bonds and coupons attached are declared to be valid and binding on said town and its authorities. It is, by consent, further ordered, adjudged, and decreed, that the injunction be dissolved, the demurrer herein filed be, and the same is hereby, overruled, and this decree is declared a final settlement of the right of the parties; the New Orleans, St. Louis and Chicago Railroad Company to pay the costs, and this case only retained on the docket so far as is necessary to enforce the final execution of this decree."

It was further agreed by said stipulation, that the records of the town were destroyed by fire in 1879; that no census authorized by law, of the town, had been taken before 1880, when the population was ascertained to be 1600; that the railroad was not completed to the town until after July, 1873; that, after the final decree in the Chancery Court, the plaintiffs became the owners of the bonds and the coupons attached, purchasing the same for value and before they were due; and that, in the proposition submitted to the voters of the town, the question of subscribing $12,000 to the stock of the railroad company, payable in the bonds, "was also submitted in one question and at one and the same time, and was so approved by the requisite majority."

The bill of exceptions stated that the plaintiffs offered in evidence the above named record of the Chancery Court at Humboldt, found in the stipulation; that the defendant, waiving all other objections, objected to the same because the record showed upon its face that it was not binding in law upon the town as a matter of adjudication, and, therefore, did

not sustain the replication to the plea; that the court sustained the objection and the plaintiff excepted; and that the court found, as one of the facts to support its judgment, that, at the time the bonds and coupons were issued, the town did not contain 1000 inhabitants.

The court found that the facts and the law were with the defendant, and rendered a judgment in its favor, for the costs of the suit, to review which the plaintiffs have brought a writ of error. The opinion of the Circuit Court is reported in 21 Fed. Rep. 842.

Mr. Holmes Cummins and *Mr. J. B. Henderson* for plaintiffs in error cited: *Humboldt Township* v. *Long*, 92 U. S. 642; *Marcy* v. *Oswego*, 92 U. S. 637; *Moultrie County* v. *Rockingham Savings Bank*, 92 U. S. 631; *Walnut Township* v. *Wade*, 103 U. S. 683; *Oregon* v. *Jennings*, 119 U. S. 74, 95; *Pana* v. *Bowler*, 107 U. S. 529; *Harter* v. *Kernochan*, 103 U. S. 562; *Anthony* v. *Jasper County*, 101 U. S. 693; *Dixon County* v. *Field*, 111 U. S. 83; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Lynde* v. *The County*, 16 Wall. 6; *Commissioners* v. *January*, 94 U. S. 202; *Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners* v. *Bolles*, 94 U. S. 104; *County of Warren* v. *Marcy*, 97 U. S. 96; *Johnson* v. *Stark County*, 24 Illinois, 75; *Clay* v. *Hawkin's County Justices*, 5 Lea, 137; *Meyer* v. *Muscatine*, 1 Wall. 384; *Flagg* v. *Palmyra*, 33 Missouri, 440; *Supervisors* v. *Galbraith*, 99 U. S. 214; *Milan* v. *Tennessee Central Railroad*, 11 Lea, 329; *Adams* v. *Memphis & Little Rock Railroad Co.*, 2 Coldwell, 645; *Louisville & Nashville Railroad* v. *Tennessee*, 8 Heiskell, 663, 780; *McCallie* v. *Chattanooga*, 3 Head, 317; *Seybert* v. *Pittsburgh*, 1 Wall. 272; *Nichol* v. *Nashville*, 9 Humphrey, 250; *Gifford* v. *Thorn*, 9 N. J. Eq. (1 Stockton) 702; *Green* v. *Hamilton*, 16 Maryland, 319; *Olcott* v. *Supervisors*, 16 Wall. 678; *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416, 432; *The City* v. *Lamson*, 9 Wall. 477, 485; *Douglass* v. *County of Pike*, 101 U. S. 677; *Taylor* v. *Ypsilanti*, 105 U. S. 60; *New Buffalo* v. *Iron Company*, 105 U. S. 73; *Corpenning* v. *Kincaid*, 82 Nor. Car. 202; *Wood*

v. *Raymond*, 42 California, 643; *Hillsborough* v. *Nichols*, 46 N. H. 379; *Miller* v. *Sherry*, 2 Wall. 237; *Lee* v. *Kingbury*, 13 Texas, 68; *S. C.* 62 Am. Dec. 546; *Larson* v. *Reynolds*, 13 Iowa, 579; *S. C.* 81 Am. Dec. 444; *Wilson* v. *Stripe*, 4 Greene (Iowa), 551; *S. C.* 61 Am. Dec. 138; *Luckett* v. *White*, 10 G. & J. 480; *Atkins* v. *Faulkner*, 11 Iowa, 326; *Platt* v. *Judson*, 3 Blackford, 235; *Brown* v. *Mayor*, 66 N. Y. 385; *Jarvis* v. *Driggs*, 69 N. Y. 143; *Newton* v. *Hook*, 48 N. Y. 676; *Gates* v. *Preston*, 41 N. Y. 113; *White* v. *Merritt*, 3 Selden, 352; *S. C.* 57 Am. Dec. 527; *Cromwell* v. *Sac Co.*, 94 U. S. 351, 356, 357; *Tadlock* v. *Eccles*, 20 Texas, 782; *S. C.* 73 Am. Dec. 213; *Dillard* v. *Harris*, 2 Tenn. Ch. 193; *Mayo* v. *Harding*, 3 Tenn. Ch. 237; *Greenlaw* v. *Kernahan*, 4 Sneed, 371; *Winchester* v. *Winchester*, 1 Head, 500; *Hoffer* v. *Fisher*, 2 Head, 253; *McGovach* v. *Bell*, 3 Coldwell, 512; *Kindell* v. *Titus*, 9 Heiskell, 727; *Jones* v. *Williamson*, 5 Coldwell, 371; *Williams* v. *Neil*. 4 Heiskell, 279.

Mr. Sparrel Hill for defendants in error cited: *Milan* v. *Tennessee Central Railroad Co.*, 11 Lea, 330; *Green* v. *Dyersburg*, 2 Flippin, 477; *Albany & Susquehanna Railroad* v. *Mitchell*, 45 Barbour, 208; *Marsh* v. *Fulton County*, 10 Wall. 676; *Wells* v. *Supervisors*, 102 U. S. 625; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Mayor* v. *Ray*, 19 Wall. 468; *Floyd's Acceptances*, 7 Wall. 666; *Northern Bank* v. *Porter*, 110 U. S. 608; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Manhattan Ins. Co.* v. *Broughton*, 109 U. S. 121; *Russell* v. *Place*, 94 U. S. 606; *Allen* v. *Richardson*, 9 Rich. Eq. 53; *Dillard* v. *Harris*, 2 Tenn. Ch. 193; *Hartfield* v. *Simmons*, 12 Heiskell, 255; *Gay* v. *Parpart*, 106 U. S. 679; *Parkhurst* v. *Sumner*, 23 Vermont, 538; *S. C.* 56 Am. Dec. 94; *Mitchell* v. *Kintzer*, 5 Penn. St. 217; *S. C.* 47 Am. Dec. 408.

Mr. Justice Blatchford, after stating the case, delivered the opinion of the court.

Two questions arise for consideration in this case, (1) as to the statutory authority for the issue of the bonds; (2) as to the effect of the decree of January 9, 1875, in the suit in the state court of Chancery.

The bonds in question were issued in payment of a subscription made by the town to the stock of the Mississippi Central Railroad Company. On their face, they do not recite any such subscription to stock, but recite, as the consideration for the bonds, the "location of the Mississippi Central railroad by said town." It is well settled, that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred upon it by a grant from the legislature; and that even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment of the subscription, unless the power to issue such bonds is expressly or by reasonable implication conferred by statute. Such is the law as recognized by the Supreme Court of Tennessee, in the case of *Pulaski* v. *Gilmore*, decided in 1880, and published in 21 Fed. Rep. 870, and in *Taxpayers of Milan* v. *Tennessee Central Railroad*, 11 Lea, 330, decided in 1883. Such is also the law as established by this court. *Marsh* v. *Fulton County*, 10 Wall. 676; *Wells* v. *Supervisors*, 102 U. S. 625; *Ottawa* v. *Carey*, 108 U. S. 110, 123; *Daviess County* v. *Dickinson*, 117 U. S. 657, 663.

The grant of authority to a municipal corporation to subscribe for the stock of a railroad company does not carry with it the power to issue negotiable bonds to pay for the subscription, or anything more than the power to raise money by taxation to pay the amount of the subscription. If, in the statute granting the power to subscribe for the stock, no manner of paying the subscription is provided for, it cannot be paid by issuing negotiable bonds. The practice in Tennessee, as shown by its statute books, has been to authorize expressly the issuing of negotiable bonds by municipal corporations to pay for subscriptions to stock, in all cases where it was desired to confer upon such corporations the power to issue such bonds.

By a statute passed in 1852, and carried into the Code of Tennessee of 1857–8, (sections 1142 to 1161,) in force when the bonds in this case were issued, any county, incorporated town, or city was authorized (section 1142) to subscribe for

stock to a specified amount of its taxable property "in railroads running to or contiguous thereto," upon certain specified terms and conditions. An election was to be held (section 1143) when ordered (section 1144) in a specified manner, after the entire line of the road (section 1145) had been surveyed, and a certain estimate of the grading, embankment, and masonry had been made, and after a specified notice of the election (section 1146) had been given. The statute (section 1147) prescribed the form of the vote, and provided (section 1148) that the subscription should be made if a majority of the votes cast should be in favor of it. Sections 1150, 1154, 1155, 1156, 1157, 1160, 1161, provided as follows:

"1150. As soon as the stock is subscribed, it is the duty of the county court, or corporate authorities, to levy a tax upon the taxable property, privileges and persons, liable by law to taxation within the county or corporation limits, sufficient to meet the instalments of subscription as made, and the cost and expenses of collection, which tax shall be levied and collected like other taxes."

"1154. Not more than thirty-three and one-third per cent of the stock subscribed as above can be collected in any one year.

"1155. The tax-collector, as fast as he makes collections, shall pay the amounts over to the company.

"1156. He shall also, as he receives the tax, give to each taxpayer a certificate in such form as the railroad company may prescribe, showing the amount of such tax paid by him, of which he shall retain a duplicate to be delivered to the president of the railroad company, and such certificate is negotiable by delivery or assignment, and, with a deduction of its proportion of the cost of collection, is receivable in payment of either freight or passage on the railroad in which the subscription is taken, after the expiration of one year from the completion of such road.

"1157. The holder of such certificates to the amount of one share or more of the stock of such railroad company, is entitled to demand and receive from the company in lieu thereof, a certificate of stock in the capital stock of such company, which will give him all the privileges of any other stockholder."

"1160. For the purpose of meeting unexpected contingencies, the county or corporation authorities may anticipate the collection of the railroad tax by the issuance of warrants, bearing six per cent interest, and payable at such times as may be desired by the railroad company, the warrants to be received as payment of so much stock.

"1161. In such a case a sufficiency of the railroad tax shall be paid into the county treasury to meet the warrants as they fall due."

These provisions of the statute do not contemplate or authorize the issue of negotiable bonds. They provide distinctly for the levying of a tax to meet the instalments of the subscription. Section 1160, in authorizing the issuing of warrants made payable at such times as may be desired by the railroad company, and to be received by it in payment for the stock, only contemplates that the warrants shall be issued in anticipation of the collection of the tax, which, under the provisions of section 1154, may be entirely collected in three years, but cannot be collected more rapidly than one-third in each year; and there is no implication that any warrants are to be issued except to anticipate the collection of a tax, after such tax is levied under the provisions of section 1150, and such levy is to be made as soon as the stock is subscribed for, and is to be the levy of a tax sufficient to meet the instalments of subscription as made, and the costs and expenses of collection, subject to the provision of section 1154, that, although the levy of the tax is made, not more than one-third of the stock subscription can be collected in any one year. It is solely to anticipate the collection of the tax, when it is collectible by virtue of the terms of the levy, that the warrants are authorized, by section 1160, to be issued; and there is nothing in the statute which contemplates that the warrants shall be made payable at any time later than the time fixed for the collection of the instalments of the tax. These provisions exclude the power of issuing such negotiable bonds as were issued in this case.

It is contended by the plaintiffs that express authority for issuing the bonds in question is to be found in an act of the legislature of Tennessee, approved January 23, 1871, being

chapter 50 of the Acts of 1870–71. In 1870, a new constitution was adopted in Tennessee, section 29 of Article II. of which reads as follows:

"SEC. 29. The general assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation. But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Fentress, Van Buren, White, Putnam, Overton, Jackson, Cumberland, Anderson, Henderson, Wayne, Marshall, Cocke, Coffee, Macon, and the new county herein authorized to be established out of fractions of Sumner, Macon, and Smith counties, and Roane, shall be excepted out of the provisions of this section, so far that the assent of a majority of the qualified voters of either of said counties voting on the question shall be sufficient, when the credit of such county is given or loaned to any person, association, or corporation: *Provided*, That the exception of the counties above named shall not be in force beyond the year one thousand eight hundred and eighty, and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State."

The act approved January 23, 1871, was entitled "An act to enforce article 2, § 29, of the Constitution, to Authorize the Several Counties and Incorporated Towns in this State to impose Taxes for County and Corporation Purposes." It read as follows:

"SECTION 1. *Be it enacted by the General Assembly of the*

State of Tennessee, That the several counties and incorporated towns in this State may, and are hereby authorized to impose taxes for county and corporation purposes, respectively, in the following manner and upon the following conditions:

"1st. That all taxable property shall be taxed according to its value, upon the principles established in regard to state taxation.

"2d. The credit of no county, city, or town shall be given or loaned to, or in aid of any person, company, association, or corporation, except, first, upon the consent of a majority of the Justices of the Peace of the county, at a Quarterly Term of the County Court of such county, or a majority of the Board of Mayor and Aldermen, as the case may be, of such city or town, and upon an election afterwards held by the qualified voters of said county, city, or town, and the assent of three-fourths of the votes cast at said election. The said County Court, or Board of Mayor and Aldermen, as the case may be, shall spread upon their records the proposition and the amount to be voted upon by the people, and shall have full power to hold and conduct such elections according to the laws regulating elections in this State; and if the assent of three-fourths of the voters of such county, city, or town, is had, then the County Court or Board of Mayor and Aldermen, as the case may be, shall have full power to make and execute all necessary orders, bonds, and payments, in order to carry out such loan or credit voted for as prescribed in this act; nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election, and the assent of a like majority, as prescribed in this Act."

Section 2 of the act enacts the constitutional exception as to the specified counties.

This act was manifestly passed for the object stated in its title, to carry into effect the provisions of section 29 of article 2 of the constitution of 1870, and to prescribe the manner and the conditions, in conformity with the provisions of that section, in and upon which the several counties and incorporated towns in the State should have the right to impose

taxes for county and corporation purposes. The second clause of the first section of the act only provides, in the language of the constitution, that "the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except" upon the assent of three-fourths of the votes cast at an election held by the qualified voters of the county, city, or town. The clause then goes on to provide, in the exact language of the constitution, as follows: "Nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority."

The enactments in that clause are entirely inhibitory and negative in their character. They do not confer any authority for the giving or loaning of credit upon any municipality, nor confer the right upon any municipality to become a stockholder with others in any corporation; but they only prescribe the condition, that no credit shall be given or loaned, and no ownership of stock be created, unless the prescribed election be first held and the assent of three-fourths of the votes cast at it be first given. But the authority to give or loan credit, and to become a stockholder, under the conditions prescribed in the act of 1871, must be found in an independent grant of authority, in some other statutory provision, either general or special. These were the views taken by the Supreme Court of Tennessee, in the case of *Pulaski* v. *Gilmore*, before cited. (See, also, *Taxpayers of Milan* v. *Tennessee Central Railroad*, *supra*.)

It is further contended, that authority to issue the bonds was given by an act of the legislature of Tennessee, approved March 23, 1872, chapter 20 of the Acts of 1872, entitled, "An act to Authorize the Mayor and City Council, or Mayor and Board of Aldermen, of any Incorporated City or Town in the State of Tennessee having a Population of from One Thousand and upwards to Twenty Thousand Inhabitants, to issue Bonds of said City or Town to the amount of Fifteen Thousand Dollars." That act is as follows:

"SEC. 1. *Be it enacted by the General Assembly of the State*

of Tennessee, That the Mayor and City Council or the Board of Mayor and Aldermen of any incorporated city or town in the State of Tennessee, having a population of from one thousand to twenty thousand, are hereby authorized in their corporate capacity to issue the bonds of the said city or town, signed by the Mayor and countersigned by the Recorder of said city or town, with coupons for interest attached, to an amount not exceeding Fifteen Thousand Dollars. The Bonds herein provided for may be executed of denominations from Twenty-five to Five Hundred Dollars, at discretion of said Mayor and City Council or Mayor and Aldermen, and to mature at such times as may be fixed by said Mayor and City Council or Mayor and Aldermen, from one to twenty years after date, and bearing interest at the rate of eight per cent per annum, payable semi-annually; the past-due coupons on which bonds shall be receivable for taxes, and all other dues to the corporation issuing the same: *Provided*, That the bonds issued under the provisions of this Act shall be alone for the purpose of paying outstanding liabilities against the city or corporation issuing them, and shall not in any case exceed the unsettled and matured liabilities or debts of such city or corporation at the time of issuance thereof; but in no event shall the bonds be issued without the consent of three-fourths of the qualified voters voting at an election to be held for that purpose under the supervision of said Mayor and City Council or Board of Aldermen.

"SEC. 2. *Be it further enacted*, That the said Mayor and City Council or Mayor and Aldermen of said city or town are hereby authorized to issue at par such coupon bonds as are provided for in this Act, to the holders of bona fide claims against said city or town, in liquidation and discharge of such claims and interest thereon, and to such others as are willing to take them at par, not to exceed in amount said sum of fifteen thousand dollars: *Provided*, That in no case shall said Mayor and City Council or Mayor and Aldermen of said city or town, as the agent for that purpose, sell under their par value any of the bonds the issuance of which is authorized by this act: *Provided further*, That the proposed rate of interest

the bonds are to bear shall be specified and submitted to the vote of the inhabitants of such corporations, at the time the election is held in regard to the issuance of the bonds."

By the express provision of section 1 of this act, the bonds to be issued under it are to "be alone for the purpose of paying outstanding liabilities against the city or corporation issuing them;" and it is provided that they "shall not in any case exceed the unsettled and matured liabilities or debts of such city or corporation at the time of issuance thereof;" and, by section 2, they are to be issued "to the holders of bona fide claims against said city or town, in liquidation and discharge of such claims and interest thereon, and to such others as are willing to take them at par."

We are of opinion that this statute has no application to the present case. Its object was manifestly to enable certain incorporated cities and towns to fund their matured debts, by issuing bonds of the character specified in the act. The debts for which they were to be issued were not only to be unsettled debts, but matured debts, and the bonds were not to be issued in any event without the consent of three-fourths of the qualified voters voting at an election to be held for the purpose. When the election in the present case was held, no debt created by any subscription to any stock had yet been incurred; and it is expressly stipulated, in the agreed statement of facts, that the question of subscribing $12,000 to the stock of the company, and the question of paying such subscription in bonds, were submitted to the voters as a single question, at one and the same time, and were approved by the same vote. Indeed, from the record of the proceedings of the board of mayor and aldermen of the town, there does not appear to have been any submission to the voters of the question of subscribing to the stock of the railroad company, or of issuing the bonds in payment for any such subscription, but only the question of whether the bonds should be issued by the town to the company as a donation or subscription of bonds; and the bonds themselves, on their face, carry out only the same idea. Still, it is agreed that the bonds were issued in payment of a "stock subscription" made by the town to the railroad

company. But, even in that view, the liability on the subscription to the stock was not such a matured liability or debt of the town, at the time the election was held, as the act of 1872 refers to. The vote of the people was, at most, a vote to subscribe for the stock. The terms of the vote appear to have been "For subscription," or "No subscription." The vote to subscribe for the stock and the vote to issue the bonds were one and the same vote, comprehended in the words "For subscription." In order to make the liability for the subscription a "matured" liability of the town, it was necessary that the subscription should be actually made, in pursuance of the vote, and that the terms for paying the money in discharge of it should be determined, and that an election should be thereafter held to vote in regard to issuing bonds for the liability, as a matured liability, and in view of all the terms and circumstances of such liability. No such election was held after any liability for the subscription became a matured liability.

In regard to the effect of the decree of the Chancery Court, of January 9, 1875, it is to be said, that it was made in a suit by the town authorities to enjoin perpetually the collection of the bonds, on the ground that they were issued without authority of law. By the decree it was ordered, by consent of the parties, that the preliminary injunction should be dissolved and the demurrer be overruled. This left the bill to stand as it was originally filed. The decree sets forth that the suit had been settled by an agreement, a copy of which is embodied in the decree. That agreement refers to the bonds as having been issued by the town "to aid in the construction of said road," that is, the road of the Mississippi Central Railroad Company. It does not refer to the bonds as having been issued in payment of a subscription to the stock of the company. It then sets forth that it has been agreed by the town and the New Orleans, St. Louis and Chicago Railroad Company, (into which the Mississippi Central Railroad Company had been merged, by contract of consolidation between the last-named company and the New Orleans, Jackson and Great Northern Railroad Company,) that the suit

should be compromised by the issue, by the New Orleans, St. Louis and Chicago Railroad Company, to the town, of certificates of stock, in the sum of $500 each, dollar for dollar, for the $12,000 of bonds, the town agreeing, on the receipt of the stock, to let a decree be entered in the cause in favor of the validity of the bonds, which were to be redelivered, with the seal of the town affixed, and the costs of the suit were to be paid by the New Orleans, St. Louis and Chicago Railroad Company.

The substance of this is that, on the bill, it standing good, with the demurrer to be overruled, the plaintiffs agree, notwithstanding the averments of the bill, that the bonds are valid. The decree then states, that, in pursuance of that agreement and by consent of the parties, it is decreed, that the New Orleans, St. Louis and Chicago Railroad Company shall issue to the town the certificates of stock in the company referred to in the agreement; that, on the presentation of those certificates, the town shall have its corporate seal affixed to each of the twelve bonds; and that the bonds and their coupons are declared to be valid and binding on the town and its authorities.

This was no adjudication by the court of the validity of the bonds, on the submission to it, as a judicial tribunal, of the question of such validity. The declaration of the validity of the bonds, contained in the decree, was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor of the town and the officer of the New Orleans, St. Louis and Chicago Railroad Company. The act of the mayor, in signing that agreement, could give no validity to the bonds, if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare them valid. The mayor had no such authority. The decree of the court was based solely upon the declaration of the mayor, in the agreement, that the bonds were valid; and that declaration was of no more effect than the declaration of the mayor, in the bill in chancery, that the bonds were invalid.

The adjudication in the decree cannot, under the circum-

stances, be set up as a judicial determination of the validity of the bonds. (*Russell* v. *Place*, 94 U. S. 606; *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121, 125.) This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision, by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally.

There is nothing inconsistent with this view in *Nashville &c. Railway Co.* v. *United States*, (113 U. S. 261,) where it was held, that a decree in equity, by consent of parties, and upon a compromise between them, was a bar to a subsequent suit upon a claim therein set forth as among the matters compromised and settled, although not in fact litigated in the suit in which the decree was rendered. In that case both parties had full power to make the compromise involved.

The judgment of the Circuit Court is affirmed.

NORTON *v.* DYERSBURG.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 207. Argued April 5, 1888. — Decided April 23, 1888.

In this case, certain negotiable bonds issued by the town of Dyersburg, Tennessee, were held to have been issued without lawful authority.

Certain provisions of the statutes of Tennessee considered and held not to confer power on the town of Dyersburg to issue the bonds in question.

The grant to a municipal corporation of the power to subscribe for stock in a railroad company does not carry with it the implied authority to issue negotiable bonds therefor; and such is the view of the Supreme Court of Tennessee.

In a suit at law against the town to recover on the bonds, no question growing out of the liability of the town for the subscription to the stock can be inquired into.

THE court stated the case as follows:

Statement of the Case.

This is an action at law, brought in the Circuit Court of the United States for the Western District of Tennessee, by Extein Norton, a citizen of New York, against the mayor and aldermen of the town of Dyersburg, a municipal corporation created by the State of Tennessee, to recover sundry sums of money, as due for the principal of 36 bonds, for $500 each, and 58 bonds for $250 each, and 62 bonds for $100 each, all due May 10, 1883, and on sundry coupons cut from such bonds, due at various times between the date of the bonds and their maturity.

The bonds and coupons were in the following form:

"Bond No. —. $250.

"The mayor and aldermen of the town of Dyersburg, in the State of Tennessee, a corporation duly chartered by act of the General Assembly of the State of Tennessee, by the qualified voters of said town, under the provisions of an act of Legislature empowering them so to do, by this bond promise to pay to the bearer hereof, ten years after the date hereof, the sum of two hundred and fifty dollars, with interest at seven per centum per annum from this date, payable semi-annually, at the city hall in Dyersburg, on presentation of the coupons hereto attached, to aid in the construction of the Paducah and Memphis Railroad; upon the express condition, however, that the said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court-house in said town.

"In testimony whereof the mayor and aldermen of the town of Dyersburg, Tennessee, have caused this bond and the coupons attached to be signed by the mayor of said town, and countersigned by the recorder, on this 10th day of May, 1873.

"[Seal, Mayor and Aldermen, Dyersburg, Tenn.]

"C. P. Clark, *Mayor.*

"Countersigned:

"W. C. Doyle, *Recorder.*"

Statement of the Case.

"$8.75. $8.75.

"The mayor and aldermen of Dyersburg, Tennessee, will pay the bearer on the — day of ——, 18—, eight dollars and seventy-five cents, being the semi-annual interest due on Paducah and Memphis Railroad bond No. —.

"C. P. Clark, *Mayor.*

"W. C. Doyle, *Recorder.*"

The defendant pleaded *nil debet* and *non est factum*. The cause was tried by the court, on the written waiver of a jury, and it found the issues of law and fact with the defendant, and rendered a judgment for it, to review which the plaintiff has brought a writ of error. There was an agreed statement of facts, which is embodied in a bill of exceptions, and there is a finding of facts and of conclusions of law, also contained therein. From this, the following facts appear:

The plaintiff bought the bonds and coupons before maturity, for full value, and without any knowledge or notice of any defect, infirmity, equity, or condition against the liability of the town therefor, unless, as matter of law, the face of the bonds charges him with notice. The bonds and coupons were signed, sealed and delivered by the properly authorized municipal officers of the defendant, but the want of authority so to do is controverted, the defendant insisting that no proper legislative or other authority existed for making the subscription and issuing the bonds that were made and issued, the plea of *non est factum* only going to that extent. The Mississippi River Railroad Company, to which, it is claimed, the subscription was originally authorized to be made by the defendant, was afterwards consolidated with and became a part of the Paducah and Memphis Railroad Company. That company mortgaged its properties and franchises, the mortgage was foreclosed, and the purchaser at the sale reorganized, under the statute of Tennessee, as the Chesapeake, Ohio and Southwestern Railroad Company, by which the road was built and finally completed on January 1, 1882, and is now operated as a railroad its entire length. The bed and track are now, and were at the date of the bringing of the suit, fully built and

equipped and operated through the county of Dyer, in which county the town of Dyersburg is situated, and the last-named company had built a depot building within half a mile of the court-house in the town of Dyersburg before this action was brought.

The proceedings of the board of mayor and aldermen of the town, relative to the subscription in controversy, are contained in a paper, Exhibit "B" to the stipulation, which is set forth in the margin.[1]

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[1] "MEMPHIS, TENN., *July* 13, '72.

"At a meeting of the board of directors of the Paducah and Memphis Railroad Company held this day — present, L. S. Trimble, vice-president; Jno. Overton, Jr., W. F. Norton, D. M. Henning, and A. T. Lacy; L. S. Trimble, vice-president, in the chair.

"The minutes of the meeting of May 1st were read and approved.

"Jno. Overton, Jr., offered a resolution as follows:

"Whereas C. P. Clark, mayor of the town of Dyersburg, in the county of Dyer, in the State of Tennessee, by his subscription in writing, has subscribed in behalf of the town of Dyersburg the sum of fifty thousand dollars to the capital stock of the Paducah and Memphis Railroad Company, which said subscription is in the words and figures following, to wit:

"MAYOR'S OFFICE, DYERSBURG, *July 8th*, 1872.

"DEAR SIR: I beg leave to submit herewith a copy of the proceedings of the board of mayor and aldermen of the town of Dyersburg, authorizing me to subscribe $50,000.00 (fifty thousand dollars) to the capital stock of the Paducah and Memphis Railroad Company on certain terms and conditions minutely set forth in said proceedings, payable in bonds of the town of Dyersburg, bearing seven per cent interest, payable semi-annually. In pursuance of the authority thus conferred upon me, I herewith tender and propose to subscribe said sum to the capital stock of your company on the terms proposed, and will promptly issue the bonds of said town, if accepted, as soon as the terms and stipulations allow it.

"I have the honor to be, sir, very respectfully, etc.,

"C. P. CLARK, *Mayor of Dyersburg.*

"To the president of the Paducah and Memphis Railroad Company.

"Now, therefore, be it resolved, That this board does hereby, in behalf of the Paducah and Memphis Railroad Company, accept said subscription, made by said town of Dyersburg, through said C. P. Clark, upon the terms therein expressed.

"Resolved 2d, That the record of the proceedings of the board of mayor and aldermen of said town of Dyersburg, accompanying said sub-

The question of the subscription referred to in the foregoing proceedings was left, under proper notices, to the decision of

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scription, be entered upon the minutes of this meeting, and the same is accordingly done, as follows:

"STATE OF TENNESSEE, *Town of Dyersburg:*

"Be it remembered, that, at a meeting of the board of mayor and aldermen of the town of Dyersburg, held at the court-house (within said town), on the 5th day of June — present, his honor, Mayor Clark, and every one of the aldermen of said town: In the year 1872, the following ordinance was adopted by unanimous vote of said board, to wit: The president of the Paducah and Memphis Railroad Company, by attorney, has presented a memorial to the board of mayor and aldermen, praying the board to order an election to be held to allow the qualified voters of the corporation of Dyersburg to determine by ballot whether they are willing to authorize the mayor and aldermen to make a subscription of $50,000 to the capital stock of said company, to be paid in the bonds of said corporation, said bonds to be due and payable in ten years from the date thereof, the interest thereon to be paid semi-annually at the rate of seven per cent per annum, for the purpose of assisting in preparing the road-bed of said railroad company through the county of Dyer; and said memorial was accompanied by a statement of the cost of the work through Dyer County.

"And whereas, heretofore, to wit, on the 9th day of August, 1871, upon application of the president of the Mississippi River Railway Company to the board, under and by virtue of which there was submitted to the qualified voters of said corporation, on the 12th day of September, 1871, the question as to their willingness to vote a subscription of $50,000 to the capital stock of said Mississippi River Railway Company; and whereas, in accordance with said ordinance, said election was held on said 12th day of September, 1871, and resulted in favor of said subscription by a legal majority; and whereas said subscription so made was held to be illegal on account of its exceeding the amount allowed by the existing laws to be voted, and was never accepted by said railway company;

"And whereas afterwards, to wit, on the 14th day of December, 1871, by the legislature of the State of Tennessee (see chapter 122, sec. 1, acts of 1871), said action of the corporation of Dyersburg was ratified and said town authorized to revote a like amount of subscription;

"And whereas, under and by virtue of provisions of their respective charters, and under and by virtue of the laws of the States of Tennessee and Kentucky, the Paducah and Gulf Railroad Company and said Mississippi River Railway Company have been consolidated into one company, under the name and style of the Paducah and Memphis Railroad Company:

"Therefore, on motion, the following ordinance was unanimously adopted, to wit:

"SECTION 1. Be it ordained by the board of mayor and aldermen of the town of Dyersburg, State of Tennessee, that there shall be submitted to

the qualified voters of the town of Dyersburg, and the subscription was carried by a vote largely in excess of the requi-

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the qualified voters of the town of Dyersburg the proposition to subscribe fifty (50) thousand dollars, in the bonds of said town, to the capital stock of the Paducah and Memphis Railroad Company, on the following terms and conditions, viz.: When the said railroad company has laid the track of said road to the northern and southern line of Dyer County and commenced work on said railway within the limits of Dyer County, then the mayor shall issue to said railway company coupon bonds of the town of Dyersburg, to the amount of said subscription, which is fifty thousand dollars; the whole of said bonds shall be known as the 'Dyersburg, Paducah and Memphis Railroad bonds,' and shall be due and payable in ten years from date of issuance, bearing interest at the rate of seven per cent per annum, payable semi-annually; the bonds shall be issued in sums of $100, $250, and $500, with the necessary interest coupons attached.

"SECTION 2. To pay the interest accruing upon said bonds and, if deemed advisable, to create a sinking fund for their redemption, it shall be the duty of the board of mayor and aldermen of said town, at their first regular meeting after the first day of December of each year, to levy a specific tax upon such subjects of taxation as they may deem best, to meet the interest coupons falling due within the year succeeding said levy; and, if the board of mayor and aldermen, for any cause, fail at the said meeting so to levy said tax, then the same may by said board be levied at any subsequent regular or called meeting, and the coupons of said bonds shall be receivable in the payment of said railroad tax.

"SECTION 3. This subscription shall not become binding until ratified by a majority of three-fourths of the votes of the legally qualified voters of said town voting in an election held to test their sense on the question. The mayor shall make publication in both the Dyer County Progress and Neale's State Gazette, by proclamation, of an election to be held for that purpose, with thirty days' notice, and shall also make publication of this ordinance in connection with said election notice. Those who favor said subscription at said election shall place on their ballot 'For subscription,' and those who oppose shall place on their ballots the words 'No subscription.'

"SECTION 4. The above subscription is made on the condition that the Paducah and Memphis Railway is to be located and built to Dyersburg, and a depot of said road to be located within one-half mile of the court-house, without which condition accepted by said railroad company this subscription to be void, and no bonds shall be issued (and this condition shall be written or printed, if deemed necessary by the mayor, on the face of said bonds).

"SECTION 5. The acceptance by the officers of said railroad company of any portion of the bonds herein authorized to be issued shall bind said company to the terms and conditions of said subscription, as set forth in all the sections of this ordinance.

site constitutional majority. At the date of the subscription the town was without railroad facilities, and the object of the

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"I certify that the foregoing is a full, true, and perfect copy of the proceedings of the mayor and aldermen in the matter of the subscription to the Paducah and Memphis Railroad Company, as the same appears on the minutes of the board on the 5th day of June, 1872, now in my custody.

"Dyersburg, July 8th, 1872. F. G. SAMPSON, *Recorder.*

"SATURDAY, *July 6th*, 1872.

"The board of mayor and aldermen met at the court-house this evening at candle-light.

"Present: Mayor Clark, Aldermen De Berry, McAllister, Miller, Painer, and Sampson.

"The mayor reported to the board of aldermen that the people of the town of Dyersburg, by a vote of 126 votes 'for subscription' to 2 votes for 'no subscription,' have authorized the mayor and aldermen to subscribe $50,000 to the capital stock of the Paducah and Memphis Railroad Company, on the terms and conditions of the ordinance of June 5th, 1872.

"In pursuance of the ordinance passed by this board on the 5th day of June, 1872, which has been duly ratified by the legal majority of the qualified voters of the town of Dyersburg at the election to-day, on motion, it is ordered, by unanimous consent, that the mayor be authorized to subscribe $50,000 at once to the capital stock of the Paducah and Memphis Railroad Company, on the terms and conditions of said ordinance.

"A true copy from the minutes.

"Attest: F. G. SAMPSON, *Recorder.*

"Which said resolution, having been duly seconded, was, upon motion, adopted. It was ordered that the power of attorney from C. P. Clark, mayor of Dyersburg, to Isaac F. Child, of Dyersburg, Tennessee, be spread upon the records of the company. Said power of attorney is in words and figures as follows, to wit:

"Whereas I am fully authorized and empowered, by the action of the board of mayor and aldermen of the town of Dyersburg, Dyer County, Tennessee, as well as by the vote of the people of the town ratifying that action, to subscribe fifty thousand dollars in the bonds of the town of Dyersburg, (payable in ten years from date of issuance and bearing seven per cent interest, payable semi-annually from date of issuance,) to the capital stock of the Paducah and Memphis Railroad Company; and whereas it is not convenient for me to go to Memphis now and attend to said business in person; I have, therefore, nominated, and do hereby appoint and constitute, Isaac F. Child, of Dyersburg, Tennessee, my true and lawful agent, proxy, and attorney-in-fact to do and perform whatever acts and things it may be proper and necessary for me to do to effect and perfect said subscription, on the terms contained in my proclamation dated June

subscription was to aid the building of the proposed line near the town. The railroad has been built, but no part of the

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5th, 1872, hereby ratifying and confirming whatever my said attorney shall lawfully do in the premises, as if I did the same myself.

"July 8th, 1872 C. P. CLARK, *Mayor of Dyersburg, Tennessee.*

"STATE OF TENNESSEE, *Dyer County:*

"Personally appeared before me, W. M. Watkins, clerk of the county court of said county, C. P. Clark, mayor of the town of Dyersburg, Tennessee, who acknowledged the execution of the within instrument for the purposes therein contained. I further certify that I am personally acquainted with the said C. P. Clark.

"Witness my hand and seal of the Dyer County court, affixed at Dyersburg, July 10th, 1872. W. M. WATKINS, *Clerk*,

"[SEAL.] By ZACK. WATKINS, *D. C.*

"On motion of D. M. Henning, a resolution in words and figures as follows was adopted:

"*Resolved*, That the president of this company be authorized and instructed to call upon the town of Dyersburg for the bonds subscribed to the capital stock of the Paducah and Memphis Railroad Company, amounting to $50,000, as soon as the conditions of said subscription upon the part of the county are complied with.

"Jno. Overton, Jr., offered the following resolution, viz.:

"Whereas an obligation in the words and figures following has been executed and delivered to this company, to wit:

"We, the undersigned, citizens of the county of Dyer and State of Tennessee, for and in consideration that the president and directors of the Paducah and Memphis Railroad Company have and do agree to build and locate their said road to and by the town of Dyersburg, Dyer County, Tennessee, and to locate and build a depot thereon within one-half mile of the court-house in said town, hereby guarantee a subscription to the capital stock of said company of one hundred thousand dollars in the following manner, that is to say:

"We guarantee that there will be voted by the citizens of the corporation of Dyersburg the sum of fifty thousand dollars, as a subscription to the capital stock of said company, and that said subscription will be paid in ten-year coupon bonds of said corporation, bearing interest at the rate of 7 per centum per annum, payable semi-annually, and that said bonds will be issued in accordance with the terms of a proclamation made by the mayor of said town, dated June 5th, 1872, and published in the 'Dyer County Progress' and 'Neal's State Gazette,' newspapers published in the town of Dyersburg, and that said bonds will be prepared as soon as practicable after being voted, and will be delivered to said company in accordance with the terms of said proclamation.

subscription has been paid except the first instalment of interest, which was paid.

The bill of exceptions states as follows: "The court found as facts, 1st, that an ordinance was regularly and legally adopted June 5th, 1872, by the board of mayor and aldermen of the town of Dyersburg, ordering an election to be held by the qualified voters of said town, to determine whether the said town should subscribe for $50,000 of the capital stock of the Paducah and Memphis Railroad Company, to be paid for by said town by issuing to said railroad company its negotiable bonds to that amount, bearing interest at 7 per cent, and payable at 10 years from date; that, on July 6th, 1872, said proposition was voted on by the qualified voters of said town,

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"We further agree that there will be subscribed to the capital stock of said Paducah and Memphis Railroad Company the sum of fifty thousand dollars of private individual subscription, by good and solvent subscribers, upon condition that said road is built and has a depot located within one-half mile of the court-house at Dyersburg, and payable as follows: Twenty-five per cent of the amounts of said private subscription, payable when the said road is constructed to the northern or southern line of said county, and work thereon is commenced in Dyer County, the balance subject to calls of ten per cent every thirty days.

"This latter amount of fifty thousand dollars we guarantee will be subscribed and delivered to said company on or before the 10th day of July, 1872.

"Witness our hands this June 20th, 1872.

"T. E. Richardson, Tom. W. Neal, Jno. S. Kiffington, H. L. Fowlky, F. G. Sampson, C. I. Coker, W. M. Watkins, W. E. De Berry, P. E. Wilson, B. C. Burgis, W. C. Doyle, Wat. Sampson, S. R. Latta, I. F. Child, A. M. Stevens, C. P. Clark, W. P. Sugg, E. G. Sugg, J. E. Roberts, E. S. Thurmond, R. R. Watson, Jno. L. Webb, Alf. Stevens, Jno. Sawyer.

"*Therefore, resolved*, That this company accepts the said obligation and its stipulations, as the consideration for building and locating the road to and by the town of Dyersburg, and for building a depot thereon within half a mile of the court-house in Dyersburg; and, in reliance of said obligation, the board agrees to so build and locate the road and so to locate the depot.

"2. That the $52,525 of private subscriptions this day tendered and received in pursuance of that portion of the above obligation which provides for the same, is accepted upon the guaranty of its solvency by the above-named obligees.

"Which said resolution, having been seconded, was, upon motion, adopted."

after 30 days' notice of such election had been duly published in the newspapers of said town, when said proposition was carried by a vote of 126 for the subscription to two against it; that, at a meeting of the board of mayor and aldermen of said town, held on July 6th, 1872, the returns of said election were duly and properly canvassed by said board, which, by ordinance then duly passed, declared the subscription on the terms of the ordinance of June 5th, 1872, was properly and legally carried, in said election, by the vote as before stated, and instructed the mayor to subscribe said sum of $50,000 to the stock of the said railroad company, upon the terms and conditions of said ordinance; that, acting pursuant to that authority, the mayor of said town, on May 10th, 1873, subscribed for and in the name of said town said sum to the capital stock of said company, received a certificate of stock therefor, issued and delivered the coupon bonds of said town for said amount to said railroad company, including those here in this suit; that, when said coupon bonds were so executed, issued, and delivered by said mayor to said railroad company, the said company had laid the track of said road to the northern and southern line of Dyer County, and commenced work on said railway within the limits of said county of Dyer; that plaintiff bought the bonds and coupons sued on herein in due course of trade, for full value, before maturity, and without any knowledge or notice of any defect, infirmity, equity, or condition against the liability of said town, except so far as appears on the face of said bonds; that, before the bringing of this suit, the said railroad had been constructed and was being operated its entire length from Paducah, Kentucky, to Memphis, Tennessee, and was constructed to said town of Dyersburg, Tennessee, and had a depot located within half a mile of the court-house in said town, the same having been done by the Chesapeake, Ohio and Southwestern Railroad Company on or about the — day of ——, as set forth in the agreed statement of facts filed herein. The court ruled that no legislative authority whatever existed for the issuance by said defendant of the bonds and coupons sued on in this case. To which finding and ruling plaintiff then and there duly excepted. The plain-

tiff requested the court to rule that, under the facts found, the defendant was authorized to execute, issue, and deliver to said railroad company the said bonds, which request was refused by the court, to which plaintiff then and there duly excepted. The court thereupon rendered judgment in favor of defendant, supporting its judgment by reading the same opinion filed in the case of *Green* v. *Town of Dyersburg*, 2 Flippin, 477, and directing, by consent of counsel, that the said opinion be filed as its opinion in this case and sent up with the transcript of the record, as required by the rules of the Supreme Court."

Mr. D. H. Poston (with whom was *Mr. W. K. Poston* on the brief) for plaintiff in error.

I. It will be noticed that the declaration does not aver that these bonds were issued under any particular act, nor do the bonds recite any particular act as authority for their issuance; the declaration sues for the bonds "executed and issued by said corporation on the 10th day of May, 1873, upon and in pursuance of lawful authority conferred for that purpose on said corporation."

And the bond simply recites that it is issued "under the provision of an act of the legislature empowering them to do so."

Therefore we can look to all the legislation on the subject, and if there be any, authorizing the same, the bonds must be supported.

It will be observed that paragraph 29, Art. II, of the constitution of 1870 is identical with that of 1834, being *verbatim* down to the point of lending corporate aid, the only difference being that the constitution of 1870 has an *addenda*, not in the constitution of 1834, which itself restricts and limits the power of municipal corporations in lending aid and credit, and provides that it can only be done upon the votes of three-fourths of the qualified voters cast at the election, to determine the question, while the constitution of 1834 authorizes it to be done as the legislature may from time to time direct.

Argument for Plaintiff in Error.

However, under both constitutions, it has been held that a subscription in aid of railroads was a corporate purpose, and counties and towns had the right to lend aid and credit, and levy taxes to pay the same. *Nichol* v. *Nashville*, 9 Humphreys, 250, 252; *Louisville & Nashville Railroad* v. *Davidson County*, 1 Sneed, 637; *S. C.* 62 Am. Dec. 424; *City of Memphis* v. *Gayoso Gas Co.*, 9 Heiskell, 518; *Winston* v. *Tenn. & Pacific Railroad*, 1 Baxter, 60.

We insist that there was express legislative authority for the issuance of these bonds, and that they were executed in strict conformity therewith.

[*Mr. Poston* then examined the statutes of Tennessee, and continued:] We further insist that, upon questions of commercial securities, Federal courts are not bound by state decisions. *Oates* v. *National Bank*, 100 U. S. 239, 246; *Pine Grove* v. *Talcott*, 19 Wall. 666, 677.

II. Our second proposition presents the simple question, whether the defendant, having the power to make the subscription and lend the credit, had the implied power and authority to execute and deliver bonds negotiable in form, independent of any express authority conferred.

All the authorities agree that where a municipal corporation has the implied power to borrow money or lend credit, it has the implied power to execute all proper bonds, notes or other negotiable securities to accomplish these purposes. *Seybert* v. *Pittsburg*, 1 Wall. 272; *Commonwealth* v. *Pittsburg*, 41 Penn. St. 278; *Police Jury* v. *Britton*, 15 Wall. 566, 572; *Hull* v. *Marshall County*, 12 Iowa, 142; *Gause* v. *City of Clarkville*, 5 Dillon, 165; *Commonwealth* v. *Pittsburg*, 34 Penn. St. 496; *Griffin* v. *Inman*, 57 Georgia, 370; *Black* v. *Cohen*, 52 Georgia, 621; *Ketchum* v. *Buffalo*, 14 N. Y. 356.

This implied power is thoroughly indoctrinated into the laws and decisions of the State of Tennessee, as will be seen by reference to the cases.

On this point, see *Union Bank* v. *Jacobs*, 6 Humphreys, 515; *Nichol* v. *Mayor of Nashville*, 9 Humphreys, 264; *Adams* v. *Memphis & Little Rock Railroad Co.*, 2 Coldwell, 645; *Moss* v. *Harpeth Academy*, 7 Heiskell, 283.

III. In any event this court should hold the defendant as upon non-negotiable bonds or notes, treating the issuance of negotiable bonds as an excess of authority only, and not invalidating the loan with interest as agreed upon. *Nashville* v. *Ray*, 19 Wall. 468.

Mr. T. B. Turley for defendants in error. *Mr. Spaval Hill* was with him on the brief.

Mr. Justice Blatchford, after stating the case, delivered the opinion of the court.

It is insisted by the plaintiff in error that there was express legislative authority for the issue of these bonds. The first statute relied on is the act of the legislature of Tennessee, approved January 23, 1871, chapter 50 of the acts of 1870–71, entitled "An Act to Enforce Article 2, Section 29, of the Constitution, to Authorize the several Counties and Incorporated Towns in this State to Impose Taxes for County and Corporation Purposes." This statute has been fully considered by us in the case of *Kelley* v. *Town of Milan*, just decided, and shown to have conferred no such authority.

The act approved December 16, 1871, chapter 122 of the Acts of 1871, entitled "An Act to legalize and authorize subscription by incorporated Cities and Towns for the benefit of Railroad Companies created by law," applies only to cases where an incorporated town or city had subscribed to the capital stock of a railroad company prior to the passage of that act. The subscription in the present case was not made until May 10, 1873, the election having been held on July 6, 1872; and the entire act relates only to the validity and the legality of the subscription to stock, and in no manner touches the question of the issue of bonds.

It is also contended that express authority to issue the bonds in question was granted by section 20 of an act passed February 26, 1869, chapter 59 of the acts of 1868–69, which section is as follows: "Sec. 20. *Be it further enacted*, That it shall be lawful for the town of Dyersburg to make a cor-

porate subscription to the capital stock of the Mississippi River Railroad Company, not to exceed fifty thousand dollars in amount, payable in not exceeding four years by annual assessments levied by the Board of Trustees of said town, and collected as other moneys are, and bonds of the town may be issued in anticipation of such collections, collected for town purposes: *Provided, however*, That before the Board of Trustees or Aldermen of said town shall make any such subscription, the question shall have been first submitted to the qualified voters of said town, and shall have received a majority of the votes cast therefor after twenty days' notice of the time and place of holding said election, and of the amount proposed to be subscribed."

Reliance is also placed upon section 18 of an act passed February 8, 1870, chapter 55 of the acts of 1869–70, which section is as follows: "SEC. 18. *Be it further enacted*, That stock which has been subscribed, or may hereafter be subscribed, by any county, city, or incorporation, to said railroad companies may be payable in six annual payments; and it shall be lawful for county courts and the corporate authorities of any city or town making such subscription to issue *short* bonds bearing interest at the rate of six per cent per annum, to said railroad companies, in anticipation of the collection of annual levies, if thereby the construction of the roads can be facilitated."

As to the act of 1869, the subscription to the stock, not to exceed $50,000, was made payable, by section 20, in not exceeding four years, by annual assessments of taxes. The express limitation was to the four years, but authority was given to issue the bonds of the town in anticipation of the collections of taxes. Of course, under this provision the bonds were to be paid by the four annual collections of the taxes levied by the four annual assessments. That was the fund provided for their payment. No authority was given for the issue of bonds other than such as were to be paid, one-fourth in one year, one-fourth in two years, one-fourth in three years, and one-fourth in four years; and no authority was given for the issue of any bond payable in ten years.

As to section 18 of the act of 1870, it gave no power to the town of Dyersburg beyond that conferred by the act of 1869, to subscribe for stock or to issue bonds. The only possible effect it could have as to that town was to modify section 20 of the act of 1869, so as to make the subscription to stock payable in six annual payments, instead of four annual payments, and to authorize the issue of bonds in anticipation of the collection of the annual tax levies, the bonds to be payable in not exceeding six annual instalments, instead of four; but each set of bonds to be still payable by an annual tax levy, and to fall due annually for six years, at the time of the maturity of the levy for each year.

That these statutory provisions did not authorize the issue of bonds payable in ten years is entirely clear. *Pulaski* v. *Gilmore*, decided by the Supreme Court of Tennessee, and published in 21 Fed. Rep. 870; *Milan* v. *Railroad Co.*, 11 Lea, 329.

The cases of *Louisville & Nashville Railroad* v. *County Court of Davidson*, 1 Sneed, 683, and *The State* v. *Anderson County*, 8 Baxter, 249, do not sustain the position of the plaintiff in error. While, in each of those cases, the statute provided that not more than one-third of the amount of the subscription should be collected in any one year, it did not prohibit its distribution into more numerous instalments, each of less amount. Here, the acts in question prohibited any extension of time beyond four or six years, and the vote of the town distinctly varied the terms fixed by the statute.

It is also contended by the plaintiff in error that the grant of power to subscribe for the stock carried with it the implied authority to issue negotiable bonds therefor. None of the cases cited by the plaintiff in error, decided outside of the State of Tennessee, establish such doctrine. The cases cited in Tennessee, *Union Bank* v. *Jacobs*, 6 Humphreys, 515; *Nichol* v. *Mayor of Nashville*, 9 Humphreys, 252; *Adams* v. *Memphis and Little Rock Railroad Co.*, 2 Coldwell, 645; *Moss* v. *Harpeth Academy*, 7 Heiskell, 283; *The State* v. *Anderson County*, 8 Baxter, 249; and *Williams* v. *Railroad Co.*, 9 Baxter, 488, do not maintain the doctrine contended for.

In the case in 6 Humphreys, it was held that a railroad company, a private corporation, could contract a debt for a corporate purpose, and give a negotiable promissory note therefor. In the case in 9 Humphreys, there was express legislative authority to subscribe for stock and issue bonds, and the point decided was that a subscription by a municipality to railroad stock was a county or corporation purpose, within the provision of the constitution empowering the legislature to authorize counties and towns to impose taxes for county and corporation purposes. The case in 2 Coldwell was considered by this court in *Nashville* v. *Ray*, 19 Wall. 468, 479, and it was there said that the doctrines propounded in the opinion in 2 Coldwell, with reference to the implied powers of municipal corporations, were not necessary to the decision of that case. In the case in 7 Heiskell, the question was as to the power of a private corporation to borrow money. In the case in 8 Baxter there was express authority to issue the bonds, and the question of implied power did not arise, as was said by this court in *Claiborne County* v. *Brooks*, 111 U. S. 400, 411. In the case in 9 Baxter, the question now under consideration does not appear to have been raised or discussed, the only question involved being whether the original subscription to the stock of the railroad company was valid.

On the contrary, the decision of the Supreme Court of Tennessee, in the cases of *Pulaski* v. *Gilmore* and *Milan* v. *Railroad Co.*, above cited, was distinctly, that express legislative authority to issue bonds like those involved in the present suit was necessary. In harmony with this view is the fact of the numerous instances in which the legislature of Tennessee, after granting authority to municipalities to subscribe for stock in railroad companies, has also expressly granted the power to issue bonds therefor.

The views of this court on the subject of the implied power to issue municipal bonds were fully expressed in the cases of *Wells* v. *Supervisors*, 102 U. S. 625, and *Claiborne County* v. *Brooks*, 111 U. S. 400. In the first of those cases it was held, that the mere authority given to a municipality to subscribe for stock in a railroad company did not carry with it

the implied power to issue bonds therefor, especially where, as in the present case, special provisions were made for paying the subscription by taxation.

Our views as to the proper construction of the general laws of Tennessee, Code of Tennessee, §§ 1142 to 1161, have been fully expressed in the case of *Kelley* v. *Town of Milan*, just decided.

It is further contended for the plaintiff in error, that this court should, in any event, hold the town liable as upon non-negotiable bonds or notes, treating the issue of the negotiable bonds as an excess of authority only, and not invalidating the loan, with interest, as agreed upon. It is a sufficient answer to this proposition to say that this suit is brought solely for a recovery upon the bonds and coupons, and no question growing out of the liability of the town for the subscription to the stock can be inquired into in this suit.

The judgment of the Circuit Court is affirmed.

FORNCROOK *v.* ROOT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 225. Argued April 13, 1888. — Decided April 23, 1888.

Letters-patent No. 243,674, granted to James Forncrook, June 28, 1881, for an "improvement in sectional honey-frames," on an application filed May 13, 1879, are invalid, for want of novelty.

The claim of the patent, namely, "As a new article of manufacture, a blank for honey-frames formed of a single piece of wood, having transverse angular grooves *c*, longitudinal groove *d*, and recesses *b*, all arranged in the manner shown and described," is not infringed by a blank which does not contain the longitudinal groove, or any substitute or equivalent for it.

IN EQUITY to restrain alleged infringements of letters-patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. William P. Wells for appellant.

Mr. M. D. Leggett and *Mr. J. A. Osborne* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

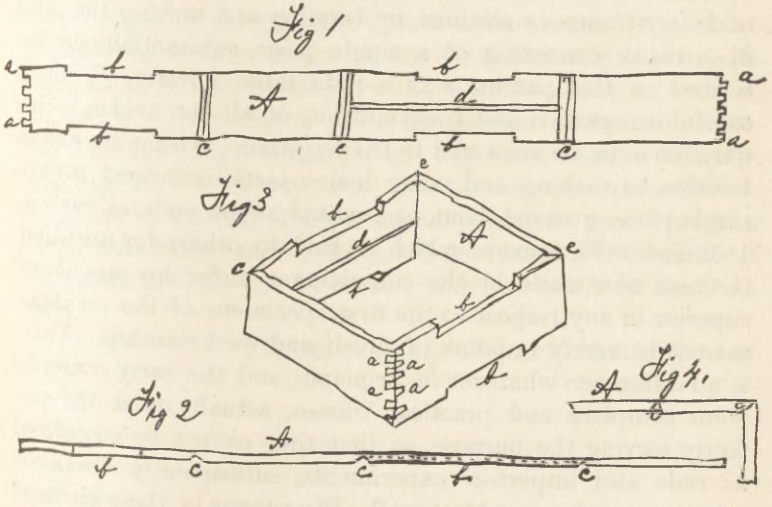
This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of Ohio, by James Forncrook against Amos I. Root, for the infringement of letters-patent of the United States, No. 243,674, granted to the plaintiff, June 28, 1881, for an "improvement in sectional honey-frames," on an application filed May 13, 1879.

The specification, claim, and drawings of the patent, are as follows:

"Be it known that I, James Forncrook, of Watertown, in the county of Jefferson and State of Wisconsin, have invented certain new and useful improvements in sectional honey-frames, and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification. This invention relates to an improvement in sectional honey-frames, the object being to so construct them that they shall be stronger and in a more portable form than the frames now used for such purposes; and the invention consists essentially in forming the frames from a single blank or piece of material having all the necessary grooves and recesses required to form a complete frame cut in it, the ends of the blank being notched or dentated, and angular grooves cut across it at those points which are to form the corners. These blanks, after being thus prepared, may be packed solidly in boxes, or otherwise, for transportation, and, when required for use, are bent into the square forms, and their ends united at one of the corners, by means of the interlocking notches or teeth, thus forming a complete frame ready for use. In the drawings, Fig. 1 is a plan of one of the blanks, showing the various recesses and grooves with which it is sup-

plied. Fig. 2 is an edge view of the blank, and shows the form and depth of the angular grooves which form the corners of the frame. Fig. 3 shows the blank bent into a square form, with the ends united, making a complete frame ready for use. Fig. 4 shows a modification of the groove or mitre *c*, Fig. 2. The blanks for these frames are preferably formed from some light, tasteless, and comparatively tough wood, which will bend at the corners without steaming or boiling, such as bass wood or white wood, the material being produced by cutting it from the log in the form of a thick veneer, or by sawing into thin stuff and then planing both surfaces. The blanks A are then cut from this material, of the proper width and length, the ends dentated, as shown at *a a*, by means of a series of circular saws placed close together upon an arbor or other suitable tool, so that they will interlock when brought together. The recesses *b b* are then formed in its edges, at such points in its length as will bring them at the top and bottom of the frames when set up in the hive. These recesses form openings which allow space for the passage of the bees between the frame, and for the ventilation of this part of the hive. Three triangular grooves *c c c* are then cut across the blank at such points in its length as will divide it into four nearly equal parts, each of which forms one side of the frame after the blank is bent into a quadrangular shape. These triangular grooves are cut nearly through the blank, sufficient wood only being left to hold the parts firmly together. As the sides of the grooves *c* are inclined toward each other at a right angle, it follows that, when the blank is bent into the form of a frame, these grooves make perfectly fitting interjoints at three of its corners, the fourth corner being that at which the ends of the blank are united to each other by means of the interlocking teeth formed thereon. In one of these spaces, between two of the grooves *c*, and preferably that which will form the top of the frame when placed in the hive, is formed a longitudinal groove, *d*, for the guide-strip, which makes a secure point of attachment for the comb, when the bees begin to build in the frames set side by side in the hive, with the parts of the frame containing the recesses *b b* at top. These

frames meet a want long felt by bee keepers, as those in common use are either dovetailed or nailed together at the corners, and, if set up at the manufactory, form a large bulk for transportation, and are very liable to breakage in handling; but, if sold to the user in pieces, to be put together by him, the numerous joints to be made cause loss of time and produce a very fragile article when finished, which loses its rectangular shape with the slightest rough usage, as the joints at the corners lack the necessary strength and rigidity to hold them in shape. My frame will be found to possess none of the above named defects, as it is intended for transportation in solid packages before being set up, and, when set up, possesses great strength and rigidity, preserving its form without difficulty during all the rough handling to which such frames are frequently subjected. Having thus described my invention, I claim as new, and desire to secure by letters-patent, the following: As a new article of manufacture, a blank for honey-frames formed of a single piece of wood, having transverse angular grooves *c*, longitudinal groove *d*, and recesses *b*, all arranged in the manner shown and described."



The answer sets up as defences non-infringement and want of novelty. After issue joined, proofs were taken on both sides, and the Circuit Court, on a hearing, dismissed the bill. Its decision is reported in 21 Fed. Rep. 328.

The plaintiff does not carry his invention further back than the summer or late spring of 1877. The answer sets up that the same invention as that patented was known to Alexander Fiddes, who resides at Centralia, in the State of Illinois, as early as May or June, 1873.

The Circuit Court, in its decision, said, that if the patentee was entitled to claim the blank for honey-frames as a new and useful device, it was because it is a constituent of the frame or section into which it is formed by bending, no matter who bends it, whether the maker or the purchaser for use; and that, if the state of the art at the date of the alleged invention was such that the patentee could not claim as his invention the honey-frame or section when formed by bending and uniting the ends of such a frame, he, for the same reason, could not claim as his invention such a blank for the purpose of forming it into a frame or a section. The opinion then proceeded: "The question, therefore, is whether, upon the evidence, at the date of the alleged invention, the manufacture of honey-frames or sections, by bending and uniting the ends of a blank consisting of a single piece, substantially as described in this patent, was a patentable novelty. Upon a careful comparison and consideration of all the evidence this question must be answered in the negative. Alexander Fiddes testifies to making and using honey sections formed from a single piece, grooved, bent, and united at the ends, as early as 1872 and 1873, some of which he sold to others for use; and, if those now made by the complainant under his patent are superior in any respect to the first specimens of the manufacture, it is merely in point of finish and workmanship. There is no difference whatever in principle, and the early examples were complete and practical frames, actually used and perfectly serving the purpose, so that they cannot be considered as rude and imperfect experiments, subsequently developed into a successful manufacture." We concur in these views of the Circuit Court.

Opinion of the Court.

In addition to this, the claim of the patent is as follows: "As a new article of manufacture, a blank for honey-frames formed of a single piece of wood, having transverse angular grooves *c*, longitudinal groove *d*, and recesses *b*, all arranged in the manner shown and described." The description in the specification states that "the invention consists, essentially, in forming the frame from a single blank or piece of material having all the necessary grooves and recesses required to form a complete frame cut in it." It also says, that "in the drawings, Fig. 1 is a plan of one of the blanks, showing the various recesses and grooves with which it is supplied." One of those grooves is the longitudinal groove *d*. The description further says: "In one of these spaces, between two of the grooves *c*, is formed a longitudinal groove, *d*, for the guide strip, which makes a secure point of attachment for the comb, when the bees begin to build in the frames, set side by side in the hive, with the parts of the frame containing the recesses *b b* at the top." Thus, the longitudinal groove *d* is made by the patentee a necessary element in the structure. The defendant's structure has no longitudinal groove, and no substitute or equivalent for it. *Fay* v. *Cordesman*, 109 U. S. 408; *Yale Lock Co.* v. *Sargent*, 117 U. S. 373; *Dryfoos* v. *Wiese*, 124 U. S. 32.

It is urged by the plaintiff that it is shown that the defendant's section is to be used with the comb foundation or attachment made by the putting, by the user, of pieces of wax on the section. But this is not a mechanical equivalent in the blank for the longitudinal groove, any more than, in *Gage* v. *Herring*, 107 U. S. 640, 648, the person who shovelled or swept up, by manual labor, the meal deposited upon the floor of the dust-room, was a mechanical equivalent, in the sense of the patent law, for the automatic conveyor shaft in the dust-room.

The decree of the Circuit Court is affirmed.

UNITED STATES *v.* LOUISIANA.

APPEAL FROM THE COURT OF CLAIMS.

No. 1388. Submitted April 2, 1888. — Decided April 23, 1888.

A claim by the State of Louisiana to 5 per cent of the net proceeds of the sales of the lands of the United States, under § 5 of the act of February 20, 1811, c. 21, 2 Stat. 641, and a claim by the same State to the proceeds of the sale by the United States of swamp lands, growing out of the provisions of the acts of September 28, 1850, c. 84, 9 Stat. 519, and March 2, 1855, c. 147, 10 Stat. 634, are claims against which the United States can set off the amount due to them by the State on matured coupons on bonds known as the Indian Trust bonds, issued by the State.

Under § 1069 of the Revised Statutes, the Court of Claims had no jurisdiction of so much of the claim to the 5 per cent fund as was credited to the State on the books of the Treasury Department more than six years before the bringing of the suit

THE case is stated in the opinion of the court.

Mr. Attorney General and *Mr. Heber J. May* for appellant.

Mr. William E. Earle and *Mr. James L. Pugh, Jr.* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the United States from a judgment of the Court of Claims, awarding to the State of Louisiana the sum of $43,572.71.

There are claims of two kinds involved in the suit. The first claim arises under the act of February 20, 1811, c. 21, 2 Stat. 641, which authorized the inhabitants of Louisiana to form a constitution and a state government. The 5th section of that act provided as follows: "That five per centum of the net proceeds of the sales of the lands of the United States, after the first day of January, shall be applied to laying out and constructing public roads and levees in the said State, as the legislature thereof may direct."

The second claim arises under §§ 1, 2, and 4 of the act

of September 28, 1850, c. 84, 9 Stat. 519, and §§ 1 and 2 of the act of March 2, 1855, c. 147, 10 Stat. 634. Sections 1, 2, and 4 of the act of 1850 read as follows: "That, to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State. SEC. 2. That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the land described as aforesaid and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee-simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid." "SEC. 4. That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated." Section 1 of the act of 1855 provided that the President should cause patents to be issued to purchasers or locators who had made entries of public lands claimed as swamp lands, prior to the issue of patents to the State, as provided for by § 2 of the act of 1850, except in certain specified cases. Section 2 of the same act provided as follows: "That upon due proof, by the authorized agent of the State or States, before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to the said State or States."

The State alleged, in its petitions in the Court of Claims, (for there were two suits, which were consolidated,) that the moneys due to it under the act of 1811, instead of being paid

over to it by the United States, had been unlawfully credited upon certain bonds alleged to have been issued by the State, and claimed to be held by the United States as an investment of certain Indian Trust funds; that, as to the acts of 1850 and 1855, moneys were due to the State thereunder, which had been legally ascertained and certified, but, instead of being paid over to the State, had been credited on bonds of the same kind; and that the sums referred to as being ascertained and found due to the State were trust funds, to be devoted to specific purposes, under the provisions of the acts granting them to the State.

The United States, in addition to a general traverse, put in a special plea of set-off, alleging that the State was indebted to the United States in the amount of interest which had accrued on bonds issued by the State and held by the United States.

The Court of Claims found as facts (1) that, of the 5 per cent fund accruing to the State under the act of 1811, there remains due from the United States to the State, as credited on the books of the Treasury Department, the following sums: May 8, 1879, $13,602.71; June 8, 1882, $63.47; February 7, 1884, $22,773.51; making a total of $36,439.69; and that, of the swamp-land fund accruing to the State under the acts of 1850 and 1855, there remains due from the United States to the State, as credited on the books of the Treasury Department, the following sums: May 26, 1886, $3803.02; September 9, 1886, $1110.00; May 2, 1887, $1730.41; May 4, 1887, $489.59; making a total of $7133.02; (2) that the First Comptroller of the Treasury, at the dates stated in finding 1, admitted and certified the above sums to be due to the State on account of the 5 per cent fund and the indemnity for swamp lands purchased by individuals within the State, but directed those amounts to be credited on moneys due the United States, as stated in finding 3; and that it does not appear that the state authorities had knowledge of this proceeding; (3) that the United States own coupon bonds issued by the State, amounting to $37,000, payable in 1894, known as the Indian Trust bonds, and also hold and own overdue

coupons attached to those bonds, representing the interest from May 1, 1874, to November 1, 1887, amounting to $31,080. The court gave a judgment in favor of the claimant for the total of the two amounts of $36,439.69 and $7133.02, namely, $43,572.71.

The contention of the United States in the Court of Claims was that, under § 1069 of the Revised Statutes, which provides that every claim against the United States, cognizable by that court, shall be forever barred unless the petition setting forth a statement thereof is filed in the court within six years after the claim first accrues, the court had no jurisdiction in respect to the sum of $13,602.71, credited on the books of the Treasury Department on the 8th of May, 1879, as a part of the 5 per cent fund, because the first of the two petitions was not filed until February 1, 1887. Deducting this sum of $13,602.71 from the $43,572.71, would leave the sum of $29,970; and it was contended by the United States that the claim for this sum was more than covered by the set-off of the $31,080, due by the State on the coupons on the Indian Trust bonds.

The Court of Claims held that the two funds in question, in the treasury of the United States, were trust moneys, to be held for special purposes, at first by the United States, and by the State after a transfer to it; that the trust had not been disavowed or annulled by Congress; that it became the duty of the executive officers of the United States, in charge of the funds, to hand them over to the State as a succeeding trustee; that the credit given to the State in the Treasury Department, on its indebtedness to the United States, for the amount of the coupons on the Indian Trust bonds, was without authority of law; that, consequently, the funds were free from liability to the set-off; and that the claim of the State to the $13,602.71 was not barred by § 1069 of the Revised Statutes.

The provisions of the swamp-land act of 1850 have been before this court in several cases. In *Emigrant Co.* v. *County of Wright*, 97 U. S. 339, at October Term, 1877, the State of Iowa had, by statute, granted the swamp lands to the counties of the State in which they might be found, with an injunction

that the lands and their proceeds should be appropriated to reclaiming the swamp lands; and if, when this was accomplished, anything was left, to building roads and bridges over the same; and lastly, the remainder to be used in building roads and bridges in other parts of the county. By subsequent legislation of the State, the counties were authorized to depart from this injunction, and to use the lands for public buildings and internal improvements; but the assent of the majority of the voters of the county to such purpose was required. The State also authorized the sale of all the lands to any person or corporation by a written contract, to be in like manner submitted to the vote of the county; but the sale was to be subject to the proviso that the vendee should take the lands subject to all the provisions of the act of Congress of 1850. Wright County, with the assent of a majority of the voters of the county, having contracted in writing with the Emigrant Company to sell to it all the swamp lands in the county, and the claim of the county for indemnity against the United States for swamp lands which had been sold by the United States, and having executed a deed of a quantity of the lands to the company, the county filed a bill in equity to set aside the contract and deed, and obtained a decree to that effect in the Circuit Court. In the opinion of this court, delivered by Mr. Justice Miller, the proposition urged by the plaintiff in the suit was considered, namely, that the contract was void on its face, because it contemplated a diversion of the fund in violation of the original grant. As regarded that proposition, the court said: "It is not necessary to decide it in this case, and we do not decide that the contract is, for that reason alone, void. But we are of opinion that any purchaser of these lands from the county, or of the claim of the county to indemnity, must be held to know that in the hands of the county they were impressed with an important public trust, and that, in examining into the fairness and honesty of such a purchase, this consideration constitutes an important element of the decision." The court then proceeded, in its opinion, to hold that the contract must be rescinded, because of what amounted to fraud in the manner in which it was

procured, namely, that the officers and citizens of the county were ignorant of the nature and value of what they were selling; that the vendee was well informed in regard to both, and withheld such information unfairly from the officers of the county; and that there was a provision in the contract "for a diversion of the fund to other purposes, a gross inadequacy of consideration, and a successful speculation at the expense of the rights of the public."

Questions arising under the same act of Congress, of 1850, and the same legislation of Iowa, came before this court again, at October Term, 1879, in *Emigrant Co.* v. *County of Adams*, 100 U. S. 61. In that case the county of Adams had made a contract with the Emigrant Company to convey to it the county's swamp lands and claim for indemnity against the United States on account of swamp lands which had been sold by the United States, and had given a deed in pursuance of the contract. It afterwards filed a bill to rescind the contract and the deed, and obtained in the Circuit Court a decree to that effect, which this court reversed. The case was twice argued here. In the opinion of the court, delivered by Mr. Justice Bradley, it was stated that there was no sufficient proof that the contract was procured by false and fraudulent representations. It was also said, of the act of 1850, that by it the lands "were granted to the several States in which they lie for a purpose expressed on the face of the act; and that purpose was 'to enable the State to construct the necessary levees and drains to reclaim them.'" The opinion added: "Our first view was, that this trust was so explicit and controlling as to invalidate the scheme finally devised by the legislature of Iowa for the disposal of the land, and under which the contract in question was made. But, on more mature reflection, after hearing additional argument, we are satisfied that such a result did not necessarily follow." The opinion then referred to the act passed by the legislature of Iowa in 1858, by which it was declared that it should be competent and lawful for the counties owning swamp and overflowed lands to devote the same, or the proceeds thereof, either in whole or in part, to the erection of public buildings for the

purpose of education, for the building of bridges, roads, and highways, and for building institutions of learning, or for making railroads through the county or counties to which such lands belonged. The opinion then proceeded: "The contract in dispute was made under this law, and our first impression was that it introduced a scheme subversive of the trust imposed upon the State by the act of Congress; that its effect was to devote the lands and proceeds thereof to purposes different from those which the original grant was intended to secure; that it threw off, or endeavored to throw off, all public responsibility in relation to the trust; and hence that the scheme itself and the contract based upon it were void. But a reconsideration of the subject has brought us to a contrary conclusion. The argument against the validity of the scheme is, that it effects a diversion of the proceeds of the lands from the objects and purposes of the congressional grant. These were declared to be to enable the State to reclaim the lands by means of levees and drains. The proviso of the second section of the act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the State was to have the full power of disposition of the lands; and only gives direction as to the application of the proceeds, and of this application only 'as far as necessary' to secure the object specified. It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof, or other suitable action, in a clear case of violation of the conditions. And, as the application of the proceeds to the named objects is only prescribed 'as far as necessary,' room is left for the exercise by the State of a large discretion as to the extent of the necessity. In the present case it is not shown by allegations in the bill, or other-

wise, (if such a showing would be admissible,) that any necessity existed for devoting the proceeds of the lands in question to the purposes of drainage. No case is shown as the basis of any complaint, even on the part of the general government, much less on the part of the county of Adams, which voluntarily entered into the arrangement complained of. Our conclusion, therefore, is that this objection to the validity of the contract cannot prevail." The opinion then overruled the other grounds urged in favor of the plaintiff, reversed the decree below, and directed a decree to be entered dismissing the bill, without prejudice to the right of the county to bring an action at law for any breach of the terms of the contract.

The provisions of the swamp land act of 1850, and of the Iowa statutes in regard to the swamp lands, were again considered by this court in *Mills County* v. *Railroad Companies*, 107 U. S. 557, at October Term, 1882, the opinion of the court being delivered by Mr. Justice Bradley. In that case, reference was made to *Emigrant Co.* v. *County of Wright*, *supra*, and it was said that the contract there "was declared to be void for actual fraud of the grossest character," and that the question as to whether the disposition of the lands operated as a diversion of the fund, in violation of the original grant, was not fully considered. The opinion also referred to the case of *Emigrant Co.* v. *County of Adams*, *supra*, and quoted a large part of the extract above given from the opinion in that case, and then added: "Upon further consideration of the whole subject, we are convinced that the suggestion then made, that the application of the proceeds of these lands to the purposes of the grant rests upon the good faith of the State, and that the State may exercise its discretion as to the disposal of them, is the only correct view. It is a matter between two sovereign powers, and one which private parties cannot bring into discussion. ' Swamp and overflowed lands are of little value to the government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas, the state governments, being concerned in their settlement and improvement, in the opening up of roads and other public works through them, in the pro-

motion of the public health by systems of drainage and embankment, are far more deeply interested in having the disposal and management of them. For these reasons, it was a wise measure on the part of Congress to cede these lands to the States in which they lay, subject to the disposal of their respective legislatures; and, although it is specially provided that the proceeds of such lands shall be applied, 'as far as necessary,' to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the States alone, when they accepted the grant; and whether faithfully performed or not is a question between the United States and the States; and is neither a trust following the lands nor a duty which private parties can enforce as against the State."

These views were confirmed in the case of *Hagar* v. *Reclamation District*, 111 U. S., 701, 713, at October Term, 1883, where it was said of the swamp-land act of 1850, that the appropriation of the proceeds of the sale of the lands rested solely in the good faith of the State; and that its discretion in disposing of them was not controlled by the condition mentioned in the act, as neither a contract nor a trust following the lands was thereby created.

In the case of *Louisiana* v. *United States*, 22 C. Cl. 284, the State of Louisiana sued the United States for claims arising under the 5 per cent act of 1811, and under the swamp-land acts of 1850 and 1855, and had a judgment for both claims, amounting to $71,385.83, which was affirmed by this court in *United States* v. *Louisiana*, 123 U. S. 32. In that case, the United States interposed the defence of the limitation of six years, as to the swamp-land claim. The Court of Claims held that the action of the Commissioner of the General Land Office, under § 2 of the act of 1855, in determining, on proof by the agent of the State, that any of the swamp land had, within the meaning of the act, been sold by the United States, so as to bring into force the requirement that the purchase money should be paid over to the State, was necessary to a right of action for the money on the part of the State, and that, as such action in that case did not occur more than

six years before the bringing of the suit, the limitation prescribed by § 1069 of the Revised Statutes did not apply. A set-off or counter-claim was interposed in that case by the United States, they alleging that the amount due by citizens of the State of Louisiana to the United States for the direct tax levied by the act of August 5, 1861, 12 Stat. 292, was a proper subject of set-off against the claim of the State in the suit. This contention of the United States was overruled by the Court of Claims, on the ground that the State had never assumed the payment of the tax assessed under the act of 1861. On the appeal to this court by the United States, 123 U. S. 32, it was said in the opinion of the court delivered by Mr. Justice Field, that the statute of limitations did not seem to have any application to the demand arising upon the swamp-land acts; and that, as the Commissioner of the General Land Office had not found and certified the amount due to the State from the sales of swamp lands until the 30th of June, 1885, and the suit was commenced in September, 1886, the limitation of the statute did not apply to the case. It was further held, that the State was not liable for the taxes assessed under the act of August 5, 1861, against the real property of private individuals in the State, and that the Court of Claims had jurisdiction of the action. Therefore, the judgment was affirmed.

In accordance with the views of this court in the cases above cited, it must be held that the proceeds of the swamp lands are not subject to a property trust, either in the hands of the United States or in those of the State, in such sense that the claim of the United States upon the State for the overdue coupons on the Indian Trust bonds, involved in the present case, cannot be set-off against the claim of the State to the swamp-land fund.

Under the act of 1850, the swamp lands are to be conveyed to the State as an absolute gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. The judgment of the State as to the necessity is paramount, and any application of the proceeds by the State to any other object is to be taken as

the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary. By the 2d section of the act of 1855, it is provided that the purchase money received by the United States for the swamp lands sold by them shall be paid over to the State. There is nothing in these provisions of the character of a property trust, and nothing to prevent the application by the State of the swamp-land fund to general purposes. If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress and not in the court.

The same views apply to the provision as to the 5 per cent fund, in the act of 1811, that it shall be applied to laying out and constructing public roads and levees in the State, "as the legislature thereof may direct;" and as to both the 5 per cent fund and the swamp-land fund, we are of opinion that neither of them is of such a character that the debt due to the United States by the State of Louisiana, for the overdue coupons on the Indian Trust bonds, cannot be set off against the fund which is in the hands of the United States. This being so, it follows that the limitation of § 1069 of the Revised Statutes is a bar against the recovery of the item of $13,602.71 of the 5 per cent fund, credited May 8, 1879, and that the amount of the set-off of $31,080, for coupons falling due up to November 1, 1887, on the Indian Trust bonds, is a valid set-off against the remaining $29,970, and is more than sufficient to extinguish that item.

It results from these views that

The judgment of the Court of Claims must be reversed, and the case be remanded to that court, with a direction to enter a judgment in favor of the United States.

WHITBECK *v.* MERCANTILE NATIONAL BANK OF CLEVELAND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 970. Argued March 20, 1888.— Decided April 23, 1888.

The auditor of Cuyahoga County, Ohio, fixed the taxable value of shares in a national bank at 60 per cent of their true value in money, in accordance with the practice adopted for the valuation of other moneyed capital of individuals in the courts and State, and transmitted the same to the State Board of Equalization for incorporated banks. That board increased the valuation to 65 per cent, and this value, being certified back to the auditor, was placed by him on the tax list without a corresponding change being made in the valuation of other moneyed capital of individuals. *Held*, that this was such a discrimination as is forbidden by § 5219 of the Revised Statutes of the United States.

The statutes of Ohio regulating assessments for taxation allow an owner of moneyed capital other than shares in a national bank to have a deduction equal to his *bona fide* indebtedness made from the amount of the assessment of the value of such moneyed capital; but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such a deduction may be obtained. *Held:*

(1) That the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value as in the case of other moneyed capital; and

(2) That the right to it is not lost by not making a demand for it until the entire process of the appraisement and equalization of the value of the shares for taxation is completed, and the tax duplicate is delivered to the treasurer for collection.

The laws of Ohio regulating the taxation of shares in national banks considered.

BILL IN EQUITY to restrain the treasurer of Cuyahoga County, Ohio, from collecting a tax upon shares of the stock of a national bank in Cleveland alleged to have been illegally assessed. Decree granting the relief prayed for except as to three stockholders. The treasurer appealed. The bank took no appeal as to the three shareholders. A certificate of division of opinion was filed. The case is stated in the opinion of the court.

Mr. James Lawrence and *Mr. Clarence Brown* for appellant. *Mr. David K. Watson*, Attorney General of Ohio, and *Mr. Frederick L. Geddes* were with them on the brief.

Mr. W. W. Boynton and *Mr. John C. Hale* for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Northern District of Ohio.

The Mercantile National Bank of Cleveland, Ohio, brought this suit against Horatio N. Whitbeck, the appellant here, as treasurer of Cuyahoga County, in that State, in which the city of Cleveland is located, to restrain him from the collection of certain taxes levied upon the shares of the capital stock of that bank. The substantial allegations of the bill are that upon the assessment of the value of the shares of its capital stock for purposes of taxation they were estimated at sixty-five cents on the dollar of their real value in money, while all other personal property in the city of Cleveland and county of Cuyahoga, including the moneyed capital in the hands of individual citizens of said city and county, was estimated at only sixty cents upon the same basis.

This occurred in the following manner: The auditor of Cuyahoga County, in accordance with the rules and practice adopted for the valuation of other moneyed capital of individuals, fixed the taxable value of these bank shares at sixty per centum of their true value in money, and certified and transmitted the same to the annual State Board of Equalization for incorporated banks. This board made an order increasing the valuation to sixty-five per centum, which latter value was certified back to the auditor and by him placed upon the tax duplicate for the year 1885. This was delivered to the defendant, the treasurer of said county, for the collection of the taxes thereon.

Another point made by the bill was, that while the statutes of Ohio permit the tax-payer owning moneyed capital subject to taxation to make a deduction, from the amount assessed

against him on account of credits, of the amount of his *bona fide* indebtedness, no such provision is made in regard to the indebtedness of any holder of bank stock. The bill sets up as affected by this proposition the names of certain shareholders of the plaintiff bank, who claim that they should be allowed this deduction for their indebtedness upon the taxable value of their bank shares.

The case was tried before the Circuit and District Judges, sitting together, and a certificate of a division of opinion was made, accompanied by a statement of the facts on which the difference arose. A decree was entered in accordance with the opinion of the Circuit Judge, enjoining the collection of the amount represented by the difference between sixty and sixty-five per centum of the actual value of the stock, and granting the relief asked for by the shareholders who claimed a deduction on account of their indebtedness, except as to three of them.

As regards the allegation of a discrimination against the stockholders on account of the shares held by them, caused by the increase in the assessment of five per centum made by the State Board of Equalization, the matter is not altogether free from difficulty; but we are of opinion that there is such a discrimination as is forbidden by § 5219 of the Revised Statutes of the United States. It is certainly true that the tax upon personal property, including the moneyed capital of private citizens, in Cuyahoga County is made upon an estimate of sixty per centum of its cash value in all cases except with regard to bank stocks, and that in regard to these the valuation is fixed upon the same basis at sixty-five per centum. It is probably the fact, as alleged by the counsel for the treasurer, that the State Board having these stocks under consideration may have made a truer estimate and may have equalized their assessed value over the entire State; but this equalization from the very nature of the functions and powers of that body merely has reference to bank shares as among themselves; that is to say, its purpose is to make the capital stock of all incorporated banks in the State equal in valuation for the purposes of taxation so far as relates to their actual cash value. This

board has no other power than this; it has no capacity to equalize the valuation of bank shares for taxation as compared with other moneyed capital in the State. Such capital may, therefore, have a valuation very much below its real value, and even very much below the conventional rate fixed upon bank stocks by the action of this body, and that result almost necessarily follows in this case from the nature of the powers which have been conferred upon it. While it has the power, and it is made its duty, to take the valuation of bank shares, as reported to it by the auditor of Cuyahoga County, and make a comparison between it and the reports of the same character made to it by the eighty other counties in the State, it receives no such report in regard to any other moneyed capital. There is no means furnished it for the purpose of making a comparison of the proportion which the assessment sustains to the true value, as between the banks and the other moneyed capital of the State, in the different counties thereof. While it is not an absolute necessity that this method should result in a discrimination against the national banks, it is one of the probabilities, as has happened in this case, that it may produce such a result, which shall be unfavorable to those institutions.

Section 2804 of the Revised Statutes of Ohio enacts that an annual county board for the equalization of the real and personal property, moneys, and credits in each county, exclusive of cities of the first and second class, shall be composed of the county commissioners and county auditor, who shall meet at the office of the latter in each county on the Wednesday after the third Monday in May, annually. It is provided that this board shall have power to hear complaints and to equalize the valuation of all real and personal property, moneys, and credits within the county. It is under this statute that the assessment was made which the auditor certified to the State Board of Equalization. No complaint has been made that this assessment upon the capital shares of the plaintiff bank was in anywise unequal as regards the assessment upon other moneyed capital.

The organization and method of proceeding of the State

Board of Equalization for incorporated banks is provided for in the following sections of the Revised Statutes of Ohio, 1880:

"SEC. 2808. (As reënacted March 9, 1883; 80 Ohio Laws, 55.) The governor, auditor of State, and attorney general shall constitute a board for the equalization of the shares of incorporated banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of State, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the state auditor.

"SEC. 2809. (As amended March 9, 1883; 80 Ohio Laws, 55.) Said board shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property, and if in the judgment of the board, or a majority of them, the aggregate value of all the bank property so reported to said board by the county auditors is below its true value in money, they may increase or diminish the value of said shares by such a per cent as will equalize said shares to their true value in money; provided, that said board shall not increase or reduce the grand aggregate value of bank shares as returned by the several county auditors by more than twenty (20) per centum."

It is obvious from these two sections that the only power of this board is to diminish or increase the assessed value of the shares of stock by such a per centum as will make them equal among themselves, and that there is no power of equalization so far as other personal property is concerned or in comparison with other moneyed capital in the hands of individuals.

The language directing the board to proceed "according to the rules prescribed by this title for valuing and equalizing the values of real and personal property" does not authorize a comparison of the value of bank shares with that of real and personal property, but is only intended to have regard to the mode of procedure, such as laying before that body the reports of the county auditors, hearing complaints, and equalizing the assessments as between the shares of the different

banks. Therefore in the order by which it equalized the various bank shares as among themselves, from all over the State, and certified this increase of five per centum upon the assessment to the auditor of Cuyahoga County, it had no purpose to change or to equalize the assessment in its relation to other moneyed capital of the State, of the city of Cleveland, or of the county of Cuyahoga.

It is said, however, that the standard of comparison required by the act of Congress is the assessment of all the banks in the State with that upon moneyed capital all over the State, and that there is no evidence presented in this suit that there was any discrimination against the bank if the standard of comparison here suggested is the one which should govern. There is evidence that the rule which was adopted by the board of equalization of Cuyahoga County of fixing the assessment at sixty per centum of the cash value of the property, prevailed in eleven other counties in the State. It is also a fact that in regard to those counties the discrimination against the national banks, as compared with other moneyed capital, is established.

This alone would be sufficient to establish a discrimination as to 23.6 mills out of the entire rate of 26 mills on the dollar of valuation; it being found as a matter of fact that 26 mills was the entire tax levied upon all the property in the county of Cuyahoga under this assessment, of which the amount of 23.6 mills was exclusively devoted to county and city purposes, and but 2.4 mills was levied for state purposes.

While it might, perhaps, be plausibly said, that in regard to taxation for state purposes, the rule of comparison should include the whole State, it is equally clear that for the much larger proportion of tax levied for county and city purposes the assessment upon the moneyed capital of the citizens in such county and city should furnish the standard by which the inequality of taxation should be determined.

As it has already been shown that the board for the equalization of the shares of incorporated banks had neither the authority nor the means to establish and equalize the assessment of the shares of all the banks of the State with the other moneyed capital of the State, we do not very well see how the

oral testimony of witnesses offered to establish this uniformity of assessment could do so; and if it could, how it was competent to do it in the face of the fact that the board had no such power.

In regard to the deduction of their *bona fide* indebtedness, claimed on the part of certain owners of shares in the plaintiff bank from the assessment levied upon such shares, the court finds that no demand was made therefor "either by the complainant or by any of its shareholders until the 17th day of December, A.D. 1885, a date prior to the commencement of this action, at which time the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with law to the treasurer of said county for the collection of said taxes; but the laws of Ohio make no provisions for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured."

Under the decision in *Hills* v. *Exchange Bank*, 105 U. S. 319, we are of opinion that the bank was entitled to relief in the cases of all the shareholders named in the bill, (except James A. Barnett, Robert L. Chamberlain, and James Parmalee,) and that the fact that they did not make an earlier demand for the deduction of their indebtedness from the assessed value of the shares of their bank stock does not defeat their right to have it made by this bill in chancery, for the reason that the court expressly finds that "the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured."

This was precisely the case in regard to *Hills* v. *Exchange Bank*, in which this court said: "We are of opinion that, considering the decision of the Court of Appeals of New York, the action of the assessors in the case of Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could and might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all

persons interested, that no deduction for debts would be made in the valuation of bank shares for taxation. It is, therefore, not now essential to show such an offer when it is established that there were debts to be deducted, and when the matter is still *in fieri*, the tax being unpaid."

In regard to all of the shareholders claiming this deduction, except Barnett, Chamberlain, and Parmalee, the court finds that the allegations of the bill are true, but that as to them they are untrue. It, therefore, granted relief by the injunction as to all of them except these three, as to which it was denied. It is to be observed, however, that the bank takes no appeal from the part of the decree denying relief to these three shareholders.

These principles require the affirmance of the decree of the Circuit Court; and while there will be found in them a sufficient answer to the questions certified by the judges of that court, we do not think it necessary to make a more specific answer to each of them.

The decree is affirmed.

PEORIA AND PEKIN UNION RAILWAY COMPANY *v.* CHICAGO, PEKIN AND SOUTHWESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 210. Argued April 6, 1888. — Decided April 23, 1888.

A railroad company, all whose stock was owned by four other companies, whose roads connected, having obtained a lease of another connecting railroad, and improved the terminal facilities, made a contract with the four companies, by which they should have the use of its tracks and terminal facilities for fifty years, each paying the same fixed rent and certain terminal charges, and any other company with the same terminus might, by entering into a similar contract, acquire like privileges upon paying the same rent and similar charges; and demanded the making of such a contract by the receiver of another company, who previously had the use of the road now leased, and of its terminal facilities, upon terms

agreed on between him and the company owning that road. The receiver objected that the terms demanded were exorbitant and oppressive, and could not be assented to by him without an order of the court which appointed him; and it was thereupon agreed that his company should enjoy like privileges, paying the like terminal charges as the four companies, and such rent as the judge should award, and meantime should pay at the same rate as before. The judge declining to act as an arbitrator, the receiver was excluded from the use of the tracks. *Held*, that he had not assented, and was not liable, to pay the same rent as the four companies, during the time that he used the tracks and terminal facilities of the first company.

THIS was a petition by an intervenor in a suit to foreclose a railway mortgage, in order to compel the receiver of the mortgaged property to pay rent. Decree dismissing the petition, from which the petitioner appealed. The case is stated in the opinion.

Mr. Wager Swayne for appellant. *Mr. C. Walter Artz* was with him on the brief.

Mr. Thomas S. McClelland for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

Pending a suit in equity by the Farmers' Loan and Trust Company against the Chicago, Pekin and Southwestern Railroad Company, to foreclose a mortgage of its road, the Peoria and Pekin Union Railway Company filed this intervening petition to compel the receiver of the defendant company, appointed in that suit, to pay to the petitioner the sum of $16,231.55 for rent of tracks and terminal facilities at Peoria from February 1, 1881, to March 1, 1882.

From the documents in the record, and the very argumentative and somewhat conflicting affidavits of Cohr, the vice-president and general counsel of the petitioner, and of Hinckley, formerly the president and now the receiver of the defendant, the material facts appear to be as follows:

Peoria and Pekin are ten miles apart, on opposite sides of the Illinois River, and connected by two lines of railway tracks, that of the Peoria and Springfield Railroad Company on the

east side of the river, and that of the Peoria, Pekin and Jacksonville Railroad Company on the west side of the river, and each crossing the river on a bridge. Connecting with these at Peoria or at Pekin are the lines of four other railroad companies, the Wabash, St. Louis and Pacific Railway Company, the Indiana, Bloomington and Western Railway Company, the Peoria, Decatur and Evansville Railway Company, and the Peoria and Jacksonville Railroad Company.

The petitioner was organized in 1880, its whole capital stock being owned by these four companies, one quarter by each. On February 1, 1881, the petitioner, having obtained a lease of the Peoria and Springfield Railroad, and acquired by purchase the Peoria, Pekin and Jacksonville Railroad, and having improved the terminal accommodations and facilities at Peoria, entered into a contract in writing with the four companies aforesaid, by which it leased to them for fifty years the tracks between Pekin and Peoria, with the use of its terminal accommodations and facilities at Peoria; and each of the four companies agreed to pay a yearly rent of $22,500 and a proportionate share of the expenses of maintaining the terminal accommodations at Peoria and of terminal services, according to the business done by each; and it was further agreed as follows:

"Eighth. Any other railroad company, whose road shall now or hereafter run into said city of Peoria, or that shall desire to procure an entrance into said city, shall be allowed to acquire the same rights and privileges as the said several lessees, but no other, and upon no less rental, upon entering into a like contract hereto with the party of the first part, except as to representation in the board of directors of the party of the first part and ownership in its capital stock."

Before February 1, 1881, the trains of the defendant company had been run over the road of the Peoria and Springfield Railroad Company, at a rate of compensation fixed by agreement between the receivers of those two companies.

On February 1, 1881, Cohr, in behalf of the petitioner, demanded of Reed, then the receiver of the defendant company, that he should enter into or contract to pay, during his receivership, the same rent and other charges as the four companies,

and insisted that he had no authority to allow the use of the petitioner's tracks on any other terms. Reed objected that the terms demanded were exorbitant and oppressive, and that he had no authority to assent to them without an order of the court; and it was thereupon agreed that the defendant company should enjoy the use of the tracks and the terminal facilities, and should pay the like terminal charges as the four companies, and should also pay such rent from February 1, 1881, as should be determined by Judge Drummond, upon an application to be forthwith made by Reed, and that until such determination the defendant company should pay at the same rate as formerly paid to the receiver of the Peoria and Springfield Railroad Company, and should pay the residue, if any, when the judge should so determine.

Pursuant to this agreement, Reed made an application in writing to Judge Drummond, who, as Cohr testifies, in December, 1881, or early in 1882, informed him that he declined to decide upon it, and that, unless the defendant settled with the petitioner by March 1, 1882, the petitioner might shut out the defendant from its tracks. Upon notice to that effect, Reed declined to pay, and on March 1, 1882, ceased to use the tracks of the petitioner.

The defendant paid the petitioner for the use of its tracks and terminal facilities from February 1, 1881, to March 1, 1882, at the same rate as previously paid to the receiver of the Peoria and Springfield Railroad Company, amounting to $17,537.83. The petitioner claimed for the same period the sum of $9394.38 for terminal expenses, and the sum of $24,375 for rent, and applied the sum received from the defendant to the payment in full of the first of these claims, and in part of the second, leaving $16,231.55, which the petitioner now sought to recover.

The master, to whom the petition was referred, reported that there was nothing before him which enabled him "to report the amount of compensation which the petitioner should have, except as the result of the conditions upon which the receiver continued to use the property after the attempted making of a contract between the parties resulting in the notice

referred to;" but found "from their relations, and the implied understanding upon the part of the receiver arising from them," that the sum claimed was due from the defendant to the petitioner.

The Circuit Court sustained exceptions taken by the defendant to the master's report, and dismissed the petition. Its opinion, which is not made part of the record, is reported in 18 Fed. Rep. 484. The petitioner appealed to this court.

The only matter in dispute is whether the defendant is liable to the petitioner, by way of rent, from February 1, 1881, to March 1, 1882, for anything more than has already been paid. There is no more ground for implying an assent by the defendant to the claim of the petitioner, than for implying an assent of the petitioner to the position of the defendant. When the petitioner demanded of the receiver of the defendant the like rent, as well as the like rate for terminal expenses, as was to be paid by the four companies, the receiver of the defendant declined to assent to the demand without an order of the court whose officer he was. The parties thereupon came to a temporary arrangement, by which the defendant agreed to pay the terminal expenses demanded, and the parties submitted the question of rent to the Circuit Judge as an arbitrator, and it was agreed that until his determination the defendant should continue to pay the same charges that it had paid before February 1, 1881.

By the terms of that agreement, then, the amount of rent to be paid by the defendant was left uncertain and dependent upon the award of the judge. The affidavit of the petitioner's own witness shows that the judge, after some delay, declined to act as an arbitrator. The judge's view upon the subject appears in the opinion afterwards delivered by him in the Circuit Court, in which he said: "On looking into the question at the time, the judge was of the opinion that the contract which was demanded of the receiver by the Peoria and Pekin Union Company was oppressive in its terms, and doubted whether the receiver could afford to pay the prices then demanded; but at the same time, admitting that the Peoria and Pekin Company was the owner of the property, and that it had

the right to prescribe on what terms the receiver should do his railroad business between Pekin and Peoria and in the latter city, stated that if the receiver would not accept the terms he could not be permitted to have the use of the property of the Peoria and Pekin Union Company." The judge, while he recognized the right of the petitioner, as owner of the property, to exclude the defendant from its use, if the defendant would not accept the petitioner's terms, in no way intimated that upon the facts of the case the defendant could be held to have accepted those terms.

There is no evidence tending to show that the sum paid by the defendant is not all that its use of the property was fairly worth. The rent which each of the four companies, who owned all the stock of the petitioner company, agreed by express contract to pay that company, affords no test of what is a reasonable rent as between the petitioner and a stranger, like this defendant, who had no interest in its stock and was no party to that contract. As observed in the opinion of the Circuit Court, "The Peoria and Pekin Union Company was really owned by the other companies which made the agreement with it, and consequently they were substantially owners of the property of the Peoria and Pekin Company. It was substantially a contract, therefore, made by one party with itself, which it was insisted should be the test of payment by the receiver."

Decree affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* MACKEY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 218. Argued April 12, 1888. — Decided April 23, 1888.

The statute of Kansas of 1874, c. 93, § 1, p. 143, Comp. Laws Kansas, 1881, p. 784, which provides that "Every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employés, to any person

sustaining such damage," does not deprive a railroad company of its property without due process of law; and does not deny to it the equal protection of the laws; and is not in conflict with the Fourteenth Amendment to the Constitution of the United States in either of these respects.

THE case, as stated by the court, was as follows:

In 1882, the defendant below, the Missouri Pacific Railway Company, a corporation created under the laws of Kansas, operated lines of railway in the latter State. It also had control of two track-yards adjacent to the city of Atchison, designated respectively as the upper and lower yard, and it used two switch-engines in moving cars from one yard to the other. On the 11th of February of that year the plaintiff was in the service of the company as a fireman on one of these engines employed in transferring cars from one point to another in the upper yard, when it was run into by the other engine, owing to the negligence of the engineer of the latter. By the collision the right foot and leg of the plaintiff were so crushed as to necessitate amputation. For the damages thus sustained the present action was brought in a district court of the State. On the trial the defendant requested the court to instruct the jury, that if they found from the evidence that the plaintiff was injured through the carelessness of a fellow-servant he could not recover; which instruction was refused, and the defendant excepted. The court charged the jury as follows:

"At the common law a master or employé could not be held liable for an injury sustained by one servant by reason of the mere negligence of a fellow-servant engaged in the same common employment, the negligence of the fellow-servant not being deemed in such case the negligence of the master, and such was the law of this State up to 1874; but at that time this rule of the common law was abrogated, so far as it related to railroad companies and their employés in this State, by a statute which reads as follows:

"'Every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any person sustaining such damage.'

Opinion of the Court.

"This enactment so far modifies and changes the common law that a servant or employé of a railroad company may maintain an action against such railroad company for an injury received while in the line of his employment through the negligence of a fellow-servant or employé engaged with him in the same common work of the master or employer, unless such injured servant or employé has himself been guilty of negligence or want of ordinary care which has directly contributed to produce the injury complained of."

To this charge the defendant excepted. The jury found a verdict for the plaintiff for $12,000, upon which judgment was entered. On appeal to the Supreme Court of the State the judgment was affirmed; and to review the latter judgment the case is brought here.

Mr. John F. Dillon, with whom was *Mr. Winslow S. Pierce, Jr.*, on the brief, for plaintiff in error.

Mr. Thomas P. Fenlon, for defendant in error. *Mr. John C. Tomlinson* was with him on the brief.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

At the trial, and in the Supreme Court of the State, it was contended by the defendant, and the contention is renewed here, that the law of Kansas of 1874 is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it deprives the company of its property without due process of law, and denies to it the equal protection of the laws.

In support of the first position the company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employés caused by the negligence or incompetency of a fellow-servant, which prevailed in Kansas and in several other States previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompe-

tency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow-servants in the same common employment, and acting under the same immediate direction. *Chicago and Milwaukee Railway* v. *Ross*, 112 U. S. 377, 389. Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company, as we understand it, is that that law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the 14th Amendment. The plain answer to this contention is, that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the Fourteenth Amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are sub-

sequently suffered by employés, though it may be by the negligence or incompetency of a fellow-servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt.

The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment. *Santa Clara County* v. *Southern Pacific Rail-*

road Company, 118 U. S. 394; *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, 125 U. S. 187. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employés, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories. See *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 523; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703.

Judgment affirmed.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY *v.* HERRICK.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 202. Argued April 2, 3, 1888. — Decided April 23, 1888.

This case is affirmed on the authority of *Missouri Pacific Railway Co.* v. *Mackey*, *ante*, 205.

The case is stated in the opinion.

Mr. C. K. Davis for plaintiff in error.

Mr. Edward J. Hill for defendant in error.

Mr. Justice Field delivered the opinion of the court.

The defendant is a corporation created under the laws of Minnesota, and in December, 1881, it operated a railroad ex-

tending from Minneapolis, in that State, to Fort Dodge, in Iowa. A law of Iowa, then in force, provides that "every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employés, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

On the 6th of December, 1881, the plaintiff was employed by the defendant as a brakeman on one of its cars, and on that day, in Webster, in Iowa, it became his duty to make a coupling of an engine and a freight car. The engine was in charge of one of its employés, an engineer, and whilst the plaintiff was making the coupling the engine was, by the negligence and mismanagement of the engineer, driven against the car, causing severe and permanent injuries to the plaintiff. To recover damages for the injuries thus sustained he brought this action in a District Court of Minnesota, relying upon the law of Iowa quoted above. The defendant in its answer alleged, and on the trial contended, that this law was abrogated by that provision of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The District Court held the law to be in full force, and that under it the railroad company was responsible to the plaintiff for the injuries sustained by him through the negligence of the engineer. The plaintiff accordingly recovered a verdict for two thousand dollars, upon which judgment was entered. Upon appeal to the State Supreme Court the judgment was affirmed, and to review that judgment the case is brought here.

We have just decided the case of *Missouri Pacific Railway Co.* v. *Mackey*, *ante*, 205, where similar objections were raised

to a law of Kansas, which on the point here involved is not essentially different from the law of Iowa, namely, in imposing liabilities upon railroad companies for injuries to employés in its service, though caused by the negligence or incompetency of a fellow-servant, and we held that the law was not in conflict with the clauses referred to in the Fourteenth Amendment. On the authority of that case the judgment in the present one must be

Affirmed.

UNITED STATES *v.* BROADHEAD.

UNITED STATES *v.* BROADHEAD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Nos. 233, 234. Argued April 18, 1888. — Decided April 30, 1888.

On the authority of *United States* v. *Hill*, 123 U. S. 681, it is *held*, that an action against sureties to recover on a bail bond conditioned for the appearance of the principal to answer to an indictment for making and forging checks against an assistant treasurer is not a case for the enforcement of a revenue law, within the intent of Rev. Stat. § 699.

No interest can be recovered in an action by the United States upon a bail bond conditioned for the appearance of a person to answer to an indictment for forgery.

These were actions against sureties on bail bonds. The case is stated in the opinion of the court.

Mr. Assistant Attorney General Maury for plaintiff in error.

No appearance for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

These cases are suits brought upon two bonds given by John F. Broadhead and his sureties, conditioned for his appearance in the District Court of the United States for the

District of California, to answer two separate indictments for making and forging checks on the Assistant Treasurer of the United States at San Francisco. The penalty of each of these bonds was $5000, and, according to well settled principles, no interest can be recovered in such a suit as this, nor can any recovery be had beyond the amount prescribed in these instruments, except for costs.

Section 3 of the "act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," approved February 16, 1875, 18 Stat. 315, c. 77, § 3, fixing the amount necessary to give jurisdiction to this court of writs of error from the Circuit Courts at a sum in excess of five thousand dollars, applies to the United States as well as to other parties, except in the cases enumerated in § 699 of the Revised Statutes. None of these exceptions apply to the present cases.

It was attempted in *United States* v. *Hill*, 123 U. S. 681, to establish the proposition that that case was for the enforcement of a revenue law, and, therefore, came within the exceptions specified. It was, however, overruled by this court, and the opinion in that case forbids the idea that these cases can be treated as an exception to the general rule.

As the act of 1875, above cited, requires that there shall be an amount in controversy, exclusive of costs, exceeding five thousand dollars, and as no such recovery can be had in the cases now under consideration,

The writs are dismissed.

JONES'S ADMINISTRATOR *v.* CRAIG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 235. Submitted April 18, 1888. — Decided April 30, 1888.

A brought ejectment against B. B thereupon filed a bill in equity, (which was subsequently amended,) to remove a cloud from the title, setting up that the deed under which A claimed was a mortgage, with a written

contract of defeasance. A demurred. Upon hearing on the demurrer it was ordered that if B should, within fifteen days, bring into court the amount due on the mortgage, and interest, and all taxes paid by A, etc., A should be restrained from further prosecution of the ejectment suit; but that if he should fail to do so within that time, the bill should be dismissed and the defendant allowed to proceed with the suit. *Held*,

(1) That this order, made upon hearing of a demurrer to a bill in chancery, was wholly irregular; but,

(2) That this court was without jurisdiction as the order was not a final decree.

In equity. The case is stated in the opinion.

Mr. G. E. Pritchett for appellants.

Mr. W. J. Connell for appellee.

Mr. Justice Miller delivered the opinion of the court.

The appellants here, Henry O. Jones and John Jort, brought their bill in chancery against Walter Craig, the defendant, in the Circuit Court of the United States for the District of Nebraska.

The object of the bill was to remove a cloud upon the title to certain lands. The defendant had brought an action of ejectment to recover the possession, and, having a *prima facie* title of record upon which he could recover, this bill was filed for the purpose of setting up an equitable defence. Thereupon a temporary injunction was allowed, restraining Craig from prosecuting his action of ejectment until the chancery suit was decided.

The allegation of the bill was, that a deed under which the plaintiff in the ejectment suit asserted title was executed as a mortgage, with a written contract of defeasance when the money loaned should be repaid. To this bill a demurrer was filed, upon which the court made an order in the following language:

"If the plaintiff will amend bill and bring into court proper amount of money to redeem and pay taxes, all of same to bear interest from time money was due, and interest on taxes from date of payment at present rate of interest, then perpetual

injunction can be allowed. Costs of both suits to abide further order."

Afterwards the plaintiffs did file an amended bill, to which likewise there was a general demurrer. Upon the hearing of that demurrer the court made the following order:

"Henry O. Jones et al.
v. } 193—H.
Walter Craig.

"This cause coming on to be heard upon the demurrer of the defendant to the amended bill of complaint filed herein, and the court being fully advised in the premises, it is ordered that if within fifteen days the plaintiff bring into court the amount of the note and mortgage set forth in the bill of complaint, with interest thereon from the time the note became due, with interest thereon at ten per cent per annum until November 1, 1879, and from November 1, 1879, to date of this order, at seven per cent per annum, together with all taxes paid by defendant upon the land described in said bill, with interest thereon at ten per cent per annum, then the defendant be restrained from the further prosecution of the cause in ejectment set forth in said bill of complaint, and entitled *Walter Craig* v. *Henry O. Jones;* but if the plaintiff shall fail so to do within the time mentioned, the said demurrer to said bill be sustained and the said bill of complaint be dismissed, and the defendant herein be allowed to proceed with the prosecution of his said action at law. To the ruling and decision of the court the plaintiffs except."

This order, made upon the hearing of the demurrer, to a bill in chancery, is wholly irregular.

This court, however, has no jurisdiction of the case as it stands, because the order just cited is not a final decree. Something yet remains to be done in order to make it such, and that action depends upon whether or not the complainants will comply with the order to bring in the sum due on the mortgage. If that order is complied with, then a decree should be made, upon the hypothesis on which the order was made, in favor of the complainants in the bill, and quieting their title. If, however, the money is not brought into court,

then, according to the theory of the order, the bill of complaint should be dismissed. But, even assuming the right of the court to make the order, as well as its validity, the circumstances under which the bill of complaint is to be dismissed or the relief granted to the complainants named therein, and the sum to be paid, are matters which are yet to be determined, which may turn out either one way or the other, and which, when ascertained, will be the foundation for a final decree. There is no final decree as the matter now stands.

The appeal is therefore dismissed, and the case remanded to the Circuit Court for further proceedings.

DE SAUSSURE *v.* GAILLARD.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 205. Argued and Submitted April 4, 1888. — Decided April 30, 1888.

It appearing that, before reaching and deciding the federal question discussed here, the Supreme Court of South Carolina had already decided that the plaintiff's action could not be sustained according to the meaning of the provisions of the statute of that State under which it was brought, this court dismisses the writ of error for want of jurisdiction, under the well settled rule that, to give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

When a State grants a right of remedy against itself, or against its officers in a case in which the proceeding is in fact against the State, it may attach whatever limitations and conditions it chooses to the remedy; and its own interpretation and application of its statutes on that subject, given by its own judicial tribunals, are conclusive upon the parties seeking the benefits of them.

THE court stated the case as follows:

The complaint in this case filed in the Court of Common Pleas in the County of Charleston, South Carolina, alleged

Statement of the Case.

that the plaintiff was the owner and holder of three bonds of the State of South Carolina, two designated by the numbers 850 and 851, for $500 each, and one by the number 2290, for $1000; that thereby the State of South Carolina promised to pay to the bearers the sums therein named on the 1st day of July, 1893, with interest at the rate of six per cent per annum payable semi-annually, on the 1st day of January and July of each year, on the presentation of the proper coupons thereto annexed bearing the signature of the State Treasurer, said coupons being receivable in payment of all taxes due the State during the year in which they mature, except for the tax levied for the public schools, the words following being indorsed on each of the said bonds, viz.: "The payment of the interest and the redemption of the principal of this bond is secured by the levy of an annual tax of two mills upon the entire taxable property of the State. The faith, credit, and funds of the State are hereby solemnly pledged for the punctual payment of the interest and redemption of the principal of this bond by the act of the General Assembly approved December 22d, 1873;" and upon each of said coupons was indorsed the following: "State of South Carolina. Receivable in payment of all taxes except school tax;" that the plaintiff became the holder for value of the three bonds mentioned in the year 1878, and of all the coupons thereto annexed, including the coupon which matured on each, respectively, on the 1st day of January, 1882; that notwithstanding the contract of the State expressed in the act of December 22, 1873, recited in said consolidation bonds, the General Assembly of South Carolina, by an act entitled "An act to raise supplies and make appropriations for the fiscal year commencing November 1st, 1881," approved February 9, 1882, has prohibited the county treasurers of the State from receiving the coupons of said bonds in payment of the taxes levied by the said act, which last mentioned act the plaintiff charges to be void as repugnant to article 1, section 10, of the Constitution of the United States, forbidding the States to pass any law impairing the obligation of contracts.

The complaint further alleges that the defendant is the

county treasurer for Charleston County, whose duty it is to collect and receive the taxes due to the State of South Carolina upon the property situate in that county; that the plaintiff is the owner of property in said county upon which taxes were levied under the provisions of the act to raise supplies for the fiscal year commencing November 1, 1881, in the sum of $153.86, of which sum $29.34 were levied by the said act for the public schools; that on the 18th day of December, 1882, the plaintiff tendered to the defendant, as county treasurer, in payment of said taxes, $131.97 in cash, and the remainder, viz., $60, in the coupons of the said consolidated bonds Nos. 850, 851 and 2290, which matured on the 1st day of January, 1882; that the defendant wrongfully and illegally refused to receive the said coupons, and assigned as a reason therefor that he was forbidden so to do by the provisions of the said act; whereupon the plaintiff paid to the defendant, under protest, the sum of $191.97 in legal tender notes of the United States, in pursuance of the provisions of an act of the General Assembly of said State, approved the 24th of December, 1878, entitled "An act to facilitate the collection of taxes."

Plaintiff therefore demands judgment "that it be adjudged that the amount of sixty dollars in United States currency paid by the plaintiff to the defendant on the eighteenth day of December, 1882, was wrongfully and illegally collected and ought to be refunded, and that a certificate of record thereof be issued accordingly to the plaintiff; that he have such further relief in the premises as the nature of the case may require and to the court may seem meet and proper."

The answer of the defendant set forth the history of the legislation of the State of South Carolina on the subject subsequent to the passage of the act of December 22, 1873, known as the consolidation act as follows:

"II. Defendant, further answering, alleges that subsequent to the passage of said act the General Assembly of the said State, by a 'Joint resolution to raise a commission to investigate the indebtedness of the State,' approved June 8, 1877, provided a commission to make a complete and thorough investigation of

the entire amount of consolidated bonds and certificates of stock which had been issued under the 'consolidation act' aforesaid, and of the bonds, coupons, and certificates of stock which had been surrendered to the state treasurer in exchange for the consolidated bonds and certificates of stock issued under said act, and to report to the General Assembly any illegality or non-conformity to law in the issue of consolidated bonds and certificates of stock, and the grounds of the same, which commission is known as the 'bond commission.'

"That the said commission made a report to the General Assembly of the result of the investigation made by them under the joint resolution aforesaid, with schedules annexed showing the different classes of bonds and certificates of stock which had been surrendered in exchange for consolidated bonds and certificates of stock, Schedule 6 showing the consolidated bonds and certificates of stock which, in the judgment of the said commission, were not issued in accordance with law and were not authorized to be consolidated under the 'consolidation act.'

"And thereupon the General Assembly, by a 'Joint resolution providing a mode of ascertaining the debt of the State and of liquidating the same,' approved March 22, 1878, created a special court, known as the 'court of claims,' to hear and determine any case or cases made up or brought to test the validity of any of the consolidated bonds or certificates of stock or of any of the various classes of bonds or certificates of stock mentioned in the said report of the 'bond commission' as not issued in accordance with law.

"It was further provided by the joint resolution aforesaid that there should be the same right of appeal from the said 'court of claims' to the Supreme Court of South Carolina as from the Circuit Courts of the said State, and with a right of appeal by writ of error or otherwise as provided by law to the Supreme Court of the United States.

"That said special court should have the same right to enter judgment, issue execution, punish for contempt, and enforce its mandates as was then possessed by the Circuit Courts of the State of South Carolina.

Statement of the Case.

"That the State should be represented in said special court by the attorney general and two associate counsel to be selected by the joint vote of the General Assembly.

"That the attorney general and his associates, with the consent of the creditors of the State, or so many of them as shall be necessary, might make up a case or cases to be heard and determined in said court, in which, if practicable, the State should be the defendant, to test the validity of the said consolidated bonds, coupons, and certificates of stock mentioned in Schedule 6 of the report of the 'bond commission,' bringing before the court the various classes of vouchers which it is stated in the said report impair the validity of the said consolidated bonds, coupons, or certificates of stock or any of them.

"The said joint resolution further provided for the levy for the current year of a tax sufficient to pay the coupons and interest orders maturing on the outstanding consolidated bonds and certificates of stock during the said fiscal year, the interest on the consolidated bonds and certificates of stock mentioned in Schedule 5 of the report of the 'bond commission' as subject to no valid objection to be paid, and the payment of the interest on the several classes of consolidated bonds and certificates of stock mentioned in Schedule 6 of said report whenever there should be a final adjudication as to the validity of the several classes of bonds and stocks in the manner therein provided, and none other.

"That in pursuance of the provisions of the said joint resolution, actions in which the State of South Carolina was the defendant were, with the consent of the attorney general and his associates, brought in the said 'court of claims' on coupons of the bonds of the various classes mentioned in Schedule 6 of the report of the 'bond commission.'

"That after trial and hearing of the said causes, the said 'court of claims' rendered judgment in favor of the State.

"From the judgments of the 'court of claims,' in these several cases, appeals were taken to the Supreme Court of the State of South Carolina, as provided in the joint resolution establishing the said 'court of claims.'

Statement of the Case.

"That upon the hearing of the said appeals the Supreme Court of the State of South Carolina, at the April term, 1879, in the cases entitled '*G. M. Walker, Cashier, Appellant* v. *The State of South Carolina, Respondent*,' and '*F. J. Pelzer, Appellant* v. *The State of South Carolina, Respondent*,' decreed and adjudged:

"First. That all the bonds issued under the 'consolidation act' are valid obligations of the State of South Carolina, except as follows:

"1st. Such as were issued in exchange for bonds issued under the act entitled 'An act to authorize a loan for the relief of the treasury,' approved February 17, 1869, or for the coupons of such bonds, the said act being repugnant to § 7, article IX, of the constitution of the State of South Carolina, in that it purports to create a debt which was not 'for the purpose of defraying extraordinary expenditures,' and the debt sought to be created not being 'for some single object,' and such object not being 'distinctly specified therein,' as required by the said section and article of the constitution.

"2d. Such as were issued in exchange for the second issue of bonds under an act entitled 'An act to authorize a state loan to pay interest on the public debt,' and which were indorsed 'issued under act approved August 26, 1868,' or the coupons of such bonds, the said bonds and coupons being absolutely void, even in the hands of *bona fide* holders, because issued without any authority whatever.

"3d. Such as were issued in exchange for those conversion bonds which were issued in exchange for either of the bonds or coupons of the two classes mentioned.

"Second. That if any consolidated bond rests wholly upon any of the three objectionable classes of bonds therein mentioned, then it is wholly void; but if it rests only in part upon such objectionable bonds and coupons, then it is void only to the extent which it does rest upon such objectionable bonds or coupons, and for the balance it is a valid obligation of the State.

"Third. That the burden of proof is upon the State to show that any particular bond which may be brought into

question does rest either in whole or in part upon such objectionable bonds and coupons, and if in part only, then the State must show what part is so affected.

"III. Defendant further alleges that by an act entitled 'An act to provide for the settlement of the consolidated debt of the State in accordance with the decision of the Supreme Court of the State of South Carolina,' approved December 23, 1879, after reciting the legislation and the decision of the Supreme Court of the State of South Carolina in relation to the consolidated debt of the State hereinbefore set forth, and that it is to the interest of the State and her creditors that the principles established in the said decision of the Supreme Court should be accepted as final and forthwith applied in the elimination from the consolidated debt of the State of all invalid material, a special commissioner was appointed to ascertain and establish the exact percentage and amount of the invalidity of each and every consolidated bond and certificate of stock of the state consolidated debt and of the interest thereon in accordance with the principles laid down in the said decision of the Supreme Court of the State.

"And it was therein further provided that the said special commissioner should, at least once in each month during the period of said ascertainment, make a detailed report to the state treasurer, setting forth therein by their numbers the consolidated bonds, coupons, certificates of stock, and interest orders investigated by him during the previous month; also whether the same, under the decision of the Supreme Court aforesaid, be wholly valid or only partially valid, and where only partially valid in each case he should also set forth the exact percentage, amount, and character of the invalidity; that he should continue to make such detailed reports to the state treasurer until he should have investigated and reported upon the entire consolidated debt of the State.

"It was further therein provided that every holder of any consolidated bond or certificate of stock, or of the interest thereon reported by said special commissioner as partially invalid, shall have the right to surrender to the state treasurer for cancellation such bonds, certificates of stock, and interest;

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and upon such surrender and cancellation he shall be entitled to receive from the state treasurer, who is authorized and required to issue the same, a new bond or certificate of stock equal in amount to the exact amount of the valid portion of such bond, certificate of stock, coupon, or interest order; such new bonds and certificates of stock to be in all respects similar and of like validity to and having the same benefits and privileges as those provided for in the 'consolidation act,' approved 22d December, 1873, saving and except that the first coupon or interest to mature thereon shall mature on the 1st of January, 1879, and the same rights and privileges are likewise given to the holders of detached coupons and interest orders.

"And it was further thereby declared 'that the bonds and stocks reported by the special commissioner as valid, and the portions of the bonds and stocks also reported by him as valid, but exchanged by their holders, as hereinbefore provided, for new consolidated bonds or stocks, are hereby declared to be valid and unquestioned obligations of the State.' (And the bonds and stocks so declared to be unquestionable obligations of the State are designated and known as 'brown consols.')

"That the special commissioner appointed under the act aforesaid did perform the duties required of him by said act, and did make to the state treasurer from time to time the report of his investigations until he had investigated and reported upon the entire consolidated debt of the State, as required by the said act, which reports of the said special commissioner remain in the office of the state treasurer.

"That by an act entitled 'An act to extend the time for funding the unquestionable debt of the State,' approved December 24, 1880, the comptroller general of the State is required to examine into the character and material of all consolidated bonds and certificates of stock of the State issued since the first day of January, 1866, together with the coupons and interest orders thereon, which may be presented to him for this purpose by the holders thereof, and to report to the state treasurer how the said bonds, certificates of stock, coupons, and interest orders are affected by the decision

of the Supreme Court of the State hereinbefore stated and the exact percentage of invalidity in the material reported upon as established by the said decision.

"And the state treasurer is authorized and required, in lieu of the bonds, stocks, coupons, and interest orders so surrendered, to issue consolidated bonds and certificates of stock for fifty per cent of the face value of the valid material surrendered.

"That the State has since provided for the levy of an annual tax upon the taxable property of the State and for the payment by the state treasurer, from the proceeds of said tax, of the interest on the entire consolidated debt of the State, ascertained and reported by the special commissioner aforesaid to be valid, in accordance with the decision of the Supreme Court aforesaid, and also upon such portions of the same as shall have been ascertained and reported by said special commissioner to be valid and justly due by the State as the same shall appear from the certificates of the said special commissioner filed in the office of the state treasurer.

"That by joint resolution approved 9th February, 1882, it was resolved as follows:

"Whereas the consol bonds bear upon their face the contract of the State to receive the coupons of the same for taxes; and

"Whereas, from the fact that the green consols outstanding are more or less tainted with invalidity, varying with each security (which has been established by the courts and acquiesced in by the holder), the coupons from this class of bonds cannot be received by the tax collector, but can only be paid at the state treasury where access to the registry permits the amount of invalidity in each coupon to be ascertained: Now, therefore, in order to hasten the process now going on of the conversion of green consols into brown consols, which latter represent the unquestioned consol debt of the State, and the coupons from which are now being received in payment for taxes:

"Be it resolved, That on and after the first day of January, eighteen hundred and eighty-three, the interest upon the

green consol bonds and stocks of the State shall not be paid at the treasury until said securities have been converted into brown consol bonds and stocks."

The answer then proceeded to set forth the particulars in which it was claimed that the consolidated bonds described in the complaint are not valid obligations of the State of South Carolina, and further alleged "that the holders of the bonds Nos. 850, 851 and 2290 mentioned in the complaint did not bring the same before the special 'court of claims,' and that they have never surrendered the same to the commissioner or the comptroller general or the state treasurer to ascertain and establish the exact percentage and amount of the invalidity of the said bonds in accordance with the principles laid down in the decision of the Supreme Court of the State of South Carolina aforesaid, as provided by law, and have never received new consolidated bonds or certificates of stock equal in amount to the valid portions of said bonds, as provided by law, known as 'brown consols.'"

The answer further alleged that the act entitled "An act to raise supplies and make appropriations for the fiscal year commencing November 1, 1881," approved February 9, 1882, "provides that all taxes assessed and payable under the said act shall be paid in the following kinds of funds and no other: Gold and silver coin, United States currency, national bank notes, and coupons which shall become payable during the year 1882 on the valid consolidated bonds of the State known as 'brown consols:' Provided, however, the jury certificates and the *per diem* of state witnesses in the circuit courts shall be received for county taxes, not including school taxes;" and the defendant admitted and justified under the terms of said act his refusal, as county treasurer of Charleston County, to receive the coupons tendered by the plaintiff in payment of taxes.

The cause came on for trial before a jury, who, under the instructions of the court to that effect, found a verdict for the defendant, on which judgment was accordingly rendered. On appeal to the Supreme Court of the State this judgment was affirmed. To review that judgment the present writ of error has been sued out.

Mr. Clarence A. Seward, *Mr. Samuel Lord* and *Mr. T. M. Mordecai* for plaintiff in error, submitted on their brief.

Mr. Joseph H. Earle, Attorney General of South Carolina, for defendant in error.

Mr. Justice Matthews, after stating the case, delivered the opinion of the court.

This action is not brought against the defendant in his individual capacity for a trespass or wrong alleged to have been committed by him as a natural person upon the property or personal rights of the plaintiff; it is brought against him in his official capacity as Treasurer of the County of Charleston, to recover judgment for a sum of money voluntarily paid by the plaintiff, though under protest, demanded and received by the defendant in his official capacity, contrary, as the plaintiff alleges, to law. The judgment sought is not a personal judgment against the defendant, but for a judicial declaration that the money paid was wrongfully and illegally collected, and ought to be refunded in order that a certificate of record thereof may be issued accordingly, to the end that the amount might be repaid out of the state treasury.

The action is founded expressly on the provisions of the act of the General Assembly of the State of South Carolina, approved December 24, 1878, entitled "An act to facilitate the collection of taxes." The first section of that act provides: "That in all cases in which any state, county, or other taxes are now or shall hereafter be charged upon the books of any county treasurer of the State against any person, and such treasurer shall claim the payment of the taxes so charged, or shall take any step or proceeding to collect the same, the person against whom such taxes are charged or against whom such step or proceeding shall be taken shall, if he conceives the same to be unjust or illegal for any cause, pay the said taxes notwithstanding, under protest, in such funds and moneys as the said county treasurer shall be authorized to receive by the act of the General Assembly levying the same, and

upon such payment being made the said county treasurer shall pay the taxes so collected into the state treasury, giving notice at the time to the comptroller general that the payment was made under protest, and the person so paying said taxes may at any time within thirty days after making such payment, but not afterwards, bring an action against the said county treasurer for the recovery thereof in the Court of Common Pleas for the county in which such taxes are payable; and if it be determined in said action that such taxes were wrongfully or illegally collected, for any reason going to the merits, then the court before whom the case is tried shall certify of record that the same were wrongfully collected and ought to be refunded, and thereupon the comptroller general shall issue his warrant for the refunding of the taxes so paid, which shall be paid in preference to other claims against the treasury: *Provided*, That the county treasurers shall be required to receive jury and witness tickets for attendance upon the circuit courts of the State receivable for taxes due the county in which the said services are rendered."

The second section of the act prohibits any other remedy "in any case of the illegal or wrongful collection of taxes or attempt to collect taxes, or attempt to collect taxes in funds or moneys which the county treasurer shall be authorized to receive under the act of the General Assembly levying the same, being other than such as the person charged with said taxes may tender or claim the right to pay, than that provided in § 1 of this act." It expressly provides that "no writ of mandamus shall be granted or issued from any court, or by the judge of any court, directing or compelling the reception for taxes of any funds, currency, or bank bills not authorized to be received for such taxes by the act of the General Assembly levying the same;" and directs that "no writ, order, or process of any kind whatsoever, staying or preventing any officer of the State charged with a duty in the collection of taxes from taking any step or proceeding in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court, or the judge of any court, but in all cases whatsoever the person against whom any taxes shall

stand charged upon the books of the county treasurer shall be required to pay the same in such funds and moneys as the said county treasurer shall be authorized to receive by the act of the General Assembly levying the said taxes, in manner and form as above provided, and thereupon shall have his remedy under the provisions of the first section of this act, and in no other manner."

The third section of the act is as follows: "That in all cases in which any person against whom any taxes stand charged upon the books of any county treasurer of the State has heretofore tendered in payment of the same any funds, currency, or bank bills, other than such as the said treasurer was authorized to receive by the act of the General Assembly levying said taxes, the said treasurer shall receive from such person the said taxes without penalty in funds or moneys authorized to be received by the act of the General Assembly levying the same: *Provided*, That such taxes shall be so paid within sixty days from the passage of this act; and any person so paying the same may do so under protest, and thereupon shall be entitled to all the benefits of the remedy provided in § 1 of this act."

The Supreme Court of South Carolina, in rendering the judgment now under review, 21 South Carolina, 560, referred in its opinion to the legislation of the State on the subject of its bonded indebtedness, an abstract of which is given in the pleadings, beginning with the joint resolution adopted June 8, 1877, and declared (p. 567), that it "was manifestly designed to ascertain *judicially*, by the rules and principles of law which regulate contracts between individuals, what was the valid debt of the State, and to make ample provision for the prompt and punctual payment of the interest on the debt so ascertained." After tracing the history of this legislation, and of the judicial and other proceedings taken thereunder, the opinion of the Supreme Court of South Carolina proceeds as follows (p. 568):

"In pursuance of these provisions, a very large amount of the original consolidation bonds, which were colored green and are usually designated as green bonds or 'green consols,'

were exchanged for the new consolidation bonds, colored brown, and are usually designated as 'brown bonds' or 'brown consols,' and represent the valid, unquestioned debt of the State, the coupons on which are received for taxes or are promptly paid on presentation. But as it was impossible to tell whether a 'green bond' represented in whole or in part, and, if so, what part, any portion of the valid debt of the State without an examination of the records of the office of the treasurer of the State, where the various reports of the special commissioner above mentioned were filed, the various county treasurers of the State are not allowed to receive the coupons of the 'green bonds' in payment of taxes until they have been examined and any invalidity which they may contain eliminated and the valid portion converted into 'brown bonds.'

"It seems, therefore, that the scope and effect of this legislation was not to impair the obligation of any contract entered into by the State with its bondholders, whereby the State had agreed to receive the coupons of certain bonds in payment of taxes, but was simply to provide a mode of proceeding by which it could be definitely and easily ascertained whether a coupon offered in payment of taxes represented any portion of the valid debt of the State; for, unless it did, there certainly was no contract on the part of the State that it should be received in payment of taxes. . . . It certainly cannot be pretended that because a tax-payer tenders in payment of his taxes a coupon of a bond purporting to be a consolidation bond of the State, colored green, that the State and its fiscal officers are bound to receive it without question as to whether it is valid or invalid; and as the State cannot be sued except with its own consent, and then only in the mode which it permits, it follows necessarily that the only mode by which the validity of the coupon so offered in payment of taxes can be tested is that which has been prescribed by the State."

In answer to the objection that the present plaintiff was not a party to any of the actions instituted in the court of claims to test the validity of his bonds, and that he is not bound by any adjudication therein, the opinion says: "This

position might possibly be very well maintained if the defence here was based simply on the doctrine of *res adjudicata;* but that is not the ground upon which the defence rests. The true ground is, that, as the State could not be sued except with its own consent, and then only in the mode which it had seen fit to prescribe, and as the State did prescribe a mode by which it could be sued, and the validity of its debt tested upon the same principle by which the contracts of individuals are tested, and having invited all persons having claims against it, whose claims were disputed, to come in and assert and establish their claims, one who has failed to avail himself of the opportunity thus offered cannot afterward, in another proceeding not permitted by the State, maintain an action against the State or against any of its officers for refusing to do that which the laws of the State forbid."

The Supreme Court of South Carolina then proceeds to examine the contention on the part of the plaintiff, that the act of the 24th of December, 1878, entitled "An act to facilitate the collection of taxes," 16 Stats. South Carolina, 785, expressly authorizes an action against the county treasurer when such coupons as his have been tendered for taxes and refused. Upon that point its opinion is expressed as follows (p. 570):

"This position is, we think, based upon a total misconception of the true meaning of that act. It certainly never was designed to afford an opportunity to a bondholder to reopen the question as to the validity of any portion of the state debt, which it was supposed had been determined by the decision of this court in the '*Bond Debt Cases*,' from which no intimation of appeal had been given. The very object of the legislation of the State hereinbefore considered was, as we have seen, to obtain a final determination of the question of the validity of the state debt; and certainly the legislature, by an act passed nearly a year before such *final* determination was reached, never intended to afford the means of reopening any of the questions thus finally determined. In addition to this, the phraseology of the act shows that it was never designed to afford a remedy to the bondholder in case his

coupons were refused when tendered for taxes, but was intended solely to afford a remedy in case bills of the bank of the State were refused when tendered for taxes. But even if it should be conceded that the terms of the act to facilitate the collection of taxes were broad enough to cover a case in which coupons of bonds purporting to be bonds of the State are refused when tendered for taxes, as well as a case in which taxes are tendered and refused in other 'funds and moneys' than the collecting officers are authorized by the act levying such taxes to receive, we do not see how these actions can be maintained. By the express terms of the act it must be made to appear that the county treasurer has *illegally* and *wrongfully* refused to receive payment of the taxes assessed against the plaintiff in anything else but gold and silver coin, United States currency, national bank notes, and coupons which shall become payable during the year 1882 on the valid consolidation bonds of this State, known as 'brown bonds,' as required to do by the 7th section of the 'Act to raise supplies and make appropriations for the fiscal year commencing November 1, 1881,' approved February 9, 1882, 17 Stats. South Carolina, 1070. Practically this last mentioned act forbids county treasurers from receiving in payment of taxes any coupons of bonds which have not been ascertained in the manner prescribed by the legislation hereinbefore mentioned to be valid obligations of the State. Now, if, as we have seen, the State had the right to prescribe the mode by which the validity of any bond purporting to be an obligation of the State should be tested and determined, and if, as we have also seen, such mode was prescribed, and the validity of all the various classes of bonds purporting to be obligations of the State was passed upon and finally determined, it would seem to follow necessarily that the State had a perfect right to forbid its officers charged with the collection of its revenue from receiving in payment of taxes any coupons or other form of obligation which had not only not been adjudged to be a valid obligation of the State, but which, on the contrary, had been expressly adjudged to be invalid. There certainly can be notning illegal or wrongful in an officer of the State

yielding obedience to a law of the State passed in the usual form, in pursuance of a judgment of its highest judicial tribunal, from which there had been no appeal to the tribunal of last resort, though express provision had been made for such appeal."

After having thus decided that the present action was not maintainable under the provisions of the act of December 24, 1878, the Supreme Court of South Carolina proceeds to review the grounds of its prior decisions in the *Bond Debt Cases*, 12 South Carolina, 200, 263, 294, and restates and reaffirms the same, going at large into the question of the validity of the bonds held by the plaintiff as obligations of the State, adjudging them to be invalid. The conclusion follows and is declared that the act of the General Assembly entitled "An act to raise supplies and make appropriations for the fiscal year commencing November 1, 1881," approved February 9, 1882, alleged by the plaintiff to be void as impairing the obligation of the State contained in the bonds and coupons, is a valid and constitutional law, and justified the defendant, as county treasurer, in refusing to receive the coupons in payment of taxes when tendered.

It thus appears that in point of fact the Supreme Court of the State of South Carolina in its opinion in this case passed upon the federal question sought to be raised by the plaintiff as the foundation of his case, and decided it adversely to him; but the analysis of the case which we have made shows clearly that the decision of that question was not necessary to the judgment. Before reaching that question, the Supreme Court had already decided that the action of the plaintiff could not be sustained, according to the meaning of the provisions of the statute under which it was brought. The decision of that point was final, and was fatal to the plaintiff's right of recovery. That question is not a federal question; it does not arise under the Constitution of the United States, or of any law or treaty made in pursuance thereof. It is not a question, therefore, which, under this writ of error, we have a right to review. We are not authorized to inquire into the grounds and reasons upon which the Supreme Court proceeded in its construction

of that statute. It is a state statute conferring certain rights upon suitors choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances, are questions for the exclusive determination of the state tribunals, whose judgment thereon is not subject to review by this court. It was competent for the State of South Carolina either to grant or withhold the right to bring suits against the officers of the State for the recovery of money alleged to have been illegally exacted and wrongfully paid. If granted, the action is in substance, though not in name, an action against the State itself, just as an action permitted by the acts of Congress on the subject against a collector of customs, for the recovery of duties alleged to have been illegally exacted, and paid under protest, is an action against the United States, though nominally against the collector. In such cases, as the State may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses; and its own interpretation and application of its statutes on that subject, given by its own judicial tribunals, are conclusive upon the parties seeking the benefit of them. No right secured by the Constitution of the United States to any citizen is affected by them unless they are framed or administered so as, in some particular case, to deprive the party of his property without due process of law, or to deprive him of the equal protection of the laws. No such question is or can be made in reference to the statute of South Carolina under consideration. It authorizes, in certain enumerated cases, parties found to be within its terms to bring a prescribed action against the State in the name of one of its officers. According to the decision of its highest tribunal, the plaintiff in this action is not within the class entitled to sue. To review that judgment is not within the province of this court, because it does not deny or injuriously affect any right claimed by the plaintiff under the Constitution or laws of the United States.

It is a well-settled rule, limiting the jurisdiction of this court in such cases, that "where it appears by the record that the judgment of the state court might have been based either

upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one." *Klinger* v. *Missouri*, 13 Wall. 257, 263, per Mr. Justice Bradley. And it has been repeatedly decided, under § 709 of the Revised Statutes, that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Brown* v. *Atwell*, 92 U. S. 327; *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140; *Chouteau* v. *Gibson*, 111 U. S. 200; *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit City Railway* v. *Guthard*, 114 U. S. 133; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18.

Inasmuch, therefore, as the judgment of the Supreme Court of the State of South Carolina, sought to be brought in review by this writ of error, does not involve any question necessarily arising under the Constitution of the United States, or the laws and treaties made in pursuance thereof, we must refuse to take jurisdiction in the case.

The writ of error is accordingly dismissed for want of jurisdiction.

PORTER *v.* WHITE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 221. Argued April 12, 1888. — Decided April 30, 1888.

In this case it was held, on the facts, that the plaintiff in a suit in equity had not established his right to a decree that he is entitled to the one-half of the attorney's fees in an award against Mexico by the joint United States and Mexican commission, which fees had been collected by the defendant.

The plaintiff failed to establish any equitable lien on the award, by showing a distinct appropriation of a part of it in his favor, or any agreement for his payment out of it.

In equity. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. S. S. Henkle and *Mr. J. J. Johnson* for appellant. *Mr. William E. Earle* was with them on the brief.

Mr. S. V. White, appellee, in person.

Mr. Justice Blatchford delivered the opinion of the court.

This is a bill in equity, filed in the Supreme Court of the District of Columbia, by Richard H. Porter against Stephen V. White. The case arises as follows: On the 4th of July, 1868, a convention was concluded between the United States and Mexico, 15 Stat. 679, providing for the adjustment of the claims of citizens of either country against the other, under which all claims on the part of citizens of either country upon the other, arising from injuries to their persons or property by the authorities of the other, which might have been presented to either government for its interposition with the other, since the signature of the treaty of Guadalupe Hidalgo, of 1848, and which yet remained unsettled, as well as any other such claims which might be presented within the time specified in the convention, (but not covering any claim arising out of a transaction of a date prior to February 2, 1848,) were referred to two

commissioners, one to be appointed by each government, and the two commissioners to appoint an umpire to act in cases on which they might themselves differ in opinion. The decision on each claim was to be given in writing, and to designate whether any sum which might be allowed should be payable in gold or in the currency of the United States. It was provided in the convention that each government engaged "to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever." It was further provided, that the total amount awarded in all the cases decided in favor of the citizens of one government should be deducted from the total amount awarded to the citizens of the other, and the balance, to the amount of $300,000, should be paid at the city of Mexico or at the city of Washington, in gold or its equivalent, within twelve months from the close of the commission, to the government in favor of whose citizens the greater amount might have been awarded, without interest or any other deduction than that specified in Article 6 of the convention; and that the residue of such balance should be paid in annual instalments, to an amount not exceeding $300,000, in gold or its equivalent, in any one year, until the whole should have been paid. Article 6 provided for the compensation of the commissioners, the umpire, and the secretaries, and provided that the whole expenses of the commission, including contingent expenses, should be defrayed by a ratable deduction on the amount of the sums awarded by the commission, provided that such deduction should not exceed 5 per cent on the sums so awarded, and that the deficiency, if any, should be defrayed in moieties by the two governments. By successive conventions, 17 Stat. 861; 18 Stat. 760, and 18 Stat. 833, the duration of the commission, which had been originally limited to two years and six months from the day of the first meeting of the commissioners, was extended until the 31st of January, 1876; and, by a convention concluded April 29, 1876, 19 Stat. 642, the time for decision by the umpire was extended until the 20th of November, 1876.

By an act of Congress passed June 18, 1878, c. 262, 20 Stat. 144, entitled "An act to provide for the distribution of the awards made under the convention between the United States of America and the Republic of Mexico, concluded on the fourth day of July, eighteen hundred and sixty-eight," it was provided (§ 1) as follows: "That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, concluded July fourth, eighteen hundred and sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six; and whenever, and as often as, any instalments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And in making such distribution and payment, due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable; and the proportionate amount of any award of which by its terms the United States is entitled to retain a part shall be deducted from the payment to be made on such award, and shall be paid into the Treasury of the United States as a part of the unappropriated money in the Treasury." Sections 3 and 4 of the same act provided as follows: "Sec. 3. That out of the payments and instalments received from Mexico, as aforesaid, on account of said awards, and out of the moneys which shall be received by the Secretary of State under the provisions of this act, the Secretary of State shall, when and as the same shall be received and paid, and before any payment to claimants, deduct therefrom and retain

a sum not to exceed five per centum of said moneys awarded to citizens of the United States, until the aggregate of the amounts so deducted and retained shall equal the sum of one hundred and fourteen thousand nine hundred and forty-eight dollars and seventy-four cents, being the amount of the expenses of the commission, including contingent expenses paid by the United States in accordance with article six of the treaty, as ascertained and determined in pursuance of the provisions of the said treaty; which said sums, when and as the same are deducted and retained, shall be, by the Secretary of State, transmitted to the Secretary of the Treasury, and passed to the account of, and be regarded as, unappropriated money in the Treasury. Sec. 4. That in the payment of money, in virtue of this act, to any corporation, company, or private individual, the Secretary of State shall first deduct and retain or make reservation of such sums of money, if any, as may be due to the United States from any corporation, company, or private individual in whose favor awards shall have been made under the said convention."

Among the awards made by the commission was one to the legal representatives of Austin M. Standish, of $42,486.30; one to the legal representatives of Monroe M. Parsons, of $50,828.76; and one to the legal representatives of Aaron A. Conrow, of $50,497.26; those three persons having been citizens of the United States who were unlawfully killed in Mexico, in 1865, by the Mexican authorities. The awards were made in 1874 or 1875. The bill avers that, in 1869 or 1870, the plaintiff was authorized by powers of attorney from the legal representatives of Standish, Parsons, and Conrow to prosecute their claims for such unlawful killing, before the commission; that the powers of attorney to the plaintiff stipulated that he should be entitled, as compensation for his services and expenses in the prosecution of the claims, to one-half of whatever sums might be awarded by the commission to such legal representatives; that he prosecuted the cases with success, and paid or assumed to pay all the necessary expenses thereof; that, by virtue of his contract, he became entitled to the one-half of the sums awarded, and the

legal representatives of the parties recognized his right to such moieties, and respectively claimed for themselves only the one-half of the awards; that there was, at the time of the filing of the bill, in December, 1880, in the custody of the Secretary of State of the United States, something over $20,000 applicable to the moieties of the plaintiff upon the three awards, and the Secretary was ready and willing to pay the same whenever it should be determined who was entitled thereto; that the plaintiff had, in 1876, borrowed from the defendant $5000, and given him, as security, a lien upon the moiety of the plaintiff in the Parsons award, and a power of attorney to collect such moiety; that, in 1877, he borrowed from the defendant $2500 more, and executed to him an absolute assignment of the plaintiff's moiety of the Standish award, with the agreement that, although such assignment was absolute in form, it was to be simply a security for the money borrowed, and for services to be performed by the defendant in collecting the moieties for the plaintiff; that the Secretary of State had refused to pay the plaintiff his interest in the awards until the rights of certain parties, who had filed claims with the Secretary upon the plaintiff's interest in the fund, should be settled; that the defendant represented to the plaintiff that he (the defendant) could procure the payment of his interest in the awards, if the plaintiff would authorize him to do so, and that, believing such representation, he gave to the defendant "power of attorney to collect not only the Standish and Parsons cases, which had been assigned to him, but gave him also the said Conrow case, in which the defendant had no interest whatever;" that the defendant was now claiming that he was the absolute owner of the two moieties in the cases of Parsons and Standish, while his only real claim upon the same was on account of his loan of the $7500; that the defendant also refused to recognize the right of the plaintiff to the moiety of the Conrow claim, falsely alleging that he had purchased the plaintiff's interest therein from one Richard H. Musser, who set up a false claim to the one-half of the plaintiff's moiety of the Conrow claim; that the Secretary had decided that none of the claimants had any lien upon the

fund except the plaintiff and the defendant, and was ready and willing to pay the amount which was in his control, applicable to the three moieties, upon the joint receipt of the plaintiff and the defendant; and that, inasmuch as the defendant held absolute assignments for the Parsons and Standish cases, the Secretary would not undertake to decide the rights between the plaintiff and the defendant, but left them to settle their controversy by adjustment, or by the determination of a court of competent jurisdiction.

The bill waives an answer on oath, and prays for a decree that the defendant holds the assignment of the plaintiff's moieties in the cases of Standish and Parsons as security for the plaintiff's indebtedness to him for money borrowed, and for no other purpose and in no other right; that he may be ordered to cancel the moieties or reassign them to the plaintiff, upon the payment to him by the plaintiff of the amount of money, with interest, which the court may find that the plaintiff owes to him; and that he may be decreed to empower the plaintiff to collect from the Secretary the amount of the instalments in his hands, applicable to all three of the cases. The bill also prays for such other and further relief as may be necessary.

A demurrer to the bill was overruled, and the defendant put in an answer. The substance of the answer is that, in 1869 or 1870 the legal representatives or next of kin of the three persons referred to made written executory contracts with Musser, whereby he undertook to furnish the necessary money and do the necessary legal work to establish the claims, and the claimants undertook, on such services and money being furnished, to pay him a fee which should equal the moiety of any award in the premises, in each case; that, in pursuance of such contracts, the claimants executed powers of attorney, whereby Musser was constituted attorney in fact, irrevocable, with a statement that the power of attorney was coupled with an interest; that, about that time, there was a verbal contract made between Musser and the plaintiff, whereby it was agreed that the plaintiff should furnish the money and Musser should do the legal work, and the two should divide the fees of Musser under the contract; that the plaintiff failed to furnish the

money to carry on the suits, and undertook to dismiss Musser from the cases, leaving Musser with the responsibility of furnishing money and doing the legal work; that, in the discharge of his duties under his agreements with the claimants, Musser retained the legal firm of Pike & Johnson, and the claimants agreed in writing that that firm should receive 25 per cent of the resulting awards, to be taken from Musser's moiety; that, on the making of the awards, the several claimants executed assignments to Musser and Pike & Johnson, for a moiety of each of the awards; and that, on the 12th of February, 1879, Musser and Pike & Johnson, for the consideration of $30,000, sold and assigned such moiety to the defendant in his own right. There are other allegations in the answer, which it is unnecessary to set forth, in the view we take of the case.

A replication was put in to the answer, and proofs were taken on both sides. The court, in special term, in February, 1883, made a decree as follows: "The court finds that the plaintiff is entitled to the one full, equal half of the attorney's fees in the awards against Mexico by the joint United States and Mexican commission in the case of Mary Ann Conrow, referred to in the bill and proceedings in this case, and the defendant is entitled to the other half. It appearing to the court that the defendant White has been recognized by the State Department as entitled to the whole of the said attorney's fees in said award, and that he has already been paid by the State Department, from the instalments heretofore paid by Mexico upon said award, the following sums, at the times following, to wit: on the 5th day of May, 1881, $8896.81; on the 11th day of April, 1882, $1806.06; and that there is now on hand in the State Department the sum of $1806.06, applicable to said attorney's fee in said Conrow case, and that there are seven more annual instalments to be paid by Mexico upon said award, it is, this 27th day of February, 1883, ordered, adjudged, and decreed, that the said defendant do, within five days from this date, pay to the solicitors of said complainant Porter the one-half the said sums by him heretofore received upon said awards, with interest thereon

at the rate of six per cent per annum from the times of payment to him as aforesaid, to wit, $4448.41, with interest from the fifth day of May, 1881, and $903.03, with interest thereon from the 11th day of April, 1882; that said defendant assign and transfer to the plaintiff, by such form of conveyance as will be recognized by the State Department, the one equal half of the payments yet to be made by Mexico upon said award applicable to attorney's fee, including the amount now in said Department applicable to said purpose, and that the defendant pay the costs of this suit within ten days, or that in default thereof, as well as in default of the payment of the amount found due to the said Porter, execution do issue therefor, as upon judgment at law."

This decree was a decision in favor of the plaintiff in regard to the Conrow award only. It did not grant the relief prayed by the bill in respect to the Parsons and Standish awards, and decreed nothing in favor of the plaintiff in regard to those awards. There is nothing in the record to show that either party appealed to the general term of the court; but there appears in the record a decree of the court in general term, made December 24, 1883, which reads as follows: "This cause came on to be heard at this term, and was argued by counsel; and thereupon, on this 24th day of December, A.D. 1883, upon consideration thereof, it is found by the court, that the equities thereof are with the defendant, and that the respective awards of S. Kearney Parsons against Mexico and Mildred Standish against Mexico were not assigned and delivered by the plaintiff to the defendant as security for the return of money, and that the plaintiff is not the assignee of any portion of the award of Mary Ann Conrow against Mexico, but that the defendant, Stephen V. White, is the assignee in his own right of a moiety of each of the said three awards; wherefore it is ordered, adjudged, and decreed by the court, that the judgment and decree heretofore entered in favor of plaintiff against the defendant on February 27, 1883, in the special term, be, and the same is hereby, vacated, annulled, and held for naught, and the bill herein is dismissed, and that the defendant, Stephen V. White, do have and recover of the

plaintiff, Richard H. Porter, his costs herein expended, taxed at $—, and that he have execution therefor as in a suit of law, and to said order the plaintiff prays an appeal to the Supreme Court of the United States, which is allowed."

Although the plaintiff has appealed from the whole of the decree of the court in general term, it is stated in the brief of his counsel that he did not appeal from the decree of the court in special term, and is therefore concluded by the failure of that decree to award relief to him in respect to the Parsons and Standish claims; and that the dispute in this court is limited to his right to one-half of the fees in the Conrow case. Therefore, although the decree of the court in general term finds that the awards in favor of the Parsons and Standish claims were not assigned and delivered by the plaintiff to the defendant as security for the return of money, and although that decree further finds that the defendant is the assignee in his own right of a moiety of each of those two awards as well as of a moiety of the Conrow award, and although the plaintiff appeals generally from that decree, no question arises in this court as to any claim of the plaintiff to any share of the Parsons and Standish awards, but the only portion of the decree of the court in general term drawn in question is that which declares that the plaintiff is not the assignee of any portion of the Conrow award, but that the defendant is the assignee in his own right of a moiety of that award.

The claim of Porter in respect to the Conrow award is based upon the contention that he procured Musser to obtain, for a compensation to be paid to him by the plaintiff, powers of attorney from the legal representatives of the three men who had been killed, to prosecute the claims, the powers of attorney and contracts to contain the plaintiff's name as attorney in fact, with a power of substitution; that Musser procured the powers of attorney, and contracts in writing, in each of the cases, for one-half of the recovery as a fee, but procured the name of Musser to be inserted as attorney, instead of that of the plaintiff; that, on the plaintiff's complaint of this, Musser substituted the plaintiff as attorney in each of the three cases, by an indorsement on the power of attorney itself;

that the legal effect of those substitutions was to make the plaintiff the attorney in all three of the cases, instead of Musser; that, under these substitutions, the plaintiff employed attorneys in Washington, who with him prosecuted the cases to success, Musser aiding in taking testimony; that the plaintiff paid Musser in full for all his services; that Musser had no interest in the fees secured under the contracts with the claimants; and that Musser disputed this, and, in 1872, employed the firm of Pike & Johnson, after the evidence in the cases had been closed, and the printed arguments had been filed, and the cases were awaiting a hearing.

It is further urged, on the part of the plaintiff, that it is admitted in the answer of the defendant that there was a verbal contract between Musser and the plaintiff that the plaintiff should furnish the money and Musser should do the legal work, and that the two should divide the fees of Musser under the contract with the claimants; and much stress is laid upon the decision of this court in *Peugh* v. *Porter*, 112 U. S. 737, made January 5, 1885, after the decree of the court in general term in this suit, in which it is said that the agreement between Musser and Porter was "that each should have an equal interest in the prosecution and proceeds of the claims in case of recovery;" and upon the fact that White was a party to that suit.

But there is no evidence in the case that Porter had any assignment in writing of any interest in the Conrow award, or any written instrument creating any lien upon it, or its proceeds, by way of fee or otherwise, from either the claimants of that award or from Musser. The power of attorney from the widow of Conrow to Musser, dated December 10, 1869, contains no assignment of any specific interest in the claim, and the substitution of Porter by Musser, indorsed on such power of attorney, and dated July 4, 1870, only states that "Richard H. Porter is substituted and authorized to act under the powers hereinabove given."

Under these views, the plaintiff has failed to establish any equitable lien on the Conrow fund, by showing any distinct appropriation of a part of that fund in his favor by the widow

of Conrow, either directly or indirectly, or any agreement, direct or indirect, that the plaintiff should be paid out of that fund. *Wright* v. *Ellison*, 1 Wall. 16; *Trist* v. *Child*, 21 Wall. 441, 447; *Peugh* v. *Porter*, 112 U. S. 737, 742. On the contrary, the evidence shows that the widow of Conrow, recognizing her agreement with Musser that he should have as compensation one-half of the money which should be awarded to her on the claim, executed, on the 28th of March, 1872, a written power of attorney to the firm of Pike & Johnson, to prosecute her claim, which power revoked all prior powers executed by her in that behalf, a like power being executed at the same time by the son of the deceased Conrow; that Mrs. Conrow at that time agreed with Musser and the firm of Pike & Johnson that that firm and Musser should have, between them, as compensation, the one-half of whatever should be awarded to her on the claim; that, on the 19th of December, 1878, she made a written request to the Secretary of State to pay one-half of the award to herself, one-fourth of it to Musser, and one-fourth of it to the firm of Pike & Johnson; and that, on the 12th of February, 1879, Musser and the firm of Pike & Johnson, by a written instrument executed by them, assigned to the defendant all their interest in the Conrow claim, the award on that claim having been made to Mrs. Conrow.

It is very clear that the plaintiff has no title to any relief against the defendant, whatever he may have against Musser, who is not a party to this suit. There is nothing in the case of *Peugh* v. *Porter* which can affect the claim of the plaintiff against the defendant.

The decree of the court below in general term is affirmed.

BAYARD *v.* UNITED STATES *ex rel.* WHITE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 938. Argued October 11, 12, 1887. — Decided April 30, 1888.

In answer to a petition for a writ of mandamus to be issued to the Secretary of State to compel him to pay to the petitioner part of an award made by the Mexican claims commission, the Secretary set up that he could not recognize the claim of the petitioner without ignoring the conflicting claim of another person, between whom and the petitioner litigation in respect to the award was then, and had for a long time, been pending. On demurrer to the answer: *Held*, that it was sufficient.

The Secretary, in view of the litigation, was not bound to decide between the conflicting claims.

Whether it was a good answer to the petition, that the Secretary was not invested with authority over the money independently of the President, and that it was the opinion of the President that the public interest forbade the making of payments to the petitioner, in the condition of things set forth in the answer, *quære*.

This was an application for a mandamus against the Secretary of State directing him to pay to the relator certain moneys received by him, as awards, from the Republic of Mexico. The court below ordered the writ to issue, to review which judgment this writ of error was sued out. The case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Stephen V. White defendant in error in person.

Mr. W. Hallett Phillips filed a brief for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is a writ of error to the Supreme Court of the District of Columbia, brought by Thomas F. Bayard, Secretary of State of the United States, to reverse a judgment rendered

by that court, in general term, on the 7th of March, 1887, awarding to Stephen V. White a writ of mandamus, commanding the Secretary to pay to White certain sums of money, specifically on hand, computed and set apart by the proper auditing officer of the State Department, on account of certain awards mentioned in the petition for the mandamus, namely, on account of the Conrow award, $1806.06; on account of the Standish award, $1519.55; and on account of the Parsons award, $1817.92.

The petition of White, which was filed April 23, 1886, sets forth that, under the joint convention between the United States and Mexico, concluded July 4, 1868, 15 Stat. 679, such proceedings were had that an award was made to Mary Ann Conrow for $50,497.26, another to S. Kearney Parsons for $50,828.76, and another to Sarah Mildred Standish for $42,486.30; that, before the payment of any part of the awards, White became the assignee of one-half of each of them; that the Department of State had recognized White as such assignee, and had paid to him nine instalments hitherto paid by Mexico and distributed by the Secretary of State; that on the 31st of January, 1886, a tenth instalment was paid by Mexico to the defendant, as Secretary of State of the United States, and he had made a ratable distribution of it, having paid other claimants, and especially Parsons and Conrow and Standish, the moieties which they had not assigned to White; that by the first section of the act of June 18, 1878, chapter 262, 20 Stat. 144, it was made the duty of the Secretary to ratably apportion and pay to the claimants or their assigns each instalment of money when received from Mexico; that of the tenth instalment there was due to White, on account of the Conrow award, $1806.06, on account of the Standish award, $1519.55, and on account of the Parsons award, $1817.92, which sums were specifically on hand, and the amounts had been computed and set apart by the proper auditing officers of the State Department, but the defendant refused to pay to White those sums of money.

The material provisions of the joint convention referred to and of the act of June 18, 1878, are set forth in the case of *Porter* v. *White* (*ante*, p. 235).

The answer of the Secretary of State to the petition is as follows: "This respondent, answering, saith, that it is true that awards were made by the commission established by the treaty between the United States and Mexico of the 4th of July, 1868, for the amounts and in favor of the parties named in the said petition, and this respondent is advised that the said relator, Stephen V. White, doth claim an interest in the one-half part of each of the said awards, and this respondent doth admit that the rights and interests claimed by said White as aforesaid were recognized by one, although not recognized by another, of the predecessors of this respondent, and payments made to him accordingly, but this respondent saith that he finds it impossible, as the matter now stands, to recognize the claims and pretensions of the said White to the moieties of the said awards, without ignoring the conflicting claims and pretensions of a certain Richard H. Porter, between whom and the said White litigation in respect to the said awards is now and for a long time has been pending. And this respondent further saith, that he hath always been, and is now, willing to pay whatever sum or sums may be due on the said moieties, out of moneys received, under the said treaty, from the Republic of Mexico, on an order and acquittance signed by all the rival claimants of the said moieties, which your respondent respectfully submits is as much as could be done by him without embroiling the United States in a litigation in which it has no interest whatever. And this respondent, further answering, saith that the several sums of money mentioned in said petition, and claimed to be due and payable to the relator, are held by him subject to the order and control of the President of the United States, and are disposable by this respondent at the discretion of the President only, and that, as this respondent is advised and believes, there is no law, as hath been mistakenly supposed by the said relator, by which this respondent is invested with authority over the said sum of money independent of the President of the United States; and, it being the opinion of the President that the public interests forbid the making of payments to the said relator in the present condition of things, as herein-

before set forth, this respondent submits that he is not subject to the process of mandamus in the premises, and he, therefore, prays that he may be discharged from the said rule, with his proper costs in this behalf sustained."

To this answer White demurred, assigning, in the demurrer, the following reasons for the insufficiency of the answer: "1. It does not deny that the relator, S. V. White, is assignee of the moieties of the awards in controversy. 2. The President did not have any supervisory power under the act of June 18, 1878, except in the two cases named in the fifth section thereof, known as the La Abra and the Weil cases." On the hearing of the demurrer, the judgment above mentioned was entered. The opinion of the General Term is reported in 5 Mackey, 428.

We are of the opinion that the demurrer to the answer should have been overruled; that the answer showed sufficient cause for a refusal to issue the writ; and that the petition should have been dismissed.

The answer sets forth that the Secretary of State "finds it impossible, as the matter now stands, to recognize the claims and pretensions of the said White to the moieties of the said awards, without ignoring the conflicting claims and pretensions of a certain Richard H. Porter, between whom and the said White litigation in respect to the said award is now and for a long time has been pending;" and that he has "always been and is now willing to pay whatever sum or sums may be due on the said moieties, out of moneys received, under the said treaty, from the Republic of Mexico, on an order and acquittance signed by all the rival claimants of the said moieties," which he "submits is as much as could be done by him without embroiling the United States in a litigation in which it has no interest whatever." This is adequate ground for a refusal on the part of the Secretary of State to pay the money in question to White. The answer alleges, that the claims and pretensions of Porter to the moieties of the awards conflict with the claims and pretensions of White to the same. This is a sufficient averment that the claims of Porter are of the same character and extent with those of

White. The answer also avers, that litigation in respect to such awards was then pending between White and Porter. This allegation necessarily implies that the litigation was in respect to the conflicting claims of the two parties to the moieties of the awards, inasmuch as the petition states that White is the assignee of one-half of each of the awards. The Secretary of State, in view of such litigation, was not bound to decide between such conflicting claims, after he had notice of them, and that they were in litigation, and when his decision might, perhaps, be a different one from what that of the court would be in the litigation. The writ of mandamus is a remedy to compel the performance of a duty required by law, where the party seeking relief has no other legal remedy and the duty sought to be enforced is clear and indisputable. *Knox County* v. *Aspinwall*, 24 How. 377, 383. Both requisites must concur in every case.

It is urged, that the answer to the petition, so far as it refers to the conflicting claims of White and Porter, as a ground for not recognizing the claim of White, is insufficient as a pleading. But no such ground is taken in the demurrer to the answer; and, independently of this, we think that the answer was sufficient.

We express no opinion as to the validity of the second ground of defence set up in the answer, that the Secretary of State is not invested with authority over the moneys in question independently of the President, and that it is the opinion of the President that the public interests forbid the making of payments to White, in the condition of things set forth in the answer.

The decree of the General Term is reversed, and the case is remanded to the court below, with a direction to dismiss the petition for the writ.

Counsel for Parties.

UNITED STATES *ex rel.* ANGARICA *v.* BAYARD.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1241. Argued January 5, 1888. — Decided April 30, 1888.

On a petition for a writ of mandamus to the Secretary of State to compel him to pay to the petitioner the interest or income derived from the investment of a sum of money received by a predecessor of his, in office, as part of an award made by the Spanish-American Claims Commission, which sum of money had been eventually paid to the petitioner: *Held*, that the Secretary was not liable to pay such interest or income, because

(1) The award was to be paid by the Spanish government to the government of the United States.

(2) It was paid by the Spanish government to the Secretary of State of the United States, representing the government of the United States.

(3) The money withheld was withheld by the United States, and the petitioner's claim, based on the withholding, was a claim against the United States.

(4) The case fell within the well-settled principle that interest is not allowed on claims against the United States, unless the government has stipulated to pay interest, or it is given by express statutory provision.

(5) No claim for the allowance of interest could be predicated on the language of any notification, or circular or letter which issued from the Department of State, during the administration of a predecessor of the Secretary; no binding contract for the payment of interest was thereby created; and the present Secretary was at liberty to act on his own judgment, irrespective of anything contained in any such notification, circular or letter.

THIS was a petition for a mandamus. The writ was refused, and the relator sued out this writ of error. The case is stated in the opinion.

Mr. Edward K. Jones for plaintiff in error. *Mr. F. R. Coudert* was with him on the brief.

Mr. Assistant Attorney General Maury for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

In this case, Lutzarda Angarica de la Rua, executrix of the estate of Joaquin Garcia de Angarica, deceased, presented a petition to the Supreme Court of the District of Columbia, praying for a writ of mandamus to be issued to Thomas F. Bayard, Secretary of State of the United States, to pay the petitioner the amount of the interest or income derived from a certain investment of money. The case was heard in the first instance by the general term of that court, which rendered a judgment, on the 7th of December, 1885, dismissing the petition, with costs, on the ground that mandamus was not the remedy applicable to the case stated in the petition. 4 Mackey, 310. The petitioner has brought a writ of error in the name of the United States, on her relation, to reverse that judgment.

The following are the material facts of the case: On the 12th of February, 1871, an agreement was concluded between the United States and Spain, for the settlement of certain claims of citizens of the United States, 17 Stat. 839, of which a copy is set forth in the margin.[1]

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[1] "Memorandum of an arbitration for the settlement of the claims of citizens of the United States, or of their heirs, against the government of Spain for wrongs and injuries committed against their persons and property, or against the persons and property of citizens of whom the said heirs are the legal representatives, by the authorities of Spain, in the Island of Cuba, or within the maritime jurisdiction thereof, since the commencement of the present insurrection.

"1. It is agreed that all such claims shall be submitted to arbitrators, one to be appointed by the Secretary of State of the United States, another by the Envoy Extraordinary and Minister Plenipotentiary of Spain at Washington, and these two to name an umpire who shall decide all questions upon which they shall be unable to agree; and in case the place of either arbitrator or of the umpire shall from any cause become vacant, such vacancy shall be filled forthwith in the manner herein provided for the original appointment.

"2. The arbitrators and umpire so named shall meet at Washington within one month from the date of their appointment, and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially hear and determine, to the best of their judgment, and according to public law and the treaties in force between the two countries

Pursuant to the agreement, the arbitrators and the umpire were appointed, and a commission thus composed, generally

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and these present stipulations, all such claims as shall, in conformity with this agreement, be laid before them on the part of the government of the United States; and such declaration shall be entered upon the record of their proceedings.

"3. Each government may name an advocate to appear before the arbitrators or the umpire, to represent the interests of the parties respectively.

"4. The arbitrators shall have full power, subject to these stipulations, and it shall be their duty, before proceeding with the hearing and decision of any case, to make and publish convenient rules prescribing the time and manner of the presentation of claims and of the proof thereof; and any disagreement with reference to the said rules of proceeding shall be decided by the umpire. It is understood that a reasonable period shall be allowed for the presentation of the proofs; that all claims, and the testimony in favor of them, shall be presented only through the government of the United States; that the award made in each case shall be in writing, and, if indemnity be given, the sum to be paid shall be expressed in the gold coin of the United States.

"5. The arbitrators shall have jurisdiction of all claims presented to them by the government of the United States for injuries done to citizens of the United States by the authorities of Spain, in Cuba, since the first day of October, 1868. Adjudications of the tribunals in Cuba concerning citizens of the United States, made in the absence of the parties interested, or in violation of international law or of the guarantees and forms provided for in the treaty of October 27, 1795, between the United States and Spain, may be reviewed by the arbitrators, who shall make such award in any such case as they shall deem just. No judgment of a Spanish tribunal, disallowing the affirmation of a party that he is a citizen of the United States, shall prevent the arbitrators from hearing a reclamation presented in behalf of said party by the United States Government; nevertheless, in any case heard by the arbitrators, the Spanish Government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required. The commission having recognized the quality of American citizens in the claimants, they will acquire the rights accorded to them by the present stipulations as such citizens. And it is further agreed that the arbitrators shall not have jurisdiction of any reclamation made in behalf of a native-born Spanish subject, naturalized in the United States, if it shall appear that the same subject-matter having been adjudicated by a competent tribunal in Cuba, and the claimant, having appeared therein, either in person or by his duly appointed attorney, and being required by the laws of Spain to make a declaration of his nationality, failed to declare that he was a citizen of the United States; in such case, and for the purposes of this arbitration, it shall be deemed and taken that the claimant, by his own default, had renounced his allegiance to the United

known as the "Spanish-American Claims Commission," was established. Angarica filed a claim before the commission, and it decided that he had a right to recover damages to the amount of $748,180, with interest at 6 per cent per annum thereon from November 1, 1875, to the day of payment. The full amount of the award was paid to the Secretary of State of the United States in two instalments, namely, March 27, 1877, $406,894.96, and, October 8, 1877, $415,699.75, making a total of $822,594.71. The whole amount was paid over by the Secretary, except $41,129.74, being 5 per cent of the amount received, which sum the Secretary retained until the government of Spain should make provision for paying the expenses of the commission. Of the $41,129.74 so retained, so much as could be utilized for the purpose was invested in securities of the United States, and thereafter the surplus, with the interest which accrued on the first investment, was similarly invested, and so were subsequent accumulations of interest.

In a circular letter addressed by the then Secretary of State to Angarica, when the 5 per cent was withheld, it was said: "Five per centum of the amount due in each case will be reserved for the present, to meet the expenses of the commission, until a payment to cover such expenses shall have been made by Spain in conformity with the provision in that regard of said agreement of February 12th, 1871, between the United States and Spain."

In a report made by Mr. Evarts, Secretary of State, to the President, dated February 16, 1880, and transmitted by him

States. And it is further agreed that the arbitrators shall not have jurisdiction of any demands growing out of contracts.

"6. The expenses of the arbitration will be defrayed by a percentage to be added to the amount awarded. The compensation of the arbitrators and umpire shall not exceed three thousand dollars each; the same allowance shall be made to each of the two advocates representing respectively the two governments; and the arbitrators may employ a secretary at a compensation not exceeding the sum of five dollars a day for every day actually and necessarily given to the business of the arbitration.

"7. The two governments will accept the awards made in the several cases submitted to the said arbitration as final and conclusive, and will give full effect to the same in good faith and as soon as possible."

to the Senate, the Secretary stated that "this retention of 5 per centum may be regarded as provisional only, the commission not having yet taken the final step of adding a percentage to the amount of its awards in order to meet the expenses of the commission." The then Secretary of State also notified Angarica that "it is hoped that no great delay will occur in receiving the payment from Spain, which will liberate this reserve for expenses, and the Department will expect to keep this reserve invested in interest-bearing securities of the United States, to cover the delay in its distribution to the claimants." On the 12th of February, 1885, Mr. Frelinghuysen, then Secretary of State, paid to the petitioner the $41,129.74, but did not pay any interest or income which had been earned by its investment. Correspondence thereupon ensued between the attorneys for the petitioner and Mr. Frelinghuysen, in regard to the payment of such interest, in which such attorneys referred to a letter written to them on the 13th of September, 1880, by Mr. Evarts, then Secretary of State, in which they alleged that he had officially promised to pay the interest earned on the money; but no copy of such letter is found in the record. Mr. Frelinghuysen declined to pay any interest. The attorneys renewed the correspondence with Mr. Bayard, in October, 1885, but he refused to pay the interest, on the ground that the matter had been decided by his predecessor, and that his decision was in accordance with the almost unbroken rulings of the executive and judicial departments of the government, citing the opinion of Attorney General Cushing, 7 Opinions Attorneys General, 523, and the case of *Gordon* v. *United States*, 7 Wall. 188. Further correspondence ensued, and, in one letter, Mr. Bayard stated that the investment of the retained moneys was in pursuance of the general system founded on § 2 of the act of September 11, 1841, c. 25, 5 Stat. 465, now § 3659 of the Revised Statutes, by which it is prescribed that "all funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum;" that, the enactment being

silent as to the beneficiary by such a transaction, "the sole competence of Congress, which prescribed the mode of investment, to direct the disposition of the proceeds, is beyond dispute;" that Congress exercised its discretion in regard to the payment of interest in the case of the Japanese indemnity fund and in the case of the Alabama Claims fund; that it is *res adjudicata* that the Secretary of State has no discretionary power to dispose of the accumulations resulting from investments made in pursuance of the act of September 11, 1841; and that, therefore, he cannot be bound by what he deems to have been the improvident intimation contained in Mr. Evarts's letter of September 13, 1880. In reply to a further letter from the attorneys, Mr. Bayard, while furnishing them with a statement of the amount of the original award and its date, and of the amount received from Spain and the date of its receipt, and of the amount paid to the estate of Angarica, less the 5 per cent previously retained, and of the date of such payment, and of the amount of the 5 per cent retained, declined to state whether such 5 per cent was invested in government or other securities, and, if so, the date of the investment, and what part of it was so invested, and from what date it earned interest, or any other particulars in regard to any investment, except to state "that, of the 5 per cent retained by the Department of State, so much as could be utilized for the purpose was invested in securities of the United States, and that thereafter the surplus, with the interest which accrued on the first investment, was similarly invested, and so were subsequent accumulations of interest;" and that, to give the further detailed information asked for, would be in effect conceding to private parties an accountability which he owed to Congress alone.

The petition, after setting forth the foregoing facts, alleges that, as matter of law, the said interest or income is an incident to the principal fund and follows the same; that the fund due and payable to the petitioner is a liquidated and fixed sum of money, involving no accounting, and which it is the ministerial duty of the Secretary to pay to the petitioner; and that such payment does not involve the exercise of any

discretion, nor concern any international matter connected with the foreign relations of the United States. It also alleges that the sum of $41,129.74, retained by the Secretary from the award in favor of Angarica, formed part of a general fund, composed of various sums similarly retained by the Secretary from awards made in favor of other claimants, and received in instalments at different times, the total of such reserves amounting to $77,887.04; that these amounts were from time to time invested in such sums and in such manner as was practicable, without reference to the separate and individual interests involved; that the income on these investments resulted in part from the sale of gold coin, in part from premiums on United States bonds sold and exchanged without reference to the shares of the several claimants, and in part from interest on such bonds, and amounted in all to $14,485.50; that such increment is not traceable, in separate or respective amounts, to any particular percentages of individual claimants; and that no apportionment of such increment has been made by the Secretary among the respective claimants. The prayer of the petition is for a writ of mandamus commanding the Secretary to apportion and pay to the petitioner her proportion of the increment attributable to the sum of $41,129.74, so reserved from the award made in favor of her testator.

The Secretary answered the petition as follows: "This respondent, admitting the matters and things set forth and averred in the said petition, except as hereinafter excepted, answering, saith, that it is not true, as stated in the third paragraph of the said petition, that the Spanish-American Claims Commission 'duly awarded a judgment in favor of said Joaquin Garcia de Angarica and against the said Kingdom of Spain for the sum of $748,180, with interest at the rate of six per centum per annum from the 1st day of November, 1875, until paid;' but this respondent saith, that an award or judgment for a like sum of money and for like interest was made and rendered by the said commission in favor of the United States of America, and that the said Joaquin Garcia de Angarica was no party to any proceedings at any time pending before the said Spanish-American Claims

Commission; and, as a consequence, this respondent doth also deny that the said sum of money, with the interest thereon, was paid unto the Secretary of State of the United States to the use of, or to be paid to, the said Joaquin Garcia de Angarica, as is averred in the fourth paragraph of the said petition, or that, upon the said payment, it became the duty of the Secretary of State to pay the same to the said petitioner's testator in satisfaction of any judgment or award, for this respondent doth aver, that, when the said money was received by the then Secretary of State, it came to his hands coupled with duties to the United States and possible duties to the Kingdom of Spain, which duties were in the one case, and would have been in the other case, paramount and superior to any duty in the premises to the said petitioner or her testator. And this respondent, further answering, saith, that the said petition proceeds upon a ground which wholly ignores certain grave international elements and considerations that entered into the claim of the petitioner's testator so soon as the government of the United States began and assumed to urge and prosecute the same, and that thenceforth the said claim became, in contemplation of law, subject to the will of the government of the United States and entirely beyond the control of the said petitioner's testator. And this respondent, further answering, saith, that the interest money demanded in the said petition as the accretion of a part of the said sum of money adjudged and awarded as aforesaid, is the fruit of an investment of the said principal money by the Secretary of State, made in obedience to law and in the performance of a general statutory duty, and not for the use and behoof of the said petitioner's testator. And this respondent, protesting that no agreement to pay the said petitioner or her testator the said interest money was made by the Secretary of State, as is averred in the said petition, doth deny that the Secretary of State could have made a valid agreement in that behalf. And this respondent, further answering, saith, that to place him under the stress of the writ of mandamus, as touching the said interest money, would be subversive of the established principle, that the government of the United States does not

pay interest to its citizens, as damages for the detention of money. And this respondent, further answering, saith, with all deference and respect, that, as the representative of the President of the United States in carrying out a treaty, he cannot hold the relation of trustee toward any citizen, saving in the larger sense that every public functionary is clothed with a trust, and that he cannot be controlled or directed in the performance of any such duty at the suit of any citizen."

We are of the opinion that the judgment of the court below must be affirmed. Under the agreement for arbitration, the claim of Angarica was to be laid before the arbitrators and umpire "on the part of the government of the United States."

The claim and the testimony in its favor were to be presented "only through the government of the United States." In another place the claim is spoken of as one presented to the arbitrators "by the government of the United States."

In the sixth clause, the two advocates are spoken of as "representing respectively the two governments," and in the seventh clause it is said that "the two governments will accept the awards." Thus, by the plain terms of the agreement, the amount of the award in the case of Angarica was to be paid by the Spanish Government to the government of the United States. It was paid by the Spanish Government to the Secretary of State of the United States, representing the government of the United States.

If there was any unlawful withholding from the petitioner of the $41,129.74, the money was withheld by the government of the United States, acting through the Secretary of State, and any claim of the petitioner, based upon an unlawful withholding, was a claim against the government of the United States. That claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time it was withheld; but the claim in that respect is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the United

States would or might have received by the exercise of proper care in the investment of the money.

The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.

This appears from a succession of the opinions of the Attorneys General of the United States, given by Attorneys General Wirt, Crittenden, Legaré, Nelson, Johnson, Cushing and Black, and appearing in the following volumes and pages of those opinions, as published: 1, 268; 1, 550; 1, 554; 3, 635; 4, 14; 4, 136; 4, 286; 5, 105; 7, 523; 9, 57; and 9, 449.

Not only is this the general principle and settled rule of the executive department of the government, but it has been the rule of the legislative department, because Congress, though well knowing the rule observed at the Treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment of interest on claims against the government. Such statutes for the payment of interest as have been passed, apply to specific cases enumerated in the several statutes, and do not cover the present case.

The principle above stated is recognized by this court. In *Tillson* v. *United States*, 100 U. S. 43, 47, this court, speaking of the rule that interest is recoverable between citizens if a payment of money is unreasonably delayed, says that with the government the rule is different, and that the practice has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for. See also *Gordon* v. *United States*, 7 Wall. 188, and *Harvey* v. *United States*, 113 U. S. 243, 248, 249.

No claim for the allowance of interest can be predicated in this case upon the language of any notification or circular or letter which issued from the Department of State. No binding contract for the payment of interest was thereby created, and the present Secretary was at liberty to act on his own judgment in the premises, irrespective of anything contained in any such notification, circular, or letter.

Upon these considerations,

The judgment of the court below in general term is affirmed.

CORNELL v. WEIDNER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 240. Argued April 19, 1888. — Decided April 30, 1888.

A patent for a bushing, or tapering ring of metal, for the bungs of casks, with a screw-thread on its outer surface, and with a notched flange at the edge, so as to enable the bushing to be forced into place by a wrench having a projection to fit the notch, was reissued, nearly seven years afterwards, for a bushing without any notch. *Held*, that the reissue was void.

Bill in equity for the infringement of letters patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. J. W. Merriam for appellant. *Mr. John H. Whipple* was with him on the brief.

Mr. George H. Lothrop for appellee.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity for the infringement of a second reissue of letters patent. When the facts are understood, the case is clear.

The original patent, issued August 29, 1871, No. 118,517,

was for an "improvement in metallic bushings for the bungs of casks, etc., and in wrenches for operating the same;" and described the bushings thus: "A tapering thimble or ring of metal, provided with a flange, *b*, at its larger end, and having a screw-thread, *c*, on its outer surface, which screw-thread is cast on the bushing in the mould, and is capable of immediate use without other finishing. The flange *b* is rounded off at its edge, and is provided at some point in its extent with a V-shaped notch, *d*, extending in to the screw-thread."

It then described the wrench and its mode of operation as follows: "E represents the wrench-bar, consisting of the slotted plate *e* and the shank *f*. The metal of the shank, at its junction with the plate, forms a downward V-shaped projection, *l*, whose point extends forward toward the centre of the plate *e*. F represents a tapering core of metal, adapted to fit the bung-bushing *a*, and secured to the plate *e* by means of the bolt *h* and its nut. This core is made separable from the wrench-bar, in order that, by providing a number of cores of different sizes, the same wrench may be used for bushing of different diameters. Provision is also made by the slot *k*, for moving the bolt toward the angular projection *l*, which becomes necessary when a smaller core is substituted for a larger one.

"The wrench is applied by inserting the core into the opening through the bushing, and turning it until the projection *l* falls into the notch *d*. By means of the core the bushing is kept steady, and is readily prevented from assuming an oblique position in the bung-opening; at the same time the operator is enabled to get a better hold on the bushing than by means of the wrenches in common use, which are apt to slip from their seats when used on such difficult work as turning a rough-cast screw into place."

The single claim was in these words: "What we claim as our invention, and desire to secure by letters patent, is —

"The combination, with the notched bung-bushing *a*, of the wrench, consisting of the bar E having the slotted plate *e* and angular projection *l*, and the removable core F, substantially as specified."

It thus appears that the original patent described a bushing

with a V-shaped notch in the flange, and a wrench made with an angular projection to fit that notch, and applied by turning the wrench until the projection fell into the notch; and that all that the patentee claimed as his invention was the combination of the notched bushing with the wrench having a projection to fit it.

On August 6, 1872, the patent was reissued in two divisions, No. 5026 (not in this record) being for the wrench, and No. 5027 being for the bushing, describing it as "an angular ring of metal. This ring is made tapering on both its outer and inner sides, and is screw-threaded upon its outer side, by which means the same is secured within the aperture in the cask. This thread may be formed by a suitable tool, or may be formed in the mould, as found most advantageous. The larger end of the said ring is provided with a flange B, the outer surface or periphery of which is made in an ovolo shape, and is provided with a V-shaped notch *d*, which extends inward to a point near the body of the ring. The object of this notch is to allow a suitable wrench, adapted for the purpose, to engage therewith, whereby the said bushing may be turned into place without the wrench slipping from its seat, as would be the case with a bushing having a smooth surface."

The claim in that reissue was for "The screw-threaded metallic bung-bushing, made tapering upon both its outer and inner sides, and provided with the flange B having the V-shaped notch *d*, as and for the purpose described."

The specification and the claim of that reissue, as clearly appears upon its face, both treated the notch in the flange of the bushing as an essential element of the invention. Of the notch in that reissue it may be said, as this court, in a case decided at October Term, 1877, said of the notch described in the reissue for the wrench, that it was "vital in the invention covered by his patent. The notch is the point of engagement between the bushing and the wrench when the latter, operating as a lever, gives the former its circular motion and thus forces it home. Without this arrangement such motion could not be communicated and the desired result produced. Hence its importance in the scheme of the invention." *Schumacher* v. *Cornell*, 96 U. S. 549, 555.

On June 17, 1879, a second reissue, No. 8759, was obtained for the bushing, the material parts of the specification and the claim of which were as follows:

"Our invention relates to bushings for barrels; and consists of a short metallic tube in exterior form in shape of the frustum of a cone, slightly tapering. The outer surface is screw-threaded, to adapt it to be screwed forcibly into the bung-hole of the barrel, and to be held securely in place by the contact of the surfaces. The larger end of this tube is provided with an annular flange projecting outwardly, and adapted to rest, when the bushing is screwed to its place in the hole of the barrel, snugly upon the outer surface of the stave. The interior surface of the bushing is also made in the form of a frustum of a cone, and tapers uniformly from the exterior or flanged to the inner end of the bushing. This surface is made smooth and unbroken, and extends in such form quite through from one end of the bushing to the other, so that the wooden or compressible plug or bung to which it is adapted may have a ready and unobstructed entrance, and may pass, if necessary, beyond the inner end of the bushing, and have a uniform bearing-surface throughout the entire length of the bushing."

"Having thus described our invention, what we claim as new, and desire to secure by letters patent, is —

"A metallic bushing for the bung-holes of barrels, made with a flange adapted to rest on the outer surface of the stave, and with an exterior threaded and an interior smooth surface, both tapering from the flanged to the interior end, said inner surface being unbroken and unobstructed, and tapering uniformly from one end of the bushing to the other, as and for the purpose set forth."

The notch in the flange of the bushing is not mentioned either in the specification or in the claim of this reissue, although it is shown in the accompanying drawings, substantially as it was shown in the drawings of the original patent and of the former reissue.

The original patent and the first reissue having been distinctly limited to a bushing having a notch to aid in forcing

it into place, the second reissue, obtained nearly seven years later, for a bushing without any such notch, is an unwarrantable enlargement of the supposed invention, which, according to the now well settled law, renders the reissue void. *Yale Lock Co.* v. *James*, 125 U. S. 447, 464, and cases there cited.

The defendant's plea, that the second reissue was for a different invention from that described or claimed either in the original patent or in the first reissue, was therefore rightly adjudged good by the Circuit Court, and

The decree dismissing the bill is affirmed.

STATE OF WISCONSIN *v.* PELICAN INSURANCE COMPANY.

ORIGINAL.

Argued April 25, 1887. — Decided May 14, 1888.

This court has not original jurisdiction of an action by a State upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another State for a pecuniary penalty for a violation of its municipal law.

THIS was an action of debt, commenced in this court by the State of Wisconsin against a corporation of Louisiana. The declaration was as follows:

"The plaintiff, The State of Wisconsin, and one of the States of the United States, now comes and complains of the defendant, The Pelican Insurance Company of New Orleans, a corporation duly organized and existing under the laws of the State of Louisiana, in a plea of debt —

"For that, whereas the plaintiff, the said State of Wisconsin, on the 16th day of September in the year 1886, at the county of Dane in the said State of Wisconsin, and in and before the Dane County Circuit Court, in said State — such court being then and there a court of general jurisdiction under the laws of said State — and by the consideration and judgment of the said court, recovered against the said defend-

ant, the said Pelican Insurance Company, a judgment in favor of the said plaintiff for the sum of eight thousand five hundred dollars damages, together with the further sum of forty-five dollars and thirty-nine cents for costs and disbursements, amounting in all to the sum of eight thousand five hundred and forty-five dollars and thirty-nine cents; which said judgment still remains in that court in full force and effect, and not in anywise modified, reversed, set aside, appealed from, or otherwise vacated; and the said plaintiff, the said State of Wisconsin, hath not obtained any satisfaction upon the said judgment, but, on the contrary, the whole thereof, together with interest thereon from said date of such judgment, remains wholly unpaid and owing; whereby an action hath accrued unto the said plaintiff, the said State of Wisconsin, to demand and have from and of the said defendant the said sum of eight thousand five hundred and forty-five dollars and thirty-nine cents, with interest.

"Wherefore the said plaintiff, the said State of Wisconsin, saith that the plaintiff is injured and hath sustained damage to the said amount of eight thousand five hundred and forty-five dollars and thirty-nine cents, with interest, and therefore it brings this suit."

Annexed to the declaration was a copy of the record of the judgment therein described, which showed that it was rendered on default of the defendant, after service of summons on three persons, each of whom was stated in the officer's return to be a resident and citizen of Wisconsin and an agent of the defendant, upon a complaint alleging that the defendant had done business in the State for thirty months, without having itself, or by any officer, agent or other person in its behalf, prepared or deposited in the office of the commissioner of insurance of the State annual statements of its business, as required by the provision of § 1920 of the Revised Statutes of Wisconsin, and that the defendant had thereby become indebted to the plaintiff in the sum of $15,000, according to that provision.

By that section of the Revised Statutes of Wisconsin, it is enacted that the president or vice-president and secretary of

each fire insurance corporation doing business in the State shall annually within the month of January prepare and deposit in the office of the commissioner of insurance a statement, verified by their oaths, of the business of the corporation during the year, and of the condition thereof on the 31st day of December then next preceding, exhibiting various items, enumerated in the statute, as to its capital stock, property or assets, liabilities, income and expenditures, and any other items or facts which the commissioner of insurance may require, and that "for any failure to make and deposit such annual statement, or to promptly reply in writing to any inquiry addressed by the commissioner of insurance in relation to the business of any such corporation, or for wilfully making any false statement therein, every such corporation or officer so failing or making such false statement shall forfeit five hundred dollars, and for neglecting to file such annual statement an additional five hundred dollars for every month that such corporation shall continue thereafter to transact any insurance business in this state until such statement be filed."

By the statute of Wisconsin of 1885, c. 395, (which took effect April 12, 1885,) § 1, it is "made the duty of the commissioner of insurance to prosecute to final judgment, in the name of the State, or to compromise, settle or compound, every forfeiture incurred by an insurance corporation, by its failure to comply with, or for its violation of, any law of the State, of which he may be credibly informed;" and by § 2, "one half of every sum collected, paid or received by virtue of section 1 of this act shall be paid into the state treasury, and the remainder shall belong to the commissioner of insurance, who shall pay all expenses incurred in prosecuting all actions brought to enforce the payment of such forfeitures, both in and out of the State, and shall pay all expenses incident to the collection of such forfeitures."

In the present action in this court, the defendant filed several pleas, the first of which was as follows:

"The defendant is a civil corporation organized under the terms of the Revised Statutes of the State of Louisiana, sections 638 to 688, both inclusive, and is authorized to effect fire

insurances, and is subject to suit and required to determine its domicil in the city aforesaid, and to maintain and designate an officer of that company to receive there citations and other judicial writs and notices. This duty has been fulfilled from the date of the organization, and the charter of the company has been recorded and published, as those statutes require, in the office of the recorder of mortgages and a city paper, for the time defined in the statute. No other designation has been made or required of the defendant. The section 687 of the Revised Statutes of the United States defines the original jurisdiction of this court, and designates as subjects for the exercise of that jurisdiction, where a State is the complainant, citizens of States other than of the plaintiff or complainant; and, that there should be no error on the subject, the first section of the Fourteenth Amendment to the Constitution of the United States exactly describes all of those who are citizens. They are natural persons born or naturalized within the limits of the United States, and having a residence in any State determines the State in which he may have privilege or immunity as a citizen. Moreover, the complaint of the plaintiff discloses that this defendant is a fire insurance company, without political character or interstate relations, and had its origin and domicil in New Orleans, and that the said corporation had offended the State of Wisconsin by imputed and alleged disobedience or inattention to her statute laws, and had incurred heavy forfeitures and penalties by such offences to the sum stated in the demand, and for the collection of which fines and forfeitures this suit has been commenced in this court. But the defendant says that the statute of the United States, above cited, further defines the cause for the exercise of original jurisdiction that the controversy should be of a civil nature. It excludes from cognizance of this court the punitive statutes and divers litigations arising out of the internal and peculiar or peevish regulations, accompanied with fines, forfeitures, and arbitrary exactions, which a State may impose upon citizens or corporations of other States from a just cause, or from caprice or captiousness. The controversy must be of a civil nature, and not of

the punitive nature, as shown by this record. Wherefore, this defendant submits to this court that the complaint of this plaintiff does not show a cause within the original jurisdiction of the court, nor within the terms of the statutes of the United States."

To this plea the plaintiff filed a general demurrer, upon which the case was set down for argument.

Mr. Samuel Shellabarger for plaintiff. *Mr. J. M. Wilson* and *Mr. H. W. Chynoweth* were with him on the brief.

The demurrer presents two distinct grounds for the defeat of the original jurisdiction of the court.

1st. That because the defendant is a local fire insurance company, deriving its existence, location, and non-political and non-interstate franchise from the local or state laws, it is therefore not a "citizen of another State," within the sense of these words, either as found in § 687 of the Revised Statutes of the United States, or as found in § 2, article 3, of the Constitution of the United States, or within the meaning of the words, "citizens of the United States and of the State wherein they reside," as found in the Fourteenth Amendment; and

2d. That the present suit is one for the enforcement of a penalty or forfeiture, and is a suit penal in its character, and is not "a controversy of a civil nature," within the meaning of these words in § 687, Rev. Stat.

I. 1st. Each of these alleged defences is, we submit, plainly bad. The first, to wit, that this action of debt upon a judgment is not an action of a civil nature, is obviously untenable, because the use of the words "controversies of a civil nature," as found in § 687, has sole regard to that primary division of actions into two classes — civil and criminal.

The classification pointed to by the words "controversies of a civil nature" is that, and only that, pointed out in 4 Blackstone's Commentaries, p. 5, in these words: "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: That private wrongs, or civil injuries, are an infringement or priva-

tion of civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach or violation of public rights and duties due to the whole community, considered as a community, in its social aggregate capacity."

Had § 687 attempted to exclude, from the original jurisdiction of this court, jurisdiction of the pecuniary or civil rights due to a State in its corporate capacity (and a State is a *private individual* when suing under the original jurisdiction of this court) merely because the debt owing to the State arose out of a tort instead of a contract, then the section would have been palpably in violation of § 2, article 3, of the Constitution, which does not so limit the original jurisdiction of this court, but, on the contrary, expressly extends its original jurisdiction to "all cases . . . in which a State shall be a party," and which comes within the judicial power of the United States, and which judicial power the same section extends to "all cases in law and equity," including "controversies between a State and the citizens of another State."

This, therefore, takes in every case, in law and equity, between a State and citizens of another State where the liability is of a civil nature, within the definition of these words as above given from Blackstone, whether sounding in contract or in tort. The Eleventh Amendment to the Constitution enforces this interpretation of the words "cases" and "controversies," as found in § 2, article 3, did these words admit of any doubt as applied to controversies between a State and citizens of another State. This is so because, in this Eleventh Amendment the words "cases in law and equity," as applied to States and citizens of other States, are supplied by the words "any suit in law or equity." The words "cases in law and equity" in § 2, article 3, are the equivalent of "any suit in law or equity" as found in Eleventh Amendment.

And it is thoroughly settled by this court that the word "suit," as applied to a controversy between a State and citizens of another State, means any civil demand or claim for money or private right, as distinguished from a criminal prosecution.

Argument for Plaintiff in Error.

All criminal prosecutions, as to their method of institution and prosecution, are thoroughly distinguished from these "controversies at law or in equity," by article VI of the Amendments; and, amongst other things, it compels every criminal prosecution to be in the district, previously ascertained by law, wherein the crime shall have been committed.

It is thus that, from the beginning, the Constitution has been held to divide actions into two classes as applied to the original jurisdiction of this court where States are parties, to wit, into civil and criminal, and to make the original jurisdiction of this court apply to every "case" or "suit" or "controversy" where a State is plaintiff and a citizen of another State defendant, and which is not within the words "criminal prosecutions," as found in the Sixth Amendment. And these express provisions of the Constitution were the authority upon which Congress was entitled to introduce, and did introduce, the words "civil nature" after the word "controversies" in § 687 of the Revised Statutes of the United States.

2d. Another conclusive reason why the present action is of a civil nature is that it is an action *ex contractu*, founded upon a contract of record, to wit, judgment; and is in no sense penal. In the court below every penal element, entering into the original cause of action, was conclusively tried, adjudicated, and settled beyond review by this court, if jurisdiction existed in the court below. This court sits upon and tries (outside of said question of jurisdiction) the question of pecuniary indebtedness, and can neither inquire into nor know what was the cause of action in the original suit. That question is absolutely excluded from the investigation of this court. See *Biddle* v. *Wilkins*, 1 Pet. 686, 692; *Pennington* v. *Gibson*, 16 How. 65.

These cases might be indefinitely multiplied, but need not be; and the apology for citing any upon a proposition so familiar and settled as the one we now enforce, namely, that the rendition of a judgment by a competent jurisdiction merges and extinguishes the original cause of action, and makes the judgment to be a new debt, with the new characteristics of contract obligation, against which no defence is al-

lowed that did not arise subsequently to the judgment, is to be found only in the fact that the plea demurred to is one that ignores this fundamental and settled rule of the law, recognized, as remarked by this court, in every system of jurisprudence known to civilized States. See *Taylor* v. *Root*, 4 Keyes (N. Y.), 235; *Thatcher* v. *Gammon*, 12 Mass. 268; *Spencer* v. *Brockway*, 1 Ohio, 259, 1st ed., 122, 2d ed.; *S. C.* 13 Am. Dec. 615; *Indiana* v. *Helmer*, 21 Iowa, 370; *Healy* v. *Root*, 11 Rich. 390.

II. We now turn to the other defence relied on in the plea demurred to, to wit, that the defendant corporation is an artificial person, so local in its nature and so destitute of interstate functions, purposes, and franchises, and so fettered and shielded by the statutes giving it existence, as that it is inaccessible, as a defendant, by the processes of the courts of other States, under the statutes of such other States providing for services of process upon foreign corporations doing business in the State where the suit is brought.

We proceed to state, first of all, what is held by the courts of Wisconsin regarding the liability to be sued in Wisconsin, which is created by her laws, as against foreign corporations doing business in Wisconsin. After doing this we shall give a reference to the rulings of this court upon the same general subject.

In introducing these two classes of authorities, to wit, the interpretation, by the Supreme Court of Wisconsin, of her own statutes, and the interpretation put by this court upon the constitutional provision regarding commerce between the States and other like principles of interstate law, two things must be carefully premised touching the bearing of these authorities upon the issue raised by the demurrer. One is that the plea demurred to bases itself upon the legal idea that this particular corporation is not a "citizen of another State" within the sense of these words as found in § 2, article 3, and in articles XI and XIV of the Amendments, and in § 687 of the Revised Statutes of the United States; and hence that no *possible* state of legislation, in Wisconsin, touching suits against foreign insurance companies, and touching the state of their business and agency, can make a suit in Wisconsin against

such foreign corporation possible; and that hence, also, no averment was needed in this first plea regarding the State of Wisconsin's statute, or the state of defendant's business in that State, to make its plea of non-citizenship of another State a good plea.

The other thing that must be premised is that the other and independent defence set up in this first plea must proceed upon the idea that, if defendant might, under possible conditions of legislation, agency, and business in Wisconsin, be suable there, yet since this court judicially knows the condition of Wisconsin's public statutes (1 Greenl. Ev., sec. 6, p. 10, 13th ed., and cases in note 3), and since the plea avers defendant to be a corporation having its habitat in Louisiana alone, and one without interstate franchises and objects, therefore the non-suability of defendant in Wisconsin is made out by simply averring what kind of a charter defendant has, and without any averment as to its business and agency in Wisconsin.

We now present to the court the decision of the Supreme Court of Wisconsin in the case of *State of Wisconsin* v. *United States Mutual Accident Association*, 67 Wisconsin, 624, recently decided.

The case was stated as follows: This is an appeal from an order refusing to set aside the service of summons in this action, the defendant having appeared specially and for that purpose only. The sheriff's return indorsed upon the summons was to the effect that on April 10th, 1886, at Fort Howard, Brown County, Wisconsin, he served the within summons upon the within-named defendant, personally, by then and there delivering to and leaving with C. Bombach, a resident and citizen of this State, personally, he, the said Bombach, being then and there an agent of the said defendant, a true copy thereof. From the affidavit upon which the motion was based, and the affidavits and proofs used in opposition to the same, it appears, in effect, that the defendant was, at the several dates herein mentioned, a foreign insurance corporation, previously organized under the laws of the State of New York, and having its home office at No. 320 Broadway, in the city of New York; that its business was that of receiving applications for and

issuing accident insurance policies upon the principles of mutual insurance; that it had never been admitted or licensed to transact business of accident insurance in this State, or had never designated or appointed any attorney or agent in this State, for the service of process in actions in this State against the defendant; that said C. Bombach has been a resident of Fort Howard, in this State, since September 10, 1883; that he commenced soliciting insurance for the defendant in February, 1885, and continued to advertise and solicit such insurance until the commencement of this action; that during that time he received from the defendant from time to time printed matter for use and advertising purposes, including printed forms and rate books for his use in soliciting and taking applications for insurance in the defendant company; that during such time of his soliciting such insurance he took two applications, to wit: one from John Nelson and another from Frank Winding, from each of whom he collected at the time of taking such applications five dollars, from which he retained a commission of three dollars, and transmitted the balance, together with such applications, to the defendant at its said home office, and in due course of mail received from the defendant policies of insurance issued by it insuring said Nelson and Winding respectively, and which policies were delivered to them respectively by said Bombach; that no part of the money so sent to the defendant had ever been returned; that during said time said Bombach was so engaged soliciting insurance for the defendant, he advertised said business by posting up and distributing the circulars and printed matter sent to him by the defendant for that purpose.

The following is the full opinion of the court:

"Are the facts stated such as to make the service on Bombach good as against the defendant? In our judgment they are. The defendant is a foreign accident insurance corporation. It never procured a license to do business in this State as required by the statutes, §§ 1220 and 1953, R. S. It is provided by § 2637, R. S., that actions against corporations shall be commenced in the same manner as personal actions against

natural persons. The summons, etc., shall be served, and such service held of the same effect as personal service on a natural person, by delivering a copy thereof as follows: '. . . 9. If against any insurance corporation not organized under the laws of this State, to the agent or attorney thereof having authority therefor by appointment under the provisions of § 1915 or § 1953, *or to any agent* of such corporation within the definition of § 1977 in the State.' Here the summons could not have been served on the defendant by delivering a copy thereof to the agent or attorney appointed by the defendant under the provisions of § 1915 or § 1953, since no such appointment was ever made. It follows that such service could only be made by delivering such copy to an agent of the defendant, within the definition of § 1977, R. S. By that definition whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance or a policy of insurance to or from any such corporation, or who makes any contract of insurance, or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertises to do any such thing, *shall be held an agent* of such corporation to all intents and purposes, and the word agent, whenever used in chapter 89, R. S., shall be construed to include all such persons. Sec. 1977, R. S.

"The several things thus enumerated are connected by disjunctives, so that the doing of any of them by Bombach would have made him the agent of the defendant within the definition. *The State* v. *Farmer*, 49 Wis. 459. The facts stated show that he did every one of them himself, unless it was to make the contract of insurance mentioned; and the facts stated show that he aided and assisted in making each of them, which, of itself, was enough to make him such agent within the definition.

"As to the commencement of actions, or service of process upon foreign insurance corporations, this is in no respect changed by c. 240, Laws of 1880, notwithstanding § 5 of that act is nearly in the same language of § 1977, R. S. It simply makes it a misdemeanor to act as such agent otherwise

than as prescribed. This was fully considered and determined in *The State* v. *The Northwestern Endowment & Legacy Association of Minnesota*, 62 Wis. 176–7. But here Bombach received a commission on each of the policies mentioned as issued by the defendant, and hence the question of his acting 'gratuitously,' there considered, is not here involved. By receiving and retaining such applications and premiums, and then issuing to the respective beneficiaries policies thereon, and then sending the same to Bombach for delivery, the defendant thereby ratified his agency.

"If the argument of counsel to the effect that § 1977 only relates to agents of such foreign insurance companies as are duly licensed to do business within the State is sound, then there would be no possible way of commencing an action against an unlicensed foreign insurance company doing business in this State in violation of law. In other words, such construction would reward such foreign insurance companies as refused to pay the requisite license, by enabling them to retain the license money and then shielding them from the enforcement of all liability, whether on their contracts or otherwise, in the courts of Wisconsin. Such construction would defeat the whole purpose and scope of the statute. Besides, such construction would restrict the application of the section wholly to home insurance companies and such foreign insurance corporations as procured the requisite license; whereas the language of the section is 'any insurance corporation,' 'any contract of insurance,' 'any premium for insurance,' 'any business for any insurance corporation,' and then enlarges the word 'agent' whenever used in other portions of the chapter so as to include 'all such persons' as are therein described. The chapter evidently applies to foreign insurance companies not having procured such license, as well as those who have. Thus § 1952 applies to 'every life or accident insurance corporation doing business in this State . . . upon the principle of mutual insurance.' Section 1953 applies to 'every life or accident insurance corporation not organized under the laws of this State.' Section 1954 applies to 'every life or accident insurance corporation doing business in this

State.' Manifestly it was not the intention of the legislature that the right of service of process upon foreign insurance companies doing business in this State should be dependent upon their first taking out a license."

The courts of other States have taken a similar view of similar statutes. *Gibbs* v. *Queen Insurance Company*, 63 N. Y. 114; *Pope* v. *Terre Haute, C. & M. Co.*, 87 N. Y. 137; *Osborn* v. *Shawmut Ins. Co.*, 51 Vt. 278; *McNichol* v. *U. S. Mercantile R. Assn.*, 74 Missouri, 457; *Swift* v. *The State of Delaware*, 25 Am. Law Reg. (N. S.) 594; *Lhoneux, Limon & Co.* v. *Hongkong & Shanghai Banking Co.*, 33 Ch. Div. 446.

Foreign insurance companies are not compelled to do business in this State. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose. *Fire Department of Milwaukee* v. *Helfenstein*, 16 Wis. 136; *The State ex rel. Drake* v. *Doyle*, 40 Wis. 176.

In *Paul* v. *Virginia*, 8 Wall. 168, a person having acted as an agent of an insurance company doing business in that State without a license, under a similar act, was convicted and fined under the statute, and it was held that there had been no violation of sec. 2, art. 4, of the Constitution, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" nor of section 8, art. 1, giving to the Congress the power to "regulate commerce with foreign nations and among the several States." In that case Mr. Justice Field, speaking of foreign insurance companies for the whole court, used this significant language: "Having no absolute right of recognition in other States, but depending for such recognition and enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." (page 181.) This lan-

guage was expressly sanctioned by the same learned court in *Ducat* v. *Chicago*, 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, and in the more recent case of *Philadelphia Fire Association* v. *New York*, 119 U. S. 117–8. The same language was quoted approvingly in the opinion of the court in *The State ex rel. Drake* v. *Doyle*, (pages 197–8) *supra.*

From these decisions it appears that by voluntarily doing business in the State the defendant voluntarily submitted itself to the laws of the State. From them it further appears that the question of interstate commerce is in no way involved in such a case, and hence it is distinguishable from *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727, and other similar cases.

The defendant's right to impeach the sheriff's return by other evidence includes plaintiff's right to support such return by similar evidence. We conclude that the court got jurisdiction of the defendant by the service upon Bombach.

The question, however, is not before us as to just what subject-matter such jurisdiction may extend to. It is enough to know that there may be cases to which such jurisdiction extends. *Gauser* v. *Fireman's Fund Ins. Co.*, 34 Minn. 372, and cases there cited. *Ehrman* v. *Teutonia Ins. Co.*, 1 McCrary, 123; *Merchants' Manufacturing Co.* v. *Grand Trunk Railroad Co.*, 13 Fed. Rep. 358; *Gray* v. *Taper Sleeve Pulley Works*, 16 Fed. Rep. 437.

We also refer the court to *State* v. *Endowment and Legacy Association Company of Minnesota*, 62 Wis. 174, which is a case also interpretative of the statutes involved in this case, in which the holdings are in substance like those in the last preceding case, and is a case holding, also, that § 5 of c. 240 of Laws of 1880 does not repeal the ninth paragraph of § 2637 of the Revised Statutes of Wisconsin. These decisions of the Supreme Court of Wisconsin cover the entire subject-matter of the scope and effect of the Wisconsin statutes, and to the force of what the court there says we can add nothing by any argument.

Their effect is to hold that foreign insurance companies doing business in Wisconsin through agents in that State,

though not licensed, and though the foreign company omits to procure license, as required by §§ 1220 and 1953, are yet suable in Wisconsin. And this conclusion is reached by the court in full view of all the legislation of Wisconsin on the subject and of the decisions of this court in regard to when a foreign corporation consents to be sued in a State away from its residence.

We now turn to the decisions of this court upon the two questions above indicated, which are supposed to be presented by the demurrer, namely, the question whether this corporation, under the averments of the plea, is a "citizen of another State," within the sense of these words in § 2, art. 3, and in § 687 of the Revised Statutes; and, second, whether the defendant doing business in Wisconsin, under or in the face of the statutes of Wisconsin, has assented to being there sued.

That a corporation aggregate created by and transacting business in a State, is to be deemed a citizen of that State for all the purposes of suing and being sued, by citizens of other States, in the courts of the United States, is, of course, the settled law of this court.

The present doctrine of this court upon this subject is stated in *Paul* v. *Virginia*, 8 Wall. 168, 178, where the court, after stating that: "In the early cases, when this question of the right of corporations to litigate in the courts of the United States, was considered, it was held that the right depended upon the citizenship of the members of the corporation and its proper averment in the pleadings," adds, "In later cases this ruling was modified, and it was held that the members of that corporation would be *presumed* to be citizens of the State in which the corporation was created, and where alone it had any legal existence, without any special averment of such citizenship, the averment of the place of creation and business of the corporation being sufficient; and that such presumption *cannot be controverted* for the purposes of defeating the jurisdiction of the court." And the court cites *Railroad Co.* v. *Letson*, 2 How. 497; *Marshall* v. *Railroad Co.*, 15 How. 314; *Drawbridge Co.* v. *Shepard*, 20 How. 227, 233; *Railroad Co.* v. *Wheeler*, 1 Black, 286, 297.

This doctrine has been repeated, by this court, in the same words, in numerous cases, as, for example, in *Steamship Company* v. *Tugman*, 106 U. S. 118, 120, 121, where the cases are cited.

The only question left, therefore, regarding the point as to whether the defendant, for the purposes of being sued, is a citizen of Louisiana, is this, namely, whether there is any *distinction* between the liability of a corporation to be sued in the Circuit Courts of the United States, as a "citizen of another State," under the laws defining the jurisdiction of the Circuit Court, and such corporation's liability to be sued, as a citizen of another State, under the constitutional provisions and statutes defining the original jurisdiction of this court, where such original jurisdiction is given in suits by a State against citizens of other States. We submit there is no distinction, which is applicable to the present case, in this regard.

In *Pennsylvania* v. *The Wheeling Bridge Company*, 13 How. 518, the State of Pennsylvania sued a foreign corporation of Virginia under the original jurisdiction of this court, and the jurisdiction was maintained.

The same case was again in this court in 18 How. 421, where the court held that the act of Congress of August 31, 1852, legalized the bridge, and superseded the effect of the former decree of this court declaring the bridge a nuisance.

We may remark, in passing, that this is a case where the original jurisdiction of this court was held to include actions and suits for *torts*, as distinguished from suits *ex contractu*.

In *Wisconsin* v. *Duluth*, 96 U. S. 379, this court entertained, as coming under its original jurisdiction, the suit of Wisconsin against a corporation foreign to the State of Wisconsin, to wit, Duluth, a corporation of the State of Minnesota, the suit being brought under the clause giving this court jurisdiction, where a State is plaintiff against the citizens of another State. In that case the Northern Pacific Railroad Company was made defendant along with Duluth, but it was dismissed before the hearing, and the court was not required to decide whether its original jurisdiction would extend to the Northern Pacific Railroad Company, a corporation created by act of

Congress; but the court maintained the jurisdiction against Duluth as being a "citizen of another" State than the State of Wisconsin, but dismissed the bill with costs, because the court held that it had no authority to prescribe the manner in which work, being done under the authority of a law of Congress, should be carried forward.

And see opinion of Justice Miller in the same case — 2 Dillon, 406 — where it is held that the Supreme Court *alone* of the federal courts, has this jurisdiction.

If the case at bar can be distinguished, on the point of the citizenship of the defendant, and of its liability to be sued as the citizen of another State under the original jurisdiction of this court, from the cases now cited, we are unable to perceive wherein that distinction is to be found; and we will await further discussion of the point to hear from the defendant's counsel.

We now, therefore, turn to the question whether or not the public laws of Wisconsin, of which this court will take judicial notice, bring the defendant within the class of cases where this court has held that suits may be maintained against foreign corporations, away from the State of the residence of the corporations, and in States where, by doing business, they consent to be sued. It would be a useless extension of argument to consider, in detail, the large number of cases decided by this court upon this point.

The general doctrine of this court, upon this subject, may be indicated by a quotation from the language of the court in *Insurance Co.* v. *Woodward*, 111 U. S. 138, 146, where the court says: "But the reason why the State, which charters a corporation, is its domicile in reference to debts which it owes, is because there only can it be sued or found for service of process. This is now *changed* in cases like the present; and in the courts of the United States it is held that a corporation of one State, doing business in another State, is suable in the courts of the United States established in the latter State if the laws of that State so provide, and in the manner provided by those laws," citing *Lafayette Insurance Company* v. *French*, 18 How. 404; *Railroad Company* v. *Harris*, 12 Wall. 65;

Ex parte Schollenberger, 96 U. S. 369; *Railroad Company* v. *Koontz*, 104 U. S. 5, 10.

In the case of *St. Clair* v. *Cox*, 106 U. S. 350 *et seq.* this court reviews the state of the law upon the subject of the suability of a corporation in other States than the State of its creation and principal domicile, notices the inconvenience of the old doctrine, (that they could only be sued in the States of their principal residence,) owing to the great increase of corporation transactions away from the States of their residence, and holds that, wherever a corporation does business in States other than its home, and where this business is done under laws of the State providing for the bringing of suits against the corporation in such foreign State, and for serving process upon its agents, there the suit may be maintained.

In *Ex parte Schollenberger*, 96 U. S. 369, this court, in commenting upon the doctrine laid down in the case of *Railroad Company* v. *Harris*, 12 Wall. 65, places the suability of a corporation, in a jurisdiction foreign to that of its creation, upon the distinct ground that where the corporation does business in the foreign jurisdiction, when a statute exists authorizing a suit to be brought in such foreign jurisdiction against corporations doing business therein, then and thereby the corporation *consents* to being sued in such foreign jurisdiction.

In *Railroad Company* v. *Koontz*, 104 U. S. 510, the court says: "It is well settled that a corporation of one State doing business in another State is suable where its business is done, if the laws make provision to that effect; and we have so held many times," citing *Insurance Company* v. *French*, 18 How. 404; *Railroad Company* v. *Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369.

The authorities gone over establish our proposition that these provisions of the Wisconsin law are not inconsistent with the Constitution, or with public law, or with the mutual rights of the States. It may not be amiss, however, upon a question of this importance to submit to the court a further reference to authorities in the Circuit Courts of the United States, and in the courts of the States, in further enforcement

of the point that these provisions of the Wisconsin laws, for such method of bringing foreign corporations into her courts, to answer touching business done in the State, are valid.

In *Merchants' Manufacturing Company* v. *Grand Trunk Railway Co.*, 13 Fed. Rep. 358, in the Circuit Court of the United States for the Southern District of New York, in 1882, it was held (in accordance with *Insurance Company* v. *French*, *Railway Company* v. *Harris*, *Ex parte Schollenberger*,) that the fact of doing business in the State is an *assent* to the service of process upon agents there, in suits against foreign corporations; and the court there cites a long line of authorities holding that, even in the absence of statutes of the State authorizing such mode of service, suits may be maintained against foreign corporations in States where they engage in business, by service of process on those doing the business.

In *Mohr and Mohr Distilling Co.* v. *Insurance Companies*, 12 Fed. Rep. 474, decided in the Circuit Court of the United States for the Southern District of Ohio, by Justice Matthews, in June, 1882, the court reasserted the doctrines of this court above cited, and indicated that the consent implied from the doing of business, by a foreign corporation, in a State having laws providing for suits in the State where the business is done, is *not limited to causes of actions arising within the State, but extends to all transitory actions.*

In *Gray* v. *Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436, the suit was in the Circuit Court of the United States for the Western District of Pennsylvania, decided in 1883; opinion by Acheson, J. In that case the same doctrines are reasserted, and the additional point is decided which is indicated by the following sentence from the opinion of the court, page 443: "Suits may be instituted against a foreign corporation by service of process conformably to the act of 1849 (Pennsylvania), *notwithstanding it has failed to establish a place of business in the State and appoint an agent upon whom service may be made, agreeably to the state constitution and act of April* 22, 1872." The court cites *Hagerman* v. *Empire State Company*, 97 Penn. St. 534.

The state decisions are innumerable which are to the same effect.

We have already cited the case of *Wisconsin* v. *Northwest Endowment and Legacy Association*, 62 Wis. 174.

The case of *Gibbs* v. *Queen Insurance Co.*, 63 N. Y. 114, (1875,) where the opinion is by Judge Folger, is to the same effect as the foregoing, but is valuable as presenting an elaborate review of the English and American authorities upon the general subject as to when a service upon an agent of a foreign corporation is not violative of the principles of the public law or of natural justice.

At the end of the opinion, page 131, Justice Folger alludes to the fact that *Insurance Company* v. *French*, 18 How. 404, was called to his attention after the preparation of his opinion, and the Justice remarks that this case of French *goes further than the court went in the case of Gibbs.* The Justice cites, in addition to the cases appearing in the body of the opinion, *Copin* v. *Adamson*, L. R. 9 Ex. 345; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155.

The case of *Sadler* v. *Mobile Insurance Co.*, 60 Mississippi, 391, decided in 1882, is of value, in the present case, as presenting statutes quite equivalent to those of Wisconsin upon this subject, and also as indicating that the omission of the foreign company to take out license does not exempt it from liability in the foreign State where it does business. The case shows that statutes are not against natural justice or public law which broadly and generally make foreign corporations liable in the States where their business is done by any agent whose acts have been adopted as valid by such foreign corporation.

The case of *Farmers' Insurance Co.* v. *Highsmith*, 44 Iowa, 330, decided in 1876, is one where the court holds that the service need not be upon the *general* agent of the foreign corporation, but may be upon any insurance agent who solicits risks and forwards them to the company.

In *Osborne* v. *Shawmut Insurance Co.*, 51 Vermont, 278, decided in 1878, the same doctrine was asserted, and it was also held that it made no difference that the plaintiff was not a resident of the State where the Insurance Company did business, and where the suit was brought.

Argument for Plaintiff in Error.

The case of *McNichol* v. *United States Mercantile Reporting Agency*, 74 Missouri, 457, decided in 1881, contains a valuable review of the authorities upon this subject, and sustains alike all the principles which are so often asserted by this court, that laws which provide for service of process on recognized agents of a foreign corporation are not *against public law, or against justice, or against the Constitution*, and are reasonable, and have been adopted because citizens doing business with foreign corporations, if obliged to go to the State of the residence of the corporation, would be without redress. (See pages 474 *et seq.*)

These cases, and others that might be cited, firmly establish, as the doctrine of this court, that wherever the laws of a State provide that foreign corporations, doing business in the State, shall be suable in such State by process served in a prescribed manner, there the doing of business in such State is a consent to be sued according to the laws existing at the time the business is done; and hence this court cannot fail to perceive that it was *possible* for the courts of the State of Wisconsin to acquire jurisdiction of the defendant for the purpose of rendering the judgment which is sued in this case. Hence the first plea discloses no facts showing that it was not possible for the court to acquire the jurisdiction which was exercised in rendering said judgment; and the plea, therefore, is bad, in failing to disclose any facts showing that no jurisdiction *in fact* existed.

Only one additional point need to be here noticed:

It may be argued that the record discloses that the defendant never took out license to do business in Wisconsin, as provided by her statutes. This fact does not appear *in the record in this case.* The showing made by the plaintiff for leave to file the present petition *is no part of the record of the present case.* The record proper begins with the leave of this court to file the declaration, and with its filing. Anything *outside* of what is disclosed subsequently to the leave of this court is *de hors* the record.

But, assuming that the court knows that the defendant never took out license, and that the judgment below was for

forfeitures incurred on account of doing business in Wisconsin in defiance of her laws, then, still, that fact does not affect the present issue.

Upon the point that the defendant is still liable for the penalties incurred by doing business in Wisconsin without complying with the license laws of the State, we refer this court to what is said upon this point in the opinion of the court (*supra*) in the case of *Wisconsin* v. *Accident Insurance Co.* The argument of the court there found seems to us conclusive upon the subject. See, also, *Ithaca Fire Department* v. *Beecher*, 99 N. Y. 429; *Ehrman* v. *Teutonia Ins. Co.*, 1 McCrary, 123; and the following cases cited by the court in that case: *Insurance Co.* v. *McMillen*, 24 Ohio St. 67; *Clay Fire Insurance Co.* v. *Huron Salt &c. Co.*, 31 Mich. 346; *Columbus Insurance Co.* v. *Walsh*, 18 Missouri, 229; *Lamb* v. *Bowser*, 7 Bissell, 315, 372; *Hartford Insurance Co.* v. *Matthews*, 102 Mass. 221.

In the light of these authorities, we submit that it is conclusively established that even if this court, in trying this demurrer, can look outside of the record proper, and can see that the court below rendered the judgment, which is the foundation of the present action, for penalties incurred by a company which had never taken out license in the State of Wisconsin, yet that fact is immaterial, because it did not deprive the court below of jurisdiction to render the judgment which was rendered. This is so, because the business done in the State was valid, and operated as assent to be sued in Wisconsin.

Mr. John A. Campbell for defendant.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

This action is brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to

the insurance commissioner of the State, as required by that statute. The leading question argued at the bar is whether such an action is within the original jurisdiction of this court.

The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the States of the Union, and the defendant a corporation of another of those States.

The Constitution of the United States, as originally established, ordains in art. 3, sect. 2, that the judicial power of the United States shall extend "to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects;" and that in all cases "in which a State shall be party" this court shall have original jurisdiction. The Eleventh Article of Amendment simply declares that "the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States; and it is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States which define the jurisdiction of the federal courts. *Kansas Pacific Railroad* v. *Atchison &c. Railroad*, 112 U. S. 414; *Paul* v. *Virginia*, 8 Wall. 168, 178; *Pennsylvania* v. *Wheeling Bridge*, 13 How. 518.

Yet, notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens; and a consideration of the cases in which it has heretofore had occasion to pass upon the construction and effect of these provisions of the Constitution may throw light on the determination of the question before us.

As to "controversies between two or more States." The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress. Story on the Constitution, § 1681; *New Jersey* v. *New York*, 3 Pet. 461; 5 Pet. 284; 6 Pet. 323; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 724, 736, 759; 13 Pet. 23; 14 Pet. 210; 15 Pet. 233; 4 How. 591, 628; *Missouri* v. *Iowa*, 7 How. 660, and 10 How. 1; *Florida* v. *Georgia*, 17 How. 478; *Alabama* v. *Georgia*, 23 How. 505; *Virginia* v. *West Virginia*, 11 Wall. 39; *Missouri* v. *Kentucky*, 11 Wall. 395. See also *Georgia* v. *Stanton*, 6 Wall. 50, 72, 73.

The books of reports contain but few other cases in which the aid of this court has been invoked in controversies between two States.

In *Fowler* v. *Lindsey* and *Fowler* v. *Miller*, actions of ejectment were pending in the Circuit Court of the United States for the District of Connecticut between private citizens for lands over which the States of Connecticut and New York both claimed jurisdiction; and a writ of *certiorari* to remove those actions into this court as belonging exclusively to its jurisdiction was refused, because a State was neither nominally nor substantially a party to them. 3 Dall. 411. Upon a bill in equity afterwards filed in this court by the State of New York against the State of Connecticut to stay the actions of ejectment, this court refused the injunction prayed for, because the State of New York was not a party to them, and had no such interest in their decision as would support the bill. *New York* v. *Connecticut*, 4 Dall. 1, 3.

This court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in *Kentucky* v. *Dennison*, 24 How. 66, where the State of Kentucky, by her governor, ap-

plied to this court in the exercise of its original jurisdiction for a writ of mandamus to the governor of Ohio to compel him to surrender a fugitive from justice, this court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ. And in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U. S. 76, it was adjudged that a State, to whom, pursuant to her statutes, some of her citizens, holding bonds of another State, had assigned them in order to enable her to sue on and collect them for the benefit of the assignors, could not maintain a suit against the other State in this court. See also *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 20, 28, 51, 75.

In *South Carolina* v. *Georgia*, 93 U. S. 4, this court, speaking by Mr. Justice Strong, left the question open, whether "a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court;" and dismissed the bill, because no unlawful obstruction of navigation was proved. 93 U. S. 14.

As to "controversies between a State and citizens of another State." The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in *Chisholm* v. *Georgia*, 2 Dall. 419, 475; Story on the Constitution, §§ 1638, 1682. The grant is of "judicial power," and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all.

By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory,

except when extended by express treaty or statute to offences committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country. Wheaton's International Law (8th ed.) §§ 113, 121.

Chief Justice Marshall stated the rule in the most condensed form, as an incontrovertible maxim, "The courts of no country execute the penal laws of another." *The Antelope*, 10 Wheat. 66, 123.

The only cases in which the courts of the United States have entertained suits by a foreign State have been to enforce demands of a strictly civil nature. *The Sapphire*, 11 Wall. 164; *King of Spain* v. *Oliver*, 2 Wash. C. C. 429, and Pet. C. C. 217, 276. The case of *The Sapphire* was a libel in admiralty, filed by the late Emperor of the French, and prosecuted by the French Republic after his deposition, to recover damages for a collision between an American ship and a French transport; and Mr. Justice Bradley, delivering the judgment of this court sustaining the suit, said: "A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts." 11 Wall. 167. The case of *The King of Spain* v. *Oliver*, although a suit to recover duties imposed by the revenue laws of Spain, was not founded upon those laws, or brought against a person who had broken them, but was in the nature of an action of assumpsit against other persons alleged to be bound by their own contract to pay the duties; and the action failed because no express or implied contract of the defendants was proved. Pet. C. C. 286, 290.

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Wharton's Conflict of Laws, § 833;

Westlake's International Law (1st ed.), § 388; Piggott on Foreign Judgments, 209, 210.

Lord Kames, in his Principles of Equity, cited and approved by Mr. Justice Story in his Commentaries on the Conflict of Laws, after having said, "The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself;" and recognizing the duty to enforce foreign judgments or decrees for civil debts or damages; adds, "But this includes not a decree decerning for a penalty; because no court reckons itself bound to punish, or to concur in punishing, any delict committed *extra territorium*." 2 Kames on Equity (3d ed.) 326, 366; Story's Conflict of Laws, §§ 600, 622.

It is true that if the prosecution in the courts of one country for a violation of its municipal law is *in rem*, to obtain a forfeiture of specific property within its jurisdiction, a judgment of forfeiture, rendered after due notice, and vesting the title of the property in the State, will be recognized and upheld in the courts of any other country in which the title to the property is brought in issue. *Rose* v. *Himely*, 4 Cranch, 241; *Hudson* v. *Guestier*, 4 Cranch, 293; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumner, 600, 605; Pigott on Foreign Judgments, 264. But the recognition of a vested title in property is quite different from the enforcement of a claim for a pecuniary penalty. In the one case, a complete title in the property has been acquired by the foreign judgment; in the other, further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right.

The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered. Constitution, art. 4, sect. 1; Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905.

Those provisions establish a rule of evidence, rather than of

jurisdiction. While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being reëxaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Hanley* v. *Donoghue*, 116 U. S. 1, 4.

In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, "The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Story's Conflict of Laws, § 609; *Thompson* v. *Whitman*, 18 Wall. 457, 462, 463.

A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, "does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *McElmoyle* v. *Cohen*, 13 Pet. 312, 325.

The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the

technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. *Louisiana* v. *New Orleans*, 109 U. S. 285, 288, 291; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716; *Chase* v. *Curtis*, 113 U. S. 452, 464; *Boynton* v. *Ball*, 121 U. S. 457, 466.

The only cases cited in the learned argument for the plaintiff, which tend to support the view that the courts of one State will maintain an action upon a judgment rendered in another State for a penalty incurred by a violation of her municipal laws, are *Spencer* v. *Brockway*, 1 Ohio, 259, in which an action was sustained in Ohio upon a judgment rendered in Connecticut upon a forfeited recognizance to answer for a violation of the penal laws of that State; *Healy* v. *Root*, 11 Pick. 389, in which an action was sustained in Massachusetts upon a judgment rendered in Pennsylvania in a *qui tam* action on a penal statute for usury; and *Indiana* v. *Helmer*, 21 Iowa, 370, in which an action by the State of Indiana was sustained in the courts of Iowa upon a judgment rendered in Indiana in a prosecution for the maintenance of a bastard child.

The decision in each of those cases appears to have been mainly based upon the supposed effect of the provisions of the Constitution and the act of Congress as to the faith and credit due to a judgment rendered in another State, which had not then received a full exposition from this court; and the other reasons assigned are not such as to induce us to accept those decisions as satisfactory precedents to guide our judgment in the present case.

From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a State and citizens of another State, or of a foreign

country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. This is shown both by the nature of the cases in which relief has been granted or sought, and by acts of Congress and opinions of this court more directly bearing upon the question.

The earliest controversy in this court, so far as appears by the reports of its decisions, in which a State was the plaintiff, is that of *Georgia* v. *Brailsford*.

At February term, 1792, the State of Georgia filed in this court a bill in equity against Brailsford, Powell and Hopton, British merchants and copartners, alleging that on August 4, 1782, during the Revolutionary War, the State of Georgia enacted a law, confiscating to the State all the property within it (including debts due to British merchants or others residing in Great Britain) of persons who had been declared guilty or convicted, in one or other of the United States, of offences which induced a like confiscation of their property within the States of which they were citizens; and also sequestering, and directing to be collected for the benefit of the State, all debts due to merchants or others residing in Great Britain, and confiscating to the State all the property belonging and debts due to subjects of Great Britain; and that by the operation of this law all the debts due from citizens of Georgia to persons who had been subjected to the penalties of confiscation in other States, and of British merchants and others residing in Great Britain, and of all other British subjects, were vested in the State of Georgia. The bill further alleged that one Spalding, a citizen of Georgia, was indebted to the defendants upon a bond, which by virtue of this law was transferred from the obligees and vested in the State; that Brailsford was a citizen of Great Britain, and resided there from 1767 till after the passing of the law, and that Hopton's and Powell's property (debts excepted) had been confiscated by acts of the legislature of South Carolina; that Brailsford, Hopton and Powell had brought an action and recovered judgment against Spalding upon this bond, and had taken out execution against him, in the Circuit Court of the United States for the District of Georgia, and that the parties to that

action had confederated together to defraud the State. Upon the filing of the bill, this court, without expressing any opinion upon the merits of the case, granted a temporary injunction to stay the money in the hands of the marshal of the Circuit Court, until the title to the bond as between the State of Georgia and the defendants could be tried. 2 Dall. 402.

At February term, 1793, upon a motion to dissolve that injunction, this court held that if the State of Georgia had the title in the debt (upon which no opinion was then expressed) she had an adequate remedy at law, by action upon the bond; but, in order that the money might be kept for the party to whom it belonged, ordered the injunction to be continued till the next term, and, if Georgia should not then have instituted her action at common law, to be dissolved. 2 Dall. 415.

Such an action was brought accordingly, and was tried by a jury at the bar of this court at February term, 1794, when the court was of opinion, and so charged the jury, that the act of the State of Georgia did not vest the title in the debt in the State at the time of passing it, and that by the terms of the act the debt was not confiscated, but only sequestered, and the right of the obligees to recover it revived on the treaty of peace; and the jury returned a verdict for the defendants. 3 Dall. 1.

It thus appears that in *Georgia* v. *Brailsford* the State did not sue for a penalty, or upon a judgment for a penalty, imposed by a municipal law, but to assert a title, claimed to have absolutely vested in her, not under an ordinary act of municipal legislation, but by an act of war, done by the State of Georgia as one of the United States (the Congress of which had not then been vested with the power of legislating to that effect) to assist them against their common enemy by confiscating the property of his subjects; and that the only point decided by this court, except as to matters of procedure, was that the title had not vested in the State of Georgia by the act in question.

In *Pennsylvania* v. *Wheeling Bridge*, 13 How. 518, this court, upon a bill in equity by the State of Pennsylvania against a corporation of Virginia, ordered the taking down or

neightening of a bridge built by the defendant over the Ohio River, under a statute of Virginia, which the court held to have obstructed the navigation of the river, in violation of a compact of the State, confirmed by act of Congress. 13 How. 561. See also *Willamette Bridge* v. *Hatch*, 125 U. S. 1, 15, 16. All the judges who took part in the decision in the *Wheeling Bridge Case* treated the suit as brought to protect the property of the State of Pennsylvania. Mr. Justice McLean, delivering the opinion of the majority of the court, said: "In the present case, the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property on the same ground and to the same extent as a corporation or individual may ask it." 13 How. 560, 561. So Chief Justice Taney, who dissented from the judgment, said: "She proceeds, and is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned." 13 How. 589. And Mr. Justice Daniel, the other dissenting judge, took the same view. 13 How. 596.

Mississippi v. *Johnson*, 4 Wall. 475, and *Georgia* v. *Stanton*, 6 Wall. 50, were cases of unsuccessful attempts by a State, by a bill in equity against the President or the Secretary of War, described as a citizen of another State, to induce this court to restrain the defendant from executing, in the course of his official duty, an act of Congress alleged to unconstitutionally affect the political rights of the State.

Texas v. *White*, 7 Wall. 700, *Florida* v. *Anderson*, 91 U. S. 667, and *Alabama* v. *Burr*, 115 U. S. 413, were suits to protect rights of property of the State. In *Texas* v. *White*, the bill was maintained to assert the title of the State of Texas to bonds belonging to her, and held by the defendants, citizens of other States, under an unlawful negotiation and transfer of the bonds. In *Florida* v. *Anderson*, the suit concerned the title to a railroad, and was maintained because the State of Florida was the holder of bonds secured by a statutory lien upon the road, and had an interest in an internal improvement fund pledged to secure the payment of those bonds. In *Alabama* v. *Burr*, the object of the suit was to indemnify the

State of Alabama against a pecuniary liability which she alleged that she had incurred by reason of fraudulent acts of the defendants; and upon the facts of the case the bill was not maintained.

In *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. 533, an action brought in this court by the State of Pennsylvania was dismissed for want of jurisdiction, without considering the nature of the claim, because the record did not show that the defendant was a corporation created by another State.

In *Wisconsin* v. *Duluth*, 96 U. S. 379, the bill sought to restrain the improvement of a harbor on Lake Superior, according to a system adopted and put in execution under authority of Congress, and was for that reason dismissed, without considering the general question whether a State, in order to maintain a suit in this court, must have some proprietary interest that has been affected by the defendant.

The cases heretofore decided by this court in the exercise of its original jurisdiction have been referred to, not as fixing the outermost limit of that jurisdiction, but as showing that the jurisdiction has never been exercised, or even invoked, in any case resembling the case at bar.

The position that the jurisdiction conferred by the Constitution upon this court, in cases to which a State is a party, is limited to controversies of a civil nature, does not depend upon mere inference from the want of any precedent to the contrary, but has express legislative and judicial sanction.

By the Judiciary Act of September 24, 1789, c. 20, § 13, it was enacted that "the Supreme Court shall have exclusive jurisdiction of controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction." 1 Stat. 80. That act, which has continued in force ever since, and is embodied in § 687 of the Revised Statutes, was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning. *Ames* v. *Kansas*, 111 U. S. 449, 463, 464.

In *Chisholm* v. *Georgia*, 2 Dall. 419, decided at August term, 1793, in which the judges delivered their opinions *seriatim*, Mr. Justice Iredell, who spoke first, after citing the provisions of the original Constitution, and of § 13 of the Judiciary Act of 1789, said: "The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but, in respect to the subject matter upon which such jurisdiction is to be exercised, uses the word 'controversies' only. The act of Congress more particularly mentions *civil* controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think was well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only, are uniformly considered of a local nature, and to be decided by its particular laws." 2 Dall. 431, 432. None of the other judges suggested any doubt upon this point; and Chief Justice Jay, in summing up the various classes of cases to which the judicial power of the United States extends, used "demands" (a word quite inappropriate to designate criminal or penal proceedings) as including everything that a State could prosecute against citizens of another State in a national court. 2 Dall. 475.

In *Cohens* v. *Virginia*, 6 Wheat. 264, decided at October term, 1821, Chief Justice Marshall, after showing that the Constitution had given jurisdiction to the courts of the Union in two classes of cases, in one of which, comprehending cases arising under the Constitution, laws and treaties of the United States, the jurisdiction depended on the character of the cause, and in the other, comprehending controversies between two or more States, or between a State and citizens of another State, the jurisdiction depended entirely on the character of the parties, said: "The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be in-

stituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a State and its citizens, and perhaps every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction." 6 Wheat. 398, 399.

The soundness of the definition, given in the Judiciary Act of 1789, of the cases coming within the original jurisdiction of this court by reason of a State being a party, as "controversies of a civil nature," was again recognized by this court in *Rhode Island* v. *Massachusetts*, decided at January term, 1838. 12 Pet. 657, 722, 731.

The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. Wisconsin Rev. Stat. § 1920. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. Wisconsin Stat. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offence. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offence.

This court, therefore, cannot entertain an original action to compel the defendant to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine.

The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if indeed it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State for the recovery of any sum of money, however small, by way of a fine for any offence, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution.

Judgment for the defendant on the demurrer.

COLTON *v.* COLTON.

COLTON *v.* COLTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Nos. 228, 229. Argued April 13, 16, 1888. — Decided April 30, 1888.

The intention of a testator, as expressed in his will, is to prevail when not inconsistent with rules of law.

No technical language is necessary for the creation of a trust in a will, and no general rule can be formulated for determining whether a devise or bequest carries with it the whole beneficial interest, or whether it is to be construed as creating a trust.

If a trust be sufficiently expressed and capable of enforcement, it is not invalidated by being called "precatory."

When property is given by will absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence; but if the objects of the supposed trust are definite and the property clearly pointed out, if the relations between the testator and the supposed beneficiary are such as to indicate a motive on the part of the one to provide for the other, and if the precatory clause, expressing a wish, entreaty, or recommendation that the donee shall apply the prop-

Statement of the Case.

erty to the benefit of the supposed *cestui que trust* warrants the inference that it is peremptory, then it may be held that an obligatory trust is created, which may be enforced in a court of equity.

C. a citizen of California, died there, leaving a will which contained the following provisions: "I give and bequeath to my said wife E. M. C. all of the estate, real and personal, of which I shall die seized, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. . . . I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix." This will was duly proved in the probate court of San Francisco. The widow having failed to make suitable provision for the mother and sister, each filed a bill in equity against her, setting up that the provision in their favor in the will was a trust. The bills alleged that the property received by the widow under the will amounted to $1,000,000; that the sister was dependent upon the mother for support; that the mother was in feeble health and required constant care, and was without means of support except the sum of $15,000 loaned at interest, which loan was well known to the testator when he made his will and at the time of his death; that no suitable provision had been made for either mother or sister by the widow, but that they had been left in "very straitened circumstances." The remedy sought in each bill was that the widow should be required to make a suitable provision for the complainant. To each bill a demurrer was filed on the ground that the will created no trust; that the court had no jurisdiction; that the claim was stale, having accrued more than four years before the commencement of the suit; and that the matter had been adjudicated by the probate court of San Francisco in the probate of the will. *Held*,

(1) That the claim being against the defendant as devisee and legatee, and not as executrix, and there being no allegation in the pleadings that any jurisdiction was exercised by the probate court in the construction of the will in this respect, the adjudications in that court were no bar to the prosecution of this suit;

(2) That the complainants took under the will a beneficial interest in the estate given to the wife to the extent of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come;

(3) That it was the duty of the court to ascertain, determine, and declare what provision would be suitable and best under the circumstances, and all particulars and details for securing and paying it.

THESE were two bills in equity, one filed by Martha Colton, and the other by Abigail R. Colton, each of whom was a citi-

zen of the State of New York, against Ellen M. Colton, a citizen of California.

Martha Colton alleged in her bill that she was a sister of David D. Colton, who died in San Francisco, California, on October 9, 1878, and that the defendant, Ellen M. Colton, was his widow; that on October 8, 1878, the said David D. Colton made and executed in due form his last will and testament, a copy of which was made a part of the bill, and was set out as follows:

"I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die possessed is community property and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix. I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court, or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate, I hereby appoint my friend, S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her, the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers."

The bill further alleged that on or about October 29, 1878,

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"the defendant duly filed the said last will and testament of the said David D. Colton in the then probate court in and for the city and county of San Francisco, State of California, and thereafter such proceedings were duly had in said probate court that on or about the 11th day of November, A.D. 1878, an order of said probate court was duly made and entered appointing the defendant executrix of said will and testament, and thereupon the defendant duly qualified as such executrix, and letters testamentary upon the said last will and testament were duly granted and issued to her, the said defendant, and the said defendant thereupon entered upon and thereafter continued to discharge the duties as such executrix until about the 18th day of December, A.D. 1879, when, by an order or decree of said probate court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton then remaining was distributed to the said defendant, and she was discharged from any further duties as such executrix."

The bill then alleged that the estate of David D. Colton thus distributed to the defendant was of the value of about $1,000,000, and that the defendant, though often demanded, has failed, neglected, and refused to make to the plaintiff any gift or provision whatever from the estate of said David D. Colton.

The bill also contained the following allegations:

"Your oratrix further shows that she has no estate, property, or income; that for many years she has been, and still is, dependent upon her mother, the said Abigail R. Colton, for her support and maintenance; that ever since your oratrix was a young child her said mother has been in feeble health, and has always required your oratrix' aid and services, and especially during the lengthened illness and last sickness of your oratrix' said father, and ever since the death of your oratrix' said father as aforesaid, her said mother has been an invalid, and has endured much sickness and suffering, and has required much medical attendance, and the almost constant nursing and care of your oratrix.

"And your oratrix further shows that about December,

1869, your oratrix' said father, Isaac W. Colton, then residing in the city of New York, at the request of your oratrix' brother, the said David D. Colton, then residing in San Francisco aforesaid, converted all of his property, consisting of what was then known as five-twenty bonds of the government of the United States, as was well known to the said David D., in gold, amounting to the sum of fifteen thousand dollars, and loaned the same to the said David D.; and thereupon your oratrix' father received therefor the promissory note of the said David D. Colton, dated at San Francisco aforesaid, on or about December 7th, 1869, for the said sum of $15,000, payable in gold, with interest; that afterwards, on or about March 1st, 1873, the said David D. Colton renewed his said note by giving his new note to his father, the said Isaac W. Colton, for the same amount and payable in the same manner, and which said new note was owned and held by your oratrix' said father at the time of his death.

"And your oratrix further shows that her said father died intestate, and that after his death, and on or about March 1st, A.D. 1877, the said David D. Colton, with the consent of your oratrix, took up said last mentioned note by giving his new note therefor, payable to his and your oratrix' mother, the said Abigail R. Colton, for the said sum of fifteen thousand dollars, with interest, and thereby your oratrix surrendered and relinquished all her legal share and interest in the said note so held by her father at the time of his death, as aforesaid, as your oratrix' brother, the said David D. Colton, well knew."

The prayer of the bill is that the "defendant may be compelled to execute the terms and directions of the said last will and testament of the said David D. Colton, and to make your oratrix a suitable provision from the said estate of the said David D. Colton in such amount and in such manner as to your honors shall seem most meet and proper in the premises."

Abigail R. Colton, complainant in the other bill, is the mother of Martha Colton, and also of David D. Colton the testator. Her bill is in substance the same as that of Martha Colton, and prays for similar relief, but contains the following:

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"And your oratrix further shows that the said defendant has, although often demanded, utterly failed, neglected, and refused to make to or for your oratrix any gift or provision whatever from the estate of your oratrix' son, the said David D. Colton, except as hereinafter mentioned, that is to say: On or about March 1st, 1880, the defendant sent to your oratrix the sum of fifty dollars; and thereafter, at divers times, and at various intervals between the day last named and about the first day of January, 1881, the defendant sent to your oratrix about five other sums of fifty dollars each, amounting in the whole, as above given to your oratrix, to the sum of about three hundred dollars; and in or about the month of February, 1881, the defendant sent to your oratrix the further sum of six hundred dollars; and in or about November, 1882, she gave to your oratrix the further sum of six hundred dollars; the whole given as aforesaid, since the death of the said David D. Colton, amounting altogether to the sum of about fifteen hundred dollars only.

"Your oratrix further shows that she is now in the seventy-fifth year of her age, and that for many years prior to the death of her husband, the said Isaac W. Colton, she was in feeble health, and ever since that event she has been an invalid and endured much sickness and suffering, and has required much medical attendance, and the almost constant nursing and care of her said daughter, Martha Colton, who has always resided with her, until the present time.

"That your oratrix is not the owner of and has no interest in any real estate, or chattels real, except a one-half lot in Greenwood cemetery, near the city of New York, where her said husband is buried, and that besides her wearing apparel your oratrix has no personal property whatever except the sum of $15,000, which she has had loaned out upon interest ever since, on or about March 1st, 1877, from which time the possession and loaning out of the said sum of $15,000 by your oratrix were well known to the said David D. Colton, down to and at the time of his making his last will and testament.

"And your oratrix further shows, that her entire income

ever since the death of her son, the said David D. Colton, has consisted solely of the interest moneys arising from the loan of the aforesaid fifteen thousand dollars, and the aforesaid several sums of money given by the defendant to your oratrix as aforesaid; and ever since in November, 1882, her income has consisted and does still consist solely of said interest moneys alone.

"And your oratrix further shows, that at the time of the death of the said David D. Colton, his sister, the said Martha Colton, was not and is not now the owner of any real estate or property, nor has she any income whatever, and your oratrix has, therefore, ever since the death of the said Martha's father provided and still provides her, the said Martha, support and maintenance.

"That by reason of your oratrix' very limited income aforesaid, and notwithstanding great economy in her living and expenses and the denying herself much that would conduce to her health and comfort, your oratrix is in very straitened circumstances."

To each of these bills the defendant demurred, and for causes of demurrer assigned the following:

"First. That the said complainant hath not by her said bill made such a case as entitles the said complainant to any relief in this court. Avouching any of the matters therein complained of, in this, that no estate, trust, or interest exists in favor of said complainant or arises in her favor out of the said last will and testament in her bill set forth or any matter, legacy, or devise therein contained.

"Second. That this court hath no jurisdiction of the matters and things set forth in said complainant's bill, nor hath it jurisdiction to consider the same or to grant the relief prayed for or any relief whatever.

"Third. That neither this court nor any other court whatever hath jurisdiction to hear and determine the matters and things set forth in complainant's said bill or to grant the relief therein prayed, or any other relief whatever.

"Fourth. That it appears on the face of said complainant's bill that if any cause of action whatever exists by reason of

the matters and things in said bill set forth, that such cause of action is founded upon a stale equity and claim.

"Fifth. That it appears on the face of complainant's said bill that the said cause of action therein set forth, if any such exists, accrued more than four years before the commencement of this action, and that the same is barred upon the principle which courts of equity follow in analogy to the statute of limitation at law.

"Sixth. That it appears upon the face of said complainant's bill that the said pretended cause of action therein set forth accrued more than four years before the filing of her said bill.

"Seventh. That it appears on the face of complainant's said bill that the matters and things therein sought to be inquired of and determined have long since been inquired into and determined against the said complainant by the probate court of the city and county of San Francisco, State of California."

The demurrer to each of the bills was sustained, and they were severally dismissed. *Colton* v. *Colton*, 10 Sawyer, 325, 336. From these decrees the present appeals were prosecuted.

Mr. Sherman Evarts and *Mr. William M. Evarts* for appellants.

Mr. George R. B. Hayes for appellee. *Mr. John A. Stanly* was with him on the brief.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

These appeals bring before us the will of David D. Colton for construction. The question is, whether his widow, Ellen M. Colton, by its provisions, takes the whole estate of which he died seized and possessed absolutely in her own right, or whether she takes it charged with a trust enforceable in equity in favor of the complainants, and, if so, to what extent. The language of the will to be construed is as follows: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate real and personal, of which I shall die seized, possessed,

or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best."

Before proceeding, however, to a consideration of the will itself, we are met with the objection, interposed by the counsel for the appellee, that the matter of the present controversy has already been finally adjudicated. The proposition is, that the decree of the probate court of the city and county of San Francisco, distributing the whole of the estate of the testator to the appellee, was a complete and final adjudication as to all parties claiming, as heirs, legatees, or devisees, any interest, legal or equitable, in or to the estate, and is, therefore, a bar to the present suit. It is contended that by the law of California, the probate court, having jurisdiction over matters relating to the settlement of estates of deceased persons, and, among other matters, to distribute the residue of the estate among the persons who by law are entitled thereto, if a trust is attempted to be created by will, that court must determine how far the attempt is successful, what is the trust, who is the trustee, and who are the beneficiaries, and distribute accordingly.

As there is no plea in bar of the relief sought by the bills, setting up any decree of the probate court to which the appellants were parties, and by which they could be bound, denying to them any interest under the will of the testator, we must look to the bills themselves for the only allegations on that subject. All that is said on the subject in them is that the defendant "continued to discharge the duties as such executrix until about the 18th day of December, A.D. 1879, when, by an order or decree of said probate court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton then remaining was distributed to the said defendant, and she was discharged from any further duties as such executrix."

The entire effect of this averment is to show that the defendant had come into possession of the estate as devisee and legatee, as she was clearly entitled to, as soon as the estate was fully administered by her as executrix. The claims in-

sisted on by the complainants are not against her as executrix, but as devisee and legatee; and the trusts alleged to be created by the will do not arise until the widow of the testator comes into possession of the estate as devisee and legatee. Whatever jurisdiction by the laws of California its probate court may have been entitled to exercise for the purpose of construing the will as between the widow and the present complainants, there is no averment in the pleadings that it was ever exercised. There is, therefore, no adjudication on the subject by the probate court, which has decided the question raised in these suits so as to operate as a bar to their prosecution.

The fundamental and controlling rules for the construction of wills are familiar and well understood. They were well stated by Chief Justice Marshall in delivering the opinion of this court in *Smith* v. *Bell*, 6 Pet. 68, as follows: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. 1 Doug. 322; 1 W. Bl. 672. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions which he wills to be performed after his death.' 2 Bl. Com. 499. These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. . . . No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. . . . Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator at-

tempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone farther. The construction put upon the words in one will has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded; it should never be carried so far as to defeat the plain intent; if that intent may be carried into execution without violating the rules of law. It has been said truly (3 Wils. 141) 'that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'" See *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 502.

The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed. These rules of construction, indeed, apply to every written instrument, although in deeds and some other formal documents the long usage of the law has, in certain cases, required the use of technical words and phrases to accomplish particular effects. No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words "upon trust" or "trustee," if the creation of a trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a

trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument. Perry on Trusts, §§ 82, 151, 158; *Creswell's Administrator* v. *Jones*, 68 Alabama, 420.

The question upon the language of the present will, which constitutes the point in dispute, is whether the testator intended to charge his estate in the hands of his widow with a trust in favor of his mother and sister, or whether he intended his widow to take the estate free from any obligation of that character, at liberty to disregard the recommendation and request, and to make provision for his mother and sister or not out of property absolutely her own, as she might choose.

It is argued against the establishment of the trust in favor of the complainants that it is of the nature of those called "precatory trusts," founded originally in the earlier decisions of courts of equity in England and in this country, upon strained, artificial, and inappropriate interpretations of the language of testators, whereby their real intentions were perverted and defeated, according to a rule which is no longer favored as an existing doctrine of equity, and which is excluded by the express terms of the Civil Code of California, according to which the will in this case must be construed. That code provides that "a will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." Section 1317. "In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." Section 1318. "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." Section 1321. "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by the inaccurate recital of or reference to its contents in another

part of the will." Section 1322. "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Section 1324. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." Section 1325. "Technical words are not necessary to give effect to any species of disposition by a will." Section 1328. And by § 1319 it is provided that these rules are to be observed "unless an intention to the contrary clearly appears." In relation to trusts, the code also provides, in respect to real property, that they must be either in writing or created by operation of law (sec. 852); subject to which condition, it is further provided that "a voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty; 1, an intention on the part of the trustor to create a trust; and 2, the subject, purpose, and beneficiary of the trust." Section 2221. It will be observed, however, that these statutory provisions of the State of California are merely declaratory of preëxisting law, and are perfectly consistent, if not identical, with the rules of construction already noticed as of controlling and universal application.

As to the doctrine of precatory trusts, it is quite unnecessary to trace its origin, or review the numerous judicial decisions in England and in this country which record its various applications. If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it "precatory." The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not to take away the discretion of the legatee growing out of his right to use and dispose of the property given as his own. On the other hand, the language employed may be imperative in fact,

though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary.

"All the cases upon a subject like this," said Lord Chancellor Cottenham in *Shaw* v. *Lawless*, 5 Cl. & Finn. 129, 153, "must proceed on a consideration of what was the intention of the testator." In *Williams* v. *Williams*, 1 Simons N. S. 358, 369, Vice Chancellor Cranworth said: "The point really to be decided in all these cases is whether, looking at the whole context of the will, the testator has meant to impose an obligation on his legatee to carry his express wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not at his discretion." And referring to rules for ascertaining this intention sought to be deduced from the numerous decisions on the subject, he adds: "I doubt if there can exist any formula for bringing to a direct test the question whether words of request, or hope, or recommendation are or are not to be construed as obligatory."

In *Briggs* v. *Penny*, 3 Macn. & Gord. 546, 554, Lord Chancellor Truro stated the same rule with a little more particularity. He said: "I conceive the rule of construction to be that words accompanying a gift or bequest expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: first, that they are so used as to exclude all option or discretion in the party who is to act as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced." The most recent declarations of the English courts of equity do not modify this statement of the law. *Lambe* v. *Eames*, L. R. 6 Ch. 597; *In re Hutchinson and Tenant*, 8 Ch. Div. 540; *In re Adams and the Kensington Vestry*, L. R. 27 Ch. Div. 394, 406.

The existing state of the law on this question, as received in

England, and generally followed in the courts of the several States of this Union, is well stated by Gray, C. J., in *Hess* v. *Singler*, 114 Mass. 56, 59, as follows: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some of the earlier English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the later cases in this, and in all other questions of the interpretation of wills, the intention of the testator, as gathered from the whole will, controls the court; in order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence."

In the previous case of *Warner* v. *Bates*, 98 Mass. 274, 277, Chief Justice Bigelow vindicated the soundness and the value of this rule in the following commentary. He said: "The criticisms which have been sometimes applied to this rule by text writers and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the

testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee, the just and reasonable interpretation is that a trust is created which is obligatory and can be enforced in equity against the trustee by those in whose behalf the beneficial use of the gift was intended."

In the light of this rule, as thus stated and qualified, we proceed to ascertain the intention of the testator in this will as to the point in controversy. In the first place, the language of the bequest to his wife is undoubtedly sufficient to convey to her at his death the whole estate absolutely and without conditions. The will says: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to." If this stood alone there could be no controversy as to the nature and extent of her title. But it does not stand alone, and it does not contain any expressions which necessarily anticipate or limit any subsequent provisions affecting it. It does not say expressly that she shall have the absolute right to use, for her own benefit exclusively, or the absolute right to dispose of, the estate which he gives to her. Her right to use and her power to dispose are merely the legal incidents of the title conveyed by the clause considered as unqualified by its context. But the bequest to the wife is immediately followed by the clause which is the subject of the present contention. In direct connection with this gift to his wife the testator adds: "I recommend to her the care and protection of my

mother and sister, and request her to make such gift and provision for them as in her judgment will be best." It may well be admitted that the recommendation of the testator to his wife to care for and protect his mother and sister, when they should be deprived of the care and protection which he could personally secure to them while he lived, is not sufficient of itself to create a trust and attach it to the estate of his widow, so as to be capable of enforcement. It is certainly the expression of a strong desire on the part of the testator for a continuance of care and protection by his legatee over his mother and sister, but, considered by itself, cannot be construed as creating in them an enforceable right to a beneficial interest in the estate given to his widow. It is rather a personal charge than a property charge. But he did not leave it so. The testator adds: "And request her to make such gift and provision for them as in her judgment will be best." It is immaterial in the construction of this language to determine whether the word "gift" means a donation from the legatee or from the testator, for it is also to be a "provision." It is this which he requests his widow to make, out of that provision which the testator made directly for her, consisting of the whole of his estate, real and personal. The entire estate bequeathed to his widow is thus affected by this request. Is that request equivalent to a command, or is it a mere solicitation, which after his death she may reject and disregard without violating the terms of his will and the conditions upon which she accepted her estate under it? Is there anything in the language of the clause itself, in its context, or in the circumstances and situation of the testator when he framed it, to indicate an intention on his part to confer upon his widow the authority to accept his property, and at the same time to refuse to use it according to his request? Undoubtedly he gives to her some discretion on the subject; the gift and provision which he requests for his mother and sister is to be such as in her judgment will be best. It is to be such as will be best for them, having regard to all the circumstances, both of their necessities and the amount and sufficiency of the estate; and this proportion, which is to constitute what shall be best, is

to be determined by the widow in the exercise of her judgment. It is her judgment that is to be called into exercise, and this excludes caprice, whim, and every merely arbitrary award; but whatever the judgment may be, and whatever discretion is involved in its exercise, it operates only upon the nature, form, character, and amount of the gift and provision intended for them. The fact of a gift and provision is presupposed, and stands on its own ground. Her judgment is not invoked as to that. The only ambiguity, in respect to whether there shall be a gift and provision or not, resides in the single word "request." Does that mean a wish of the testator which he intended to be fulfilled out of the means which he had furnished to make it effectual, or does it mean a posthumous petition which the testator understood himself as addressing to the favor and good will of his sole legatee?

The situation of the testator at the time he framed these provisions is to be considered. He made his will October 8, 1878; he died the next day. It may be assumed that it was made in view of impending dissolution, in the very shadow of approaching death. There is room enough for the supposition that by this necessity the contents of his will were required to be brief; the conception of the general idea to give everything to his wife was simple and easily expressed, and capable of covering all other intended dispositions. The time and the circumstances, perhaps, disabled him from specifying satisfactory details concerning a provision for his mother and his sister, but he did not forget that he owed them care and protection. That care and protection, therefore, he recommended to his wife as his legatee; but he was not satisfied with that; he wished that care and protection to be embodied in a gift and provision for them out of the estate which he was to leave to her. He therefore requested her to make it, and that request he addressed to his legatee and principal beneficiary as expressive of his will that a gift and provision for his mother and sister should come out of it. His legacy to them was part of his legacy to her. All other particulars, as to its form and amount, he was willing to leave, and did leave, to be determined by his widow in her judgment of

what would be best for his beneficiaries, so as to insure them that care and protection for which he was providing.

The substance of the bequest was his own; the form of it, shaped only by the declared purpose of his bounty, he was willing to leave to the judgment of his wife. The alternative that such discretion should assume the power to disappoint his dispositions evidently was not present in his thoughts, as it is not implied in his words.

The language of the testator immediately succeeding that under consideration throws some light on the meaning of the words in dispute. He says: "I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise." These were the daughters of the wife as well as of the testator, as it is to be inferred from the fact that he refers the whole subject of any provision for them to her love, and the provision which he requests in their behalf is to be not such "as in her judgment will be best," but only such "as she may in her love for them choose to exercise," leaving the whole question of a provision subject to the exercise of the legatee's choice, which the testator was quite willing to adopt as the dictate of the love of a mother for her children.

It is also to be assumed that the circumstances and situation of his mother and sister were remembered by the testator in the act of making his will; that they were separated from his personal care by a wide distance; that his mother was a widow, and had nearly attained the age of three score years and ten; that even before the death of his father her health was feeble, and that since, she had been an invalid, enduring much sickness and suffering, requiring constant medical attendance, and the nursing and care of her daughter, who had always resided with her; that except the lot in Greenwood cemetery, where her husband was buried, she owned no real estate, and had no income except the interest on $15,000, which had been advanced to the testator himself by his father as a loan many years previously, and on the income from which the mother and daughter were obliged, with great economy and self-denial, to maintain themselves in very strait-

ened circumstances. A recollection of their necessities, as well as natural love and affection, must have inspired that sentence of his will by which the testator recommended to his widow the care and protection of his mother and sister, giving commanding weight and solemnity to the accompanying request "to make such gift and provision for them as in her judgment will be best;" for he also well knew that such a provision, sufficient for their comfort and independence, would not sensibly diminish the abundance of the legacy to his wife out of which it must issue.

It is an error to suppose that the word "request" necessarily imports an option to refuse, and excludes the idea of obedience as corresponding duty. If a testator requests his executor to pay a given sum to a particular person, the legacy would be complete and recoverable. According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator; as where a testator desired that all of his just debts, and those of a firm for which he was not liable, should be paid as soon as convenient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter. *Burt* v. *Herron*, 66 Penn. St. (16 P. F. Smith), 400. And in such a case as the present, it would be but natural for the testator to suppose that a request, which, in its terms, implied no alternative, addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command. In such a case, according to the phrase of Lord Loughborough in *Malim* v. *Keighley*, 2 Ves. Jr. 333, 529, "the mode is only civility."

But it is also argued that the trust sought to be established under this will in favor of the complainants is incapable of execution by reason of the uncertainty as to the form and extent of the provision intended, and because it involves the exercise of discretionary power on the part of the trustee which a court of equity has no rightful authority to control. We have seen that whatever discretion is given by the will to the testator's widow does not affect the existence of the trust.

That discretion does not involve the right to choose whether a provision shall be made or not; nor is there anything personal or arbitrary implied in it. It is to be the exercise of judgment directed to the care and protection of the beneficiaries by making such a provision as will best secure that end. There is nothing in this left so vague and indefinite that it cannot, by the usual processes of the law, be reduced to certainty. Courts of common law constantly determine the reasonable value of property sold, where there is no agreement as to price, and the judge and jury are frequently called upon to adjudge what are necessaries for an infant or reasonable maintenance for a deserted wife. The principles of equity and the machinery of its courts are still better adapted to such inquiries. In the exercise of their discretion over trusts and trustees, it is a fundamental maxim that no trust shall fail for want of a trustee, and where the trustee appointed neglects, refuses, or becomes incapable of executing the trust, the court itself in many cases will act as trustee. In *Thorp* v. *Owen*, 2 Hare, 607, 610, Wigram, V. C., said: "Whatever difficulties might originally have been supposed to exist in the way of a court of equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a court of equity can measure the extent of interest which an adult, as well as an infant, takes under a trust for his support, maintenance and advancement, provision, or other like indefinite expression, applicable to a fund larger confessedly than the party entitled to the support, maintenance, or advancement can claim, and some interest in which is given to another person." And in *Foley* v. *Parry*, 2 Myl. & K. 138, where the words of a will were "and it is my particular wish and request that my dear wife and A. will superintend and take care of the education of D. so as to fit him for any respectable profession or employment," it was held that a charge was created on the interest taken by the testator's widow which could be made effectual by a court of equity.

It is quite true that where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control

their discretion as to the way in which they exercise the power, so that if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself, in the first instance, to regulate the maintenance, but will leave it to the trustees. But the court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government, or real, or personal security, and the trust fund is outstanding upon any hazardous security. Lewin on Trusts, c. 20, § 2, 402, 403, 4th Eng. ed.

In the case of *Costabadie* v. *Costabadie*, 6 Hare, 410, 414, Vice Chancellor Sir James Wigram said: "If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended that he should have — that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy." But it is always for the court eventually to say, when called upon, whether the discretion has been either exercised at all, or exercised honestly, and in good faith. *In re Hodges*, *Davey* v. *Ward*, L. R. 7 Ch. Div. 754. Plainly, if the trustee refuses altogether to exercise the discretion with which he is invested, the trust must not on that account be defeated, unless by its terms it is made dependent upon the will of the trustee himself.

On the whole, therefore, our conclusion is that each of the complainants in these bills is entitled to take a beneficial interest under the will of David D. Colton, to the extent, out of the estate given by him to his wife, of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from

which it must come. It will be the duty of the court to ascertain after proper inquiry, and thereupon to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it.

The decrees of the Circuit Court are accordingly reversed, and the causes remanded with directions to overrule the demurrers to the several bills, and to take further proceedings therein not inconsistent with this opinion; and it is so ordered.

CAMERON *v.* HODGES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 208. Argued April 5, 1888. — Decided April 30, 1888.

A petition by defendant for removal of a cause from a state court, on the ground of citizenship, which alleges that he is a citizen of another named State of which none of the complainants are citizens, is insufficient unless the record discloses that they are citizens of other named States of which the defendant is not a citizen, or are aliens.

This court of its own motion uniformly takes the objection of want of jurisdiction in the Circuit Court, especially as regards citizenship.

A want of jurisdiction of a Circuit Court arising out of a defect in the allegations of citizenship in a cause removed from a state court, on the ground of citizenship, cannot be cured by affidavits here.

THIS was an appeal from the Circuit Court of the United States for the Western District of Tennessee.

The suit was originally brought in the Chancery Court of Shelby County, held in the city of Memphis in that State, in regard to a controversy which arose concerning the title to certain real estate situated in the State of Arkansas. The principal defendant, Asa Hodges, was a citizen of Arkansas, and upon that ground procured an order in the Chancery Court to remove the case into the Circuit Court of the United States for the Western District of Tennessee. The allegations upon which this removal was made were as follows:

Argument for Appellees.

"In the Chancery Court of Shelby County, Tennessee.

"Anna E. Cameron et al.
v. } R. 4593.
Asa Hodges et al.

"To the Hon. W. W. McDowell, chancellor:

"Your petitioner states that he is, and at the time of the institution of this suit was, a citizen of the State of Arkansas and not of the State of Tennessee, and that none of the complainants are or were at that time citizens of the State of Arkansas; that said suit is of a civil nature, and the matters in controversy exceed, exclusive of costs, in value the sum of five hundred dollars; that the controversy affects the ownership of real estate in said State of Arkansas, and can be wholly decided between complainants and this defendant. Wherefore he prays an order for the removal of said cause from this court to the United States Circuit Court for the Western District of Tennessee, at Memphis, and he tenders herewith the requisite bond, as required by law, for the removal thereof.

"Asa Hodges, the petitioner, being sworn, says the matters set forth in the above petition are true as far as stated on his own knowledge; the rest he believes to be true.

ASA HODGES.

"Sworn to this October 2d, 1882.

"J. M. BRADLEY, *Deputy Clerk and M.*"

Mr. D. H. Poston, with whom was *Mr. W. H. Poston* on the brief, for appellants.

Mr. W. G. Weatherford, with whom was *Mr. T. B. Turley* on the brief for appellees. *Mr. Weatherford* and *Mr. J. B. Heiskell* after the cause was argued and submitted, filed the following affidavit:

Asa Hodges, being sworn, says that he is the defendant and appellee in this cause, and that the affidavit made by him for its removal from the state court in Tennessee to the United States court was inadvertently made less full than the facts warranted; that at the time of the institution of said suit he

was, and ever since has remained, a citizen of the State of Arkansas; and that at the same time Ann E. Cameron and J. D. Cameron were citizens of the State of Mississippi; Mary F. Thompson and J. A. Thompson, and J. E. Price, were citizens of the State of Texas; E. J. Morton, L. W. Morton, L. C. Cobb, and R. W. Cobb, were citizens of the State of Alabama; and Gasken Price, Wm. Price, Lawler Price, and Leila Price, were citizens of the State of Tennessee; and that the parties named were all the complainants in said cause.

A. Hodges.

State of Tennessee, }
County of Shelby. }

Personally appeared [before] the undersigned, notary public for said county and State, Asa Hodges, who made oath that the statements in the foregoing affidavit are true.

Subscribed and sworn to before [me] this 20th day of April, 1888.

[seal.] J. E. Dillard,
Notary Public.

With this affidavit they filed a brief in support of the jurisdiction of the court.

Mr. Justice Miller, after stating the case, delivered the opinion of the court.

While this petition sets forth the citizenship of Hodges to be in the State of Arkansas, both at the commencement of the suit and at the time of the application for removal, it does not state that of any of the complainants, but merely says "that none of the complainants are or were at that time citizens of said State of Arkansas," nor have we been able to find in the record any evidence, allegation or statement as to the citizenship of any of them. That the defendant, Hodges, was a citizen of Arkansas, in connection with the fact that none of the complainants were citizens of that State, is not sufficient to give jurisdiction in a Circuit Court of the United States. *Brown* v. *Keene*, 8 Pet. 112, 115.

The adverse party must be a citizen of some other named

State than Arkansas, or an alien. All the complainants might be residents and citizens of the District of Columbia, or of any Territory, and they might not be citizens of the State of Tennessee where the suit was brought, or indeed, of any State in the Union. A citizen of a Territory, or of the District of Columbia, can neither bring nor sustain a suit on the ground of citizenship, in one of the Circuit Courts. *Barney* v. *Baltimore*, 6 Wall. 280.

This court has always been very particular in requiring a distinct statement of the citizenship of the parties, and of the particular State in which it is claimed, in order to sustain the jurisdiction of those courts; and inasmuch as the only citizenship specifically averred and set out in the case before us is that of the defendant, Hodges, at whose instance the cause was removed, and as that is the only ground upon which the removal was placed, it seems clear that the Circuit Court did not have jurisdiction of it, and that the suit should have been dismissed or remanded for that reason. *Robertson* v. *Cease*, 97 U. S. 646. The allegation which was made in that case, that Cease, who was the plaintiff, in the action in the Circuit Court for the Western District of Texas, "resides in the county of Mason and State of Illinois," was held not to be a sufficient averment of his citizenship in Illinois. See, also, *Godfrey* v. *Terry*, 97 U. S. 171.

This court has uniformly acted upon the principle that in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the federal courts, it would, on its own motion, take the objection of the want of jurisdiction in the Circuit Court, especially as regards citizenship. *Hilton* v. *Dickinson*, 108 U. S. 165; *Morgan's Executor* v. *Gay*, 19 Wall. 81.

We have considered the application of Hodges, the defendant in error, to supply the want of averments in regard to the citizenship of the complainants in this suit. The difficulty here, however, does not relate to the jurisdiction of this court, in regard to which evidence by affidavit has sometimes been received where the defect was as to the amount in controversy, and perhaps in relation to some other point. The juris-

diction of this court in the present case is undoubted, but, as the previous remarks in this opinion show, the Circuit Court never had jurisdiction of it; and while we may be authorized to reverse the decree so rendered we have no power to amend the record so as to give jurisdiction to that court by proceedings here. The case in this court must be tried upon the record made in the Circuit Court. In this instance there has been a removal from a tribunal of a state into a Circuit Court of the United States, and there is no precedent known to us which authorizes an amendment to be made, even in the Circuit Court, by which grounds of jurisdiction may be made to appear which were not presented to the state court on the motion for removal. In fact, under the fifth section of the act of March 3, 1875, it being manifest upon the face of the affidavit or petition for removal in the present suit that the case had been improperly removed into the Circuit Court, it was the duty of that court at all times and at any time during its pendency before it to have remanded the case to the tribunal of the State where it originated. We can do no more, however, than to reverse the action of the court below from which this appeal was taken, because it had no jurisdiction of the case.

The decree in this case is reversed for want of jurisdiction in the Circuit Court, and the case remanded for further proceedings.

CULBERTSON *v.* THE H. WITBECK COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

No. 217. Argued April 11, 1888. — Decided April 30, 1888.

The statutes of Michigan require the attestation of two witnesses to the grantor's signature. A deed of husband and wife was offered in evidence, the attestation to which was: "Signed, sealed, and delivered in presence of S. W. for" the husband; "W. H. R., G. H. for" the wife; and there was a certificate that "the word 'half' in the twelfth line was

Counsel for Plaintiff in Error.

interlined before signing S. W., E. W." E. W. signing this certificate with S. W. was the justice of the peace who took the acknowledgment, and his certificate of acknowledgment stated that he knew the person who made the acknowledgment to be the person who executed the instrument. *Held*, that the execution of the deed was proved, and it was properly admitted in evidence.

A certificate by a master in chancery and notary public in New Jersey, taking an acknowledgment there of a deed of land in Michigan that he is "satisfied that the parties making the acknowledgment are the grantors in the within deed of conveyance," is a sufficient certificate that they were the same persons as those named as grantors in the deed; but if defective in this respect, the defect is cured under the laws of Michigan by a certificate from the proper official that the person taking the acknowledgment was "a master in chancery and notary public," and that "the annexed instrument is executed and the proof of acknowledgment thereto taken in accordance with the laws of the State of New Jersey."

The will of a citizen of New York, dying in the city of New York, was admitted to probate there. A duly authenticated copy being presented for probate in Michigan, notice to all parties interested by publication was ordered, and on proof of such publication, and after hearing and proof, the instrument was admitted to probate in Michigan, and ancillary letters were issued. *Held*, that the parties were properly brought before the court by publication, and that the will was properly admitted to probate.

An objection as to the sufficiency of a certificate of a register of deeds to an instrument offered in evidence which was not made at the trial cannot be taken here.

In Michigan a declaration of trust which declares that the parties executing it hold the property in trust for themselves and two other persons is an express trust, and under the laws of that State the whole estate in law and in equity is vested in the trustees.

When a party to an action of ejectment in Michigan sets up a tax title, several years old, it is competent for the other party, after showing by the official records that an illegal expenditure of public money was ordered, sufficient under the laws of the State to vitiate the whole tax if paid from it, to prove by parol evidence that the sum so ordered to be paid was paid out of the moneys raised by the tax in question.

EJECTMENT. Verdict and judgment for the plaintiff. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. D. H. Ball and *Mr. Walter H. Smith* for plaintiff in error. *Mr. A. T. Britton* and *Mr. A. B. Browne* were with them on the brief.

Mr. Edward Cahill for defendant in error. *Mr. B. J. Brown* was with him on the brief.

Mr. Justice Miller delivered the opinion of the court.

This is an action of ejectment, originally brought in the Circuit Court for the County of Marquette, in the State of Michigan, by The H. Witbeck Company, plaintiff, against William C. Culbertson, defendant.

The object of the suit was to recover certain lands situated in the county of Marquette, to which the plaintiff claimed title in fee. The case was removed to the Circuit Court of the United States, where a trial was had which resulted in a verdict in favor of the plaintiff. This, as a matter of right, was set aside, upon motion, under the law of Michigan, and a new trial granted, which also resulted in a verdict and judgment in favor of the plaintiff. It is this which the present writ of error brings up for review.

During the progress of the trial the plaintiff established title by various conveyances, beginning with patents from the United States, in William A. Pratt. As a link in the chain of title from Pratt, the plaintiff offered in evidence the record of a deed from Pratt and wife to Still Manning and William Wright, which was executed and acknowledged in the State of Michigan. This was objected to by the defendant upon the ground that it was attested by only one witness as to the signature of William A. Pratt. The instrument was, however, admitted in evidence notwithstanding the objection, to which the defendant excepted. This ruling is made the ground of the first assignment of error.

The deed offered in evidence was signed, acknowledged and recorded according to the laws of the State of Michigan. It is admitted that there was one witness to the signature of Mr. Pratt and two witnesses to the signature of Mrs. Pratt, but it is denied that there was a second witness to the signature of the former. The part of the record containing the testimonium is as follows:

"In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

"WM. A. PRATT. [L. S.]
"HARRIET W. PRATT. [L. S.]

Signed, sealed and delivered in presence of —

"STEPHEN WALSH,
"For William A. Pratt.
"W. H. ROCKWELL,
"GEO. HOWE,
"For Harriet W. Pratt.

"The word 'half' in the twelfth line was interlined before signing [on the second page].

"STEPHEN WALSH.
"EBENEZER WARNER."

Ebenezer Warner was the justice of the peace who took the acknowledgment of Pratt on the 29th day of October, 1855, which is also the date of the deed, and in his certificate of such acknowledgment he says: "I certify that I know the person who made the said acknowledgment to be the individual described in and who executed the within instrument." It will also be noted that he signs with Walsh as a witness, and that their signatures immediately follow the statement as to the word "half" having been interlined before signing.

These circumstances are sufficient to show that Walsh and Warner were witnesses to the signature of Mr. Pratt, and the matter may be easily explained by supposing that Rockwell and Howe, the two witnesses for Harriet W. Pratt, inserted their names above those of Walsh and Warner as witnesses for William A. Pratt. Under all the circumstances we think the court was correct in admitting the deed in evidence. *Carpenter* v. *Dexter*, 8 Wall. 513.

The second assignment of error also rests upon an alleged insufficiency in the acknowledgment of another deed, which was offered in evidence by the plaintiff, from Still Manning and wife and William Wright and wife to Edward C. Wilder,

conveying all the lands in controversy. To the admission of this deed defendant's counsel objected "for the reason that it does not appear on said certificate that the persons acknowledging were the same persons as those named as grantors in said deed." The acknowledgment in this case was taken in the State of New Jersey, before William A. Richter, a master in chancery and notary public, who says in his certificate that the parties, naming them, personally appeared before him, "who, I am satisfied, are the grantors in the within deed of conveyance." This language is the defect complained of by defendant.

We are inclined to the opinion that this is sufficient evidence that the parties who appeared before him were the grantors in the deed. If he was satisfied of that fact the court cannot now inquire into the evidence by which he reached that conclusion. But any difficulty on this subject is removed by the certificate of the clerk of the county of Essex in that State, that said Richter was a master in chancery and a notary public in and for said county, and "that the annexed instrument [meaning the deed] is executed and the proof of acknowledgment thereto taken in accordance with the laws of said State of New Jersey." This official statement that the acknowledgment was made according to the laws of the State is, we think, sufficient to make it valid, because the law of Michigan provides, (Howell's Statutes, § 5660,) where such acknowledgments are taken out of the State, that the clerk certifying to the official character of the officer shall also state "that the deed is executed and acknowledged according to the laws of such State."

The third assignment of error is based upon the fact that the court allowed the plaintiff to put in evidence a record from the office of the register of deeds of Marquette County of the will of Edward C. Wilder. The objection of defendant's counsel to the admission of this certified copy of the will, as stated in the bill of exceptions, is "that said record contained no proof that the probate court of the county of Marquette obtained jurisdiction to make the order admitting said will to probate in this State, and that it contains no

record of any authentication or probate by any foreign court or officer." This objection being overruled an exception was taken by counsel for the defendant to the admission of the record.

The copy contained, after the seal of Wilder, the testator, the usual attestation of two witnesses, who declare that the will was signed in the presence of each of them, and that it was at the same time declared by him to be his last will and testament, and that at his request and in his presence they signed their names as witnesses thereto. The testator died in New York, and the paper offered for probate in the county of Marquette, in Michigan, purported to be a copy of the will as it had been probated in the former State. The following papers constitute the proceedings in the probate court for the county of Marquette:

"STATE OF MICHIGAN, *County of Marquette, ss:*

"At a session of the probate court for the county of Marquette, holden at the probate office in the city of Marquette, on Monday, the thirty-first day of October, in the year one thousand eight hundred and eighty-one.

"Present: Edward S. Hardy, judge of probate.

"In the Matter of the Estate of Edward C. Wilder, Deceased.

"This day having been appointed by the court for hearing the petition of James E. Dalliba praying, amongst other things, for reasons therein set forth, that a certain instrument, purporting to be a copy of the last will and testament of said deceased, and the probate thereof duly authenticated and heretofore presented to this court with said petition be allowed, filed and recorded. Now come into court the said petitioner and answers, and it satisfactorily appearing by due proof on file, that a copy of the order of this court touching the hearing of said petition made on the seventh day of October last past, had been duly published as therein directed, whereby all parties interested in the premises were duly notified of said hearing.

"And it further satisfactorily appearing to the court, after

a full hearing upon said petition and on examination of the proofs and allegations of the petitioner, that said deceased was, at the time of his death, a resident of the city of New York, in the State of New York, and died leaving his last will and testament, which was duly approved and allowed in the surrogate court for, in and of the county of New York, in the State of New York, according to the laws thereof, and that he was possessed of estate situate in said county of Marquette, on which said will operates.

"And the evidence touching the premises being materially considered, it satisfactorily appears that said copy of said will ought to be allowed in this State as the last will and testament of said deceased.

"It is therefore ordered, adjudged, and declared by this court that said copy of said last will and testament of said deceased be allowed, filed, and recorded in this court, and that the same shall have full force and effect in this State, as such will, agreeably to the statute in such case made and provided.

"And it is further ordered that the execution of said last will and testament be committed, and the administration of the estate of the said deceased be granted to said Sophia Wilder, the executrix in said will named, who is ordered to give bond in the penal sum of one thousand dollars, with sufficient sureties, as required by the statute in such case made and provided, and that the same being duly approved and filed, the letters testamentary do issue in the premises.

"EDWARD S. HARDY,
"*Judge of Probate.*

"STATE OF MICHIGAN, *County of Marquette, ss:*
"Probate Court for said County.

"Be it remembered that the annexed and foregoing instrument, being a duly authenticated copy of the last will and testament of Edward C. Wilder, late of the county of New York, in the State of New York, deceased, which was duly allowed, filed, and recorded in said court in pursuance of the decree thereof, of which the foregoing is a true, full, and correct copy.

"In testimony whereof I have hereunto set my hand and affixed the seal of said court at the city of Marquette, in said county, this thirty-first day of October, in the year one thousand eight hundred and eighty-one.

"[SEAL.] "EDWARD S. HARDY,
"*Judge of Probate.*"

We can see no defect of jurisdiction in the probate court of Marquette County sufficient to justify the rejection of this copy of the will, or to impeach the action of the probate judge in ordering it to be recorded. There is in the proceedings the full recital of the production of the copy of the will, and that the order for the hearing of the petition, made on the 7th day of October, "had been duly published as therein directed, whereby all parties interested in the premises were duly notified of said hearing." The court further certifies that the probate thereof was duly authenticated "and presented to this court," meaning, evidently, the probate of the will in the State of New York. The certificate further recites that "it satisfactorily appears to the court, after a full hearing upon said petition, and on examination of the proofs and allegations of the petitioner, that said deceased was, at the time of his death, a resident of the city of New York, in the State of New York, and died leaving his last will and testament, which was duly approved and allowed in the surrogate court for, in and of the county of New York, in the State of New York, according to the laws thereof."

This being a recital in the record of the judgment of the court admitting the instrument to probate, certifying that it had been fully proved by the "examination of the proofs and allegations of the petitioner," and that it was duly admitted to record, is sufficient. Unless the necessary parties in such cases could be brought before the court by publication there would be in many cases an impossibility of doing it at all. *Grignon* v. *Astor*, 2 How. 319.

There appears to be some controversy in the brief submitted by counsel as to the fact that the copy of the instrument offered in evidence is certified from the office of the register

of deeds; but as no such objection was made upon the trial of the case it is unnecessary to discuss it here.

The fourth assignment of error is founded upon the rejection of a deed, called a declaration of trust, made by Still Manning and William Wright, which was offered by the defendant. This instrument was signed and acknowledged in the month of November, 1855, and covered the land now in controversy. The deed from Manning and Wright to Wilder, referred to in the second assignment of error, was executed in July, 1860, nearly five years after this declaration of trust. The object of the defendant in offering the latter was to show that the legal title had passed out of Manning and Wright and that Wilder did not get the title by the deed which was made to him. Upon the objection of the plaintiff to the introduction of this deed it was rejected by the court, to which ruling the defendant excepted.

The proposition upon which the defendant sought to introduce this instrument is founded upon certain statutes of the State of Michigan, of a character similar to those common in other States, found in Howell's Statutes, §§ 5563 to 5573 inclusive. They comprise the usual provisions for abolishing uses and trusts, and enact in substance that the use shall vest in the *cestui que trust* as a legal title, except when otherwise provided. Most of these statutes, however, have relation to implied trusts, and it is not necessary here to go through all of them, nor to enter upon their critical discussion at this time. It is sufficient to say that the paper presented in this case is not a conveyance to anybody, but it purports to declare in express terms that the parties executing it hold the property in trust for themselves and two other persons. It is, therefore, an express trust, and comes within the language of § 5578, which reads as follows:

"5578. Every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

Opinion of the Court.

This declaration of trust evidently contemplated that the legal title remained with the trustees, and that they had the power and authority to sell and convey the property, the profits or proceeds to be divided according to the interest which was declared in the instrument creating the trust. We think the legal title remained in Manning and Wright, until by the deed to Wilder they transferred to him the strict legal title. The deed was therefore properly rejected.

The next and last assignment of error which we propose to consider relates to the production of various deeds conveying the lands in question to persons under whom the defendant claims on account of sales for taxes. These deeds were offered in evidence and rejected by the court, to which ruling the defendant excepted.

The principal ground upon which they were held to be invalid was, that the tax levy under which they were sold included an illegal allowance for extra compensation to Goodwin and Eddie, who were judges of the state court which included within its jurisdiction the county of Marquette. It appeared that the supervisors of that county allowed and paid to them, out of the tax levies, an additional compensation of $400 per annum in excess of their salary. It does not seem to be controverted that, by the law of Michigan, if this sum was included in the assessment and levy of taxes, on account of which the sales were made that these deeds represent, the title based upon them is void. Both parties admit this proposition in argument, and certain authorities referred to in the briefs establish it as the settled doctrine of that State. *Lacey* v. *Davis*, 4 Mich. 140; *Case* v. *Dean*, 16 Mich. 12; *Edwards* v. *Taliafero*, 34 Mich. 13.

In *Hammantree* v. *Lott*, 40 Mich. 190, the court said: "A tax deed is void if a portion of the tax for which it was given was excessive and invalid." In the recent case of *Silsbee* v. *Stockle*, 44 Mich. 561, the whole subject was very elaborately reviewed by Judge Cooley, of that court, and the principle here stated fully established. The strength of the opinion in that direction may be seen by the following extract from the syllabus of the case:

"The statutory provisions that no sale for delinquent taxes shall be held invalid unless it be made to appear that all legal taxes were paid or tendered, and that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown (Comp. L., § 1129), are unconstitutional so far as they sustain sales for taxes which are in part illegal."

Counsel for plaintiff in error deny the sufficiency of the evidence produced in regard to the increase of salary by the county, above what the State allowed to the judge, or that the fact is established by competent testimony; and it is urged with much force that this attempt to show now, some fifteen or twenty years after the transaction, that the tax levy for the particular years in question did include this increased compensation, cannot be accomplished by parol testimony. We think, however, that there is enough in the bill of exceptions which is not parol, but matter found in the records of the boards of supervisors who made the tax levy, to establish the fact without any parol testimony. The records of the proceedings of this body for Marquette County were read in evidence for each of the years 1861, 1865, 1866, and 1867, the same being all that appeared therein relative to the equalization of the assessment rolls of the several townships and the action by which the rate of apportionment of the State and county taxes for each of those years was fixed. This is spread in full upon the record in the bill of exceptions. It appears that the aggregate valuation of the taxable real and personal property of the county in 1861 was determined to be $1,285,965.50, and we then find this entry.

"The subject of additional compensation to Judge Goodwin being under consideration, on motion of —— ——, it was resolved that all former action of the board on this subject be rescinded and that the sum of four hundred dollars be paid to Judge Goodwin in orders on the treasurer of this county, upon his signing a receipt in full of all demands against the county on such account, up to the first day of January, A.D. 1862, such receipt to be filed with the clerk before such orders are issued."

Then immediately follows the rate of taxation:

"On motion it was resolved that a tax of six and one-half mills on the dollar be raised on the taxable property of Marquette and Schoolcraft Counties for the contingent fund, to defray the general expenses of the county."

The only parol evidence introduced which seems to have had any influence upon the decision of this question was the testimony of a witness that Judge Goodwin received this $400 from the county treasury at a time when it must have been paid out of the levy made at this time. We think that was competent, and that the date of the receipt of the money being shown the inference that it was paid out of the tax levy, which we have already recited, is sufficient.

It is also shown by the records of the board of supervisors, in regard to the levies of other years, that for the years 1865, 1866, 1867 and 1868, an illegal sum of the same character, being $350 per annum, was included in the assessment and paid over to Judge Eddie. The court left it to the jury to determine, under all the evidence which was introduced, whether, in pursuance of such resolutions, these sums were levied as a tax and for the purpose, as claimed by the plaintiff, of paying salaries to these judges. Although he refers in this connection to the additional evidence of two witnesses, Healy and Maynard, as having some influence upon the determination of this question, it is quite obvious that the proposition was established of the payment of additional compensation to these judges out of an unlawful levy of taxes, so far as the lands in question are concerned. And while the parol testimony was not necessary to show that the amount paid for that purpose was included in the tax levy for the years under which these sales were made, it was competent to show by oral testimony that these judges actually received the money out of the taxes collected under those assessments.

These are the only assignments of error which we are called to consider, and as we do not find that there was error in the matters alleged, the judgment of the Circuit Court is

Affirmed.

UNITED STATES *v.* BEEBE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 180. Argued February 10, 13, 1888. — Decided April 30, 1888.

The Attorney General has authority, under the Constitution, to file a bill in equity in the name of the United States to set aside a patent of public land alleged to have been obtained by fraud or mistake, when the government has a direct interest in the tract patented, or is under an obligation respecting the relief invoked by the bill.

The United States are not bound by any statute of limitations, nor barred by laches of their officers in a suit brought by them, as sovereign, to enforce a public right, or to assert a public interest; but where they are formal parties to the suit, and the real remedy sought in their name is the enforcement of a private right for the benefit of a private party, and no interest of the United States is involved, a court of equity will not be restrained from administering the equities between the real parties by any exemption of the government, designed for the protection of the rights of the United States alone.

This was a suit in equity brought by the Attorney General on behalf of the United States to set aside and cancel certain patents issued in favor of Roswell Beebe, in 1838 and 1839, for about 480 acres of land upon which the present city of Little Rock, Arkansas, is partly built. Roswell Beebe having died many years ago, this suit is prosecuted against his heirs and legal representatives. It was brought in the United States Circuit Court for the Eastern District of Arkansas, the bill having been filed on the 31st of January, 1883. The ground upon which it was asked that said patents might be set aside and cancelled was, that at the date of their issue, and for a long time prior thereto, the United States did not own the land embraced in them, but that, on the contrary, said land was legally appropriated by other persons, and was therefore segregated from the public domain; that said Roswell Beebe and others fraudulently conspired together for the purpose of securing said patents, and by false representations, pretences, and undue influence persuaded and "coerced

the register" of the United States Land Office at Little Rock into the belief that he (Beebe) was entitled to said patents, etc.; and that by reason of said premises said patents were fraudulent and void.

The bill set out at considerable length and with much regard to details a great array of alleged facts connected with the issue of said patents, the former appropriation of the land, and the alleged fraudulent acts and practices of said Beebe with reference to said land. In substance they were as follows: That said lands were formerly a part of the Quapaw Indian reservation, but were ceded to the United States by the treaty of August 24, 1818, and thereby became part of the public domain; that afterwards, to wit, in 1819 and 1820, they, with other lands not involved in this controversy, were located with what is known as "New Madrid Certificates" issued by the recorder of land titles at St. Louis in November, 1815, under and in accordance with the provisions of the act of Congress approved February 17, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," 3 Stat. 211, c. 45; that by virtue of said locations all of said lands were surveyed, and the surveys were returned to the recorder on the 17th of October, 1820, whereby said lands became legally appropriated by the holders and owners of said certificates, and thus severed from the mass of the public domain; that the equitable title to said lands thus became vested in the locators of said certificates and their assigns, and was afterwards, by proper assignments and conveyances, transferred to and became vested in one W. M. O'Hara, who subsequently conveyed the lands in undivided moieties to Nathaniel Philbrook and Chester Ashley; that in 1824 said Philbrook died intestate, seized and possessed of an undivided half interest in said lands held under the title aforesaid, and the same descended to his father, Eliphalet Philbrook, a citizen of New Hampshire, and his sole heir at law, who, dying in 1828, by last will and testament devised all of his interest in and to said lands to Thomas H. Ellison and six of his other children and grandchildren; that said devisees

and heirs of such as are deceased have, by proper deeds, conveyed said lands to George V. Dietrich, Jabez C. Hurst, citizens of Galesburg, Illinois, and John F. Calder, a citizen of Troy, New York, in trust to apply for and obtain patents thereto from the United States; that said trustees applied to the United States recorder of land titles at St. Louis, Missouri, for patent certificates in support of said original "New Madrid" locations, and, on the 10th day of September, 1875, that officer issued such certificates in the names of the original locators and their legal representatives for said lands, as he was authorized to do by the said act of February 17, 1815; that afterwards said trustees made application for patents for said lands to the proper United States authorities, but that such patents were refused because of the existence of the outstanding patents issued to said Beebe as aforesaid; that from the time of said locations, surveys, and returns in 1819 and 1820, up until the issuance of the Beebe patents in 1838 and 1839, the said New Madrid locations were the only titles to said lands, and under them the town of Little Rock was laid out and built on said lands, was duly incorporated, and contained hundreds of inhabitants prior to and at the time when said patents were issued; that said Beebe patents were issued on certain preëmption float claims, all located about the year 1838, under the provisions of the 2d section of the preëmption act of May 29, 1830, and the amendatory act of July 14, 1832; 4 Stat. 420, c. 208; 603, c. 246; but that such preëmption locations were fraudulent and void, because the lands had already been appropriated by the New Madrid certificates, were at that time occupied and improved by actual settlers, and were consequently not subject to preëmption; that said Beebe never procured the consent of said settlers to the location of said preëmption floats, and the issue of said patents, as required and provided by the said preëmption acts and the regulations of the General Land Office, but on the contrary imposed upon the officers of the Land Department, and induced them to believe that he had complied with the law and the regulations in every respect, when in fact his every act in procuring said patents was done in violation of law and was

part of a conspiracy to defraud the United States and the holders under said New Madrid locations, and that in furtherance of said conspiracy said Beebe entered into a so-called bond to convey to the original holders and claimants of said lands the title which he was to and did acquire by the issue of said patents on said float claims, which he afterwards fraudulently failed and refused to do, all of which was a fraud on the United States, and other claimants to, and settlers upon, said lands; that all defects of the said New Madrid act and of the locations thereunder had been cured by subsequent acts of Congress and the opinions of the Attorney General, and decisions of the Department, and by decisions of the Supreme Court of the United States construing the same, and that said locations of said floats and the issuance of said Beebe patents were allowed under a misconception of the law, procured by undue means and in violation of the law, and the same were null and void, and ought in equity and good conscience to be cancelled.

The defences relied on in the court below, by way of demurrers and pleas, were (1) the want of authority in the Attorney General to file a bill for the annulment of a patent in a case like the present; (2) that the claim is barred by the statute of limitations; (3) that the claim sued upon is stale; (4) that the plaintiff has no equity to maintain this suit; and that all this appears upon the face of the bill itself. The demurrer to the bill was sustained and the bill dismissed, from which decree of dismissal an appeal on behalf of the United States brought the case here.

Mr. Henry M. Baker for appellant.

Mr. U. M. Rose for appellee. *Mr. S. A. Williams* was with him on the brief.

Mr. Justice Lamar, after stating the case as above reported, delivered the opinion of the court.

The points involved in the pleadings and made before the court below have been presented and urged with much earnestness, both in the brief and in the oral argument of counsel.

First. As to the right of the Attorney General to bring this suit.

The authority of the Attorney General under the Constitution and laws of the United States to institute a suit in the name of the United States to set aside a patent alleged to have been obtained by fraud or other mistake, whenever denied by a specific pleading before this court, has been uniformly maintained. And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked. (See the opinion of the court delivered by Mr. Justice Miller in *San Jacinto Tin Company* v. *The United States*, 125 U. S. 273, decided this term of the court.)

Even if it had not been thus authoritatively settled, it would have been difficult, upon principle, to reach any other conclusion. The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the Government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the Government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institute judicial proceedings to vacate such patent.

Opinion of the Court.

In the case before us the bill avers that the patents whose cancellation is asked for were obtained by fraud and imposition on the part of the patentee, Beebe. It asserts that there exists, on the part of the United States, an obligation to issue patents to the rightful owners of the lands described in the bill; that they cannot perform this obligation until these fraudulent patents are annulled, and that they therefore bring this suit to annul these fraudulent instruments whose existence renders the United States incapable of fulfilling their said prior obligation.

The court below held that the bill in this case having been filed on the recommendation of the Secretary of the Interior, for the declared purpose of having the questions which were being pressed upon the Land Department, in connection with the claims of the Philbrook heirs against the Government, determined by the judicial department, which claims were unsettled and important, the appeal to the court was proper. In this we think the learned judge is in full accord with the principle laid down by Mr. Justice Miller in the *San Jacinto* case, and within the following language of the court in *Hughes* v. *The United States*, 4 Wall. 232, 236, which was a suit brought in the name of the United States to set aside a patent for the benefit of a private citizen entitled to the land covered by said patent. Mr. Justice Field, who delivered the opinion of the court, speaking of the patent to Hughes, said: "Whether regarded in that aspect or as a void instrument, issued without authority, it *primâ facie* passed the title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument to the end that their previous engagement be fulfilled by the transfer of a clear title, the one intended for the purchaser by the act of Congress." Unless, therefore, it appears on the face of the bill that the claim set up has no equity, or that there are valid defences to the suit, the jurisdiction of the court to entertain it cannot be denied.

Next, as to the defence of the statute of limitations, laches, and lapse of time. The grounds on which the court below sustained the demurrer were, (1) that distinct from and inde-

pendent of the statute of limitations and the laches of the public officers of the Government, the lapse of time constitutes a good defence to this suit, upon those principles of equity which would be administered as between two citizens litigating in this tribunal; and (2) that the United States is bound by the same law.

The counsel for the complainant maintain that this conclusion, upon which the decree of dismissal rests, is erroneous and contrary to the decisions of this court and of every Circuit and District Court in the United States.

The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. *United States* v. *Nashville &c. Railway Company*, 118 U. S. 120, 125, and cases there cited. But this case stands upon a different footing, and presents a different question. The question is, Are these defences available to the defendant in a case where the Government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person?

It has been not unusual for this court, for the purposes of justice, to determine the real parties to a suit by reference, not merely to the names in which it is brought, but to the facts of the case as they appear on the record. Thus, in the case decided at this term, *In re Ayers*, 123 U. S. 443, 492, 493, the court held that the State of Virginia, though not named as a party defendant, was the actual party in the controversy. Mr. Justice Matthews, who delivered the opinion, said: "It is, therefore, not conclusive of the principal question in this case, that the State of Virginia is not named as a party defendant. Whether it is the actual party . . . must be determined by a consideration of the nature of the case as presented on the whole record." So in the cases of *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U. S. 76, 80, the court looked behind and through the nominal parties on the record to ascertain who were the real parties to the suit. Chief

Justice Waite, in delivering the opinion of the court, used the following language: "No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons. . . . The bill, although signed by the Attorney General, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the State and the Attorney General are *only nominal actors in the proceeding.* The bond-owner, whoever he may be, was the promoter and is the manager of the suit. . . . And while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them."

In the case of *The United States* v. *Nashville &c. Railway Company*, *supra*, in which it was decided that the statute of limitations of the State of Tennessee was no defence to an action of the United States upon certain negotiable bonds held by them for public use, Mr. Justice Gray is careful to say, "This case does not present the question, what effect the statute of limitations may have in an action on a contract in which the United States have nothing but the *formal* title, and the whole *interest* belongs to others;" and cites *Maryland* v. *Baldwin*, 112 U. S. 490; *Miller* v. *State*, 38 Alabama, 600.

In the former case it was held that a suit in the name of a State for the benefit of parties interested is to be regarded as a suit in the name of the party for whose benefit it is brought. Mr. Justice Field, delivering the opinion of the court, said: "The name of the State is used from necessity when a suit on the bond is prosecuted for the benefit of a person interested, and, in such cases, the real controversy is between him and the obligors on the bond;" and the case was decided upon a consideration of the merits as if the party interested was alone named as plaintiff. And he cited, approvingly, the following language in *McNutt* v. *Bland*, 2 How. 9: "As the instrument of the state law his (the Governor's) name is in the bond and to the suit upon it, but in no just view . . . can he be con-

sidered as a litigant party. Both look to things, not names — to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law."

In *Miller* v. *The State*, the other case cited by Mr. Justice Gray, the court said: "As *laches* is not to be imputed to the Government, the statute of limitations does not apply to the State, unless it be clear from the act that it was intended to include the State. . . . In our opinion, the rule that the statute of limitations does not run against the State, has no application to a case like the present, when the State, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third party who alone will enjoy the benefits of a recovery."

In *Moody* v. *Fleming*, 4 Georgia, 115, 118, which was a case where a party was applying for a mandamus in the name of the State, the court said: "It is insisted, that here the State is a party, moving the contest, and setting up a right to have this survey certified, and that the tenant will not be protected by his possession, because the statute of limitations does not run against the State. We have decided, and the decision is sustained by unbroken masses of authority, that the statute of limitations does not run against the State. The answer, however, to this argument is this: The State of Georgia is not the *real party* to the proceeding. . . . The process is *in the name* of the State, but the right asserted is a private right; the issue is between two of the citizens of the State."

Applying these principles to this case, an inspection of the record shows that the Government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied. The bill itself was filed in the name of the United States, and signed by the Attorney General on the petition of private individuals, and the right asserted is a private right, which might have been asserted without the intervention of the United States at all.

Opinion of the Court.

In his letter to the United States District Attorney upon the subject the Attorney General directs that that officer shall sign his (the Attorney General's) name to the bill, when the attorneys for the petitioners shall present such a bill, and file the same in the proper court, and that after the suit is commenced these attorneys for the petitioners will have the management of the case. Accordingly the subsequent proceedings in the case have been conducted exclusively by these attorneys, who, in the pleadings, describe themselves as attorneys for the petitioners and beneficiaries of the suit.

We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants.

These principles, so far as they relate to general statutes of limitation, the laches of a party, and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the decisions of this court. According to these decisions, courts of equity in general recognize and give effect to the statute of limitations as a defence to an equitable right, when at law it would have been properly pleaded as a bar to a legal right. They refuse to interfere to give relief when there has been gross negligence in prosecuting a claim, or where the lapse of time has been so long as to afford a clear presumption that the witnesses to the original transaction are dead, and the other means of proof have disappeared.

We think the court below justly and wisely applied the principle to the case under consideration in sustaining the demurrer and dismissing the bill. The rights of the Philbrook heirs, the real parties to this case, which are set up in this bill, originated in 1815. The acts of Beebe perpetrating the alleged fraud were prior to 1838. The alleged illegal action of the Land Department occurred in 1839. More than forty-five years ago, the complainants in this bill could have instituted their action. The death of the parties charged with the fraud, and also of most, if not all, of the witnesses having personal knowledge of the transaction, the fact that a city has been built upon the land in question, the occupation of large portions of it by hundreds of innocent purchasers, the homesteads of many families covering other portions of it, the uninterrupted possession maintained for more than a generation, all resting upon faith in the patent issued by the United States Government, constitute reasons more than sufficient for the refusal of the court to set aside such patent at the suit of a party who has so long slept upon his alleged rights. For the reasons herein stated, the decree of the court below is

Affirmed.

NOYES *v.* MANTLE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 242. Argued and Submitted April 19, 1888. — Decided April 30, 1888.

When the location of a mineral lode or vein, properly made, is perfected under the law, the lode or vein becomes the property of the locators or their assigns, and the government holds the title in trust for them.

Where a location of a vein or lode of mineral or other deposits has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location has been recorded in the usual books of record within the district, that vein or lode is "known to exist" within the meaning of that phrase as used in Rev. Stat. § 2333, although personal knowledge of the fact may not be possessed by the applicant for a patent for a placer claim.

Opinion of the Court.

BILL IN EQUITY, to quiet title. Decree of perpetual injunction against defendants, from which they appealed to the Supreme Court of the Territory. The decree and judgment being affirmed there, they appealed to this court. The case is stated in the opinion.

Mr. Thomas L. Napton, for appellant, submitted on his brief.

Mr. S. S. Burdett for appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity to determine the adverse claims of the defendant below, appellant here, to a certain quartz lode mining claim, known as the Pay Streak lode in Summit Valley Mining District, in the county of Silver Bow, in the Territory of Montana. The plaintiffs below assert title to the claim as grantees of Daniel Zinn and John O. McEwan, who discovered and located it on the 23d of April, 1878, under the provisions of the act of Congress of May 10, 1872, 17 Stat. 91, c. 152, which are reënacted in the Revised Statutes, Title 32, c. 6.

The defendant below asserts title to the lode claim under a patent of the United States issued to him on the 23d day of April, 1880, for a placer mining claim, which includes that lode within its boundaries. The application for the patent was made December 14, 1878.

Several interrogatories touching matters in issue were submitted to a jury called by the court, though sitting in the exercise of its equity jurisdiction. Their findings in answer to the interrogatories were, with one exception, adopted by the court. The excepted finding gave an erroneous date to the application of the defendant for the patent, and was therefore set aside. The court thereupon found the fact as to the date as it appeared from the evidence. Upon the facts thus established the court rendered its decree. They were substantially these: That on and prior to December 14, 1878, a vein or lode of quartz, bearing gold and silver, was known to exist in the

ground in controversy; that its existence could have been readily ascertained by any person examining the ground with an honest purpose to inform himself of the fact; that in the month of April, 1878, Zinn and McEwan, the grantors and predecessors in interest of the plaintiffs, discovered in the ground a vein or lode of quartz bearing gold and silver, and they posted a notice claiming the ground, and the vein or lode which it included; that at the same time they marked off the ground by stakes so that its boundaries could be readily traced; that they named the claim in their notice of location as the Pay Streak lode, and within twenty days after its discovery filed in the proper office of the county a notice of their claim, and of its location, such as was usual where lode claims were located in that mining district; that in July, 1881, they conveyed to the plaintiffs all their interest in the claim; that in August, 1881, before the commencement of this suit, the plaintiffs caused a survey of the claim to be made, and its boundaries marked so as to be readily traced; that they then re-located the claim, of which notice within twenty days thereafter was filed in the recorder's office of the county; and that they were in its possession at the commencement of this suit.

The jury did not find that the existence of a vein or lode in the ground in controversy was known to the defendant at the time of his application for a patent; and reported that they were unable to agree on this point. The District Court, in which the suit was brought, did not consider that this want of a finding on the question of knowledge by the defendant affected the position of the plaintiffs, and it rendered a decree adjudging that the right of possession to the lode claim was in them, and that the defendant had no title, estate, or interest therein, and that he be enjoined from asserting or claiming any as against them. The Supreme Court of the Territory affirmed the decree, holding that the title to the lode mining claim had passed to the grantors of the plaintiffs by their discovery and location under the statute, and that the subsequent patent to the defendant of a placer claim did not affect their title to the lode claim, for that title was not then subject to

the disposition of the government. The court also held that the lode claim was known to exist within the meaning of the statute when it had been located pursuant to its requirements, whether knowledge of its existence was possessed or not by the defendant at the time he made his application for a patent. These rulings constitute the only matters meriting consideration in this court.

Section 2322 of the Revised Statutes, reënacting provisions of the act of Congress of May 10, 1872, (17 Stat. 91,) declares that the locators of mining locations previously made or which should thereafter be made, on any mineral vein, lode, or ledge on the public domain, their heirs and assigns, where no adverse claim existed on the 10th of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they comply with the laws of the United States, and with state, territorial, and local regulations, not in conflict with those laws governing their possessory title. There is no pretence in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale. The location having become completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim. That patent was subject to the conditions of § 2333 of the Revised Statutes, which is as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

This section was before us for consideration in *Reynolds* v. *Iron Silver Mining Co.* at October term, 1885, 116 U. S. 687; and also at the present term, 124 U. S. 374. As stated by the court at both times, it makes provision for three classes of cases:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein claim and twenty-five feet on each side of it at $5.00 an acre, and $2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section, is known to exist at the time within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

The section can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk* v. *Meagher*, 104 U. S. 279, 283: "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." It is not, therefore, subject to the disposal of the government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them. *Sullivan* v. *Iron Silver Mining Co.*, 109 U. S. 550, 554.

When can it be said that a vein or lode is "known to exist" within the meaning of the section? In *Reynolds* v. *Iron Silver Mining Company*, when first here, the court said that it might not be easy to define the words "known to exist," and as it was not necessary to determine whether the knowledge must be traced to the applicant for the patent, or whether it was sufficient that it was generally known, and what kind of evidence was necessary to prove this knowledge, it was better that the questions should be decided as they arise. When the case was here a second time the court said that the language of the section appeared to be sufficiently intelligible in a general sense, and yet it became difficult of interpretation, when applied to the determination of rights asserted to such veins or lodes, from the possession or absence of knowledge at the time application is made for a patent, and that if a general knowledge of their existence were held sufficient, the inquiry would follow as to what would constitute such knowledge, so

as to create an exception to the grant, notwithstanding the ignorance of the patentee. These suggestions indicated the difficulties of some of the questions which might arise in the application of the statute; but in the present case we think that difficulty does not exist. Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.

A copy of the patent is not in the record, so we cannot speak positively as to its contents; but it will be presumed to contain reservations of all veins or lodes known to exist, pursuant to the statute. At any rate, as already stated, it could not convey property which had already passed to others. A patent of the government cannot, any more than a deed of an individual, transfer what the grantor does not possess.

Judgment affirmed.

MOSLER SAFE AND LOCK COMPANY *v.* MOSLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 248. Argued April 24, 25, 1888. — Decided May 14, 1888.

Claims 1 and 2 of letters patent No. 281,640 granted to Moses Mosler, July 17, 1883, for an improvement in fire-proof safes, namely, "1. An angle bar for safe-frames, consisting substantially as before set forth, of a right-angled iron bar, one of the sides of which is cut away, leaving a curve facing the uncut side, whereby said uncut side may be bent to bear upon said curve to form a rounded corner. 2. An angle bar for safe-frames, consisting, substantially as before set forth, of a right-angled

iron bar, one of the sides of which is cut away, with curved cuts meeting a right-angled cut, whereby the uncut side may be bent to form rounded corners," and the claim of letters patent No. 283,136 granted to Moses Mosler, August 14, 1883, for an improvement in bending angle irons, namely, "The herein described process of bending angle irons, which consists in cutting away a portion of one web by a cut which severs the two webs at their junction, for a distance equal to the arc of the corner to be bent, and removes sufficient of metal in front of the single part of the uncut web to permit the same to bend to the desired angle and to insure the edges of the opening meeting to form a close joint as the bar is bent, substantially as shown and described," are invalid.

After a patent is granted for an article described as made by causing it to pass through a certain method of operation to produce it, the inventor cannot afterwards, on an independent application, secure a patent for the method or process of producing the identical article covered by the previous patent, which article was described in that patent as produced by the method or process sought to be covered by taking out the second patent.

The claim of letters patent No. 273,585 granted to Moses Mosler, March 6, 1883, for an improvement in fire-proof safes, being for the combination, in a fire-proof safe, of the frames, the sheet metal cover, bent around the top sides and lower corners, with projecting metal bars, and removable bottom plate, substantially as described, and claim 3 of letters patent No. 281,640, granted to Moses Mosler, July 17, 1883, for an improvement in fire-proof safes, namely, "3. In a safe, the combination of the front and back frames, formed of single bent angle bars, having one side cut away to leave curved ends, upon which the uncut side is bent to form rounded corners, and a metal sheet, E, bent around and secured to said frames to form the top end sides of the safe, substantially as described," are invalid.

BILL IN EQUITY for the infringement of letters patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. George J. Murray for appellant.

Mr. James Moore for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of Ohio, by the Mosler Safe and Lock Company, an Ohio corporation, against Mosler,

Bahmann and Company, another Ohio corporation, for the infringement of three letters patent of the United States, each of them granted to Moses Mosler, namely, No. 273,585, March 6, 1883, for an improvement in fire-proof safes, on an application filed February 5, 1883; No. 281,640, July 17, 1883, for an improvement in fire-proof safes, on an application filed December 27, 1881; and No. 283,136, August 14, 1883, for an improvement in bending angle irons, on an application filed December 11, 1882.

The answer denies that any one of the three patents shows any invention, and also denies that Mosler was the first and original inventor, or an inventor at all, of the alleged inventions which the patents purport to secure, or of any of them, and also denies that any one of the inventions has any utility. It also denies infringement, and sets up various references on the question of novelty, in regard to all three of the patents.

A replication was put in, and proofs were taken by both parties, and, on a hearing, the court dismissed the bill on the merits; its opinion, which accompanies the record, being reported in 22 Fed. Rep. 901. That opinion sets forth sufficiently the nature of the inventions covered by the three patents, and the contents of the specifications and claims, and we adopt its statement, as follows:

"1. No. 273,585; application filed February 5, 1883; letters dated March 6, 1883. The object of this invention, as stated in the specification, is to provide an improved means of constructing the outer casing, so that the safe may be filled from the bottom. The front and back frames of the safe are formed from angle bars, which have one side cut away, where the bends of the corners are to be made, and the uncut side bent around to close the joint in the corner, and form a frame with its outer corners rounded. The meeting joint at the bottom of the frame is overlapped by a short angle piece, which is screwed or riveted to the frame, uniting the joint. A sheet-metal cover is bent around the top sides and around the lower rounded corners of the frames. Upon each edge of this cover, at the bottom of the safe and between the angle frames, are secured metal bars, which project beyond the edges of the

cover to form rests for the bottom plate. The safe is made with the customary sheet-metal box forming the interior receptacle and secured to the cast-metal door frame in the usual manner. The top of the caster frame conforms to the curve of the rounded corners, and, after the bottom plate is pushed into its place, the inner bolts which secure the caster frames pass through the bottom plate which they secure and the angle frames. The patentee does not claim the bent angle frames nor the safe composed of these frames and the sheet-metal cover bent around them, (the same being shown and claimed by him in an application then pending,) but limits his claim to the combination, in a fire-proof safe, of the frames, the sheet-metal cover, bent around the top sides, and lower corners, with projecting metal bars, and removable bottom plate, substantially as described.

"2. No. 281,640. This patent differs from No. 273,585 in that a particular description is given, in the specification, of the cuts in the side of the angle bar, where the bends are to be made; but the patentee specifies that the shape of the cut may be varied, it only being essential that sufficient metal be cut away on one side of the angle bar to permit the other or uncut side to be bent, the cut nearest the uncut side being in the form of a curve or curves, so that, when said uncut side is bent to form the corner, it will bear upon and be supported by the curved end or portion of the cut, and thus be rounded by a curve similar to the curve of the cut. The claims are as follows: '1. An angle bar for safe-frames, consisting, substantially as before set forth, of a right-angled iron bar, one of the sides of which is cut away, leaving a curve facing the uncut side, whereby said uncut side may be bent to bear upon said curve to form a rounded corner. 2. An angle bar for safe frames, consisting, substantially as before set forth, of a right-angled iron bar, one of the sides of which is cut away, with curved cuts meeting a right-angled cut, whereby the uncut side may be bent to form rounded corners. 3. In a safe, the combination of the front and back frames, formed of single bent angle bars, having one side cut away to leave curved ends, upon which the uncut side is bent to form rounded cor-

ners, and a metal sheet, E, bent around and secured to said frames to form the top and sides of the safe, substantially as described.'

"3. No. 283,136, dated August 14, 1883, application filed December 11, 1882. The claim is as follows: 'The herein described process of bending angle irons, which consists in cutting away a portion of one web by a cut which severs the two webs at their junction, for a distance equal to the arc of the corner to be bent, and removes sufficient of metal in front of the single part of the uncut web to permit the same to bend to the desired angle and to insure the edges of the opening meeting to form a close joint as the bar is bent, substantially as shown and described.' In the specification the sides of the angle bar are designated by the letters A and B. A represents the uncut web, and B the cut web. The outer opening of the cut, C, is made by lines at angles of forty-five degrees to the edge of the web, so that, when the bar is bent, the edges of this opening meet each other in a true mitre. The inner opening, D, which extends outward within converging curved lines from the angle of the bar to where it meets the opening C, extending inward from the edge of B, and within converging lines, (the letter X suggesting the shape of the entire opening, excepting that the outer opening extends nearly to the angle of the bar,) has a dovetailed shape, bounded by curved lines described from points upon the mitre line and the face of the uncut web A. The curved ends of the web B abut against the uncut side when the bar is bent, making a close joint. The patentee states, in the specification, that 'the shape of the opening or cut-away portions of web B may be varied at will, so long as the meeting line or lines be not extended beyond the space bounded by the rounded corner, and the edge lines extended to web A.' The angle bars cut out as described, it is stated in the specification, may be bent to the proper form by the machine represented by Fig. 6 in the accompanying drawings. 'In this, E represents a metal block having upwardly projecting sides screw-tapped to receive clamping screw F. The opposite corners of the block are rounded to fit the inner curve of the desired

corner. G is a loose block of iron, between which and the side of block E the uncut web A is clamped by screw F, the other web, B, resting on the block, the cut-away part over the rounded corner; by force applied to the projecting end of the bar it is bent around until the severed edges meet in a close joint. The angle bar herein shown is not claimed here, as it is the subject of a pending application.'

"The safes described in these patents are filled through the bottom opening with fire-proof cement. The bottom is then secured in place and the casters attached. The patentee states, in the specification forming part of letters No. 281,640, that before his invention safes were filled from the back, and that his safe 'can be completely finished before the filling is put in. The filling adds greatly to the weight. Much labor in handling is therefore saved.'"

The opinion of the Circuit Court then proceeds to say: "For the purposes of this suit these three patents may be considered as one, containing all the claims involved. As counsel for complainant suggests, the claims are for separate and distinct but not for independent inventions, at least so far as the manufacture of safes is concerned. They might have been all included in one application had the patentee chosen to so present them.

"The first and second claims in letters patent No. 281,640 are for an angle bar for safe-frames, consisting of a right-angled iron bar, one of the sides of which is cut away, (the cuts being curved and meeting a right-angled cut,) leaving a curve facing the uncut side, whereby said uncut side may be bent to form a rounded corner. The patentee states, in the specification, that he is aware 'that it has been proposed to make protecting corner pieces for safes from angle iron, from one side of which a triangular piece was cut out to permit the opposite side to bend.' He also states that 'the shape of the cut to permit the angle bar to be bent to form rounded corners may be varied without departing from the principle of my invention,' etc.

"In the drawings accompanying the specification forming part of letters patent No. 283,126, Figure 5 represents a templet

of card-board or thin sheet metal, which the patentee states he uses to determine about the shape and size of the notch or cut which it is necessary to make to admit of the bar being bent to any desired angle and to make a corner of any desired curve. The templet is of the shape and size of a section of the angle bar. One web is severed by a cut at right angles to its edge; the two webs are then severed at their junction for some distance upon each side of the cut; then, by bending the web so that the cut edges will pass each other, the templet may be bent to any curve or angle desired, and the lines of the cuts required to make the proper shape of opening in angle bars to be bent to the same curve or angle, marked and fixed upon. Such use of the templet as a pattern is nothing new. It is clearly shown by the testimony, that cutting an opening in one web of an angle bar to permit the bending of the bar to an angle or curve, was known and used before the date claimed by complainant's assignor for his invention. Different shapes of cuts and openings are shown in exhibits put in evidence by respondents. Unless the precise cuts and shape of opening shown in the drawing attached to the specification forming part of the letters patent are patentable, the claims are worthless. But the patentee shows how, by the use of a pattern of flexible material — an old method, and familiar as the use of the carpenter's mitre box — he determines the lines of the cuts and the shape of opening. In this there is no exercise of the inventive faculty; it is only what would occur to a mechanic of ordinary skill. Moreover, if the precise lines of cuts and shape of opening shown in the drawings were patentable, the patentee does not, as we have seen, so limit his claim, but seeks to cover variations, which he says may be made without departing from the principle of his invention. Claims 1 and 2 in letters patent No. 281,640, and the claim in letters patent No. 283,136, are, therefore, adjudged to be invalid.

"As to the combination claim, being the only claim in letters patent No. 273,585, and claim 3 in letters patent No. 281,640, they are old, excepting only — and this is not material — that the precise lines of cuts and the shape of the opening

of the angle bar are not found in safes of prior manufacture. The sheet-metal cover is old. It is shown in respondent's exhibit, 'St. Louis Safe.' The bars C and lower removable plate D, claimed in No. 273,585, are old. See respondent's exhibit A and the deposition of John Hurst. The safes in the manufacture of which they were used were square-cornered, as was then the fashion, but that is not material. When the angle frames were bent the corners were round, and then heated and hammered upon both sides of the corners, to make them square. Respondent's testimony also establishes that fire-proof safes were filled from the bottom as early as 1879, by the Cincinnati Safe and Lock Company, and in that year, probably also in 1878, by Hall's Safe and Lock Company. The complainant was the first to employ the combination claimed in the manufacture of round-cornered safes, but the change from square-cornered safes was only a change in form. The combination is nothing more than an aggregation, and falls by the application of the rulings in *Hailes* v. *Van Wormer*, 20 Wall. 353, 368; *Reckendorfer* v. *Faber*, 92 U. S. 347; and *Pickering* v. *McCullough*, 104 U. S. 310, 318. The bill is dismissed at complainant's costs."

It is apparent that the claim for the process, in No. 283,136, is merely for the process or method of cutting away and removing the metal, so as to permit of the bending, and of doing the bending, and of producing the close joint as the bending takes place, such process or method being merely the process or method involved in making the article covered by claims 1 and 2 of No. 281,640. In other words, claims 1 and 2 of No. 281,640 are each for an article produced by a described method or process, and the claim of No. 283,136 is for such method or process of producing such article. The method is a purely mechanical method. No. 281,640 was applied for more than eleven months before No. 283,136 was applied for, and was issued 28 days before No. 283,136 was issued. There was no patentable invention in No. 283,136, when it was applied for, in view of what was applied for by claims 1 and 2 of No. 281,640. After a patent is granted for an article described as made by causing it to pass through a certain method of

operation to produce it, as, in this case, cutting away the metal in a certain manner and then bending what is left in a certain manner, the inventor cannot afterwards, on an independent application, secure a patent for the method or process of cutting away the metal and then bending it so as to produce the identical article covered by the previous patent, which article was described in that patent as produced by the method or process sought to be covered by taking out the second patent.

The Circuit Court, in its opinion, said that the use of the templet shown in Figure 5 of No. 283,136, as a pattern, was not new; that cutting an opening in one web of an angle bar, to permit the bending of the bar to an angle or curve, was known and used before the date of the patentee's invention; that different shapes of cuts and openings were shown in exhibits put in evidence by the defendant; that the claims in question, namely, claims 1 and 2 of No. 281,640, and the claim of No. 283,136, were invalid, unless the precise cuts and shape of opening shown in the drawings were patentable; that there was no exercise of the inventive faculty in using a pattern of flexible material, in an old and familiar method, to determine the lines of the cuts and the shape of the opening; and that the patentee had not limited his claims to the precise lines of cuts and shape of opening shown in the drawings, but had stated, in the specification of No. 281,640, that the shape of the cut to permit the angle bar to be bent to form rounded corners might be varied without departing from the principle of the invention. We concur in the view that claims 1 and 2 of No. 281,640 and the claim of No. 283,136 are invalid for the reasons thus given.

As to the claim of No. 273,585 and claim 3 of No. 281,640, which are claims to combinations, the opinion of the Circuit Court states that those claims are old, except in the immaterial point, that the precise lines of cuts and the shape of the opening in the angle bar are not found in safes of prior manufacture; that the sheet-metal cover is old, being shown in defendant's exhibit, "St. Louis Safe;" that the bars C and lower removable plate D, forming part of the claim of No. 273,585,

are old, it being immaterial that the safes in the manufacture of which they were used were square-cornered, the corners of the angle frames, when bent, having been round, and having been then made square by heating and hammering the metal on both sides of the corners; that fire-proof safes had been filled from the bottom as early as 1879; that, although the patentee was the first to employ the combination claimed in the manufacture of round-cornered safes, the change from square-cornered safes was only a change in form; and that the combination was nothing more than an aggregation, and fell within the rulings of this court, in the cases cited, that such an aggregation was not patentable. We think these views are correct.

The decree of the Circuit Court is affirmed.

HERRMAN *v.* ARTHUR'S EXECUTORS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 250. Argued April 25, 1888. — Decided May 14, 1888.

Goods made of calf hair and cotton were imported in November, 1876. The collector assessed duties on them at 50 cents a pound, and 35 per cent ad valorem, as upon goods made of wool, hair, and cotton, under Schedule L of § 2504 of the Revised Statutes (p. 471, 2d ed.). The goods contained no wool. The importer protested that the goods were liable to less duty under other provisions. In an action to recover back the alleged excess paid, the defendant, at the trial, sought to support the exaction of the duties under the first clause of § 2499, commonly called the "similitude" clause. *Held*, that this was a proper proceeding under the pleadings in the case.

The court below having directed a verdict for the defendant, this court reversed the judgment, on the ground that the question of similitude was one of fact, which should have been submitted to the jury, as it appeared that the imported goods were of inferior value and material as compared with the goods to which it was claimed they bore a similitude.

The case of *Arthur* v. *Fox* (108 U. S. 125) commented on.

This was an action brought to recover duties alleged to have been illegally exacted. Verdict for defendant and judgment

on the verdict. The plaintiffs sued out this writ of error. The case is stated in the opinion.

Mr. Edwin B. Smith for plaintiffs in error. *Mr. Stephen G. Clarke* was with him on the brief.

Mr. Solicitor General for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought by Henry Herrman, Charles Sternbach, and Abraham Herrman, against Chester A. Arthur, collector of customs at the port of New York, in the Superior Court of the city of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover the sum of $367, alleged to have been exacted by the defendant from the plaintiffs as excessive duties on the importation of goods made of calf hair and cotton, into the port of New York, in November, 1876. At the trial, before a jury, the court directed a verdict for the defendant, which was rendered, and a judgment was entered for the defendant, for costs.

It appears by the bill of exceptions that the goods were described in the invoices and entries, some as "brown calf-hair sealskin," some as "brown calf hair," and some as "brown calf-hair lustre." The duties were assessed at 50 cents a pound and 35 per cent ad valorem, as upon goods made of wool, hair, and cotton. This assessment took place under the provision of Schedule L of § 2504 of the Revised Statutes, p. 471, 2d ed., which was as follows: "Woollen cloths, woollen shawls, and all manufactures of wool of every description, made wholly or in part of wool, not herein otherwise provided for: fifty cents per pound, and, in addition thereto, thirty-five per centum ad valorem." The evidence showed that the goods in fact contained no wool, the warp being of cotton and the filling of cow or calf hair. There were 13 cases of the goods; those in 12 of the cases cost under 40 cents a pound, and those in the remaining case cost over 40 and under 60 cents a pound. The plaintiffs protested against the liquidation, because the

goods were returned by the appraiser as a manufacture of wool, hair, and cotton, and, as such, liable to a duty of 50 cents per pound and 35 per cent ad valorem, and claimed, in the protest, that the goods were a manufacture of cow and calf hair and cotton, and liable, under § 2499 and the last paragraph of Schedule A of § 2504, p. 461, 2d ed., to a duty of 35 per cent ad valorem, as partly manufactured of cotton; or else liable to a duty of 30 per cent ad valorem, under the provision of Schedule M of § 2504, p. 476, 2d ed., as follows: "Hair-cloth known as 'crinoline-cloth,' and all other manufactures of hair, not otherwise provided for: thirty per centum ad valorem." Section 2499 provided as follows: "There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this Title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid, on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." The last paragraph of Schedule A of § 2504 reads thus: "Cotton braids, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for: thirty-five per centum ad valorem." In claiming that the duty should have been 35 per cent ad valorem, reference was made to the last clause of § 2499, as providing that, as the goods in question were manufactured from cotton and hair, the duty was assessable at the highest rate at which either of those two component materials was chargeable, and that the highest rate, being 35 per cent ad valorem, was imposed on the manufacture of cotton, under the last paragraph of Schedule A of § 2504. The further

claim of the plaintiffs was that, if the goods were not thus liable to a duty of 35 per cent ad valorem, as a manufacture of cotton, they were liable to a duty of 30 per cent ad valorem, as a manufacture of hair, under the above quoted provision of Schedule M of § 2504. The plaintiffs' counsel read in evidence a decision of the Treasury Department, made in 1874, to the effect that calf hair and cotton goods were held to be dutiable, under § 2499 of the Revised Statutes, at the highest rate at which any of their component parts was chargeable, namely, cotton, and not under the provision for manufactures of hair. This would have given a duty of 35 per cent ad valorem. But it clearly appeared at the trial that the duty assessed, of 50 cents a pound and, in addition thereto, 35 per cent ad valorem, was assessed under the erroneous view that the goods contained wool.

The plaintiffs having thus shown that the liquidation made was illegal, whether the proper duty should have been 35 per cent or only 30 per cent, the defendant sought to support the validity of the assessment of duties which he had made, under the first clause of § 2499, before quoted, that "there shall be levied, collected, and paid, on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this Title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned." It was contended by the defendant, that the goods in question, composed of cow or calf hair and cotton, were a non-enumerated article, and that they bore a similitude, in the particulars mentioned in § 2499, to articles enumerated as chargeable with duty under the following provision of Schedule L of § 2504, p. 471, 2d ed., namely: "Flannels, blankets, hats of wool, knit goods, balmorals, woollen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound: twenty cents per pound; valued at

above forty cents per pound and not exceeding sixty cents per pound: thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound: forty cents per pound; valued at above eighty cents per pound: fifty cents per pound; and, in addition thereto, upon all the above named articles: thirty-five per centum ad valorem."

It was sought to be shown by the defendant, that the goods imported in this case bore a similitude, in some one of the particulars mentioned in § 2499, to goods which had previously been in the market, of two classes, one composed of wool, hair, and cotton, and the other composed of goat's hair and cotton, although it appeared distinctly that the goods involved in twelve of the cases in question cost under 40 cents a pound, and, in this view, such of them as bore a similitude to the goat's hair and cotton goods would have been dutiable at only 20 cents per pound and 35 per cent ad valorem, instead of 50 cents per pound and 35 per cent ad valorem; and that the goods in the remaining case cost over 40 and under 60 cents a pound, and so would have been liable to a duty of only 30 cents per pound and 35 per cent ad valorem, instead of 50 cents per pound and 35 per cent ad valorem.

The witnesses on the issue thus raised were all introduced on the part of the defendant. When both parties had rested, the counsel for the defendant moved the court to direct a verdict for the defendant, on the ground that the evidence was clear and undisputed, as to the two classes of prior goods, namely, the wool, hair, and cotton goods, and the goat's hair and cotton goods, that those goods existed and substantially resembled in every important particular the imported goods in question. The court granted the motion, and directed a verdict in favor of the defendant. The plaintiffs excepted, and have brought a writ of error to review the judgment.

The plaintiffs objected and excepted to the introduction of the testimony as to similitude offered by the defendant, on the ground that it was incompetent, irrelevant, and immaterial, and on the further ground that, the defendant having based his assessment on the view that the goods contained wool, could not now be permitted to justify the assessment on any

other ground. But we think that this objection was properly overruled. The suit was brought for an illegal exaction of duties, and, if the law in force at the time, properly interpreted, justified the exaction of the duties imposed, it was competent for the defendant to show it at the trial. The complaint alleges, that the defendant, as collector, exacted as duties so much money, that the true duty was only so much, and that the plaintiffs claim to recover the difference. The answer alleges, that the amount of money collected from the plaintiffs was the amount due from them to the United States, according to the rate of duty imposed by law upon the goods in question. This did not confine the issue solely to the question whether there was wool in the goods.

It appeared, in the course of the testimony put in by the defendant, that two of the three samples of the prior goods introduced by him in evidence cost over 80 cents a pound, the goat's hair in them being that of the mohair goat, as was also the goat's hair in the third sample; and that the mohair fibre came from the alpaca goat, and was sometimes a foot in length, but generally from six to seven inches long, while calf hair was always short, perhaps an inch or an inch and a quarter long. It also appeared, by the testimony, that the mohair goods were almost uniformly much finer in appearance than the calf or cow hair and cotton goods; that the cost of them was much higher; and that the plaintiffs' goods resembled certain vegetable fibre goods imported prior to 1875 and 1876, more nearly than they resembled the goat's hair and cotton goods or the mohair and cotton goods.

The direction of a verdict for the defendant in the present case is sought to be justified by the ruling of this court in *Arthur* v. *Fox* (108 U. S. 125). In that case, the article in question was called "velours," and was composed of cow or calf hair, vegetable fibre, and cotton, was an imitation of sealskin, and was used for manufacturing hats and caps. The goods were not specifically enumerated in the statute, but, in the use to which they were put, and in appearance and material, resembled manufactures of goat's hair and cotton, more nearly than any other article of commerce, the goods of both

kinds being frequently commercially called "seals," and being made to represent sealskin, and being used for the purposes for which sealskin was used. The component material of chief value in "velours" was cow and calf hair, and not cotton. The importers claimed that the goods were dutiable at 35 per cent ad valorem, under Schedule A of § 2504, as manufactures of cotton, while the collector exacted a duty of 50 cents per pound and 35 per cent ad valorem, on account of the similitude the goods bore to manufactures composed wholly or in part of the hair of the goat, without wool, under § 2499 and the provision of Schedule L of § 2504, in regard to manufactures composed wholly or in part of the hair of the goat and containing no wool. Inasmuch as the collector in that case imposed a duty of 50 cents per pound and 35 per cent ad valorem, the goods must have been valued at above 80 cents per pound, according to the terms of that clause of Schedule L. The court instructed the jury to find for the importers, and this court held that the instruction was erroneous. The view taken here was, that the goods were non-enumerated, but were substantially like a manufacture of goat's hair and cotton, which was enumerated in the clause quoted from Schedule L. One strong ground for the ruling made by this court is thus stated in its opinion, delivered by Chief Justice Waite. Speaking of the goods imported in that case, it said: "They are made of cotton and cow hair, and are evidently of equal quality with the manufactures of cotton and goat's hair, because, in this case, they are charged with a duty of fifty cents per pound, thus indicating a value of eighty cents a pound or over, which calls for the highest duty per pound put on the goat's hair goods."

In the present case, the samples of goat's hair goods introduced by the defendant as the standard of comparison, to make out the similitude spoken of in § 2499, were all of them mohair goods, two of which samples were worth over 80 cents a pound, and thus subject, under Schedule L, to the rate of duty imposed in the present case upon the goods of the plaintiffs; while it was proved that the plaintiffs' goods in twelve of the cases cost under 40 cents a pound, and in the remaining

case cost over 40 and under 60 cents a pound. Thus, as a matter of law, in the present case, the plaintiffs' goods, of such inferior value and material, were compared with costly mohair goods, and the duty assessed on them was held to have been properly charged.

We are of opinion that the question of the similitude was one of fact, which should have been submitted to the jury, under proper instructions. As there was error in the particular mentioned, we do not deem it proper to consider any of the other questions raised and discussed by counsel.

The judgment is reversed, and the case is remanded to the Circuit Court with a direction to award a new trial.

HENDY *v.* GOLDEN STATE AND MINERS' IRON WORKS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

No. 278. Submitted May 3, 1888. — Decided May 14, 1888.

Claim 1 of letters patent No. 140,250 granted to James D. Cusenbary and James A. Mars, June 24, 1873, for an "improvement in ore-stamp feeders," namely, "The feeding cylinder I, mounted upon the movable timber H H, substantially as and for the purpose above described," is a claim only for making the timbers movable, by mounting them upon rollers, and does not involve a patentable invention.

The defence of non-patentability can be availed of without setting it up in an answer.

There is no patentable combination, but merely an aggregation of the rollers and the feeding cylinder.

The specification requires the feeding cylinder to have chambers or depressions, and claim 1 does not cover a cylinder with a smooth surface not formed into chambers.

This was a suit in equity, brought by Joshua Hendy against the Golden State and Miners' Iron Works, a corporation, and six individual defendants, in the Circuit Court of the United States for the District of California, for the infringement of

Statement of the Case.

letters patent No. 140,250, granted June 24, 1873, to James D. Cusenbary and James A. Mars, for an "improvement in ore-stamp feeders." The specification, claims, and drawings of the patent were as follows:

"Our invention relates to improvements in that class of ore-feeders for quartz mills in which a pawl and ratchet are employed to operate the feeder automatically by the drop of the stamp. Our improvements consist, first, in mounting a feed-cylinder upon a movable frame or truck, so that it can be readily shifted from place to place when it is desired to repair the mill; and, lastly, of an improved arrangement for operating the pawl-rod by the drop of the stamp without the use of springs. In order to more fully illustrate and explain our invention, reference is had to the accompanying drawings, forming a part of this specification, in which Fig. 1 is a vertical section; Fig. 2 is a back view; Fig. 3 is a transverse section. A represents the frame of a stamp mill; B is the stamp; C is the stamp-stem, with its tappet D; F is the cam-shaft, and G the cam which lifts the stamp, all of which are arranged in the ordinary manner of constructing a stamp battery. H H are the foundation timbers upon which the feeding cylinder is mounted. These timbers are mounted upon rollers, so that the cylinder and frame can be moved about as desired. The cylinder I is made of cast metal, and has its outer surface formed into chambers or depressions, J J, which are separated from each other by longitudinal partitions, K. The cylinder and its carriage, when in working position, are placed below the hopper L, so that the ore from the hopper will fall into the chambers upon an inclined apron, M, which directs it beneath the stamp. This feeding cylinder, being made of cast metal, will not wear out like the endless belts heretofore used in this class of machines, and, as it turns upon journals, like any common roller or cylinder, it cannot become clogged, as the endless belt is liable to do. To one end of the cylinder or ratchet-wheel N is secured, and this ratchet-wheel is operated by, a pawl-bar, C, to revolve the cylinder. In order to operate the pawl-bar from the tappet, a horizontal shaft, *p*, has its opposite ends supported in boxes, which are secured to the

sides of the upright timbers of the frame, so that the shaft will pass across directly in front of the tappet, transversely to the movement of the stamp-stem. A fixed arm, *q*, extends backwards from the shaft *p*, so that its extremity will terminate below the tappet, in position to receive a blow from it when the stamp falls. Another fixed arm, *r*, extends forward from the shaft directly over the ratchet-wheel, and to the extremity of this arm the upper end of the pawl-bar, *o*, is attached by means of a trunnion block, *t*. This bar extends down to the middle of the periphery of the ratchet-wheel, and has one or more upward projecting teeth on its lower end, which serve to engage with the teeth of the ratchet when the pawl is lifted by the rock-shaft, and thus rotate the feeding cylinder. It will, therefore, be evident, that, at each drop of the stamp, the tappet will strike the arm *q* and carry it downward, thus giving the shaft *p* a rocking motion, the weight of the pawl and its arm *r* serving to rotate the shaft in an opposite direction, thus feeding the ore automatically when it is needed. When there is a sufficient quantity of ore beneath the stamp the drop will not be sufficient to operate the cylinder; but when the quantity of ore beneath the stamp is reduced the drop is greater, and consequently the tappet strikes the arm *q* and operates the cylinder.

"Having thus described our invention, what we claim and desire to secure by letters patent is —

"1. The feeding cylinder I, mounted upon the movable timbers H H, substantially as and for the purpose above described.

"2. The rock-shaft *p*, with its fixed arms *q r*, in combination with the pawl-bar *o*, ratchet-wheel N, and feeding cylinder I, when arranged to be operated by the tappet D, substantially as and for the purpose described."

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Fig. 1.

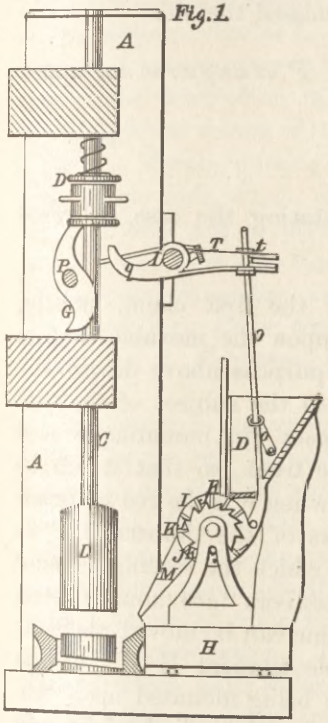


Fig. 2.

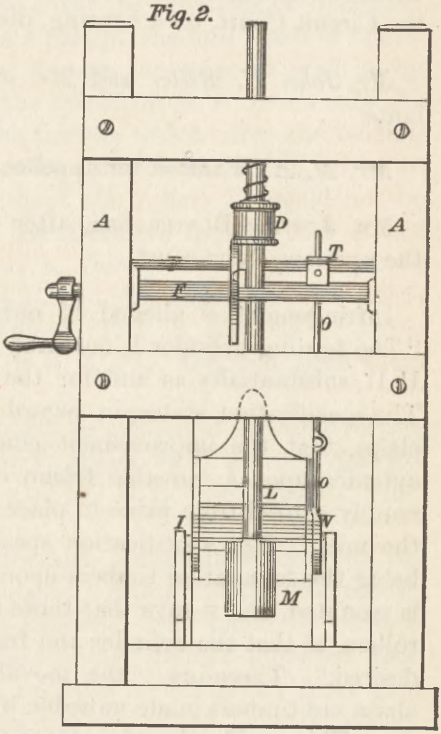
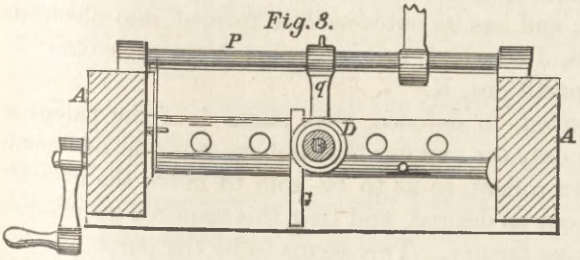


Fig. 3.



The answer denied infringement, and set up two patents on the question of novelty, and denied the utility of the invention. After replication, proofs were taken on both sides, and the Circuit Court, on a hearing, dismissed the bill.

Mr. John H. Miller and *Mr. J. P. Langhorne* for appellants.

Mr. M. A. Wheaton for appellee.

Mr. Justice Blatchford, after stating the case, delivered the opinion of the court.

Infringement is alleged of only the first claim, namely, "The feeding cylinder I, mounted upon the movable timbers H H, substantially as and for the purpose above described." The specification states, in regard to the subject of the first claim, that the improvement consists "in mounting a feed cylinder upon a movable frame or truck, so that it can be readily shifted from place to place when it is desired to repair the mill." The specification speaks of the timbers H H as being the foundation timbers upon which the feeding cylinder is mounted, and it says that those timbers "are mounted upon rollers, so that the cylinder and frame can be moved about as desired." Therefore, "the movable timbers H H" of the claim are timbers made movable by being mounted upon rollers. The specification also states, that "the cylinder I is made of cast metal, and has its outer surface formed into chambers or depressions, J J, which are separated from each other by longitudinal partitions, K."

It is contended, in defence, that claim 1 of the patent is really a claim only for making the timbers movable, by mounting them upon rollers, so as to be able to move the cylinder and frame about as desired, and that this required no exercise of any inventive faculty. This seems to be the purport of the invention, as stated in the specification. It is the movable character of the frame on which the feed cylinder is mounted, so that the cylinder and frame may be readily shifted from place to place, when repairs are desired, that is designated as

the invention. When the mill is in operation, the movable feature is not brought into play. It is only when the mill is out of operation that the movable feature is to be used. The first claim does not appear to cover the functions or operation of the feeding cylinder I, as a part of the mill when in operation; and, interpreting it by its own language as well as by that of the description in the specification, it covers only the mounting upon rollers of the timbers which carry the feeding cylinder. Merely putting rollers under an article, so as to make it movable, when, without the rollers, it would not be movable, does not involve the inventive faculty, and is not patentable. *Atlantic Works* v. *Brady*, 107 U. S. 192, 200; *Thompson* v. *Boisselier*, 114 U. S. 1, 12, and cases there cited; *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554, 559; *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335, 338, and cases there cited.

This defence is one which can be availed of without setting it up in an answer. *Dunbar* v. *Myers*, 94 U. S. 187; *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649; *Mahn* v. *Harwood*, 112 U. S. 354, 358.

Moreover, there is no patentable combination between the rollers which make the timbers movable and the feeding cylinder I, mounted upon the timbers. The union of parts is merely an aggregation. The feeding cylinder, mounted upon timbers which have rollers, operates no differently from what it does when mounted upon timbers which have no rollers. *Hailes* v. *Van Wormer*, 20 Wall. 353, 368; *Reckendorfer* v. *Faber*, 92 U. S. 347, 357; *Pickering* v. *McCullough*, 104 U. S. 310, 318; *Bussey* v. *Excelsior Mfg. Co.*, 110 U. S. 131, 146. There is nothing patentable in the aggregation.

The defendants' machine has a smooth cylinder, and not a cylinder with chambers or depressions. The specification of the patent describes the cylinder I as having its outer surface formed into chambers or depressions, separated from each other by longitudinal partitions. The cylinder of claim 1 is "the feeding cylinder I," and, to be such cylinder, must be a cylinder substantially as described, and it is described specifically as having chambers or depressions. The claim cannot

be construed to cover a cylinder with a smooth surface, not formed into chambers. *Fay* v. *Cordesman*, 109 U. S. 408, 420, 421; *Sargent* v. *Hall Safe & Lock Co.*, 114 U. S. 63, 86; *Shepard* v. *Carrigan*, 116 U. S. 593, 597, 598; *White* v. *Dunbar*, 119 U. S. 47, 51, 52· *Crawford* v. *Keysinger*, 123 U. S. 589, 606, 607

The decree of the Circuit Court is affirmed.

ST. PAUL PLOUGH WORKS *v.* STARLING.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 1367. Submitted May 4, 1888. — Decided May 14, 1888.

An action in the Circuit Court by a patentee for breach of an agreement of a licensee to make and sell the patented article and to pay royalties, in which the validity and the infringement of the patent are controverted, is a "case touching patent rights," of which this court has appellate jurisdiction, under § 699 of the Revised Statutes, without regard to the sum or value in dispute.

MOTION to dismiss for want of jurisdiction. The case is stated in the opinion.

Mr. Charles S. Careins and *Mr. D. S. Frackelton* for the motion.

Mr. John B. Sanborn and *Mr. W. H. Sanborn*, opposing.

MR. JUSTICE GRAY delivered the opinion of the court.

The original action was brought in the Circuit Court of the United States for the District of Minnesota by a citizen of Nebraska against a corporation of Minnesota, for breach of an agreement in writing, dated December 17, 1877, by which the plaintiff granted to the defendant the right to make and sell within a defined territory a certain kind of plough, under letters patent granted August 18, 1874, to the plaintiff for an

improvement in ploughs, (of which he alleged in his complaint that he was the first and original inventor,) and the defendant agreed to make such ploughs in a good and workmanlike manner, and to advertise and sell them at a price not exceeding the price of similar implements sold by other manufacturers, and to render accounts semiannually and pay the plaintiff a royalty of $2.50 for each plough sold.

The defendant, in its answer, admitted the agreement sued on, but denied any breach; denied that the plaintiff was the original and first inventor of any improvement in ploughs, and averred that his alleged improvement had been described in six earlier patents specified; admitted that the defendant had made and sold ploughs according to the method described in letters patent granted March 9, 1880, to one Berthiaume, and averred that those ploughs were constructed upon an entirely different principle from the plaintiff's. The plaintiff filed a general replication, denying the allegations of the answer.

A jury trial having been duly waived in writing, the case was tried by the court, which, upon facts set forth in detail, found that the defendant had made 960 ploughs under the Berthiaume patent, and 350 other ploughs; that all those ploughs infringed the plaintiff's patent, and that the plaintiff's invention was not anticipated by either of the six other patents set up in the answer; and concluded that the plaintiff was entitled to a royalty of $2.50 on each plough sold by the defendant, amounting to $3275; overruled a motion for a new trial, and gave judgment for the plaintiff accordingly. 29 Fed. Rep. 790; 32 Fed. Rep. 290.

The defendant sued out this writ of error, which the original plaintiff now moves to dismiss for want of jurisdiction, because the judgment below was for less than $5000.

The decision of this motion depends upon § 699 of the Revised Statutes, by which a writ of error or appeal may be allowed from any final judgment or decree of the Circuit Court, without regard to the sum or value in dispute, "in any case touching patent rights." This section substantially reënacts the corresponding provision of the patent act of 1870, in

which the words were "in any action, suit, controversy or case, at law or in equity, touching patent rights." Act of July 8, 1870, c. 230, § 56, 16 Stat. 207. The language applied to this subject in the patent act of 1836, under which the cases of *Wilson* v. *Sandford*, 10 How. 99, and *Brown* v. *Shannon*, 20 How. 55, were decided, was that used in that act in defining the jurisdiction of the Circuit Court in patent cases, namely, "actions, suits, controversies and cases, arising under any law of the United States, granting or confirming to inventors the exclusive rights to their inventions or discoveries." Act of July 4, 1836, c. 357, § 17, 5 Stat. 124. Similar words were used in the patent act of 1861 in defining the jurisdiction of this court. Act of February 18, 1861, c. 37, 12 Stat. 130. But in the act of 1870, as in the Revised Statutes, Congress, while using similar language in defining the jurisdiction of the Circuit Court, substituted, (it must be supposed, purposely,) the new phrase, "touching patent rights," in defining the jurisdiction of this court.

The present case was an action upon a contract by which the plaintiff licensed the defendant to make and sell a patented article, and not a suit for infringing the plaintiff's patent. But the questions whether that patent was valid, and whether it had been infringed, were put in issue by the pleadings and decided by the Circuit Court. Whether, within the meaning of other statutes, and in the light of previous decisions, this case should be considered as "arising under" the patent laws of the United States, is a question not before us. See *Dale Tile Manufacturing Co.* v. *Hyatt*, 125 U. S. 46, and cases there cited. It is sufficient for the decision of this motion, that we have no doubt that a case in which the validity and the infringement of a patent are controverted is a "case touching patent rights," and therefore within the appellate jurisdiction of this court, under § 699 of the Revised Statutes, without regard to the sum or value in dispute.

Motion to dismiss for want of jurisdiction denied.

ARKANSAS VALLEY SMELTING COMPANY *v.* BELDEN MINING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 197. Submitted April 2, 1888. — Decided May 14, 1888.

A contract in writing, by which a mining company agrees to sell and deliver lead ore from time to time at the smelting works of a partnership, to become its property upon delivery, and to be paid for after a subsequent assay of the ore and ascertainment of the price, cannot be assigned by the partnership, without the assent of the mining company, so far as regards future deliveries of ore. Nor is the mining company, by continuing to deliver ore to one of the partners after the partnership has been dissolved and has sold and assigned to him the contract, with its business and smelting works, estopped to deny the validity of a subsequent assignment by him to a stranger.

This was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing and Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows:

On July 12, 1881, a contract in writing was made between the defendant of the first part and Billing and Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing and Eilers at their smelting works in Leadville ten thousand tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least fifty tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once upon the delivery thereof become the property of the second party;" and it was further agreed as follows:

"The value of said ore and the price to be paid therefor

shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered.

"Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices," specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore.

The complaint further alleged that the railroad was completed on November 30, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing and Eilers at their smelting works, and delivered 167 tons between that date and January 1, 1882, when "the said firm of Billing and Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1 and April 21, 1882, delivered to Billing at said smelting works 894 tons; that on May 1, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterwards refused to perform the contract, and gave notice to the plaintiff that it considered the contract can-

celled and annulled; that all the ore so delivered under the contract was paid for according to its terms; that "the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the ore was definitely fixed;" and that "the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract.

The Circuit Court sustained the demurrer, and gave judgment for the defendant; and the plaintiff sued out this writ of error.

Mr. R. S. Morrison, *Mr. T. M. Patterson*, and *Mr. C. S. Thomas* for plaintiff in error.

This is an executory contract. The rule as to the assignability of such instruments is that all contracts may be assigned, either before or after the breach, which were not entered into upon the one side or the other upon the basis of a personal trust in the peculiar fitness of the other party to

perform his part. The illustration so often used is that of an author to write a book; or an artist to paint a picture; neither of which can be assigned on the part of the person whose genius is depended upon. But an agreement to pay $1000 for a valuable consideration, or to deliver ten tons of coal at so much per ton, cannot belong to this class of cases, as in either instance it can make no difference to either party who executes the other part of the contract. Where taste, skill or genius is one of the elements relied upon the contract cannot be assigned; where it is only a question of so much lost or so much gained, whoever performs the contract, it may be assigned.

To which class does the contract in the case at bar belong? Reduced to its elements the contract amounts to no more than an agreement on the one side to sell ten thousand tons of ore, and on the other to receive and pay for the same. It makes no difference to the one party who gives him the ore, nor to the other who pays him the price; all that both parties want is what they have contracted to get. No peculiar fitness on either side is needed to fulfil the contract, and, in point of fact, the contract is one which from its very nature has to be performed largely through the medium of agents. The contract is no more nor less than an article of property to each party, and the policy of the law is to let such articles of property pass from hand to hand with as much freedom as is requisite to make them valuable.

While all the cases lay down the rule as we have above stated, the New York Court of Appeals in *Devlin* v. *Mayor*, 63 N. Y. 8, 16, has given us a criterion by which we can the more readily bring the present case within the terms of the rule. This criterion is, that whatever contracts are binding upon the executors or administrators may be assigned, while those that die with the person cannot be assigned. While it is true that in both instances we must go back to the principle of personal skill, taste or genius, as the real test, the fact that this has been the test so far as executors and administrators are concerned for centuries of the common law, will make it much easier to apply in the matter of the assignability of

contracts. So that all the cases deciding the question of the liability or rights of the executor or administrator upon executory contracts of the decedent, can be quoted as applicable to the question of the assignability of contracts.

Adopting the law as laid down in that case, we call the attention of the court first to those cases in which the courts have applied the rule to executors and administrators, and then to the assignment of executory contracts.

The general rule as to executors was stated by the Queen's Bench in the time of Queen Elizabeth to be that "a covenant lies against an executor in every case, although he be not named; unless it be such a covenant as is to be performed by the person of the testator which they cannot perform." *Hyde* v. *Dean and Canons of Windsor*, Cro. Eliz. 553.

Lord Coke, a few years later, in the case of *Quick* v. *Ludborrow*, 3 Bulstr. 29, 30, states the rule to be the same, and says that if one is bound to build a house for another before such a time and dies, his executors are bound to perform the contract. While this was a *dictum* so far as that case was concerned, it is valuable as an illustration of how ancient the principle we are contending for is, and it is also valuable in that the great Chief Justice goes back yet further for his authority, citing to support it the Year Books, 31 H. VI., and 15 H. VII.

Lord Mansfield has also given us a clear statement of the law in delivering the unanimous judgment of the King's Bench; and in accord with the view contended for. *Hambly* v. *Trott*, Cowp. 371.

The Barons of the Exchequer have affirmed the *dictum* of Lord Coke by deciding that where the testator had contracted to build a wooden galley and died before any of the work was done, and his executors had gone on and completed the work, the executors might sue on the contract and recover; Lord Lyndhurst putting his decision on the ground of the difference between contracts personal in their nature and those that are not. *Marshall* v. *Broadhurst*, 1 Tyrwh. 348; *S. C.* 1 Cr. & Jer. 403. See, also, *Siboni* v. *Kirkman*, 1 M. & W. 417; *S. C.* 4 M. & W. 339; *Wentworth* v. *Cock*, 10 Ad. & El. 42; *Walker*

v. *Hall*, 2 Levinz, 177; *Hyde* v. *Skinner*, 2 P. Wms. 196; *Berisford* v. *Woodruff*, Croke Jac. 404.

A rule so unanimously declared to be a maxim of the common law has never been doubted by the American courts. *Petrie* v. *Vorhees*, 18 N. J. Eq., 3 C. E. Green, 285; *Woods* v. *Ridley*, 27 Mississippi, 119; *Pringle* v. *McPherson*, 2 Dessausure, 524; *White* v. *Commonwealth*, 39 Penn. St. 167.

A somewhat lengthy examination of the rule and the cases was made by the Supreme Court of Pennsylvania in one case, and while the view taken of some of the English cases is not in accord with ours the principles are, on the whole, the same; and it seems to acknowledge the rule applied in New York as to assignability. *Dickinson* v. *Calahan*, 19 Penn. St. 227.

If we admit the rule laid down in New York it does not seem possible to prevent the case at bar from being brought within the above decisions and the contract held to be not personal. But we are not forced to rely upon these cases, as there have been enough adjudications upon the exact doctrine of the assignability of contracts to bring this case far within the limits laid down, and to settle beyond controversy the question of the assignability of this contract.

The English courts have not in terms announced the doctrine stated in New York; but they have, by applying the same principles to both personal representatives and assignees, made it practically the same. The fundamental principle of personal and non-personal contracts runs through all the cases. *Robson* v. *Drummond*, 2 B. & Ad. 303; *Wentworth* v. *Cock*, *supra*; *British Waggon Co.* v. *Lea*, 5 Q. B. D. 149.

The American authorities are, if it were possible, much stronger upon the side of assignability than are the English. No State has rendered a greater number of decisions, and all to the same end, on this question than New York; and, in view of her great commercial power, no State should be listened to with more respect. *Devlin* v. *Mayor*, *supra*; *Sears* v. *Conover*, 3 Keyes, 113; *Tyler* v. *Barrows*, 6 Robertson (N. Y.) 104; *Horner* v. *Wood*, 23 N. Y. 350. See, also, in the reports of other States, *Taylor* v. *Palmer*, 31 California, 240; *Parsons*

v. *Woodward*, 22 N. J. Law (2 Zabriskie), 196; *Philadelphia* v. *Lockhardt*, 73 Penn. St. 211; *Lafferty* v. *Rutherford*, 5 Arkansas, 453; *St. Louis* v. *Clemens*, 42 Missouri, 69; *Groot* v. *Story*, 41 Vermont, 533.

The reports show us many cases in which contracts have been held to be personal and not assignable; but the majority are clearly on the other side of the line. Only two or three need any special mention.

Boston Ice Co. v. *Potter*, 123 Mass. 28, may seem at first view to be against our position; but on examination it will be found the other way. The opinion of Mr. Justice Endicott clearly states the rule and bases the decision in the case upon the particular facts disclosed.

Lansden v. *McCarthy*, 45 Missouri, 106, in view of the facts then existing, might also be cited as against the contract in the present case. The court admit the general principle and decide that the contract there sued upon is personal. We cannot but believe that if the application there can be construed as against the contract at bar, the court erred in its judgment. The personal nature of the contract was held to consist in the fact that one party had relied upon the credit and ability of the other party to pay the price named. Such a view, if accepted, would do much to put an end to the assignability of all contracts and choses in action; for all contracts are entered into with the belief that the other party will perform his part. And the court, too, seems to forget that the liability of the original parties remains the same, notwithstanding the assignment, and the contracting party may hold both assignor and assignee.

Dickinson v. *Calahan*, 19 Penn. St. 227, criticises some of the English cases cited by us; but, we believe, they are clearly in the line of all the common law authorities, and they have been expressly adopted in terms by the Court of Appeals of New York in *Devlin* v. *Mayor*, 63 N. Y. 8.

This citation of authority will, we think, convince the court of the correctness of our position as to the assignability of this contract. Nothing more can be made out of the transaction than a contract of sale. Billing and Eilers purchased the right

to so many tons of ore; the Belden Mining Company purchased the right to so many dollars per ton for a certain number of tons of its ore. Neither party secured any title or right of property in the taste, skill or genius of the other party, but simply a title to a definite, tangible, merchantable article that was readily capable of passing from hand to hand. Every element of the contract partakes of the purely mercantile transaction, and the attempt to place it in the category of those contracts that depend upon personal skill, taste or genius, seems to us an absurdity. No one can doubt the right of Billing and Eilers to sell the ore *after* they had received it from the mining company, and for what reason should they be denied the right of selling it before they received it? The ore itself was certainly capable of being sold, and the right to the ore would seem to be an equal object of barter.

There is another principle upon which we rely and which we think is conclusive of the present case. It is maintained that whether or not this contract is assignable, the defendant cannot now deny it the quality of assignability. The contract has been assigned twice, and, as under the first assignment the defendant made no objection, but dispensed with whatever rights it had, it is now estopped from denying to the first assignee the same right that it gave to his assignor. If the contract was not assignable in the first place, the implied condition arising from this fact was that upon assignment by either party the other had a right to treat the contract as at an end; but once waived the condition was gone and could no more be insisted upon. This is a principle so old and well grounded in the common law as to require little or no authority for its support. It has been frequently applied to cases where the contract in express terms provided against assignment, and declared that if assigned the contract should be at an end; and surely it will be applied to a case where the same thing was implied. And it would seem to us that the court would be readier to apply the principle in doubtful cases, than where it was expressly provided for. If the contract is claimed to be personal by one party and not personal by the other, and the court is to determine the question by reference to the in-

tention of the parties, it is surely competent for it to look at the treatment of the contract by the parties. If the party who claims that the contract is personal has treated it as not personal, this should be conclusive evidence that at the time it was entered into it was the intention of the parties that the contract should not be considered as personal. The present case, it seems to us, is brought clearly within the spirit and letter of this ruled law. *Murray* v. *Harway*, 56 N. Y. 337.

No appearance for defendant in error.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. Stat. § 914; Colorado Code of Civil Procedure, § 3; *Albany & Rensselaer Co.* v. *Lundberg*, 121 U. S. 451. The vital question in the case, therefore, is whether the contract between the defendant and Billing and Eilers was assignable by the latter, under the circumstances stated in the complaint.

At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract." *Humble* v. *Hunter*, 12 Q. B. 310, 317; *Winchester* v. *Howard*, 97 Mass. 303, 305; *Boston Ice Co.* v. *Potter*, 123 Mass. 28; *King* v. *Batterson*, 13 R. I. 117, 120;

Lansden v. *McCarthy*, 45 Missouri, 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts (4th ed.) 425.

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate of fifty tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore, and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing and Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be,

an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in *Murray* v. *Harway*, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff, (which might perhaps be an assignable chose in action,) but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. *Sears* v. *Conover*, 3 Keyes, 113, and 4 Abbott (N. Y. App.) 179; *Tyler* v. *Barrows*, 6 Robertson (N. Y.) 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. *Hambly* v. *Trott*, Cowper, 371, 375; *Wentworth* v. *Cock*, 10 Ad. & El. 42, and 2 Per. & Dav. 251; Williams on Executors, (7th ed.,) 1723–1725. Assignment by operation of law, as in the

case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. *Dickinson* v. *Calahan*, 19 Penn. St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. *Taylor* v. *Palmer*, 31 California, 240, 247; *St. Louis* v. *Clemens*, 42 Missouri, 69; *Philadelphia* v. *Lockhardt*, 73 Penn. St. 211; *Devlin* v. *New York*, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. *Robson* v. *Drummond*, 2 B. & Ad. 303; *British Waggon Co.* v. *Lea*, 5 Q. B. D. 149; *Parsons* v. *Woodward*, 2 Zabriskie, 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case.

Judgment affirmed.

MOSHER *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 246. Argued and Submitted April 20, 1888. — Decided May 14, 1888.

The S. company, owning a railroad extending from S. to M., and there connecting with the railroad of the H. company from M. to H., sold a ticket, at a reduced rate of fare, for a passage from S. to H. and return,

containing a contract signed by the purchaser, by which he agreed "with the several companies" upon the following conditions: That "in selling this ticket the S. company acts only as agent and is not responsible beyond its own line;" that the ticket "is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the H. railroad at H. within eighty-five days from the date of sale, and, when officially signed and dated in ink and duly stamped by said agent," shall be good for five days from that time; that the original purchaser shall sign his name and otherwise identify himself, whenever called upon to do so by any conductor or agent of either line; and that no agent or employé of either line has any power to alter, modify or waive any condition of the contract. The original purchaser was carried from S. to H., and within eighty-five days, and a reasonable time before the departure of a return train, presented himself with the ticket at the office of the agent of the H. railroad at H., for the purpose of identifying himself and of having the ticket stamped, and, no agent being at that office, took the return train on the H. railroad from H. to M. and a connecting train on the S. railroad for S., and, upon the conductor of the latter train demanding his fare, presented the unstamped ticket, informed him of what he had done at H., offered to sign his name and otherwise identify himself to the conductor, and demanded to be carried to S. by virtue of the ticket; but the conductor refused, and put him off the train. *Held*, that he could not maintain an action against the S. company.

This was an action by a passenger against a railroad corporation for putting him off one of its trains. The allegations of the amended petition were in substance as follows:

On April 9, 1883, the plaintiff purchased of the defendant at St. Louis a ticket expressed on its face to be "good for one first class passage to Hot Springs, Ark., and return when officially stamped on back hereof and presented with coupons attached," and containing a "tourist's contract," signed by the plaintiff as well as by the ticket agent, by which, "in consideration of the reduced rate at which this ticket is sold," the plaintiff agreed, "with the several companies" over whose lines the ticket entitled him to be carried, upon certain terms and conditions, of which those material to be here stated were as follows:

"1st. That in selling this ticket the St. Louis, Iron Mountain and Southern Railway Company acts only as agent and is not responsible beyond its own line."

"4th. That it is good for going passage only five (5) days

from the date of sale, as stamped on back and written below.

"5th. That it is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within eighty-five (85) days from date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five (5) days from such date.

"6th. That I, the original purchaser, hereby agree to sign my name and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads, and on my failure or refusal that this ticket shall become thereafter void."

"12th. And it is expressly agreed and understood by me that no agent or employé of any of the lines named in this ticket has any power to alter, modify or waive in any manner any of the conditions named in this contract."

Attached to the ticket were various coupons, a portion of which entitled the plaintiff to be carried from Malvern to Hot Springs and back on the Hot Springs Railroad. The plaintiff was accordingly carried as a passenger from St. Louis to Hot Springs.

On May 9, 1883, the plaintiff, desiring to return to St. Louis, "presented himself and said ticket at the business and ticket office and depot of said Hot Springs Railroad, the said business and ticket office and depot being then and there the business office of the authorized agent of said Hot Springs Railroad at said Hot Springs, during business hours and a reasonable time before the time of departure of its train for St. Louis that the plaintiff desired to take and did take," and offered to identify himself as the original purchaser of the ticket to the satisfaction of said agent, for the purpose of entitling himself to return thereon to St. Louis, and of permitting the ticket to be officially signed, dated in ink and duly stamped by said agent; but the defendant and the Hot Springs Railroad Company failed to have said agent there at any time between the time when the plaintiff so presented

himself and his ticket and the time of departure of the train, "whereby," the petition averred, "said defendant and its agent and the agent of said Hot Springs Railroad at Hot Springs, Ark., failed and refused, without any just cause or excuse, to identify the plaintiff as the original purchaser of said ticket, or to officially sign, date in ink and stamp said ticket."

The plaintiff thereupon boarded the train of the Hot Springs Railroad at Hot Springs, and was carried thereby to Malvern, where, on the same day, he boarded a regular passenger train of the defendant for St. Louis, and, upon the conductor thereof demanding his fare, presented his ticket, informed him of his presentation of it at the office at Hot Springs, of his offer there to identify himself, and of the absence of the agent, as aforesaid, and offered to sign his name and otherwise identify himself to the conductor, and demanded to be carried to St. Louis by virtue of said ticket; but the conductor refused, and put him off the train, and left him at a way station, where he was obliged to remain without fire or other protection against the cold until he took the midnight train of the defendant for St. Louis, first paying fare; "by reason of each and all of which wrongful and unlawful acts aforesaid of defendant, its agents and employés, the plaintiff says he has been damaged in the sum of ten thousand dollars, for which he asks judgment."

The Circuit Court sustained a demurrer to this petition, and gave judgment for the defendant. Its opinion, delivered upon sustaining this demurrer and sent up with the record, is reported in 23 Fed. Rep. 326; and its opinion at a former stage of the case, in 5 McCrary, 462, and in 17 Fed. Rep. 880.

Mr. Clinton Rowell for plaintiff in error.

Mr. Winslow S. Pierce, Jr., and *Mr. John F. Dillon*, for defendant in error, submitted on their brief.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The right of this plaintiff to be carried upon the defendant's train, without paying additional fare, does not depend upon

his having been received as an ordinary passenger, or upon any representations made by a ticket-seller, conductor or other officer of the company as to his right to use a ticket, but wholly upon the construction and effect of the written contract, signed by him, upon the face of the ticket (of the kind called "tourist's" or "round-trip" tickets) sold him by the defendant for a passage to Hot Springs and back, by which, in consideration of a reduced rate of fare, he agreed to the following terms:

By the fifth condition, the ticket "is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within eighty-five days from date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five days from such date."

The clear meaning of this condition is that the ticket shall not be good for a return passage at all, unless, within eighty-five days from its original date, the holder not only identifies himself as the original purchaser to the satisfaction of the agent named, but that agent signs, dates and stamps the ticket; and that, upon such identification and stamping, the ticket shall be good for five days from the new date.

The sixth condition, by which the ticket is to be void if the plaintiff does not sign his name and otherwise identify himself, whenever called upon so to do by any conductor or agent of either of the lines over which he may pass, is evidently intended as an additional precaution against a transfer of the ticket either in going or in returning, and not as an alternative or substitute for the previous condition to the validity of the ticket for a return trip.

The twelfth condition states that the plaintiff understands and expressly agrees that no agent or employé of any of the lines has any power to alter, modify, or waive any of the conditions of the contract.

By the express contract between the parties, therefore, the plaintiff had no right to a return passage under the ticket, unless it bore the stamp of the agent at Hot Springs. Such a

stamp was made by the contract a condition precedent to the right to a return passage, and no agent or employé of the defendant was authorized to waive that condition.

The plaintiff contends that, as there was no agent at the office at Hot Springs, to whose satisfaction he could identify himself, and by whom he could have his ticket stamped, when he presented himself with his ticket at that office, within a reasonable time before he took the return train, he had the right to be carried from Hot Springs to St. Louis under his ticket, without having it stamped, and may therefore maintain this action against the defendant for the act of its conductor in expelling him from the connecting train upon the defendant's road.

If this defendant had been the party responsible for not having an agent at Hot Springs, the question thus presented would have been of some difficulty, although we are not prepared to hold that, even under such circumstances, the plaintiff's remedy would not be limited to an action for the breach of the implied contract to have an agent there, and to the expense which he thereby incurred. But this case does not require the expression of any opinion upon that question.

By the first condition of the contract contained in the plaintiff's ticket, the defendant is not responsible beyond its own line. Consequently it was not responsible to the plaintiff for failing to have an agent at the further end of the Hot Springs Railroad. The agent who was to identify the passenger and stamp his ticket there was the agent of the Hot Springs Railroad Company, and is so described in the ticket, as well as in the petition. If there was any duty to have an agent at Hot Springs, it was the duty of that company, and not of the defendant. The demurrer admits only the facts alleged, and does not admit the conclusion of law, inserted in the petition, that by reason of the facts previously set forth, and which do not support the conclusion, the defendant and its agent failed and refused, without just cause or excuse, to identify the plaintiff as the original purchaser of the ticket, or to sign, date and stamp it. *Hitchcock* v. *Buchanan*, 105 U. S. 416.

The omission to have an agent at Hot Springs not being a

breach of contract or of duty on the part of this defendant, the case is relieved of all difficulty.

The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor, in examining the tickets of other passengers, and in conducting his train with due regard to speed and safety, that he should undertake to determine, from oral statements of the passenger or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent of the Hot Springs Railroad Company at Hot Springs the only and conclusive proof.

The necessary conclusion is that the plaintiff cannot maintain this action against the defendant for the act of its conductor in putting him off the train. *Townshend* v. *New York Central Railroad*, 56 N. Y. 295; *Shelton* v. *Lake Shore Railway*, 29 Ohio St. 214; *Frederick* v. *Marquette &c. Railroad*, 37 Michigan, 342; *Bradshaw* v. *South Boston Railroad*, 135 Mass. 407; *Murdock* v. *Boston & Albany Railroad*, 137 Mass. 293, 299; *Louisville & Nashville Railroad* v. *Fleming*, 14 Lea (Tenn.), 128.

Judgment affirmed.

HOLLAND *v.* SHIPLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 249. Argued and Submitted April 25, 1888. — Decided May 14, 1888.

A patent for a lead-holding tube of a pencil, having at the lower end two or more longitudinal slots, a screw-thread inside, and a clamping-sleeve outside, each part of which, as well as the combination of two or more slots with the sleeve, or of a single slot with the screw-thread, has been previously used in such tubes, is void for want of invention.

Opinion of the Court.

BILL IN EQUITY to restrain alleged infringements of letters patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. George J. Murray for appellant.

Mr. E. E. Wood and *Mr. Edward Boyd*, for appellees, submitted on their brief.

MR. JUSTICE GRAY delivered the opinion of the court.

This is an appeal from a decree dismissing a bill in equity for the infringement of letters patent granted to the plaintiff January 22, 1884, for "improvements in lead-holders for pencils," which (omitting the drawings and the explanation of them) fully shows the invention claimed, and the form of lead-holders or lead-tubes previously in use and known to the patentee, as follows:

"The object of my present invention is to hold the lead or crayon in pencils from slipping back within the tube when pressed upon by the act of writing, without danger of breaking the lead.

"Lead-tubes now in common use are usually slotted at the lower end to form elastic clamping-fingers, which fingers are closed upon the lead near its point end by a sleeve or a tube which moves longitudinally over the fingers. These fingers are either smooth upon the inside, or terminate at their ends in sharp inward projections or claws. The first kind soon become so smooth that the lead slips back when borne upon in the act of writing; and the second frequently breaks the lead when the clamping-sleeve is tightened up, and when tightened up carefully the lead often breaks in use when writing with the pencil inclined. I overcome both these objections by making a fine screw-thread within the lower end of the tube, before it is slotted to form the clamping-fingers.

"The clamping-fingers may, instead of being screw-threaded upon the inside, be serrated or roughened to accomplish the same result; but the screw-thread is much better, because by this means a uniformly-even roughened surface can be made

within the lower end of the tube at comparatively small expense; and, as these pencils are designed to take the place of the common lead-pencil, they must be made cheaply to insure their introduction into general use.

"I am aware that it is old to provide a pencil-case for holding ordinary lead-pencils with a sliding ring, to which are secured spring-clamps having their holding-surfaces serrated, and having their shanks bent to approach each other, then jut outwardly and downwardly at their free ends, so that a ring-slide may be moved upon said shanks to cause the free ends of the clamps to grasp or release a pencil; and I am also aware that it is old to provide the lead-holding tube of a pencil with an interior thread and a single slot. I therefore do not claim either of these devices.

"I claim as my invention —

"1. As a new article of manufacture, a lead-tube for pencils, consisting, substantially as before set forth, of a tube provided at one end with internal or female threads and two or more longitudinal slots to form threaded fingers.

"2. The combination, with the lead-tube provided at one end with internal threads and two or more longitudinal slots, of a clamping-sleeve adapted to be adjusted upon the slotted end of the tube to press the threaded fingers upon a lead, substantially as described."

It thus appears upon the face of the plaintiff's specification that there were already in use lead-holding tubes for pencils with two or more slots at the lower end, so as to form elastic clamping-fingers, closing upon the lead by means of a sliding sleeve; as well as tubes with a single slot and an interior screw-thread.

The slots, the screw-thread within, and the outer sleeve being all old, and the combination of two or more slots with the sleeve, or of a single slot with the screw-thread, being also old, it is too clear for discussion, that to make two or more slots in a tube threaded inside and sleeved outside required no invention; and it is therefore unnecessary to consider the evidence upon the question whether the plaintiff was the first person who did this.

Decree affirmed.

HOSFORD *v.* GERMANIA FIRE INSURANCE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 263. Argued April 26, 27, 1888. — Decided May 14, 1888.

A provision in a policy of fire insurance, that if the interest of the assured in the property is "any other than the entire, unconditional and sole ownership for the use and benefit of the assured," or is "incumbered by any lien, whether by deed of trust, mortgage or otherwise," it must be so represented in the policy, does not, if it is stated that the property is incumbered, require a statement of the nature or amount of the incumbrances.

An application for fire insurance, expressly made a part of the policy and a warranty by the assured, contained these questions and answers: "Is there any incumbrance on the property? Yes. If mortgaged, state the amount. $3000." *Held*, that an omission to state that the property was incumbered otherwise than by mortgage was no breach of the warranty.

A warranty, in a contract of fire insurance, that "smoking is not allowed on the premises," is not, if smoking is then forbidden on the premises, broken by the assured or others afterwards smoking there.

This was an action by Hosford and Gagnon on a policy of insurance, dated May 14, 1883, by which the Germania Fire Insurance Company and the Hanover Fire Insurance Company, severally and not jointly, and as if by separate policies, insured the plaintiffs, against loss by fire for a year from that date, each one half of the sum of $8000, payable in sixty days after notice and proof of loss, upon their flour-mill, elevator and machinery in the town of Rulo and State of Nebraska; "special reference being had to assured application No. 20,157, which is hereby made a part of this policy and a warranty on the part of the assured;" "loss, if any, payable to Israel May, mortgagee, as his interest may appear." The policy contained these provisions:

"The application, survey, plan or description of the property herein insured shall be considered a part of the contract and a warranty by the assured; and any false representation

by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise," shall render the policy void.

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or be incumbered by any lien, whether by deed of trust, mortgage or otherwise, or if the building insured stands on leased ground, it must be so represented to the companies and so expressed in the written part of this policy; otherwise, this policy shall be void."

The application was of the same date as the policy, and was signed by the assured, and contained a great number of printed questions and written answers, and so much of it as is material to be stated was as follows:

"The applicant will answer particularly the following questions, and sign the same, as descriptive of the premises and forming a part of the contract of insurance and a warranty on his part:"

"What material is used for lubricating or oiling the bearings and machinery? Tallow, lard and machine oils.

"Will you agree to use only lard and tallow, or sperm and lard oils for lubricating? Lard and tallow, or lard and machine oils.

"Is the machinery regularly oiled, and by whom? Yes, by regular attendant.

"Will you agree to keep all the bearings and machinery properly supplied with oil? Yes."

"Is smoking or drinking of spirituous liquors allowed on the premises? No."

"Is there any incumbrance on the property? Yes.

"If mortgaged, state the amount. $3000."

"The subscriber hereby covenants and agrees to and with the said companies that the same is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risks of the property to be insured, and said answers are considered the basis on which insurance

is to be effected, and the same is understood as incorporated in and forming a part and parcel of the policy; and further covenants and agrees that if the situation or circumstances affecting the risk shall be so altered or changed during the time of any policy of insurance which may be fixed upon the application, or any renewal of said policy, as to render the risk more hazardous, [he] will notify the officers of said companies, or their general agent, forthwith of such alteration."

The case was tried by a jury, who returned a special verdict, finding the value of the property insured and its loss by fire on August 1, 1883, and so much of the rest of which as is material to be stated was as follows:

"The plaintiffs forbade smoking to go on in the mill, but smoking was done on the grinding floor." "One of them himself smoked upon and in the mill."

"At the time of the application, there was due Israel May on his notes and mortgage on said premises the sum of $3079.45." "There were taxes of the county and State on said premises for several years prior to the issue of the policy, which were delinquent and unpaid, and still remain unpaid, amounting to the sum of $329.40 on May 14, 1883."

On July 2, 1885, the Circuit Court gave judgment for the defendants. The plaintiffs brought the case to this court by writ of error, with a certificate of division of opinion between the Circuit Judge and the District Judge upon the following questions:

"1st. Whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause.

"2d. Whether the fact that delinquent taxes on the mill, to the amount of $329.40, were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicants to the insurers, will defeat the plaintiffs' right to recover.

"3d. Whether the fact that smoking was done in the mill, the proprietor of the mill being one that smoked, notwithstanding the plaintiffs had stated in their application for insurance that smoking was forbid therein, will defeat their

right to recover, the fire that destroyed the property not having originated from that cause."

Mr. T. M. Marquett and *Mr. Isham Reavis* for plaintiffs in error.

Mr. Samuel Shellabarger, (with whom was *Mr. J. M. Wilson* on the brief,) for defendants in error.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

If this policy is valid, each of the defendants was severally liable for no more than the sum of $4000, and interest thereon to the date of the judgment in the Circuit Court. The whole amount recoverable against either defendant in that court being less than $5000, this court has no jurisdiction of the case, except by reason of the certificate of division of opinion. *Ex parte Phœnix Ins. Co.*, 117 U. S. 367; *Dow* v. *Johnson*, 100 U. S. 158; *Williamsport Bank* v. *Knapp*, 119 U. S. 357. The first question certified is too general to be answered, because it undertakes to refer the whole case to the decision of this court. *Jewell* v. *Knight*, 123 U. S. 426. Nothing is open for consideration, therefore, but the second and third questions upon which the opinions of the judges of the Circuit Court were opposed.

The whole scope of that clause of the policy, which requires the interest of the assured, if "other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured," or if "incumbered by any lien, whether by deed of trust, mortgage or otherwise," to be so represented by the assured and so expressed in the policy, is to ascertain whether his interest comes within either of these two descriptions, and not to call for information as to the nature or amount of any incumbrances. It is therefore fully satisfied by the statements in the application that there is an incumbrance on the property, and what the amount of mortgage is, and by the expression in the policy making the insurance pay-

able to a mortgagee. *Williams* v. *Roger Williams Ins. Co.*, 107 Mass. 377.

By the terms of this policy, and of the application made part thereof, the answers to the questions in the application are doubtless warranties, to be strictly complied with. But this court is unanimously of opinion that, so far as regards either of the matters presented for its decision in the present case, these answers are direct, full and true.

The only questions put as to incumbrances are, first, the general one, "Is there any incumbrance on the property?" which is truly answered, "Yes;" and, second, the particular one, "If mortgaged, state the amount," in answer to which the assured states the principal sum due on the mortgage. The effect of omitting to include the additional sum due for less than half a year's interest is not presented by the certificate of division. The insurers having put no question as to the nature or the amount of incumbrances, otherwise than by mortgage, cannot object that no information was given upon that subject. *Phœnix Ins. Co.* v. *Raddin*, 120 U. S. 183. There was, therefore, no breach of warranty in not disclosing the lien for unpaid taxes, independently of the question whether such a lien was an incumbrance, within the meaning of this contract; and this case does not require a decision of that question.

As to smoking, the only question put in the application, and answered in the negative, is whether smoking is "allowed on the premises" — which looks only to the rule established upon the subject at the time of the application, and not to the question whether that rule may be kept or broken in the future. This appears by the language of the question, as well as by the circumstance that it is not, as other interrogatories as to existing precautions against fire are, followed up by compelling the assured to agree that they will continue to observe the same precautions. The jury having found that the assured forbade smoking in the mill, the mere fact that other persons, or even one of the assured, did afterwards smoke there, was not sufficient to avoid the policy.

The two cases, cited by the defendants from the Illinois

Reports, contain no adjudication to the contrary. The point decided in each was that smoking by workmen in the mill did not avoid the policy, and the remark of the judge delivering the opinion, that in such a case the assured undertakes that he will not himself do the act, was *obiter dictum*. *Ins. Co. of North America* v. *McDowell*, 50 Illinois, 120, 131; *Aurora Ins. Co.* v. *Eddy*, 55 Illinois, 213, 219.

Judgment reversed, and case remanded to the Circuit Court, with directions to render judgment for the plaintiffs upon the special verdict.

HOSFORD *v.* HARTFORD FIRE INSURANCE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 264. Argued April 26, 27, 1888. — Decided May 14, 1888.

An application for fire insurance, warranted to be "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, incumbrances of all kinds, insurance and hazard of the property to be insured," contained these questions: "Is there a mortgage, deed of trust, lien, or incumbrance of any kind, on property? Amount, and in whose favor?" *Held*, that the questions related only to incumbrances created by the act or with the consent of the applicant, and that an omission to disclose an existing lien created by statute for unpaid taxes was no breach of the warranty.

This case was substantially like that of *Hosford* v. *Germania Ins. Co.*, *ante*, except that no question arose as to smoking on the premises, that the policy itself contained no provision on the subject of incumbrances, and that so much of the application as related to that subject was in this form:

"13. Incumbrance. — Is there a mortgage, trust deed, lien, or incumbrance of any kind, on property? Yes. Amount, and in whose favor? $3000; I. May. What is the entire value of property incumbered? $21,000."

"And the said applicant hereby covenants and agrees to and with said company that the foregoing and diagram annexed hereto is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, incumbrance of all kinds, insurance and hazard of the property to be insured; and the same is hereby made a condition of the insurance, a part of the contract, and a continuing warranty on the part of assured, for term of policy, or any renewal thereof of which this survey and application form a part."

Mr. T. M. Marquett and *Mr. Isham Reavis* for plaintiffs in error, cited *Baley* v. *Homestead Ins. Co.*, 80 N. Y. 21; Nebraska Comp. Stat. c. 77, §§ 70, 74, 138.

No counsel appeared for defendant in error.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

In this case, I am instructed by the majority of the court to announce its opinion that the warranty concerning incumbrances includes only incumbrances created by the act or with the consent of the assured, and not those created by the law; and therefore the policy was not avoided by the omission to disclose the fact that "delinquent taxes" on the premises for previous years were due and unpaid, although by the statutes of Nebraska taxes are made a lien on the real estate taxed.

Judgment reversed, and case remanded to the Circuit Court, with directions to render judgment for the plaintiffs upon the special verdict.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 238. Argued April 19, 1888. — Decided May 14, 1888.

Section 5 of the act of March 3, 1879, 20 Stat. c. 180, 355, 358, did not operate to repeal § 3962 Rev. Stat.; and when it was itself repealed by the act of June 11, 1880, 21 Stat. c. 206, 177, 178, § 3962 of the Revised Statutes remained in force against railroad companies contracting to carry the mails.

When there are two provisions of law in the Statutes relating to the same subject, effect is to be given to both, if practicable.

A statute will not operate to repeal a prior statute merely because it repeats some of the provisions of the prior act, and omits others, or adds new provisions; but in such cases the later act operates as a repeal of the former one only when it plainly appears that it was intended as a substitute for the first act.

THE case was stated by the court as follows:

The petitioner, the Chicago, Milwaukee and St. Paul Railway Company, is a corporation formed under the laws of Wisconsin, and owns and operates several lines of railway in that State, and in the States of Illinois, Iowa and Minnesota, and in the Territory of Dakota. In 1879 it entered into sundry contracts with the Post-Office Department to transport the mails of the United States over its lines, on specially designated routes, at rates fixed under the acts of Congress of March 3, 1873, June 12, 1876, and June 17, 1878. The petitioner alleges that it transported the mails upon all the routes designated in accordance with the contracts, except when prevented by the elements or other unavoidable disasters; that between the autumn of 1880 and the spring of 1883, owing to snow-blockades, floods, and other unavoidable causes, which it was impossible for the petitioner to provide against, it was prevented at various times from running its trains of cars over the routes, and consequently the mails were delayed and accumulated until the cars could be got through; but the peti-

tioner did finally carry all the mails over the routes, and as frequently as it was possible; that the Post-Office Department deducted from the pay of the petitioner at divers times, during the period mentioned, a large sum of money, claiming a right to do so because of the failure of the petitioner to transport the mails upon the ordinary schedule time for the departure and arrival of the mails, notwithstanding the failures were owing to no want of diligence or care in the petitioner, but were owing wholly to the causes mentioned; and that such deductions amounted to $31,251.86, which sum the petitioner alleges is unjustly and unlawfully held from it, and therefore asks judgment for the amount. A demurrer to this petition, that it did not allege facts sufficient to constitute a cause of action, was interposed by the United States and sustained by the court. Judgment was accordingly entered dismissing the petition, and the petitioner appealed to this court.

Mr. J. J. Farnsworth for appellant.

Mr. Assistant Attorney General Howard for appellee. *Mr Attorney General* was also on the brief.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

The deductions from the compensation claimed by the railway company for its failure to make the trips required, that is, to render the service stipulated, of which it complains, were made by the Postmaster General under § 3962 of the Revised Statutes, which is as follows:

"The Postmaster General may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier." This section in terms applies to all contractors, and, standing alone, there would not be any serious contention against the authority of the Postmaster General to make the

deductions complained of. It is not pretended that the amounts exceeded those mentioned in the section. It is, however, insisted that the section, so far as applicable to railroad companies, was repealed by § 5 of the act of March 3, 1879, making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1880, which provides:

"SEC. 5. That the Postmaster General shall deduct from the pay of the railroad companies, for every failure to deliver a mail within its schedule time, not less than one-half of the price of the trip, and where the trip is not performed, not less than the price of one trip, and not exceeding, in either case, the price of three trips: *Provided, however*, That if the failure is caused by a connecting road, then only the connecting road shall be fined. And where such failure is caused by unavoidable casualty, the Postmaster General, in his discretion, may remit the fine. And he may make deductions and impose fines for other delinquencies." 20 Stat. c. 180, 355, 358.

This latter section was repealed on the 11th of June, 1880 (21 Stat. c. 206, 177, 178); and § 12 of the Revised Statutes provides that the repeal of a repealing statute shall not revive the original act. It is, therefore, contended that there was no statute in force which authorized the deductions at the time they were made between the autumn of 1880 and the spring of 1883, during which period the alleged failures in the mail transportation occurred.

There is a brief and conclusive answer to this contention. Section 3962 of the Revised Statutes is not repealed by § 5 of the act of 1879. Section 3962 authorizes a deduction from the pay of contractors, whether they be natural persons or corporations, the price of the trip in all cases where the trip is not performed, and not exceeding three times the price if the failure be caused by the fault of the contractor or carrier. Section 5 of the act of 1879 applies only to railroad companies, and has special reference to failures of delivery within schedule time, and makes a difference between them and failures to make the trips, leaving the provision for the latter substan-

tially as it is in the Revised Statutes. When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice Story says, it "may be merely affirmative, or cumulative, or auxiliary." *Wood* v. *United States*, 16 Pet. 342, 363.

The most that can be said of § 5 of the act of 1879, construed with reference to § 3962 of the Revised Statutes, is that it makes an exception to the provisions of that section, so far as railway companies are concerned. Its repeal, therefore, leaves the original section in full force. The repeal was before the failures occurred for which the deductions complained of were made.

Judgment affirmed.

BARNARD *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

No. 272. Argued May 2, 1888. — Decided May 14, 1888.

Plaintiff and the Board of Public Works of the defendant entered into a contract by which plaintiff was to do certain work on a street in the city of Washington and receive payment therefor at the rate of 30 cents per cubic yard for grading, and 40 cents per cubic yard for excavation and refilling, to be measured by excavation only. The Board had before then entered in its record and notified its engineer, auditor and contract-clerk that for rock excavation contractors should be paid $1.50 per cubic yard in ditches and sewers, and $1.00 per cubic yard in street grading, etc. Plaintiff did his work, was paid at the contract price, and brought this action to recover for rock excavation, claiming that it was outside of the contract. *Held:*

(1) That it was not outside of the contract.

(2) That the act of February 21, 1871, 16 Stat. 419, c. 62, forbade the Board

to contract except in writing, and forbade the allowance of extra compensation for work done under a written contract.

(3) That the entry in the journal of the Board could not affect plaintiff's contract.

THE case is stated in the opinion of the court.

Mr. I. H. Ford for appellant.

Mr. Attorney General and *Mr. Assistant Attorney General Howard* for appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

On the 23d day of July, 1872, Robert H. Ryan, since deceased, entered into a contract with the Board of Public Works of the District of Columbia to do certain work for the improvement of New Jersey Avenue, in the city of Washington, from B Street south to the Potomac River. The different kinds of work required were stated, and the prices for each specified, among which were "grading, 30 cents per cubic yard," and "excavations and refilling, 40 cents per cubic yard, to be measured in excavating only." It is conceded that Ryan performed the work pursuant to the contract, and has been paid the amount agreed upon. The present claim is for extra work on the avenue "in grading or excavating stone or rock," for which it is contended there is no provision in the contract. The Board had entered in its journal before the contract was made the following: "Chief Engineer was notified that the following price was established for rock excavation, viz.: in ditches for sewers, etc., $1.50 per cubic yard; cutting down streets and the like, $1.00 per cubic yard. Auditor and contract clerk notified;" and Ryan contended that he was therefore entitled for all rock excavations to one dollar a yard instead of the price specified in the contract for grading and excavating, the difference being $4060.

To this contention there are two answers. In the first place, the "grading" and "excavation" specified in the contract are not limited to work done in sand or gravel or earth free from stone or rock. It might reasonably be expected

that more or less stone or rock would be found in the progress of the work, and the price was evidently fixed upon its supposed average character.

In the second place, the act of Congress of February 21, 1871, "to provide a government for the District of Columbia," in force at the time, required that all contracts by the Board should be in writing, be signed by the parties making the same, and a copy thereof filed in the office of the secretary of the District; and it forbade the allowance of any extra compensation for work done under a contract. 16 Stat. 419, 423, c. 62, §§ 15, 37.

The entry in the journal of the Board was no part of the contract with the claimant, nor could it in any respect control the construction or limit the effect of such contract. The Board could not in that way either make a new contract or alter the one previously made, so as to bind the District. *Barnes* v. *District of Columbia*, 22 C. Cl. 366.

Judgment affirmed.

RATTERMAN *v.* WESTERN UNION TELEGRAPH COMPANY.

WESTERN UNION TELEGRAPH COMPANY *v.* RATTERMAN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Nos. 1360, 1361. Argued March 21, 1888. — Decided May 14, 1888.

A single tax, assessed under the laws of a State upon receipts of a telegraph company which were partly derived from interstate commerce and partly from commerce within the State, and which were capable of separation but were returned and assessed in gross and without separation or apportionment, is invalid in proportion to the extent that such receipts were derived from interstate commerce, but is otherwise valid; and while a Circuit Court of the United States should enjoin the collection of the tax upon the portion of the receipts derived from interstate com-

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merce, it should not interfere with those derived from commerce entirely within the State.

The decisions of this court respecting the taxation of telegraph companies reviewed.

THE case, as stated by the court, was as follows:

These are cross appeals from a decree of the Circuit Court for the Southern District of Ohio, Western Division.

The suit was begun by a bill of complaint, filed by the Western Union Telegraph Company against Frank Ratterman, treasurer of Hamilton County, in the State of Ohio. As the bill is not very long, it is here presented in full:

"To the judges of the Circuit Court of the United States for the Southern District of Ohio, Western Division:

"The Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York and a citizen of said State, brings this its bill against Frank Ratterman, treasurer of Hamilton County, Ohio, and a citizen of the State of Ohio.

"And thereupon your orator complains and says:

"That its principal office is, and during the times hereinafter mentioned was, in the city of New York; that during said time it had been and now is engaged in the business of receiving and transmitting for hire telegraph messages between different points in the United States, and in the carrying on of said business has offices in the city of Cincinnati and at other points in the county of Hamilton and in the State of Ohio, and has been engaged in the transmission of messages between said offices and other points both within and without the State of Ohio.

"That prior to 1869 your orator accepted in writing the provisions of the act of Congress of July 4, 1866, 14 Stat. 221; that your orator's wires, poles, batteries, office furniture, and other property in the State of Ohio have been and are taxed like other property in said State; that your orator's telegraph lines cross nearly all of the States of the Union and occupy portions of British America, and that a large amount of the

commercial transactions, business, and intercourse of the people is carried on by means of their wires.

"That in the month of May, 1887, your orator, under protest, delivered to the auditor of said county a statement, as required by Revised Statutes Ohio, § 2778, showing the entire receipts of your orator in said county for the year next preceding, which said gross receipts amounted to the sum of $175,210.88, and were principally for business between points in the State of Ohio and points outside the State of Ohio — that is to say, the receipts of your orator for messages and business pertaining to commerce between the States, and not for messages between different points within the State of Ohio; that thereupon said auditor assessed a tax thereon amounting to five thousand two hundred and six and $\frac{90}{100}$ dollars.

"Your orator says that said tax is illegal and void and in violation of the Constitution of the United States.

"Your orator has offered to the defendant and is ready and willing to pay to him the taxes chargeable against its personal property within said county, but the defendant refuses to accept payment thereof unless your orator also at the same time pays said total assessment for all of said gross receipts; and, unless restrained, the defendant will impose and enforce the penalties for non-payment of said tax provided for by Revised Statutes of Ohio, § 2843, to the interference, stoppage, and destruction of your orator's business.

"Wherefore your orator prays that the defendant may be required to accept payment of so much of said tax assessment as covers the property of your orator in the said county, and that he may be enjoined by preliminary injunction and by final decree from levying or collecting the balance of said assessment.

"Your orator prays that a writ of subpœna may issue against the defendant, and that your orator may have such other and further relief as it is in equity and good conscience entitled to."

To this bill a general demurrer was filed, which was overruled by the court. The record then proceeds as follows:

"And thereupon it was agreed by and between the complainant and the defendant that the cause be submitted to the court on the bill without further pleading to the same by the defendant, upon the following facts:

"That of the entire receipts mentioned in the bill $142,154.18 were for business done by the plaintiff between its offices in said county and points outside of the State of Ohio — that is, for messages and business pertaining to commerce between the States and not for messages between different points within the State of Ohio, and that the balance of said receipts, to wit, $33,056.70 was for business between the offices of the plaintiff in said county and other points within the State of Ohio; and that if said receipts had been so separated and apportioned and said tax had been separately assessed on the basis of such separation and apportionment the amount of said total tax of $5206.90 apportionable to said receipts for interstate commerce would be $3931.51, and the amount apportionable to said receipts for business between the offices of the complainant in said county and other points within the State of Ohio would have been $910.40, and that the remainder of said sum of $5206.90, viz., $364.99, was for tax assessed upon the personal property of the said complainant within the said county of Hamilton aforesaid, namely, upon its instruments, wires, poles, and other chattel property which were returned by said complainant to the auditor of said county at a valuation of $18,059.

"That Exhibit 'A,' hereto annexed and made a part of this stipulation, is a copy of the return made by complainant to the auditor of said county in pursuance of the law of the State of Ohio, and that said complainant made no other return and furnished no other information to said auditor at the time of said return, save what is contained in said return.

"That Exhibit 'B,' hereto annexed and made a part hereof, is a copy of the return of the chattel property of said complainant made at the same time to said auditor.

"It is further agreed that the auditor of said county placed on the tax duplicate of said county said sums of $175,210.88, and $18,059 as the personal property of said complainant, to

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be assessed for taxation in said county of Hamilton, and that the rate of taxation assessed thereupon was the same as was assessed against the personal property listed for taxation by the citizens of said county.

"It is further agreed that complainant, prior to December 20, 1887, offered to pay the tax properly assessable against said return of $18,059 for personal property, but the defendant refused to accept payment of said assessment of $5206.90 unless the whole were paid. The plaintiff did not disclose to said auditor at the time it made said return what portion, if any, of the gross receipts of its said offices in said county was for interstate commerce.

"It is further agreed that neither said auditor nor said treasurer had any actual knowledge that any portion of the returns of said gross receipts was for interstate commerce business, but said officers knew that plaintiff's said business included interstate commerce.

"And the only knowledge said auditor and said treasurer had of the business of said company and what said receipts were derived from was from the returns hereto annexed, marked Exhibit 'A,' and from their knowledge as aforesaid of the plaintiff's business.

"The cause being thus submitted to the court on the foregoing stipulation of facts and the argument of counsel, the court is of the opinion that said receipts and tax may be separated and apportioned, and that said tax so far as so separated and apportioned to said receipts derived from the interstate commerce is unconstitutional and void, but valid apportionable to said receipts derived from state business.

"It is thereupon ordered by the court, adjudged, and decreed that the defendant is hereby forever enjoined from collecting on said assessment of $5206.90 more than the sum of $1275.39, and an injunction is refused as to the balance of said tax. It is further ordered that the defendant pay the costs of this suit."

The judges of the Circuit Court, upon this state of facts, made the following certificate of a difference of opinion:

"This is to certify that at the hearing of the above entitled

cause before Hon. Howell E. Jackson, circuit judge, and George R. Sage, district judge, said judges differed in opinion upon the following question of law, to wit:

"Whether a single tax, assessed under the Revised Statutes of Ohio, § 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce.

"And the district judge being of the opinion that such a tax is wholly invalid, and the circuit judge being of the opinion that it is invalid only to the extent and in the proportion that the receipts upon which it is based were derived from interstate commerce, said question is hereby certified to the Supreme Court of the United States for its opinion.

"Howell E. Jackson, *Circuit Judge.*
"Geo. R. Sage, *District Judge.*"

Mr. Lawrence Maxwell, Jr., for the Western Union Telegraph Company. *Mr. William M. Ramsey*, *Mr. William Brown*, and *Mr. Charles W. Wells* were with him on the brief. On the question whether the tax could be separated, and upheld in part and annulled in part, Mr. Maxwell said:

The questions are (1) whether the State of Ohio, although not at liberty to prevent the complainant from coming into the State to do interstate commerce, nor to tax it for that privilege, is nevertheless entitled to prohibit it from doing business between points within the State, and to tax it for that privilege? (2) whether the law, in its present form, can be used to enforce the collection of such a tax? in other words whether, after striking out the provisions of the Statute which are unconstitutional, effect is given to legislative intent by permitting the statute, thus emasculated, to stand as one authorizing and directing a tax upon the receipts derived from internal commerce?

The Entire Law Falls.

Telegraph Company v. *Texas*, 105 U. S. 460, was a suit brought by the State against the telegraph company to recover unpaid taxes under a statute of Texas which required every chartered telegraph company to pay a tax of one cent for every full rate message sent, and one half cent for every message less than full rate. The state court rendered judgment for the tax on all messages that had been sent by the company, including those sent to places out of the State, and those sent by officers of the government of the United States on public business. The Supreme Court of Texas affirmed the judgment, and the case came into this court upon writ of error for review of the federal question, and the decision of this court was limited to the determination of that question, and was confined to a reversal of the judgment upon the ground that it included a tax upon interstate and government messages. With respect to the question whether the statute being found to be unconstitutional in that respect could nevertheless be used to enforce the collection of a tax upon messages passing between points within the State, this court said: "Whether the law of Texas in its present form can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review."

But in the case at bar, which is not a writ of error to a state court, but an appeal from the Circuit Court, sitting as a court of original jurisdiction to decide all questions arising in the case, it is the right and duty of this court to declare upon its own judgment whether, in view of the unconstitutional features of this statute, it can be used to enforce the collection, not of the tax for which it was intended to provide, but of a tax limited to receipts from internal business, even assuming the power of the State to tax such receipts.

In *State* v. *Hipp*, 38 Ohio St. 199,230, it is said:

"Finally, it is urged that even if the section providing punishment for non-compliance with the requirements of the statute should be held to be unconstitutional, still that other parts of the act may stand. But, as Blackstone observes,

'the main strength and force of a law consists in the penalty annexed to it.' 1 Bl. Com. 57. It is not to be supposed that the legislature would have enacted this statute without such clause; and hence, the whole act fails. *The State* v. *Perry County*, 5 Ohio St. 497."

In *State* v. *Commissioners of Perry County*, 5 Ohio St. 497,506, our Supreme Court laid down the following rule: "As a general rule, one part of an act will not be held constitutional and another part unconstitutional, unless the respective parts are independent of each other," and the following language of Shaw, C. J., in *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray, 84, was quoted with approval: "The same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. . . . But this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

The same language is quoted with approval by this court in *Allen* v. *Louisiana*, 103 U. S. 80, 84, the Chief Justice adding: "The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

Is it not clear that the unconstitutional provisions of the Ohio statute are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature?

The intent of the legislature, as declared by our own Supreme Court, in *Western Union Telegraph Co.* v. *Mayer*, 28

Ohio St. 521, was to impose a charge upon foreign telegraph companies for the privilege of exercising their franchises and powers within the State, graduated according to the amount of receipts. The execution of that intention is now found to be impossible. The legislature cannot prevent these companies from exercising their powers and franchises with respect to the great bulk of their business. Can the court discover, nevertheless, an intent to charge them for the privilege of doing business wholly within the State based upon the amount of their receipts from such business. Did not the legislature intend the law as a whole? Had it been advised that it could not tax the Western Union Telegraph Company for the privilege of coming into Ohio to do interstate commerce, nor with respect to that commerce, would it have passed the law at all? Would it have laid a tax which, being confined to Ohio messages, must in the nature of things, be borne ultimately by the merchants of Ohio? Had it known that its power was confined to taxing the receipts of the company from internal business, would it not have increased the rate?

These are only a few of the questions which embarrass us in an attempt to give effect to the statute by upholding it, notwithstanding its unconstitutional provisions, as a law authorizing and directing a tax against foreign telegraph companies upon their receipts from internal commerce.

It may be that the legislature of Ohio has authority to pass a law taxing such receipts, but it will be time enough for the courts to enforce such a law when warranted thereunto by some clear declaration of legislative intent. It is not for the courts to enact or amend laws.

Mr. Thomas McDougall and *Mr. David K. Watson*, Attorney General of the State of Ohio, for Ratterman. *Mr. William A. Davidson*, County Solicitor for Hamilton County, Ohio, was with them on the brief. To the point that the receipts were separable, and that the court might apportion them, they said:

The certificate of division of opinion in this case presents this question. Take it for granted, for the purposes of argu-

ment, that the tax on the receipts from interstate commerce business is unconstitutional, does that vitiate the whole act so as to authorize the court to enjoin the collection of the tax assessed on the receipts for business done wholly within the State, as well as the receipts for business done without the State?

It must be admitted that the legislature of Ohio intended to tax the business done wholly within the State. Its authority to tax the receipts from that business cannot be questioned in this court; but has been expressly upheld in numerous cases. Does the fact that the tax is levied, or, if you please, intended to be levied, upon that which it had no power to levy it on, destroy its right to collect a tax from that which it had the right to tax?

This court has held that the law may be valid as to one class of receipts, and invalid as to another. In the *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S., on page 339, the court say: "The court, in its opinion, took notice of the fact that the law was general in its terms, making no distinction between freight transported wholly within the State and that which was destined to or came from another State. But it was held that this made no difference. The law might be valid as to one class, and unconstitutional as to the other."

In the case of *Fargo* v. *Michigan*, 121 U. S., the court, speaking of the same law, (on page 241,) say: "The Supreme Court of the State of Pennsylvania decided that all the freight carried, without regard to its destination, was liable to the tax imposed by the statute. This court, however, held that freight carried entirely through the State from without, and the other class of freight brought into the State from without, or carried from within to points without, all came under the description of 'commerce among the States,' within the meaning of the Constitution of the United States; and it held also, that freight transported from and to points exclusively within the limits of the State was internal commerce, and not commerce among the States. The taxing law of the State was, therefore, valid as to the latter class of transportation, but with regard to the others it was invalid,

because it was interstate commerce, and the State could lay no tax upon it."

In the case of the *Telegraph Co.* v. *Texas*, 105 U. S., on page 465, the court say: "The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent, the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one half cent. Clearly, if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce, and beyond the power of the State. That is fully established by the cases already cited. As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and therefore void. It was so decided in *M'Culloch* v. *Maryland*, 4 Wheat. 316, and has never been doubted since. It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government, on public business, is erroneous."

In that case a judgment was rendered by the state court against the telegraph company for the tax on the messages within the State, and for the messages which were wholly interstate commerce. And this court held that, so far as the judgment included the tax on messages sent out of the State, or for the government, it was erroneous, and reversed the judgment, and remanded the case for proceedings in accordance with the opinion. In the case at bar the court's attention is called to what constituted the sum of $5206.90, which was the amount of the tax sought to be enjoined by the bill of the telegraph company. A part of that sum consisted of

the tax levied on the personal property, the wires, batteries and poles of the company within the county of Hamilton. The remainder of the tax was what was assessed, as we claim, on the moneys received from the business, and treated as other personal property for taxation. There was no practical difficulty in the way of separation. There was no such intermingling of the receipts as made it impossible to separate the one class from the other. They were in fact separated by the court below. And yet it is claimed, though the separation is practicable, and has been made by the court below, though the amount can be ascertained to a cent of what was received from each class of business, yet the telegraph company has a right to perpetually enjoin, and thereby be released from the tax on the whole gross receipts, notwithstanding the admitted fact that the State may tax the gross receipts for the business done within the State. We know of no rule of construction of a statute that authorizes the holding of the whole tax invalid, because it was levied on property a part of which it is claimed the State had no right to tax. It will be remembered by this court that the tax laid on railway gross receipts, held to be valid in 15 Wall. included the receipts of both classes, and that in that case, as in the case of *Fargo* v. *Michigan*, 121 U. S., the receipts were separated, although the law in one of the cases was general in its terms, as in the case at bar.

The rule applicable to the granting of relief by way of injunction, which was what was sought in the case at bar, is to be found in the case of *Frazer* v. *Seibern*, 16 Ohio St. 614. In that case, on page 624, the court say, after finding that the act itself, to the extent that it taxed banks in excess of the taxation levied on the state banks, was unconstitutional: "It by no means follows, however, that the plaintiffs are entitled to an unconditional injunction against the collection of the tax. They ask equity, and must do equity. They invoke the exercise of an extraordinary power of the court for their relief, and the court, in its discretion, should refuse that relief, except upon conditions that are equitable and just. We think, therefore, that the injunction should only be granted upon the condition that the plaintiffs, or their bank, shall first pay

to the treasurer of Hamilton County a sum that will be a *pro rata* equivalent for the tax imposed upon the State and independent banks under the act of 1861; that is to say, such sum as might lawfully have been assessed upon the plaintiffs, or their bank, under said act, had it been one of said state banks. If the parties cannot agree upon this sum, proceedings can be adopted to ascertain it by the court; and, if found necessary, the bank itself can be made a party."

We submit, therefore, that should this court hold the law of the State of Ohio unconstitutional, it can only do so to the extent that it taxes the moneys received from the interstate commerce business of the Western Union Telegraph Company.

Mr. Justice Miller, after stating the case, delivered the opinion of the court.

The case has been fully argued before us upon all the matters properly presented by the record, and it seems probable from the amicable nature of the proceedings and the agreement as to a statement of facts upon which the case was to be tried, without any answer being filed to the bill, that the purpose was to obtain the judgment of this court upon the general subject of the liability of the corporation to taxation upon the amount of its receipts, and that the certificate of a difference of opinion has been used for that purpose.

With regard to the question which is certified to us as dividing the opinions of the judges of the Circuit Court, we do not think that there is any difficulty, and can hardly see how it arose in the present case. That question is "whether a single tax, assessed under the Revised Statutes of Ohio, § 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce."

We do not think this particular question is material in

this case, because the state of facts agreed upon by the parties makes this separation and presents the matter to the court, freed from the point raised by the question that the tax was not separable. Nor do we believe, if there were allegations either in the bill or answer setting up that part of the tax was from interstate commerce and part from commerce wholly within the State, that there would have been any difficulty in securing the evidence of the amount of receipts chargeable to these separate classes of telegrams, by means of the appointment of a referee or master to inquire into that fact and make report to the court. Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid.

This precise question was adjudged in the case of *The State Freight Tax*, 15 Wall. 232. That was a case in which a statute of the State of Pennsylvania was examined which provided for a tax upon every ton of freight transported by any railroad or canal in that State at certain rates, two cents for one class of freight, three cents for another, and five cents for still another class. The payment of this tax was resisted by the Reading Railroad Company upon the ground that it was levied on interstate commerce. The company made returns to the accounting officers of the commonwealth, in which they stated separately the amount of freight whose transportation was wholly within the State, and also the amount of the transportation of freight brought into or carried out of that State. This court held that the tax upon the former class, being upon commerce wholly within the State, was valid under the law of Pennsylvania by which it was imposed, but that the latter classes, being commerce among the States, were not subject to such taxation.

This ruling shows that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinc-

tion, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory.

In *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1, it was decided by this court that the telegraph was an instrument of commerce; that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business, and that such a company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods.

In *Telegraph Company* v. *Texas*, 105 U. S. 460, the same question presented in this case was before the court, that of the power of the State to tax telegraphic messages received and delivered by the same corporation which is now before us. In that case no distinction was made by the statute between what we now call interstate messages and those exclusively within the State. This court, therefore, in reviewing the decision of the Supreme Court of the State of Texas, which had allowed no deduction for taxes on messages sent out of the State, or by government officers on government business, said: "It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review."

The court reversed the judgment of the Supreme Court of Texas, and remanded the cases with instructions for such further proceedings as justice might require. Evidently, the purpose of this was to permit the Supreme Court of that State, if it could separate the taxes upon the two classes of telegrams, to do so, and to render judgment accordingly.

In the recent case of *The Western Union Telegraph Co.* v. *The Attorney General of the Commonwealth of Massachusetts*, 125 U. S. 530, decided at this term, a tax was levied upon that corporation, apportioned under the laws of Massachusetts upon the taxable value of its capital stock. The ratio which should have been allotted to that commonwealth may be supposed to have been properly apportioned to it, ascertaining that portion by means of the length of the lines of the company in relation to the entire mileage of its lines in the United States. The payment of the tax was resisted, however, partly upon the ground that it was levied upon interstate commerce, but mainly because it was asserted to be a violation of the rights conferred on the company by the act of July 24, 1866, now Title LXV., §§ 5263 to 5269 of the Revised Statutes. It was alleged that the defendant company, having accepted the provisions of that law, was entirely exempt from taxation by the State. This court, however, held that this exemption only extended under that law to so much of the lines of the telegraph company as were, in the language of § 5263, "through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States."

It was shown in that case that, of the 2833.05 miles of the lines of the defendant corporation within the boundaries of Massachusetts, more than 2334.55 miles came within the terms of that section, being over or along post roads, made such by the United States, or over, under, or across its navigable streams or waters, leaving only 498.50 miles not within such description, on which the company offered to pay the proportion of the tax assessed against it according to mileage by the state authorities.

We refer to this now only for the purpose of showing how easily the subject of taxation which is forbidden by the Constitution may be separated from that which is permissible in this class of cases. The court held in that case that this tax, being in effect levied upon the capital stock or property of the company in the State of Massachusetts, which was ascertained upon the basis of the proportion which the length of its lines in that State bore to their entire length throughout the whole country, and not upon its messages or upon the receipts for such messages, was a valid tax. The question of interstate commerce, as affecting the tax in that action, was very little pressed by counsel for the company, but they relied upon the privilege granted by § 5263, already cited, to companies which accepted its provisions, and upon the fact that a large proportion of the lines of the defendant telegraph company were over or along post roads, or over, under, or across the navigable streams or waters of the United States.

In the present case counsel for the telegraph company have argued that this statute secures the corporation from taxation of any kind whatever, and especially as to receipts arising from messages sent over its lines; but that question does not arise in this action, because there is no allegation or averment, either in the bill itself or in the statement of facts, that any part of the lines of the telegraph company in the State of Ohio is built over or along a post road, or comes within the provisions of § 5263. The only reference to this subject is in the following allegation of the bill: "That prior to 1869 your orator accepted in writing the provisions of the act of Congress of July 4, 1866, 14 Stat. 221." Under this allegation the complainant can, of course, claim no benefit from the provisions of that section, for it does not appear that any part of the company's line comes within the description of this section of the Revised Statutes.

Under these views, we answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from com-

merce within the State, but which were returned and assessed in gross and without separation or apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. Concurring, therefore, with the circuit judge in his action, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, this decree is

Affirmed.

UNITED STATES *v.* McLAUGHLIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 1027. Argued December 8, 9, 12, 1887. — Decided May 14, 1888.

The boundaries of the Mexican grant, called the Moquelamos grant, considered, — the same being described as "bounded on the east by the adjacent sierra:" *held*, as the result of the evidence adduced, that its eastern limit was at the point where the foot hills of the sierra begin to rise above the plain, near the range line between ranges 7 and 8.

Mexican grants were of three kinds; 1, grants by specific boundaries, where the donee is entitled to the entire tract; 2, grants of quantity within a larger tract described by outside boundaries, where the donee is entitled to the quantity specified and no more; 3, grants of a certain place or rancho by name, where the donee is entitled to the whole place or rancho. The second kind, grants of quantity in a larger tract, are, properly, floats, and do not attach to any specific land until located by authority of the government. The Moquelamos grant was of this kind.

In the case of floating grants, as above described, it was only the quantity actually granted which was reserved during the examination of the validity of the grant; the remainder was at the disposal of the government as part of the public domain. If within the boundaries of a land-grant made in aid of a railroad, such land-grant would take effect, except as to the quantity of land, or float, actually granted in the Mexican grant. If that quantity lying together was left to satisfy the grant, the railroad company would be entitled to patents for the odd sections of the remainder.

Citations for Appellant.

In the case of a floating Mexican grant the government retained the right of locating the quantity granted in such part of the larger tract described as it saw fit; and the government of the United States succeeded to the same right: hence, the government might dispose of any specific tracts within the exterior limits of the grant, leaving a sufficient quantity to satisfy the float.

Patents issued to the Central Pacific Railroad Company under its land-grant, for any sections lying easterly of range 6 east within the outside boundaries of the Moquelamos grant, are valid, — there being enough land lying west of range 7 to satisfy the floating grant of eleven square leagues.

The bill in this case was filed by the Attorney General on behalf of the United States to vacate a patent granted to the Central Pacific Railroad Company for lands lying east of range 6 within the claimed limits of the Moquelamos grant — the ground of relief being, that all the lands within the exterior limits of that grant were reserved lands: *held*, that the lands in question were not reserved lands, and that the bill should be dismissed.

BILL IN EQUITY to cancel a patent of public land issued to the Central Pacific Railroad Company of California. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. Michael Mullany, with whom was *Mr. Attorney General* and *Mr. D. M. Delmas* on the brief, for appellant cited: *United States* v. *Fossat*, 1 Hoffman, 211, 376; *S. C.* 20 How. 413; 21 How. 445; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Missouri &c. Railway Co.* v. *Kansas Pacific Railway*, 97 U. S. 491; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Wright* v. *Rosberry*, 121 U. S. 488; *Railroad Co.* v. *Baldwin*, 103 U. S. 426; *Leavenworth &c. Railroad Co.* v. *United States*, 92 U. S. 743; *Newhall* v. *Sanger*, 92 U. S. 761; *United States* v. *Stone*, 2 Wall. 525; *Dubuque and Pacific Railroad Co.* v. *Litchfield*, 23 How. 66; *Railroad Co.* v. *Fremont County*, 9 Wall. 89; *Reichart* v. *Felps*, 6 Wall. 160; *Best* v. *Polk*, 18 Wall. 112; *Sherman* v. *Buick*, 93 U. S. 209; *Stoddard* v. *Chambers*, 2 How. 284; *Patterson* v. *Winn*, 11 Wheat. 380; *Barry* v. *Gamble*, 3 How. 32; *Mills* v. *Stoddard*, 8 How. 345; *Walden* v. *Knevals*, 114 U. S. 373; *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S. 629; *Knevals* v. *Hyde*, 5

Dillon, 469; *Grinnell* v. *Railroad Company*, 103 U. S. 739; *United States* v. *Burlington & Missouri Railroad Co.*, 4 Dillon, 297, 305; *Morris and Essex Railroad Co.* v. *Blair*, 9 N. J. Eq. 653; *Carr* v. *Quigley*, 57 Cal. 394; *McLaughlin* v. *Powell*, 50 Cal. 64, 67.

Mr. A. L. Rhoads and *Mr. L. W. Elliott* for appellees cited: *Newhall* v. *Sanger*, 92 U. S. 761; *Pico* v. *United States*, 2 Wall. 279; *United States* v. *Minor*, 114 U. S. 233; *United States* v. *White*, 9 Sawyer, 131; *The Siren*, 7 Wall. 152; *United States* v. *Flint*, 4 Sawyer, 42, 58; *Badger* v. *Badger*, 2 Wall. 87; *Stearns* v. *Page*, 7 How. 819; *Sullivan* v. *Portland &c. Railroad*, 94 U. S. 806; *Twin Lick Co.* v. *Marbury*, 91 U. S. 587; *United States* v. *Tichenor*, 8 Sawyer, 142; *Manning* v. *San Jacinto Tin Co.*, 7 Sawyer, 418; *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *Central Pacific Railroad Co.*, 8 Sawyer, 81; *Walden* v. *Knevals*, 114 U. S. 373; *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Wood* v. *Railroad Co.*, 104 U. S. 329; *Railroad Co.* v. *Baldwin*, 103 U. S. 426; *Barney* v. *Winona Railroad*, 117 U. S. 228; *United States* v. *Phelan*, 4 Sawyer, 58; *Pratt* v. *Cal. M. Co.*, 9 Sawyer, 354, 363; *Johnson* v. *Towsley*, 13 Wall. 72; *Maxwell Land Grant Case*, 121 U. S. 325; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67.

Mr. Justice Bradley delivered the opinion of the court.

This is a bill in equity filed by the Attorney General on behalf of the United States against The Central Pacific Railroad Company, Kate D. McLaughlin, as executrix of Charles McLaughlin, deceased, and others, to cancel and annul a certain patent of the United States, issued on the 23d day of November, 1875, to the Central Pacific Railroad Company from the General Land Office, for certain sections and fractional sections of land in San Joaquin and Calaveras counties in California. The ground of relief stated in the bill is, that

the patent was issued without authority of law, for the reason that all of said lands were within the boundaries of a certain Mexican grant claim, called the Moquelamos grant, and were held and reserved for adjustment and satisfaction of said claim at the time when the line of railroad belonging to said company was definitely fixed, and when, by virtue of that fact, the government grant on which the patent was based accrued. The patent was granted to the railroad company for the lands in question as portions of its land grant under the Pacific Railroad acts passed by Congress in 1862 and 1864. This grant was originally made to the Central Pacific Railroad Company of California; was assigned, at the place in question, by said company, to the Western Pacific Railroad Company on the 31st day of October, 1864, which assignment was approved by act of Congress of March 3d, 1865; and the two companies named were consolidated together and constituted the present Central Pacific Railroad Company in August, 1870, upon which last company devolved all the franchises, rights, privileges, and property of the said two first named companies.

The bill sets forth the alleged Mexican grant, called the Moquelamos grant, and the proceedings in relation thereto upon the claim made for its confirmation, before the Commissioners to ascertain and settle private land claims in California, and the District and Supreme Courts of the United States, resulting in the final rejection of said claim by the adjudication of the Supreme Court on the 13th of February, 1865. The bill also states that the lands included within the boundaries of said claim were held and reserved during said proceedings, to await final adjudication, until said last mentioned date; that said lands lie in the counties of San Joaquin and Calaveras, on each side of the road of the said railroad company between the cities of Sacramento and San José. It recites those parts of the acts of Congress passed in 1862 and 1864, which granted to the Central Pacific Railroad Company of California the right to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, to the eastern boundary of the State; and states the fact that under and

by virtue of said acts there were granted, for the purpose of aiding in the construction of said road and telegraph line, ten alternate sections of the public lands on each side of and within twenty miles of the road, designated by odd numbers, not sold, reserved or otherwise disposed of by the United States, and to which a homestead or preëmption claim might not have attached at the time the line of the road of said company should be definitely fixed.

The bill then alleges that on the 5th day of October, 1864, the line of said road from the city of Sacramento to its western terminus at the city of San Francisco, including that portion opposite to the Moquelamos grant, was definitely fixed, and a map of said definite location of said road was filed by the said Central Pacific Railroad Company of California with the Secretary of the Interior on the 8th of December, 1864; and that on the 31st of January, 1865, the Secretary of the Interior ordered all of the public lands not then sold, reserved or otherwise disposed of within the limits of twenty-five miles on each side of said road to be withdrawn from preëmption, private entry and sale.

The bill then states the assignment on the 31st of October, 1864, by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of the right to construct the road from Sacramento to San José, with all privileges and benefits, etc., and the confirmation of said assignment by act of Congress, approved March 3d, 1865. It further states that notwithstanding the lands within the boundaries of the Moquelamos grant claim were held and reserved for the satisfaction of said claim from the acquisition of California until the final rejection of the claim on the 13th day of February, 1865, embracing the time when the line of said road was definitely fixed, yet the said patent was issued as aforesaid to the said Central Pacific Railroad Company, as the successor in interest of the Western Pacific Railroad Company, for the lands in question, which it is alleged were embraced within the boundaries of said Moquelamos grant claim.

The defendants, in their answer, deny that the line of the railroad from Sacramento to its western terminus was defi-

nitely fixed in October, 1864, or at any time prior to 1868; or that a map of the definite location of the said line or of the portions thereof opposite the Moquelamos grant was filed with the Secretary of the Interior, or in the General Land Office, in December, 1864, or at any time prior to the first of February, 1870. They admit that on the 5th of October, 1864, the Central Pacific Railroad of California designated the general route of its said road between San Francisco and Sacramento; and on the 8th of December, 1864, filed a map of the general route of its said railroad in the Department of the Interior. They admit that the lands in question are within twenty miles of the railroad as definitely located and fixed.

They allege that the Western Pacific Railroad Company, in the year 1868, definitely and finally located and fixed that portion or section of the line and route of said railroad and telegraph extending from a point at or near the city of Stockton to a point at or near Sacramento, and, on the first of February, 1870, filed in the Department of the Interior a map of said portion or section of said line; and that after the consolidation and the formation of the present Central Pacific Railroad Company, to wit, on the 27th day of February, 1873, the said company filed in the Department of the Interior a map of the line and route of said railroad as definitely and finally located and fixed from the end of the first twenty-mile section from San José to a point at the end of the $133\frac{16}{100}$ miles from San José, at or near Sacramento; and that said line and route so definitely and finally located and fixed are opposite to the lands in question, and include the line or section definitely located by the Western Pacific, and shown on the map filed in February, 1870.

The defendants further allege that the lands in question were public lands, and were not reserved, or disposed of in any manner, at the time of the passage of the acts of July 1st, 1862, and July 2d, 1864, respectively, and at the time of filing the general route of the railroad in December, 1864, and of the withdrawal of the lands by the Secretary of the Interior in January, 1865, and of the definite and final location in 1868, and of filing the map of the road in February, 1870,

and the map in February, 1873. They deny that said lands were included in any Mexican grant, or that they were reserved or held under the laws of the United States for the satisfaction of any claim under such grant; and they aver that said lands, during all the times mentioned in the bill, up to and until the issuing of the patent, were public lands of the United States; that said patent was issued to said railroad company under and in accordance with the provisions of said Pacific Railroad acts, and was and is legal and valid; that on the 12th of January, 1876, the Central Pacific Railroad Company conveyed to Charles McLaughlin, in fee simple, the lands in question, for which he paid a full and adequate consideration. The defendants append schedules to their answer showing the particular parcels for which they severally defend. To this answer several exceptions were taken, and being overruled, the general replication was filed. Thereupon the parties joined in a written admission of certain facts agreed to be true, which, omitting those relating to the status of the parties and the organization of the corporations mentioned in the pleadings, is as follows, to wit:

"8. That on, to wit, the 22d day of September, A.D. 1852, one Andres Pico, since deceased, presented and filed his petition to and with the Board of Land Commissioners appointed under the provisions of the act of Congress approved March 3d, 1851, entitled 'An act to ascertain and settle private land claims in the State of California,' in which petition he claimed in fee, as a grant by the Mexican Government, a certain tract of land situated in the said State and district of California, and known by the name of 'Moquelamos,' for eleven square leagues of land, which he alleged in his petition was granted to him within the boundaries as described in the grant made June 6th, A.D. 1846, by Pio Pico, the then Mexican governor of California, by virtue of the authority in him vested; and said petition closed with a prayer to allow and confirm to him, the petitioner, Andres Pico, the said tract of land, as described in the grant made by the aforesaid governor, Pio Pico, with the boundaries as therein set forth, to wit: once sitios de ganado mayor en el rio de Moquelumnes que linda al

norte con la orilla sur de dicho rio; al oriente con la sierra immediata al sur con el terreno del Señor Gulnak; y al poniente con los esteros de la plaza; and the translation thereof presented to said board with said petition is as follows, to wit: 'Eleven square leagues on the river Moquelamos, bordering on the north upon the southern shore of said river; on the east upon the adjacent ridge of mountains; on the south upon the lands of Mr. Gulnak; and on the west upon the estuaries of the shore.' That said petition was in the usual form of petitions to the Board of Land Commissioners, for the confirmation of claims to land in California, founded upon grants made by the Mexican Government.

"9. That said Board of Land Commissioners proceeded to consider and determine the said petition and claim of the said Andres Pico, and on the 3d day of October, 1854, rendered a decree denying the application of said petitioner for a confirmation of his said grant of land, and rejecting his claim therefor.

"10. That afterwards, to wit, on the 11th day of June, 1855, the said claimant and petitioner, Andres Pico, appealed to and petitioned the United States District Court for the Northern District of California for a reversal of the proceedings and decision of the said Board of Land Commissioners, and prayed that the decree of rejection by said board be reversed, and that the petitioner's claim to the said tract of land above described be declared valid, and that a decree be entered confirming the same to the petitioner, Andres Pico, in accordance with said alleged grant to him by the Mexican Government, as aforesaid; and the said District Court thereupon proceeded to hear, consider, and review the said decision and decree of said Board of Land Commissioners and the petition of said Andres Pico, and at a stated term of said court, held on the 24th day of April, 1857, made and entered a decree reversing the decree of rejection of said claim by the said Board of Land Commissioners, and adjudged and decreed that the claim of petitioner was valid, and confirmed the Moquelamos grant above described to the petitioner, Andres Pico, and defined the boundaries thereof as follows:

"The land of which confirmation is hereby made is of the extent of eleven square leagues, and no more, and is known by the name of 'Moquelamos,' and is situate on the river Moquelamos, bordering upon the north upon the southern shore of said river; on the east on the adjacent ridge of said mountains; on the south on the land of Mr. Gulnak, and upon the west upon the estuaries of the shore, as described in the original decree and grant of the same by the governor of California on the 6th day of June, 1846, a copy of which is on file in the transcript in this case."

"11. That thereafter the United States appealed from said decree of confirmation to the Supreme Court of the United States, and at the December term, 1859, of said court the aforesaid decree of confirmation of said District Court was, by the Supreme Court of the United States, reversed, and the case remanded, with directions to have further evidence taken in the cause and claim of said Andres Pico, for said Mexican grant Moquelamos. That thereafter the said District Court proceeded to take further evidence in said case, and after such further evidence was taken, the case was again brought before said District Court for hearing, and by that court a decree was entered on the 4th day of June, 1862, adjudging the claim of the petitioner to be invalid, and rejecting the same.

"12. That thereafter, on, to wit, the 15th day of October, 1862, the petitioner, Andres Pico, appealed to the Supreme Court of the United States from said decree of said District Court rejecting his claim as invalid. That a final hearing of said cause was had before said Supreme Court, and on the 13th day of February, A.D. 1865, a judgment was made and entered by said United States Supreme Court affirming said decree of the United States District Court, rejecting the claim of said Pico, and adjudging the same to be invalid.

"13. That all of the lands included within the boundaries of said alleged Moquelamos grant above described lie in said State and lie on each side of the road of said The Western Pacific Railroad Company, and opposite thereto in its course from said city of Sacramento to said city of San José.

"14. That under and by virtue of the act of Congress,

approved July 1, 1862, entitled, 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' and the act amendatory thereof, approved July 2d, 1864, commonly known as the Pacific Railroad acts, The Central Pacific Railroad Company of California was authorized to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, to the eastern boundary of said State of California, and under and by virtue of said acts of Congress there were granted for the purpose of aiding in the construction of the road and telegraph line of said The Central Pacific Railroad Company of California ten alternate sections of the public lands of the United States, on each side and within twenty miles of the road of said company, designated by odd numbers, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or preëmption claim might not have attached at the time the line of the road of said company should be definitely fixed.

"15. That the said railroad company filed its assent to said Central Pacific Railroad acts at the time and in the manner in said acts provided.

"16. That on, to wit, the 23d day of December, 1864, the Secretary of the Interior of the United States ordered all of the public lands not then sold, reserved or otherwise disposed of, within the limits of twenty-five miles on each side of the route or line of the road of said railroad company, to be withdrawn from preëmption, private entry, and sale in accordance with the provisions of said acts of Congress, for said railroad company; and said order was thereupon transmitted to the register and receiver of the United States land offices at Stockton, San Francisco, and Sacramento, State of California, and received by them on the 31st day of January, 1865.

"17. On the 29th day of September, 1866, the president of the Western Pacific Railroad Company made and filed with the United States Surveyor General of the State of California the varied statement provided for by § 4 of said act of July 1, 1862, and § 6 of said act of July 2, 1864, showing the con-

struction, completion, and equipment by said Western Pacific Railroad Company of the most westerly twenty miles, viz., the twenty miles next northeasterly from the city of San José, of the railroad and telegraph line of said Western Pacific Railroad Company, in compliance with and conformity to the requirements and provisions of said sections of said acts of Congress; and said Surveyor General thereupon, at the request of said railroad company, notified the commissioners designated and provided for by said acts to examine said twenty miles of said road and telegraph line and report thereon, in accordance with the provisions of said acts of Congress; and on the 5th day of October, 1866, said commissioners made their report and certificate to the effect that said twenty miles of road and telegraph line mentioned in said verified statement had been constructed, completed, and equipped by said railroad company, as provided and prescribed in and by said acts of Congress.

"Similar verified statements were made by the president of said Western Pacific Railroad Company as follows: On April 28, 1869, for a section of the road beginning at the junction thereof with the road of the Central Pacific Railroad Company of California, at the American River Bridge near Sacramento City, and extending thence southwesterly twenty (20) miles; also, on October 12, 1869, for a section of said road beginning at the westerly end of the last mentioned section, and extending thence southwesterly sixty-three (63) miles; also, on December 29, 1869, for a section of said road beginning at the westerly end of the last mentioned section, and extending thence twenty and two-tenths ($20\frac{2}{10}$) miles to the easterly end of the first mentioned section, of twenty miles, beginning at San José.

"That all those statements were, upon their being made, filed with said Surveyor General, and he did forthwith, upon the filing of each statement respectively, and at the request of said company, notify said commissioners. That said commissioners did thereupon examine said sections of said road, and made their respective reports thereon, to the same effect as upon the first section of said road, as aforesaid, said reports

being made, respectively, on the 29th day of April, 1869, and the 13th of October, 1869, and the 6th day of January, 1870.

"That each of the four reports of said commissioners was thereupon filed with the Secretary of the Interior, and he thereupon recommended the acceptance of the same, and the issue of the bonds and patents for lands due on account of said sections of road, agreeably to the provisions of said Pacific Railroad acts; and thereupon the President of the United States approved the same, and ordered the Secretary of the Interior and the Secretary of the Treasury to carry the said recommendation into effect, the first of which approvals by the President of the United States was made on the 4th day of December, 1866, and the last on the 21st day of January, 1870. That the four sections above mentioned comprise the whole of said road, from the city of San José to the city of Sacramento. That said road has been in full operation and has been operated for the transportation of passengers and freight since the 9th day of June, A.D. 1869.

"18. That thereafter there was issued, on the 23d day of November, 1875, to said Central Pacific Railroad Company (?), under the signature of the President of the United States, attested by the recorder of the General Land Office, and under the seal of the General Land Office, what purported to be, and in form was, a patent.

"That the patent was in the usual form of the patents issued by the United States to the several railroad companies, under and in pursuance of said Pacific Railroad acts of Congress.

"19. That said patent described and purported to convey to said railroad company the several tracts of land mentioned and described in said bill of complaint.

"20. That all of said lands described in the bill of complaint herein are opposite to, and within the 25-mile limits on each side of, the route or line of said railroad company's road, as laid down on the map filed by said Central Pacific Railroad Company of California in the Department of the Interior on the 8th day of December, 1864."

Besides these admissions a large amount of evidence was

taken in the case, and a final hearing was had before the court below in November term, 1886, and a decree was made dismissing the bill of complaint.

The court, in its opinion, held, amongst other things:

1. That the map of the route of the Western Division of the Central Pacific Railroad of California, filed with the Secretary of the Interior December 8, 1864, is the map of the general route, and not of the line as "definitely fixed," within the meaning of the land-grant act of 1862.

2. That the map of the route of said road as finally located and constructed, filed with the Secretary of the Interior February 1, 1870, and accepted as such by that officer, is the map of definite location.

3. That the Moquelamos grant was finally rejected February 13, 1865, after which the lands within the exterior boundaries of the grant ceased to be *sub judice* and became public lands, to the odd sections of which, within twenty miles of the line of the road, the right of the railroad company attached, and became indefeasible, immediately upon the filing of the map of definite location of the road, and the acceptance thereof as such by the Secretary of the Interior.

4. That as, from the year 1855, the land between the Moquelamos and Calaveras rivers, east of the range (or meridian) line between ranges 7 and 8, was treated by the government as lying outside of the Moquelamos grant claim, and as being public land, by running the section lines and filing plats of survey, and selling some of the lands, and opening the others to private entry, etc., the government should be held in a court of equity to be estopped as against the grantees of the patentee from now alleging that those lands are within the boundaries of the claim.

5. That the withdrawal of the lands upon filing the map of the general route of the road, for twenty-five miles on each side of the line indicated, protected the lands against the attaching of any other right as against the railroad company until the filing of the map of definite location.

Without expressing, at present, any opinion on the conclusions thus reached by the Circuit Court, we will proceed to

examine, 1st, Whether the land in question was actually within the outside limits of the pretended Moquelamos grant? If it was, and if the title of the railroad company accrued whilst the grant was under judicial examination, we will inquire, 2dly, Whether, for that reason, the railroad grant was prevented from taking effect within the said outside limits?

The defendants adduced evidence to show that the greater part of the lands in question were not embraced within the limits of the grant. Those limits are fairly well defined on three sides; the northern boundary being the Moquelamos or Moquelumne River; the southern the lands of Mr. Gulnak, (being the "Campo de los Franceses;") and the western being the "estuaries of the shore," or the marshes bordering on the San Joaquin River, not very clearly defined in outline, but sufficiently so to serve as a boundary. On the east side, the supposed grant is bounded "*con la sierra immediata;*" — "by the adjacent ridge of mountains" or "by the adjacent sierra." This is interpreted as meaning to exclude the sierra itself; in other words the grant extends, according to its terms, to the commencement of the mountain or sierra.

One of the witnesses, R. C. Hopkins, who had been employed by the government for more than thirty years in the Surveyor General's office in California, in connection with the Spanish land grants, making translations and testifying in the courts, was asked to translate the descriptive portion of the Moquelamos grant, which he did as follows: "Eleven square leagues on the Moquelamos River, which bounds on the north with the southern shore of the said river, on the east with the contiguous sierras, on the south with the lands of Mr. Gulnak, and on the west with the estuaries of the beach." He further testified that when "sierra immediata" is called for as a boundary, the "sierras" are excluded.

Now, if there were any mountain ridge or sierra in the neighborhood of the other boundaries called for, lying to the eastward, and in the vicinity of the Gulnak track, the solution would be easy. But the Sierra Nevada is the only mountain in that direction, and that is sixty or seventy miles east of the line of the railroad, and still farther from the marshes of

the beach forming the western boundary of the grant, — an extent which would give a total area of over eighty square leagues. The defendants contend that such an extension of the outside boundaries of the grant (supposing it to have been a real grant) cannot be presumed to have been in the minds of the parties; and they produce evidence to show that, starting from the marshes on the west, and proceeding eastwardly between the Gulnak tract and the Moquelumne River, the land is level valley land as far as the "Jack Tone road," (which runs north and south on the range line between ranges 7 and 8 east, — about seven miles east of the railroad;) and that beyond this road the lands are hilly, covered with timber and brush, and gradually increase in altitude above the sea-level up to the Sierra Nevada itself, becoming more broken and precipitous as we proceed.

As an example of this evidence, the testimony of Edward E. Tucker, an experienced surveyor in that country, and official surveyor of San Joaquin County, may be referred to. Amongst other things he says:

"I will say that from a line east of what is called the Jack Tone road an irregular line about, well, I suppose, averaging say two miles east of the road, some places it comes within three-quarters of a mile of the Jack Tone road, and at other places it is two or three miles from it — the ground becomes more or less broken and hilly, and in some places there are well-defined hills, and in other places it is what would be designated, I suppose, rolling land; but the general character of the country from the point I have designated, east, between the Moquelumne and Calaveras rivers, is irregular. It is up and down and generally rising; that is to say, the farther east a person goes the higher the hills become and the more irregular they are until the county line is reached. There are a number of places where there are quite high hills, and some deep elevations, and other places where perhaps a whole section would be what we call rolling land. There are no very steep hills or very high hills in a particular section, but it is what I would call, generally speaking, hilly land, the whole of it, and a rising tendency going towards the east.

There are a great many sections and quarter sections that I could locate from memoranda that I have in my book, hills, I could designate particularly, quarter sections, if required, but generally from that line indicated, east, the country is hilly. . . . Q. 50. What can you say generally with reference to the elevation of the country going east from the line indicated by you as marking the division line between the plane land and the well-defined hills near the Jack Tone road, and between the Moquelumne and Calaveras rivers? A. The country as I described it before — some of it is rolling, some rough, hilly and broken; but it is all gradually, and some very rapidly ascending. It is constantly ascending; that is, the hills, as you go east, are higher than — they keep getting higher as you go east. . . . Q. 54. In your opinion as a surveyor and civil engineer where, with reference to the tract of country between the Calaveras and Moquelumne rivers, does the Sierra Nevada range of mountains begin as a range or system? A. In my opinion a range of mountains begins — what you might properly call the base of the mountains, — on the plains where the land commences to go up regularly, and the hills are well defined — what are generally called foot-hills of the mountains; and in this instance I think the mountains begin where I have drawn that heavy red line on this diagram, Exhibit 18. I, of course, want it understood that I am not stating that those are mountains down there. I do not claim that they are mountains. I claim that they are well-defined hills, and that they are regular from there east. They run right into the mountains and there is no way of drawing a line from them mountains east without going over hills; that is, a north and south line."

The witness further testified on cross-examination, as follows:

"Q. 1. Did you hear, or come to know from anybody, that the rolling lands in range 9 east, any part of it, was ever designated as any part of the Sierra Nevada Mountains? A. No, sir. Q. 2. Did you ever know or hear of the rolling land in range 10 east being ever designated as part of the Sierra Nevada Mountains? A. A great deal of land in both those ranges

has always been referred to by myself and others in speaking of it, as foot-hills. We never call it the Sierra Nevada Mountains; we speak of it as foot-hills — going up to the mountains. Q. 3. Did you ever hear of rolling hills, if any there be, in range 8, designated as Sierra Nevada Mountains? A. No, sir. I have heard that spoken of in the same manner — as foot-hills, but not as mountains."

This seems to us to be a fair exhibit of the general evidence on the subject. The complainant produced a number of witnesses to show that there is a mountain, called Bear Mountain, east of range 11, commencing at the eastern side of said range, which would be twenty-four miles east of the Jack Tone road, thirty-one miles east of the railroad, and from thirty-six to forty miles east of the marshes of the San Joaquin. But the parties concur in considering the Moquelamos grant as comprised between the Moquelumne River on the north and the Calaveras River on the south; and this Bear Mountain is entirely south of the Calaveras. There is north of it, and separated from it by the Calaveras River itself, a hill, called Central Hill, but it is no more of a mountain than many other of the high and abrupt hills at that distance eastward from the railroad. One of the most intelligent of the complainant's witnesses referred to was a Mr. Terry, a surveyor and teacher. The following is the material part of his examination on the subject:

"Q. 3. State whether or not, as a surveyor, you have been engaged at any time by the United States to survey public lands. A. I have.

"Q. 4. State what you surveyed in that neighborhood of country as United States surveyor. A. Townships four and five north, ranges eleven and twelve east, Mount Diablo base and meridian.

"Q. 5. State whether you know a mountain in that locality known as Bear Mountain. A. Yes, sir; and sometimes that range of mountains is called Hog Back. But it is laid down as Bear Mountain on the maps, and is generally called so by surveyors.

"Q. 6. Please explain the general features, the condition,

and appearance of that mountain known as Bear Mountain. A. Well, it is a low mountain. The north end of it is covered with chaparral or shemisel, or whatever it is called.

"Q. 7. How in regard to its extension northward? A. It does not extend north of the Calaveras River.

"Q. 8. Do you know a mountain or high elevation known as Central Hill? A. Yes, sir.

"Q. 9. State what connection there is, if any, between Central Hill and Bear Mountain. A. There is no connection that I know of. The Calaveras River runs between them."

"Q. 11. State whether you know the locality north and south from and including Bear Mountain, to and including Central Hill, and for a few miles north of that. A. Yes, sir; that was in my contract. I travelled all over that range of hills in surveying.

"Q. 12. Did you survey all that country? A. Yes, sir; that was in my contract.

"Q. 13. Please give a general description, and as particular a description as you can, of that country north and south from and including Bear Mountain, to and including a few miles north — say five miles north — of Central Hill. A. There is a low range of hills running from the Calaveras River northerly — perhaps a little bit east or west of north — that is pretty hilly. That is from the west boundary, bluff, or bank, as you may call it, of the Calaveras River and of Chili Gulch. That is in townships four and five north, range eleven east.

"Q. 14. Describe the character of that land. A. It is hilly land; some of it is agricultural. I have surveyed several mines in there about Central Hill and further up. I do not know as I can tell exactly how those mines are located. The hilly lands of which I have been speaking are those north of the Calaveras River.

"Q. 15. State what the general character and appearance of Bear Mountain is. A. It is a low mountain, and there is considerable oak and pine timber on it; but on the north end there is chaparral. Perhaps a mile up, running south, is covered with this brush.

"Q. 16. Does not Bear Mountain appear conspicuous and

in full view for, say, ten or twelve miles west of it? A. Yes, sir; from most points on the west it does. Ordinarily, this Bear Mountain is within sight for several miles down here to the west. I used to travel over that country to the west of Bear Mountain and between the rivers Moquelumne and Calaveras a good deal."

We do not perceive that this evidence shows the existence of a sierra at this point, especially between the two rivers. But even if it did, it is still nearly forty miles east of the San Joaquin marshes, and the contents of the entire territory within the granted limits would be over fifty square leagues; — an extent of country which, compared with the quantity of lands granted (eleven leagues), cannot, any more than can the eighty square leagues embraced within the limits of the Sierra Nevada, be presumed to have been within the intention of the parties. It would require clear and positive evidence to establish such a result.

The defendants contend that the commencement of the hilly land at or near the Jack Tone road is the true commencement of the "adjacent sierra" named in the grant; and that the hilly and broken land east of that road is all comprehended in the foot-hills of the mountain, and excluded from the grant. In confirmation of this view they not only rely on the topographical evidence which has been noticed, but on the fact that when the claim to the Moquelamos grant was first presented to the Board of Land Commissioners in 1852, and for some time afterwards, the petitioner, Andres Pico, did not pretend or claim that the grant extended farther east than the Jack Tone road; and on the further fact, that the Surveyor General for California, in surveying the public lands and delimiting the boundaries of unconfirmed grants, under the authority conferred upon him by the appropriation act of August 31st, 1852 (10 Stat. 91), assumed the range line between ranges 7 and 8 (or the Jack Tone road) to be the utmost eastern boundary of the Moquelamos grant, and made his surveys up to that line, and no farther. And in September, 1864, when further surveys were proposed, the attorneys of Pico gave notice to the Surveyor General that the lands

in townships 2, 3, and 4, south of the Moquelumne River, in ranges 5, 6, and 7 east, (that is, the ranges immediately west of the Jack Tone road,) were claimed by Pico under the Moquelamos grant, and that the said claim had been appealed to the Supreme Court of the United States, and was then pending; and requested the Surveyor General to suspend proceedings for preëmpting said land, or any part thereof. The quantity of land thus claimed to be within the said grant was more than twice the amount required to satisfy the grant, showing that the limits named in the notice did not refer to a specific location of the eleven leagues, but to the outside limits of the grant. This evidence, it is true, might not of itself be binding as against the government; but, taken in connection with the acts of the government itself, and the conduct of its officials, from high to low, acquiescing in this view, it shows a state of things, a concord of words and acts between the parties interested, which, on a question of boundary, is not only admissible, but entitled to much weight, especially after so long a period elapsed before this suit was instituted.

Another circumstance relied on to show that the limits of the grant did not extend, at most, farther east than the commencement of the hills near the Jack Tone road, is, that the southern boundary called for is the land of Gulnak. This land is conceded to be the French Camp Grant, or Rancho Campo de los Franceses. And this grant was so determinately located by the accurate *diseño* annexed to it, that its position was established without difficulty, and has never been seriously questioned. As thus located, its northern line coincides in part with the Calaveras River, being situated a little to the north of the river towards the west, and the whole tract lies altogether west of the Jack Tone road, and does not, at the nearest point, approach it within less than half a mile. So that, if the Moquelamos grant (as required by its description) is to be bounded on the south by the Gulnak tract, it cannot itself extend to the east of said road without being forced to do so by the call of some distinct natural object.

On the whole, we are satisfied that the outside boundary

limits of the Moquelamos grant, as called for in the grant itself, do not extend east of the Jack Tone road, or the edge of the hills commencing near the same. This result would dispose of the present case with regard to nearly all the land in question therein. But as some of it lies west of said road, in range 7, and as the railroad land-grant extends to the west of said road, it will be necessary to examine the other question referred to, namely: If the lands in controversy did lie within the exterior limits of the Moquelamos grant, and if the title of the railroad company did accrue whilst that grant was under consideration in the courts, did those facts prevent the railroad land-grant from taking effect?

The Moquelamos grant belongs to that class of grants which may properly be called floats; that is, grants of a certain quantity of land to be located within the limits of a larger area. Mexican grants were of three kinds: (1) grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less; (2) grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name, where the donee is entitled to the whole tract according to the boundaries given, or if not given, according to its extent as shown by previous possession. *Higueras* v. *United States*, 5 Wall. 827, 834. In the first and third kinds, the claim of the grantee extends to the full limits of the boundaries designated in the grant or defined by occupation; but in the second kind, a grant of quantity only, within a larger tract, the grant is really a float, to be located by the consent of the government before it can attach to any specific land, like the land warrants of the United States. A float may be entitled to location either on any public lands in the United States, or only in a particular State or Territory, or within a more circumscribed region or district. Its character remains the same. The present grant is one of this kind. If it only extends to the Jack Tone road, as we suppose, it is still largely in excess of the quantity granted. If it extends, as the complainant insists, to the Bear Mountain or the Sierra

Nevada, the region embraced would be immensely enlarged, comprising over fifty square leagues in the one case, and over eighty in the other. Can it be that such an extensive region was under interdict, as reserved land, absolutely exempt from disposition, even by Congress, during the whole period covered by the litigation respecting the validity of the grant, which, in the end, even if found valid, was only for the quantity of eleven square leagues? The investigation continued thirteen years. The grant was found to be a wretched fraud. Even if signed by Pico, it was got up after the Mexican authority had ceased, and was never confirmed by the Departmental Assembly, as no such assembly then existed; and at the date on which it purports to have been confirmed, the Departmental Assembly was not in session. It was, therefore, for good cause that it was rejected by the courts.

Laying all this aside, however, and looking at the claim as one fairly *sub judice*, we may repeat our question, whether it can be possible that so great a region of country was to be regarded as reserved from alienation for so small a cause — an ordinary eleven-league grant? It is contended that the case of *Newhall* v. *Sanger*, 92 U. S. 761, has concluded this question by an answer in the affirmative. This case will be examined hereafter. Meantime let us look at the nature of the supposed case. A grant of eleven square leagues is made out of a country seventy or eighty miles in length, and from six to ten in width, containing over eighty square leagues; and this whole eighty leagues is supposed to be retired from the disposable public domain for a period of years, no one knows how long. Does this look reasonable?

One or two observations may be made calculated to show the precise question in a still stronger light. *First.* It is in the option of the government, not of the grantee, to locate the quantity granted; and, of course, a grant by the government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the government has the right to say where it shall be located, it certainly has the right to say where it

shall not be located; and if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten leagues, the government may dispose of seventy leagues without doing any wrong to the original grantee. This was the Mexican law, and of course it is our law. *United States* v. *Armijo*, 5 Wall. 444, 449. In practice, it is true, our authorities, in administering the public lands, have generally allowed the original grantee to make his own selection of the point where he will have his quantity located, provided he has it all located together in one tract. But this is a matter of favor, and not a matter of right. If this were not so, the right of way granted for the railroads by Congress would be subject to question and litigation. There cannot be any doubt, however, of the validity of these grants. The cases which show the law on this subject are numerous; it is only necessary to refer to a few of them. The following may be consulted: *Fremont* v. *United States*, 17 How. 542, 558, 565; *United States* v. *Armijo*, 5 Wall. 444; *Hornsby* v. *United States*, 10 Wall. 224, 234–5; *Henshaw* v. *Bissell*, 18 Wall. 255, 266–7; *Miller* v. *Dale*, 92 U. S. 473, 476–7; *Van Reynegan* v. *Bolton*, 95 U. S. 33, 36.

According to this rule of law, though the Moquelamos grant had been unquestionably genuine and valid, the government would have had a right to dispose of the whole territory east of range 6 without infringing in the slightest degree the rights of Pico, who would still have had his eleven leagues at the western extremity of the territory. Any construction of the laws which would tend to trammel and obstruct this right of the government, and render its acts in making alienations void, should be made with great caution and a careful consideration of the necessary import of the terms of such laws. An illustration of the absurdity which may be involved in extending the supposed reservation from sale and alienation to this kind of grants is shown in the large extent of country which

has been covered by some of them known to the records of this court. In 1822 a grant of twenty leagues square, or four hundred square leagues of land, was made by the Supreme Government of Mexico to President Yturbide, to be located in Texas. In 1835 the Mexican congress authorized his heirs to locate the land in New Mexico or in Upper or Lower California. In 1841 it was decreed that it should be located in Upper California — that is, the present State of California. This claim was actually presented to the Board of Land Commissioners, and appealed to the District Court and thence to this court. Now, according to the contention of the complainant in the present case, all California was interdicted territory during the pendency of that claim before the board and in the courts. The case is reported in 22 Howard, 290, *Yturbide's Executors* v. *United States*. This case arose under the same law as that upon which the case of *Newhall* v. *Sanger* was based — the act of March 3d, 1851. If a reservation of an entire territory is to be implied from a floating grant of quantity within it, then, logically, every float, or land warrant issued by the government, should, until actually located, operate as a reservation of the entire body of public lands.

We can well understand that Indian reservations and reservations for military and other public purposes of the government should be considered as absolutely reserved and withdrawn from that portion of the public lands which are disposable to purchasers and settlers — for, in those cases, the use to which they are devoted, and for which they are deemed to be reserved, extends to every foot of the reservation. The same reason applies to Mexican grants of specific tracts, such as a grant for all the land within certain definite boundaries named, or all the land comprised in a certain rancho or estate. But this reason does not apply to grants of a certain quantity of land, within a territory named or described, containing a much larger area than the amount granted, and where, as in the present case, the right of location within the larger territory is in the government, and not in the grantee. In such case, the use does not attach to the whole territory, but only to a part of it, and to such part as the government chooses to designate, provided the requisite quantity be appropriated.

The case of the *Leavenworth &c. Railroad Co.* v. *The United States*, 92 U. S. 733, preceded the case of *Newhall* v. *Sanger*, and was relied on in the latter case. But the Leavenworth case related to an Indian reservation, and the legislative grant upon which it depended, 12 Stat. 772, entitled, "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," had an express proviso, "that any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted." The land grant in that case was construed as taking effect immediately, and as vesting a present title in the State of Kansas, though a survey of the lands and a location of the road were held to be necessary to give precision to it, and attach it to any particular tract. The treaty with the Great and Little Osage tribe of Indians, made June 2d, 1825, which contained a cession to the United States of certain land, contained this clause, to wit: "Within the limits of the country above ceded and relinquished there shall be reserved to and for the Great and Little Osage tribe or nation aforesaid, so long as they shall choose to occupy the same, the following described tract of land." The described tract embraced the land in question in the cause, and the court held that it was no part of the public lands of the United States, and that no part of it passed to the State of Kansas under the grant, though the railroad passed through it. In our judgment that case differed materially from the one now before us. The whole reservation was appropriated to the use of the Osage nation as long as they chose to occupy it.

The case of *Newhall* v. *Sanger*, 92 U. S. 761, on which the complainant confidently relies, was argued and decided shortly after the Leavenworth case. It arose upon a bill to quiet title

to a quarter section of land situated in township 3 N., range 7 E., and therefore west of the Jack Tone road, and within the then admitted limits of the Moquelamos grant now under discussion. We have taken the pains to examine the original record. The bill is comprised in a page and a half, and the whole record in six pages. Sanger, the complainant below, claimed title through the Western Pacific Railroad Company, to whom a patent had been issued in April, 1870, in professed compliance with the requirements of the acts of Congress of 1862 and 1864. The bill alleges that Newhall claimed title to the same land under a subsequent patent, which recited that the first patent had issued by mistake to the Western Pacific Railroad Company, because the land was within the exterior limits of a Mexican grant called Moquelamos. The bill alleged that this grant was rejected by the final decision of this court in December term, 1864, before the reservation of lands for the railroad was made; but that the President, in making the second grant, pretended that the Moquelamos grant was not rejected until the 13th day of February, 1865, after the reservation for railroad purposes, claiming the right to look into the minutes of this court to ascertain the precise day when the claim was rejected, and thereby disregarding the mandate; whereas the complainant contended that the rejection took effect from the first day of the term.

This was the substance of the bill. The only issue it raised was as to the time when the rejection of the grant legally took effect, whether at the beginning of the term (December 5th, 1864), or on the actual day of rendering the judgment (February 13th, 1865); one date being before and the other after the withdrawal of the lands from sale for the benefit of the railroad company; and such withdrawal being assumed to be the act by virtue of which the railroad title accrued. There was nothing in the bill to show that the boundaries named in the grant contained any more than eleven square leagues of land, the quantity granted.

The bill was demurred to, the cause was submitted without argument, and the demurrer was overruled. The defendant adhering to his demurrer, a decree was entered for the com-

plainant. An appeal was then taken to this court, the cause was submitted on printed briefs, and the decree of the Circuit Court was reversed. The opinion took no notice of the fact (which did not appear in the record) that the grant was one of that class in which the quantity granted was but a small part of the territory embraced within the boundaries named. It proceeded throughout as it would have done on the supposition that the grant covered and filled up the whole territory described. It simply dealt with and affirmed the general proposition that a Mexican grant while under judicial investigation was not public land open for disposal and sale, but was reserved territory within the meaning of the law, — a proposition not seriously disputed. On the question of time when the rejection of the grant took effect, it held with the defendant, that the records of this court could be consulted to ascertain the precise day of rendering judgment. After deciding this point, there was no difficulty, under the admissions of the bill, in reversing the decree of the Circuit Court. The opinion, however, examined somewhat at large the grounds on which it should be held that Mexican grants (whether valid or invalid) while under judicial consideration, should be treated as reserved lands. The principal reason was that they were not "public lands" in the sense of congressional legislation; those terms being habitually used to describe such lands as are subject to sale or other disposal under general laws. The Pacific Railroad acts of 1862 and 1864 only granted, in aid of the railroads to be constructed under them, "every alternate section of public land . . . not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached at the time the line of said road is definitely fixed." The lands comprised in a Mexican grant, it was held, must be regarded not as "public lands" but as "reserved" lands, because, by the treaty with Mexico, all private property was to be respected. And when the act of March 3d, 1851, created a board of commissioners to examine all claims to Mexican grants, the 13th section declared "that all lands the claims to which have been finally rejected by the commissioners in the manner herein provided,

or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the commissioners within two years after the date of this act, shall be deemed, held, and considered, as part of the public domain of the United States," 9 Stat. 633; implying that until then they were not part of the public domain. The same conclusion was thought to be inferred from the act of March 3d, 1853, which introduced the land system into California; the sixth section of which, amongst other things, exempted from preëmption and sale "lands claimed under any foreign grant or title." And this reservation, the court argued, would apply equally to grants that were fraudulent and void, as to those that were valid; for, until investigated, it could not be known which were valid and which were void.

This reasoning of the court in *Newhall* v. *Sanger* is entirely conclusive as to all definite grants which identified the land granted, such as the case before it then appeared to be; but is it fairly applicable to floats? that is to say, grants of a certain quantity to be located within a larger tract of territory, whether of limited extent, marked by certain bounds, or anywhere in the State, as in the case of Yturbide? Many small grants, of only a few leagues, were susceptible of location in large territories. The Alvarado grant, claimed by Fremont, *Fremont* v. *United States*, 17 How. 542, was only for ten square leagues within a region containing upwards of a hundred square leagues. The description in the grant was "the tract of land known as Mariposas, to the extent of ten square leagues, within the limits of the Sierra Nevada and the rivers known by the names of the Chanchilles, of the Merced, and of the San Joaquin." Did all this vast region cease to be the public domain of the United States for the sake of the ten leagues which constituted the actual grant? Would not such a conclusion have been unreasonable, prejudicial to the public interest, and entirely unnecessary for the protection of the grantee? It may be that the Land Office might properly suspend ordinary operations in the disposal of lands within the territory indicated, and in that sense they might not be con-

sidered as public lands; but why should they not be regarded as public lands disposable by Congress itself, care being taken to preserve a sufficient quantity to satisfy the grant?

As we have already seen, there can be no doubt that a grant made by Congress within the limits of a territory subject to a Mexican float, would take precedence of the float if sufficient land remained to satisfy it. The only question is, whether the surplus land so at the disposal of Congress may be regarded as public land within the meaning of the railroad aid grants. We are disposed to think that it may be, and that as to grants of this character, floating grants as they may be called, the railroad aid grants are not deprived of effect provided a sufficient quantity lying together be left to satisfy the grant. In this case no difficulty could occur in carrying out this view. The territory described has sufficient extent west of range 7 to satisfy the grant of eleven leagues, and there seems to be no valid reason why it should not be satisfied from this part. Of course, the satisfaction of the grant is a fiction; for it never had any validity. But the part referred to would be sufficient to satisfy it, if it had been a valid grant. And as the government had the right of location, and has made a grant of its title to the railroad company, the company may exercise the same right subject to the like conditions. The company has made its election to take its lands in range 7 and the ranges that lie easterly thereof; and this option leaves the tract west of range 7 (subject to its right of way) open to disposal in the ordinary manner of other public lands.

There is really nothing in the decision of *Newhall* v. *Sanger* in conflict with the views here expressed; because the court did not have before it the case of a floating grant.

In a number of cases decided since the decision in *Newhall* v. *Sanger*, that case has been referred to with approbation; and in some of them expressions have been used as if the question of floating grants to be located in larger territories had been decided therein. But we have seen that this is not correct, and we are not aware of any case in which this class

of grants has been actually involved and has formed the subject of decision.

The decree of the Circuit Court is affirmed in this and the other cases argued with it. In consequence of the death of Kate D. McLaughlin, the decree will be entered as of the first day of the term, nunc pro tunc.

No. 11, DeWitt *v.* McLaughlin; No. 12, Friend *v.* Wise. In error to the Circuit Court of the United States for the District of California. These cases were, by the above direction of the court, affirmed, and judgment entered *nunc pro tunc* as of October 10, 1887.

Affirmed.

Mr. W. J. Johnston and *Mr. M. D. Brainard* for plaintiffs in error.

Mr. A. L. Rhoads and *Mr. Henry Beard* for defendants in error.

BENSON *v.* McMAHON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1420. Argued May 1, 1888. — Decided May 14, 1888.

On the hearing of an appeal from a judgment of a Circuit Court, discharging a writ of *habeas corpus* which had been issued on the petition of a person arrested for a crime committed in a foreign country, and held for extradition under treaty provisions, the jurisdiction of the commissioner and the sufficiency of the legal ground for his action are the main questions to be decided; and this court declines to consider questions respecting the introduction of evidence, or the sufficiency of the authentication of documentary proof.

When a person is held for examination before a commissioner, to determine whether he shall be surrendered to the Mexican authorities, to be extradited for a crime committed in Mexico, the question to be determined is, whether the commission of the crime alleged is so established as to justify the prisoner's apprehension and commitment for trial if the offence had been committed in the United States; and the proceeding resembles in its character preliminary examinations before a magistrate for the

purpose of determining whether a case is made out to justify the holding of a person accused, to answer to an indictment.

The crime of "forgery," as enumerated in article 3 of the Treaty of Extradition with Mexico of June 20, 1862, is not confined to the English common-law offence of forgery; but it includes the making, forging, uttering, and selling to the public, fraudulent printed tickets of admission to an operatic performance, bearing on their face in print the name of the manager of the operatic company, and also stamped with his name and seal. It seems that such an offence is also included in the crime of forgery as defined by the English common law.

THIS was an appeal from a judgment denying a discharge to a prisoner, on a writ of *habeas corpus*. Petitioner appealed. The case is stated in the opinion.

Mr. Peter Mitchell for appellant.

Mr. S. Mallet-Prevost and *Mr. De Lancey Nicoll* for appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court of the United States for the Southern District of New York upon a writ of *habeas corpus*, in which that court remanded the prisoner to the custody of the marshal of the district.

The proceedings were originally instituted by a complaint, made before Samuel H. Lyman, a United States commissioner for the Circuit Court of that district, by one Juan N. Navarro, consul general of the Republic of Mexico at the city of New York, against George Benson, whom he charged with being guilty of the crime of forgery, committed in Mexico, and therefore liable to extradition under the treaty of December 11, 1861, between the United States and Mexico, to be there tried for that offence. The case was heard quite elaborately before Commissioner Lyman, who rendered the following judgment: "After a full and fair examination of the law and the facts in the case, I find that the evidence produced against the said Benson is sufficient in law to justify his commitment for the crime of forgery for the purpose of being delivered up as a fugitive from justice to the Republic of Mexico, pursuant to

the provisions of the said treaty. Wherefore I have committed the said Benson, pursuant to the provisions of said treaty, to the custody of the United States marshal, to be by him held in the proper jail until a warrant for the surrender of the said Benson shall issue according to the stipulation of the said treaty, or he shall be otherwise dealt with according to law."

A writ of *habeas corpus* was thereupon allowed by Justice Blatchford, of the Supreme Court of the United States, directed to Martin T. McMahon, the marshal in whose custody the prisoner, Benson, was held by order of the commissioner, requiring him to produce said prisoner before the Circuit Court of the United States for that district on February 21, 1888, at 11 o'clock in the forenoon; and also a writ of *certiorari* to Commissioner Lyman, directing him to return at the same time the "cause of imprisonment of George Benson, and true copies of the proceedings, complaints, warrants, depositions, trials, examinations, determinations, commitments, and record" had before him.

To this the marshal made return that he held the prisoner by virtue of a commitment of Commissioner Lyman, and the commissioner returned into the court a transcript of all the proceedings had before him, including the testimony and exhibits. Upon the hearing in the Circuit Court it was "Ordered, That the writ of *habeas corpus* be, and the same is, hereby discharged; that the petitioner remain in the custody of the marshal of the United States for the Southern District of New York, pending such application on appeal as petitioner may be advised to make to a Justice of the Supreme Court of the United States, pursuant to the 34th Rule of that court; or until the further order of this court, upon notice by said complainant after twenty days from the date of this order."

Thereupon the petitioner, George Benson, obtained the allowance of an appeal from this judgment of the Circuit Court to this court, by Mr. Justice Blatchford. The matter has been argued very fully before us by counsel for the prisoner and for the Mexican government.

This proceeding was instituted before the commissioner under Title LXVI. of the Revised Statutes of the United

States, concerning extradition. The first section reads as follows:

"SEC. 5270. Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any Justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

There is no evidence in this record, at least there is no copy of any demand or requisition made by the Mexican authorities upon our government, for the extradition of this prisoner. The proceedings, therefore, up to this time rest upon the initiative authorized by the statutes upon that subject; the Mexican government, however, being represented by counsel, and the correspondence with its officers which was introduced into the record showing their interest in the matter and their purpose to have this prisoner brought to that country for trial.

The treaty under which this right to arrest the prisoner and detain him for extradition is asserted was concluded at Mexico,

December 11, 1861, and proclaimed by the President of the United States June 20, 1862. 12 Stat. 1199. It has the usual provisions, that the contracting parties shall on requisitions made in their name deliver up to justice persons who, being accused of the crimes enumerated in article 3, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other. The enumeration of crimes in that article is as follows:

"Murder, (including assassination, parricide, infanticide, and poisoning;) assault with intent to commit murder; mutilation; piracy; arson; rape; kidnapping, defining the same to be the taking and carrying away of a free person by force or deception; forgery, including the forging or making, or knowingly passing or putting in circulation counterfeit coin or bank-notes, or other paper current as money, with intent to defraud any person or persons; the introduction or making of instruments for the fabrication of counterfeit coin or bank-notes, or other paper current as money; embezzlement of public moneys; robbery, defining the same to be the felonious and forcible taking from the person of another of goods or money to any value, by violence, or putting him in fear; burglary, defining the same to be breaking and entering into the house of another with intent to commit felony; and the crime of larceny, of cattle or other goods and chattels, of the value of twenty-five dollars or more, when the same is committed within the frontier States or Territories of the contracting parties."

As the case appears before us on the transcript of the evidence produced before Commissioner Lyman, and before the Circuit Court on the writ of *habeas corpus*, it is considerably confused but very full and elaborate. Several questions in regard to the introduction of evidence which were raised before the commissioner, some of them concerning the sufficiency of the authentication of papers and depositions taken in Mexico, and as to the testimony of persons supposed to be expert in the law of that country regarding the subject, are found in the record, which we do not think require notice here. The writ of *habeas corpus*, directed to the marshal of the Southern District of New York, does not operate as a writ of error, and

many of the orders and decisions made by the commissioner at the hearing which took place before him become unimportant in the examination of the sufficiency of the proceedings under which he ordered the prisoner into custody. The main question to be considered upon such a writ of *habeas corpus* must be, had the commissioner jurisdiction to hear and decide upon the complaint made by the Mexican consul; and also, was there sufficient legal ground for his action in committing the prisoner to await the requisition of the Mexican authorities?

In regard to the jurisdiction of the commissioner to hear the complaint no doubt can be entertained. The offence set out in three or four different forms in the petition of Navarro, the Mexican consul general, is distinctly that of forgery on the part of Benson; the particular forgery charged is that of the name of Henry E. Abbey, and the time, place and circumstances are detailed with sufficient particularity to comply with the language of the treaty. The Revised Statutes, after providing for the hearing before the justice, or other officer to whom that duty is committed, to the end that the evidence of criminality may be heard and considered, proceed to enact, that if, on such hearing, such officer "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention."

The subject of what proof shall be required for the delivery upon requisition of parties charged with crime is considered in article I of the treaty, in regard to which it is provided "that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed."

Taking this provision of the treaty, and that of the Revised

Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that "the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." This describes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government. Omitting much, therefore, that under this view of the case is immaterial, both in the argument of counsel and in the record of the case as it comes before us, the following facts appear to be well established:

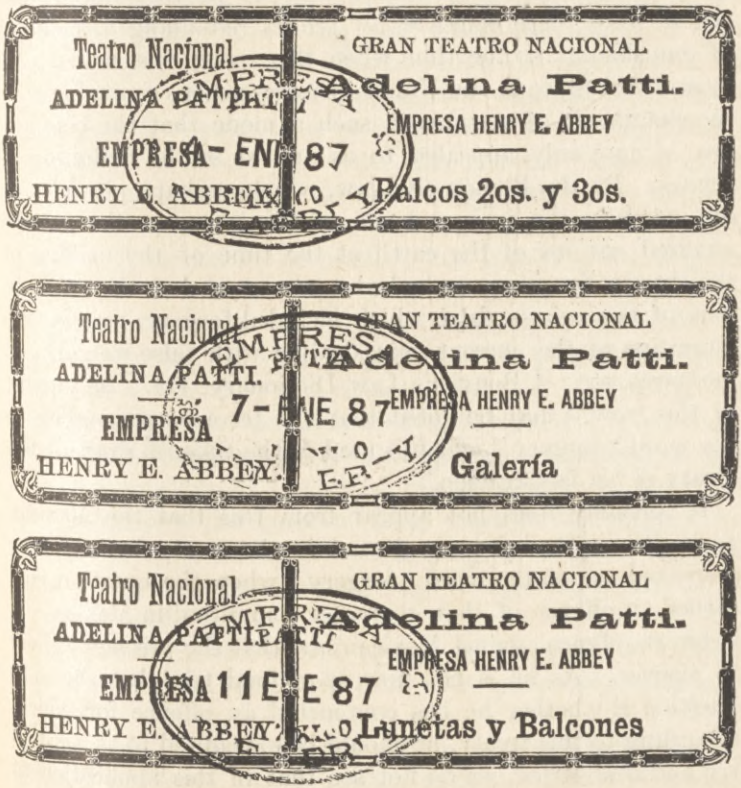
Mr. Henry E. Abbey, a noted theatrical manager in this

country, had brought Adelina Patti, the wonderful songstress, from Europe to the United States under an arrangement that she would also sing in Mexico. Benson made the acquaintance of Abbey here, and also became intimate with his agent, whose name was Marcus Meyer. Through the latter he learned that arrangements had been made for the appearance of Patti at the Teatro Nacional in the City of Mexico, in the month of December, 1886. After obtaining the particulars of the engagement and contract for the use of that theatre from Abbey's agent, Benson hastened to the city of Mexico, where he represented himself as Meyer and as the agent of Mr. Abbey. He succeeded in imposing upon the parties having control of the theatre so far as to make them believe that he had full authority to conduct the arrangements for the concerts and operas in which Patti was to appear, which were advertised in the newspapers of that city. He accordingly proceeded to fix the date of such performances, to arrange the prices and issue the tickets therefor, which he sold and obtained the money for to the amount of some twenty-five or thirty thousand dollars. He escaped with this money, fled from Mexico, and went to Europe. Of course, all the persons who had bought the tickets, so issued by him, were defrauded of the amount paid for them, as well as great injury done to Mr. Abbey and the owners of the theatre in regard to the performances to be held there.

The specific offence charged against Benson arising out of this transaction is the forgery of these tickets of admission, of which the originals are produced before us with their translations.[1]

[1] The following are facsimiles of these tickets except as to color. The tickets for the stalls and balconies were blue, those for the galleries red, and those for the second and third tier of boxes yellow.

About the only contest made by the counsel for the prisoner is, that these are not forgeries, mainly because they are printed matter and are not in writing, and because neither the name of Mr. Abbey, nor of anybody purporting to be responsible therefor, is found in writing upon them, using the word "writing," as defendant's counsel does, as meaning script or signatures made by the use of a pen. It is therefore contended that these tickets are not forgeries, but the fraudulent intent with which they were issued, the actual loss and deception to the parties who bought them, and the injury to Mr. Abbey and the others concerned, are not controverted. It is said, however, that this is only a cheat at common law, and it is very strenuously argued that the real meaning of the



word "forgery" in this treaty is to be ascertained by the definition of that offence according to common law of England.

The first idea that occurs to the mind in reference to this suggestion is, that the common law of England can hardly be said to be the only criterion by which to construe the language of a treaty between Mexico and the United States. The former government cannot be supposed to have had that common law exclusively in mind as governing the true construction of a treaty concluded between itself and this country, neither of which owes any allegiance to England.

Another circumstance in connection with this matter is, that this court has frequently decided that there are no common-law crimes of the United States. In very few of the States were there common-law crimes remaining as subjects of punishment at the time when this treaty was made. Almost every State in the Union has recast her criminal law by the enactment of statutes in such a mode that the common law is now only appealed to as an aid in the definition of crimes. By the Roman civil law, which perhaps pervades or did pervade the jurisprudence of the larger portion of the civilized nations of the earth at the time of the making of this treaty, forgery was looked upon as one of the subdivisions of the *crimen falsi*, which included forgery, perjury, the alteration of the current coin, dealing with false weights and measures, etc. 1 Bouvier's Law Dictionary, 411. In support of this view it may be noted that the term corresponding to the word "forgery" which is used in the Spanish draft of the treaty is "la falsificacion."

It certainly does not appear from this that the Mexican authorities intended to be bound in the treaty by any very restricted use of the word "forgery" when the question concerned an offence of that character committed in Mexico. It is for an offence against Mexican law that the prisoner is held to answer. As he is not now upon final trial, but the only question is whether he has committed an offence for which, according to this treaty, he should be extradited to that country and there tried, we do not see that in this application to

set the prisoner at large, after he has been once committed by an examining court having competent authority, and after having been held to answer in Mexico for the offence charged, this court is bound to examine with very critical accuracy into the question as to whether or not the act committed by the prisoner is technically a forgery under the common law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed and the final success by which the fraud was perpetrated, are undoubted.

But we are not satisfied that the crime of forgery, even at common law, is limited to the production by means of a pen of the resemblance of some man's genuine signature which was produced with a pen. This view of the subject would exclude from the definition of this crime all such instruments as government bonds, bank-notes, and other obligations of great value, as well as railroad tickets, where the signature of the officer which makes them binding and effectual is impressed upon them by means of a plate or other device representing his genuine signature. It would also exclude from its definition all such instruments charged as forgeries where the similitude of the signer's name is produced by a plate used by the forger. It can hardly be possible that these are not forgeries within the definition of the common law; and if they are, they show that it is not necessary that the name which appears upon the false instrument shall be placed thereon by means of a pen or by the actual writing of it in script, but that the crime may be committed as effectually if it is done by an engraved plate or type so arranged as to represent or forge the name as made by the actual use of a pen. It is difficult to perceive how the question as to whether the forgery was committed by printing, or by stamping, or with an engraved plate, or by writing with a pen, can change the nature of the crime charged.

Mr. Bishop, in the second volume of his work on criminal law, discusses the subject with his usual philosophical acumen. He says:

"SEC. 525. Looking at the writing as a representation addressed to the eye, reason teaches us that, whether it is made

with the pen, with a brush, with printers' type and ink, with any other instrument, or by any other device whatever — whether it is in characters which stand for words or in characters which stand for ideas, in the English language, or in any other language, — is quite immaterial, provided the representation conveys to any mind the substance of what the law requires to constitute the writing whereof forgery may be committed. This statement of the doctrine is in broader terms than are to be found in the books, yet there is no decision contrary to what is thus said; and, beyond doubt, the tribunals will hold the law as thus stated whenever the occasion requires.

"Sec. 526. Thus Mr. Hammond remarks: 'The question upon this branch of the inquiry remains, whether seals, or rather their impressions, with other similar subjects, are upon a similar footing with writings [here employing the word in its restricted sense]; and in all probability it will be found that they are, though no positive authority has sanctioned this notion.'"

This author also quotes from the fifth report of the English Criminal Law Commission, made in 1840, p. 69 *et seq.*, in which is found the following language, speaking of forgery:

"The offence extends to every writing used for the purpose of authentication; as in the case of a will, by which a testator signifies his intentions as to the disposition of his property, or of a certificate by which an officer or other authorized person assures others of the truth of any fact, or of a warrant by which a magistrate signifies his authority to arrest an offender.

The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality of genuineness of any article is warranted; and, consequently, where a party may be deceived and defrauded from having been, by false signs, induced to give credit where none was due."

While the views of counsel for the prisoner are unsupported by any well considered judicial decision, there is high authority for holding the contrary. The great increase in the use

of printing for all forms of instruments, such as deeds, bonds, tickets, tokens for the payment of goods, etc., have seemed to demand that where, either by the common law or by statute, such instruments are required to be in writing, the term "writing" should be held to include printing as well as script.

In *Henshaw* v. *Foster*, 9 Pick. 312, reference was made to the provision of the constitution of the State of Massachusetts which declared that "every member of the House of Representatives shall be chosen by written votes." A party offered his ballot, which was rejected, and he thereupon sued the inspectors of the election for their refusal to receive his vote. They declined to accept it upon the ground that the ballot was printed, and was not therefore "written" within the meaning of the constitution. The court, however, in a very well considered opinion, decided that the printed vote came within the meaning of the law requiring votes to be in writing.

In the subsequent case of *Commonwealth* v. *Ray*, 3 Gray, 441, the defendant was indicted for forgery, and the question was whether the instrument which he presented constituted a forgery at common law. The court said: "It is objected that the crime of forgery cannot be committed by counterfeiting an instrument wholly printed or engraved, and on which there is no written signature personally made by those to be bound. The question is whether the writing, the counterfeiting of which is forgery, may not be wholly made by means of printing or engraving, or must be written by the pen by the party who executes the contract. In the opinion of the court, such an instrument may be the subject of forgery, when the entire contract, including the signature of the party, has been printed or engraved. The cases of forgery generally are cases of forged handwriting. The course of business, and the necessities of greater facilities for despatch, have introduced, to some extent, the practice of having contracts and other instruments wholly printed or engraved, even including the name of the party to be bound. . . . It has never been considered any objection to contracts required by the statute of frauds to be in writing that they were printed."

Then after speaking of the cases in which a signature made

by the pen is necessary to the execution of a contract, the court proceeds: "But if an individual or a corporation do in fact elect to put into circulation contracts or bonds in which the names of the contracting parties are printed or lithographed, as a substitute for being written with the pen, and so intended, the signatures are to all intents and purposes the same as if written. It may be more difficult to establish the fact of their signatures; but if shown, the effect is the same. Such being the effect of such form of executing like contracts, it would seem to follow that any counterfeit of it, in the similitude of it, would be making a false writing purporting to be that of another, with the intent to defraud."

It was, therefore, held in that case that, although he did not personally aid in the manual operation of engraving or lithographing the spurious instrument, yet it being conceded that it was done by his procuration, the defendant was responsible. That was the case of a railroad ticket, and the applicability of the decision to the matter now before us is unquestionable."

The case of *The People* v. *Rhoner*, 4 Parker's Crim. Rep. 166, is strikingly like the present one in almost every particular. There the prisoner had been committed by a justice of the peace on the preliminary examination, upon a charge of having in his possession, knowingly, counterfeited notes of the Austrian National Bank, with intent to defraud. He was brought before the Supreme Court in the State of New York by a writ of *habeas corpus*, and the same question which is raised here was there presented. It was said that every part of these bank-notes upon which the charge was founded, which appeared to be complete and entirely filled up, including the signature of the cashier or director, was evidently a print or impression from an engraved plate. The argument was there pressed, as in this case, that these notes could not be forgeries for that reason, nor could they be the subject of forgery. The whole question was very fully reviewed by Judge Sutherland in his opinion, in which he held that "the word 'instrument' includes not only 'written instruments' and 'writings,' but also engraved or printed instruments, being or purporting to

be the act of another; indeed, all and every kind of instrument by the forging of which any person may be affected, bound, or in any way injured in his person or property. I do not see why an engraved or printed instrument, or an engraved or printed name, affixed to an instrument by a person is not his act, and may not purport to be the act of another."

The same principle is reaffirmed by the Supreme Court of Massachusetts in the case of *Wheeler* v. *Lynde*, 1 Allen, 402.

We are of opinion that the decision of Commissioner Lyman, committing the prisoner to the custody of the marshal to await the requisition of the Mexican government, was justified, and the judgment of the Circuit Court dismissing the writ of *habeas corpus* is accordingly

Affirmed.

GLACIER MOUNTAIN SILVER MINING COMPANY *v.* WILLIS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 166. Submitted April 9, 1888. — Decided May 14, 1888.

After hearing counsel the court of its own motion dismisses a case for want of jurisdiction. Plaintiff in error moves to reinstate it, supporting the motion by affidavits as to the value of the property in dispute. The court orders service on the other party, and on return vacates the judgment of dismissal.

In an action of ejectment, the description of the land claimed was as follows: "commencing near the base of said mountain east of Bear Creek and running southeast and parallel with Coley tunnel through said mountain five thousand feet from the mouth or starting point of said tunnel at a stake marked and in or at the mouth of said Silver Gate tunnel and two hundred and fifty feet northeast and two hundred and fifty feet southwest from said stake or tunnel to its termination." *Held*, that it was a sufficient description.

In ejectment for the possession of a mine in Colorado, the complaint, after describing the land and a tunnel claim therein, averred that "the said tunnel claim so located embraces many valuable lodes or veins which have been discovered, worked, and mined by the plaintiff and its grant-

ors." *Held*, that this was a sufficient description of the lodes for which recovery was asked.

A complaint in ejectment in Colorado, for a mine, which alleges a valid and legal location by those under whom the plaintiff claims, and possession and occupation by the plaintiff for more than five consecutive years prior to the ouster, and payment of taxes by him during that time, sets up a sufficient claim to title as against everybody except the United States.

Mineral locations on public lands, made prior to the passage of any mineral law by Congress, are governed by local rules and customs then in force; but their effect cannot be determined on the demurrer in this action.

THE case, as stated by the court, was as follows:

This was a writ of error to the Circuit Court of the United States for the District of Colorado to review a judgment of that court sustaining a demurrer to the "second amended complaint" filed by the Glacier Mountain Silver Mining Company, plaintiff in error, against J. Frank Willis, Charles Buckland, and Donald M. Frothingham, defendants in error, which complaint is in the words and figures following, to wit:

"For second amended complaint the plaintiff complains and alleges that it is a corporation organized and existing under the laws of the State of Ohio and is a citizen of the State of Ohio; that the defendants are and each of them is a citizen of the State of Colorado, and that the property in controversy exceeds the value of $500.

"Plaintiff further alleges that on the 21st day of June, 1865, one Joseph Coley and one George C. Reeves, each being a citizen of the United States, went upon the public domain of the United States theretofore wholly unoccupied and unclaimed and located on said day a tunnel and tunnel site at the base of Glacier Mountain, in Snake River mining district, county of Summit, State of Colorado.

"That afterwards and on the same day they marked the boundaries of their said location and commenced to run a tunnel into said Glacier Mountain, and, after fully complying with the laws of the United States, the laws of the State of Colorado, and the local rules and regulations of the said Snake River mining district, they caused to be made out and recorded in the recorder's office of the county of Summit afore-

said a location certificate of said tunnel claim, which said certificate described the location and boundaries of said tunnel claim.

"That from the day of said location until the ouster hereinafter set forth the said locators of said tunnel claim and their grantees remained continuously in possession of said tunnel claim, working and mining thereon, and have expended thereon more than the sum of $5000.

"That the plaintiff is the owner of the said tunnel claim above described by location and purchase, and is now entitled to the quiet and peaceable and exclusive possession thereof by virtue of a full compliance on its part and on the part of its grantors with the laws, rules, and customs above set forth; that the plaintiff and its grantors have been in the peaceable and undisputed possession of said tunnel claim, by virtue of such location, occupation, preëmption, and record, for more than five years prior to the ouster hereinafter complained of.

"That plaintiff and its grantors, for more than five consecutive years prior to the acts of the defendants hereinafter mentioned, paid all taxes legally or otherwise assessed upon said tunnel claim, and have worked and mined the same from said 21st day of June, 1865, up to the time of the acts of the defendants hereinafter set forth.

"That the said tunnel claim so located embraces many valuable lodes or veins which have been discovered, worked, and mined by the plaintiff and its grantors.

"That the said tunnel claim was by its locators named the Silver Gate tunnel claim, and is described more fully as follows: Commencing at the base of said Glacier Mountain east of Bear Creek, and running southeast and parallel with Coley tunnel through said mountain five thousand feet from the mouth or starting point of said tunnel at a stake marked and in or at the mouth of said Silver Gate tunnel, and two hundred and fifty feet northeast and two hundred and fifty feet southwest from said stake or tunnel to its termination.

"Said tunnel site is situate on Glacier Mountain, in Snake River mining district, county of Summit and State of Colorado, and is five thousand feet in length by five hundred feet in width.

"Plaintiff further alleges that while it was in the quiet and peaceful possession of said tunnel claim and every part thereof the defendants, wrongfully and without right and without consent of the plaintiff, to wit, on or about the 2d day of July, 1883, entered upon the premises and into said tunnel so run by plaintiff and its grantors on said claim, and wrongfully and unlawfully ousted the plaintiff therefrom, claiming the said tunnel as the War Eagle.

"That on or about said last mentioned date the defendants, without right, made a pretended location of a lode claim across said tunnel and within said tunnel claim, and therein wrongfully ousted the plaintiff therefrom, claiming that they had discovered a lode which they called the Tempest lode.

"That the defendants have ever since hitherto unlawfully and wrongfully withheld the possession of the said premises and tunnel claim from the plaintiff, to its damage in the sum of $1000.

"Wherefore plaintiff demands judgment against the defendants —

"(1) For the recovery of the possession of said Silver Gate tunnel, tunnel site, and claim.

"(2) For the sum of $1000 damages for the wrongful withholding thereof.

"(3) For costs of suit."

The demurrer of the defendants rested upon four grounds:

"First. That the property sought to be recovered in this action is not described by its legal subdivisions nor by its metes and bounds.

"Second. That the lodes alleged to be embraced within the said tunnel site location, and for which a recovery is asked by the said plaintiff, are not mentioned nor described, nor any location of them or any of them alleged.

"Third. That said complainant does not show any valid and legal subsisting preëmption or location of said Silver Gate tunnel site.

"Fourth. That the claim of the said plaintiff to a strip of ground 5000 feet in length by 500 feet in width as a tunnel site is unwarranted and unprecedented and was not at the

Affidavits on Motion to Reinstate the Case.

date of said pretended location nor at any time subsequent thereto authorized by any local, state, or congressional law."

Mr. Walter H. Smith, on the 6th of February, 1888, argued the case for the plaintiff in error when it was reached on the docket, no one appearing for the defendants in error. The court, after hearing argument on the point, dismissed the case from the bench for want of jurisdiction.

On the 7th of February *Mr. Smith* made the following motion, supported by the accompanying affidavits, all entitled in the cause:

"The said Glacier Mountain Silver Mining Company, plaintiff in error, now comes and moves the court to set aside its order made on the 6th of February, 1888, dismissing said cause for want of jurisdiction and for leave to show that the property in controversy in said cause did at the commencement of said suit and now does exceed five thousand dollars in value, and therefore that this court has jurisdiction of this cause.

"WALTER H. SMITH,
"*Attorney for Plaintiff in Error.*

"DISTRICT OF COLUMBIA,
"*County of Washington,* } *ss:*

"I, Oscar H. Curtis, being first duly sworn, say that I reside at Oxford, Chenango County, New York; that I am well acquainted with the Silver Gate tunnel claim, situate at the base of the Glacier Mountain, in Snake River mining district, in Summit County, Colorado, being the same premises and property that is now in controversy in the case now pending in the Supreme Court of the United States, wherein the Glacier Mountain Silver Mining Company is plaintiff in error and J. Frank Willis *et al.* are defendants in error, being No. 166 of the October Term, 1887. I at one time was the owner of said property. I purchased it at sheriff's sale and paid therefor over twelve thousand dollars. I know that more than twenty thousand dollars has already been expended in developing said

property, and I have no hesitation in saying that the value of said premises and property on the first day of July, 1883, and at all times since that date, exceeded the sum of five thousand dollars.

"OSCAR H. CURTIS.

"Subscribed and sworn to before me this 7th day of February, 1888.

"[SEAL.] JAMES D. MAHER."

MR. CHIEF JUSTICE WAITE, on the 13th of February made the following announcement:

The further consideration of this motion is postponed until March 19, and the plaintiff in error is directed to cause notice of this order and of the motion, with a copy of all affidavits filed or to be filed in support thereof, to be served upon the defendants in error on or before the second day of March.

On the 20th of March *Mr. Smith*, on behalf of the plaintiff in error, submitted to the court his motion to vacate the judgment and reinstate the cause, and the following additional affidavits in support of it, and evidence of service of all the affidavits, all entitled in the cause:

"STATE OF OHIO, }
"*Hamilton County*, } *ss:*

"I, Goodrich H. Barbour, being first duly sworn, say that I reside at Cincinnati, Hamilton County, Ohio, that I am well acquainted with the Silver Gate tunnel claim, situated at the base of Glacier Mountain, in Snake River mining district, in Summit County, Colorado, being the same premises and property now in controversy in the case now pending in the Supreme Court of the United States, wherein the Glacier Mountain Silver Mining Company is plaintiff in error, and J. Frank Willis *et al.* are defendants in error, being No. 166 of the October term, 1887. That I have been a stockholder in said Glacier Mountain Silver Mining Company since 1876 and was induced to purchase this by the personal knowledge of a near

relative and others who had visited the mine and from reliable correspondence up to the present time. I have not changed my opinion as to the value of said mine. I consider the said mine to be worth more than $5000.00. Would not sell my stock on a basis of treble this amount; that I have been a director since 1877, and from my personal knowledge, the Company have paid in assessments for improvements on said property, nearly five thousand dollars.

"GOODRICH H. BARBOUR.

"Sworn to before me and subscribed in my presence this 24th day of February, A.D. 1888.

"[NOTARY SEAL.] E. J. HOWARD,

"*Notary Public, Hamilton County, Ohio.*

"UNITED STATES OF AMERICA, }
"*State of Colorado.* }

"IN THE CIRCUIT COURT.

"On this twenty-fifth day of February, A.D. 1888, personally appeared Charles P. Baldwin, who, being first duly sworn, on oath deposes and says, that he is a citizen of the United States and more than twenty-one years of age; that he has been for the past twenty years and still is employed as mining superintendent in Clear Creek County, Colorado; that about eight years ago he was employed by the president of the Glacier Mountain Silver Mining Company to examine the property of said Company situate and being on Glacier Mountain in Summit County, Colorado; that he made a careful examination of said property, and that it was worth at that time, and is now worth more than five thousand dollars.

"CHARLES P. BALDWIN.

"Subscribed and sworn to before me this 25th day of February, 1888.

"[CLERK'S SEAL.] H. A. ATKINS,

"*Clerk of District Court.*

Affidavits on Motion to Reinstate the Case.

"THE STATE OF KANSAS, } ss:
"*Marshall County*, }

"Charles Preston, of lawful age, being first duly sworn, according to law, upon his oath deposeth and saith, that he is personally well acquainted with the Glacier Mountain Silver Mining Company's property in the Snake River Mining District, in Summit County, in the State of Colorado, being the property represented in the above-entitled suit, and that said affiant is personally well acquainted with the value of said property; that said affiant has been mining in that District for six years last past, and is personally acquainted with the property represented in the foregoing entitled suit, and is well acquainted with the value of said property, and other mining properties of that District, and that the said Glacier Mountain Silver Mining Property is worth over five thousand dollars, and further this affiant saith not.

"CHARLES PRESTON.

"Subscribed and sworn to before me this 24th day, February, A.D. 1888, by Charles Preston.

"In witness whereof I have hereunto subscribed my name, and affixed my Official Seal this 24th day of February, A.D. 1888.

"B. SMITH,
Notary Public.

"[NOTARY SEAL.]

"THE DISTRICT OF COLUMBIA, } ss:
"*Washington County*, }

"I, Walter H. Smith, being first duly sworn, say that I did, on the 29th day of February, A.D. 1888, deposit in the Post Office at Washington City, in said district, a letter directed to George Norris, Temple Court, corner of Beekman and Nassau streets, New York City, (the said Norris being the attorney of record for the defendants in error in the above named case of *The Glacier Mountain Silver Mining Company* v. *J. Frank Willis et al*,) which said letter contained a certified copy of the order made by this court on the 13th day of February last, in said cause; a copy of the affidavit of Oscar H. Curtis,

heretofore filed and printed and a copy of the affidavits of Isaac Graveson, Goodrich H. Barbour, Charles Preston, and Charles P. Baldwin, herein above set forth, all of which were filed in the clerk's office prior to or on the 29th day of February last, I further say that I obtained the post-office address of the said George Norris from the clerk of this court.

"WALTER H. SMITH.

"Subscribed and sworn to before me this 15th day of March, 1888.

"JAMES H. GRIDLEY,

"[NOTARY SEAL.] *Notary Public.*"

MR. JUSTICE MILLER, on the 2d of April, 1888, made the following announcement:

This case was dismissed at the hearing on the ground that the amount in dispute was not sufficient to give this court jurisdiction. Permission, however, was given for the plaintiff in error to move to set aside this dismissal and file affidavits, if it could, to show that the value of the property which was the subject of controversy exceeded five thousand dollars. We think the affidavits now produced establish that fact sufficiently, and as no affidavits to the contrary have been produced, although the defendants in error had notice, the motion to set aside the order of dismissal is granted, and the case restored to the docket in the position it occupied before it was dismissed.

Mr. Walter H. Smith, on the 9th April, 1888, submitted the case for plaintiff in error on his brief. *Mr. Ellery C. Ford* was with him on the brief.

No appearance for defendant in error, and no brief filed.

MR. JUSTICE LAMAR, after stating the case as above reported, delivered the opinion of the court.

The opinion of the court below is not found in the record, and we are not advised by brief or otherwise as to the grounds

upon which the court sustained the demurrer. We must, therefore, determine the issues presented in the case by reference to the bill of complaint, and to the causes assigned for demurrer.

First. That the property sought to be recovered in this action is not described by its legal subdivisions nor by its metes and bounds. We do not think this ground is tenable. The complaint, after setting forth the location by plaintiff's grantors of the tunnel and tunnel site in Snake River mining district, Summit County, Colorado, at the base of the Glacier Mountain, states that they (said grantors) caused to be made out and recorded in the recorder's office of the county aforesaid, a location certificate of said tunnel claim, which said certificate described the location and boundaries of said tunnel claim; that the said tunnel claim was by its locators named the Silver Gate tunnel claim, and is described more fully as follows: "Commencing at the base of said Glacier Mountain east of Bear Creek, and running southeast and parallel with Coley tunnel through said mountain five thousand feet from the mouth or starting point of said tunnel at a stake marked and in or at the mouth of said Silver Gate tunnel, and two hundred and fifty feet northeast and two hundred and fifty feet southwest from said stake or tunnel to its termination."

We think this description is sufficiently plain and distinct to enable the sheriff in case of a recovery to execute a writ of possession, or to enable a surveyor to ascertain the exact limits of the location. The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered, has, in modern practice, been relaxed, and a general description of the property held to be good. The provisions of state statutes as to the description of the premises by metes and bounds, have been held to be only directory, and a description by name where the property is well known is often sufficient.

As to the second cause of demurrer, we think that, though the lodes alleged to be embraced within the said tunnel site location are not each separately described, the statement in the complaint that all the lodes in the tunnel claim have been

worked and mined by the plaintiff and its grantors, comprehends every part of the property for the recovery of which the action is brought.

With reference to the third ground of the demurrer, it is only necessary to say that the complaint alleges that a valid and legal location of said tunnel was made by persons under whom the plaintiff claims, and that the plaintiff held possession of the same for more than five consecutive years prior to the ouster by the defendants, and paid all the taxes during that period legally or otherwise assessed upon said property. This, under the laws of Colorado, would give the plaintiff a right to the premises in dispute superior to any other claim, except that of the government.

The fourth ground of demurrer is: "That the claim of the said plaintiff to a strip of ground 5000 feet in length by 500 feet in width as a tunnel site is unwarranted and unprecedented and was not at the date of said pretended location nor at any time subsequent thereto authorized by any local, state, or congressional law." Under § 2323 Rev. Stat. the right is given to locate a tunnel 3000 feet from the face of said tunnel, and the right is also given to the lodes discovered in said tunnel "to the same extent as if discovered from the surface," which is 300 feet on each side of the tunnel. Under the local laws of Colorado the right is given to "250 feet each way from said tunnel on each lode so discovered." 1801, § 5 General Laws of Colorado, 627. The objection presented by the demurrer is, that the tunnel is 5000 feet in length, whereas the statute only recognizes a right of 3000 feet from the mouth thereof, and that this renders the whole claim void.

We do not assent to this proposition. The location would be good to the extent of 3000 feet at least. *Richmond Mining Company* v. *Rose*, 114 U. S. 576, 580. This would be true had the location been made under the mining laws now in force. It will be observed, however, that this location was made prior to the passage of any general mineral law. It was made in 1865, and the first general statute passed by Congress on the subject is that of July 26, 1866. It is alleged by the plaintiff in error that this location was made in accordance

with the local rules and customs of miners in force at the time of the location, and that, therefore, such location was recognized and protected by the general mineral laws of July 26, 1866, 14 Stat. 251, and that of May 10, 1872, 17 Stat. 91. This allegation, however, is denied by the defendants; but as these local rules and customs differ in the several mining districts as to the extent and character of the mine, the question cannot properly be determined on demurrer.

The Land Department of the government, and this court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by Congress. *Jennison* v. *Kirk*, 98 U. S. 453, 457; *Broder* v. *Water Co.*, 101 U. S. 274, 276; *Jackson* v. *Roby*, 109 U. S. 440, 441; *Chambers* v. *Harrington*, 111 U. S. 350, 352.

We are, therefore, of the opinion that the cause of action is plainly and fully set forth in the complaint, and that the judgment of the court below cannot be sustained on any ground presented by the record.

The judgment of the Circuit Court is therefore reversed, and the cause remanded to that court for such further proceedings as are consistent with this opinion. So ordered.

HEGLER *v.* FAULKNER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 283. Submitted May 3, 1888. — Decided May 14, 1888.

There being nothing in the record to show that the Circuit Court had jurisdiction of the case, this court of its own motion reverses the judgment and remands the cause for further proceedings.

THE case is stated in the opinion.

Mr. J. W. Denver and *Mr. T. H. Broady* for plaintiff in error.

Mr. T. M. Marquett and *Mr. Isham Reavis* for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Nebraska.

There is in the record presented here a transcript showing that the action was first brought October 4, 1878, in the District Court of Richardson County, in the State of Nebraska, in which the original petition or declaration was filed. The suit was to recover the possession of a tract of land situated in that county, containing 320 acres, and for rents and profits alleged to be of the value of $2500. The defendants entered their appearance on May 6, 1879, and leave was granted them to answer in thirty days. The plaintiff was ruled to reply in fifty days, and the cause continued. An answer was filed May 17, 1879, and this appears to have been done in the Circuit Court of the United States for the District of Nebraska, in which all the subsequent proceedings in the progress of the cause were taken.

There is no evidence of any petition or order for the removal of the case into this latter court from the state court sitting in the county of Richardson, nor is there any statement anywhere of the citizenship of the parties. It appears that a trial was thereafter had and a verdict rendered for the defendants. The only attempt made to show any jurisdiction in the Circuit Court, in which that trial took place, is a short stipulation between the parties made in that court December 8, 1882, by which it was agreed that the amount in controversy in the action exceeded five thousand dollars.

A judgment in favor of the defendants was entered upon this verdict, to which the present writ of error is directed. It is very clear that this verdict and judgment must be set aside, because the Circuit Court had no jurisdiction of the case.

The judgment of the court below is reversed, and the case remanded for further proceedings.

JENKINS *v.* INTERNATIONAL BANK OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 254. Submitted April 26, 1888. — Decided May 14, 1888.

An assignee in bankruptcy appeared in a suit in equity which had been commenced by a bank against the bankrupt before his bankruptcy, to obtain a decree for the sale of securities pledged to the bank as collateral, and defended upon the ground of usury and usurious payments of interest. More than five years after the appointment of the assignee the bank filed a supplemental bill, setting up a former adjudication between the bankrupt and the bank made after the commencement of the suit, but before the bankruptcy upon the matter so set up in defence by the assignee. *Held*, that the supplemental bill set up no new cause of action, but only matters operating as an estoppel which were not subject to the limitation prescribed by Rev. Stat. § 5057.

THE case, as stated by the court, was as follows:

This case was before the Supreme Court of Illinois at the March term, 1881, when the decree therein, in favor of the present defendants in error, was reversed, and the cause was remanded to the Circuit Court of Cook County, Illinois, for further proceedings. The judgment is reported in 97 Illinois, 568. The cause was reinstated by the Circuit Court, and after further proceedings therein a final decree was rendered in favor of the defendants in error, which on appeal was affirmed in the Supreme Court of Illinois on November 17, 1884, and is reported in 111 Illinois, 462. From that decree the plaintiff has brought the present writ of error.

For the purpose of determining the only federal question arising upon the record, the following statement of the case made by the Supreme Court of Illinois, and prefixed to its opinion as reported in 111 Illinois, 462, is sufficient. That statement is as follows:

"A bill in chancery was filed February 17, 1875, in the Cook County Circuit Court, by the International Bank against Samuel J. Walker and other persons to foreclose and sell certain collateral securities which had been pledged by Walker to

the bank to secure the payment of principal notes of various dates made by Walker to the bank, some twenty-two of which were still held by it, and about ten others transferred to the other parties to the suit. The prayer of the bill was, that a decree might be entered fixing and establishing the amount of indebtedness due the bank from Walker, and for a sale of the collaterals so pledged, and the application of the proceeds to the payment of such indebtedness. Walker answered, alleging that a large amount of usurious interest entered into and formed a part of the alleged indebtedness, and insisting that an account be taken between the parties, and that such usurious interest be applied toward the satisfaction of such indebtedness, and that the collaterals be surrendered. Walker also filed a cross-bill making the same allegations, and praying for an account, and the application of such usurious interest, and for a surrender of the collaterals.

"July 6, 1877, the Circuit Court made an interlocutory decree in the cause, which denied the right to interpose the defence of usury, and directed an account to be taken of what was due on the principal notes held by the bank, excluding the defence of usury and of usurious payments of interest. In pursuance of an account taken as thus directed, dated January 15, 1878, a final decree was entered on April 25, 1878, finding the amount due the bank from Walker on the notes held by it to be, on January 15, 1878, $172,474, and directing a sale of the collaterals held by the bank to satisfy it. April 26, 1878, Walker went into bankruptcy, and July 31, 1878, Jenkins, the appellant, received the deed as his assignee in bankruptcy. The decree of April 25, 1878, was by this court, at its March term, 1881, in *Jenkins* v. *International Bank et al.*, 97 Illinois, 568, reversed on the ground that the direction to the master, in the order of reference, not to consider the question of usurious payments of interest upon any of the notes, was erroneous. The collaterals so sought to be sold had been specifically pledged by Walker to the bank, each to secure a particular note. The bank also held an agreement from Walker that each of the collaterals, though specifically pledged as security for a specific principal note, should also,

after the satisfaction of such principal note, be held as security for Walker's entire indebtedness to the bank, if any surplus remained which could be so applied after the satisfaction of such particular note.

"On March 11, 1874, George Wilshire and others filed their bill of complaint against the International Bank, David Frey, Samuel J. Walker and others, alleging that they had purchased of Walker certain premises, and setting out that Frey claimed to own a certain mortgage upon the same, executed by Walker prior to their purchase, which Frey obtained from the bank, but that there was nothing due upon it, and praying that the same might be surrendered and cancelled. Frey filed a cross-bill, setting up his principal note and the collateral note and security so executed by Walker to the bank, alleging that he had bought said principal note of the bank for full value, and praying for the foreclosure of the mortgage and sale of the premises. The bank also filed its cross-bill against Wilshire, Frey, Walker and others, setting up its general collateral agreement above referred to, alleging its right, by virtue thereof, to any surplus that might remain after the satisfaction of the indebtedness so due to Frey on said principal note which had been sold by it to Frey, not exceeding the amount due on the collateral note. The said general collateral agreement provided that the bank should have the benefit of said surplus, though it had sold such principal note to a third party. The bank, in its cross-bill, set up its entire indebtedness so due to it from Walker in the same way and with the same particularity that it had set up the same in the bill in this cause now under consideration, alleging that the notes were due and payable, and asking that it might have any surplus applied to the payment of such indebtedness after the satisfaction of the amount due to Frey. Walker answered that cross-bill in the same way, and alleging the same facts that he had alleged in answer to the bill in this cause. He also filed a cross-bill therein, setting up the same facts that he had set up in the cross-bill filed in this cause, and prayed for an account between himself and the bank, and for the application of all usurious interest in satisfaction of his indebtedness to the bank, and for

a return of the bank's collaterals, just as he had done in this case by his cross-bill.

"On February 28, 1878, a decree was entered in the Wilshire suit, finding the amount due from Walker to the bank to be the sum of $172,474. That decree stands in full force and effect, and over five years have elapsed since the entry of the same. The case at bar having been re-docketed in the Circuit Court after the reversal of the first decree, on November 26, 1883, by leave of court the complainant, the International Bank, filed a supplemental bill, setting up the said proceedings, pleadings, and decree in the Wilshire suit as a former adjudication, and in bar to any further proceedings by Jenkins, assignee, for an account under his cross-bill herein, and as a conclusive adjudication of the amount due the bank upon the evidence of indebtedness set out in its original bill herein. The Circuit Court held the said former adjudication in the Wilshire suit a bar to any further account as to what was then due, and found the amount due upon the principal notes set out in the bill and offered in evidence to be the sum of $172,474 on January 15, 1878, as determined by the decree in the Wilshire suit. After the allowance of subsequent collections, the court found the amount due at the time of the decree to be $143,630.22, and rendered a decree for a sale of the collateral securities to satisfy said sum. This decree was affirmed by the appellate court of the first district, and the assignee appealed to the Supreme Court of the State."

Mr. William T. Burgess for plaintiff in error.

Mr. George W. Smith and *Mr. A. M. Pence* for defendants in error.

Mr. Justice Matthews, after stating the case, delivered the opinion of the court.

Section 5057 of the Revised Statutes provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an

adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

It is contended by the plaintiff in error that the Supreme Court of Illinois erred in giving effect in this suit to the decree of February 28, 1878, in the Wilshire suit as set up by the International Bank in its supplemental bill filed herein November 26, 1883, more than two years after July 31, 1878, when the assignee in bankruptcy succeeded to the title of the bankrupt Walker. This contention is based upon the proposition that the filing of that supplemental bill in this proceeding was the commencement of a new suit against the assignee in bankruptcy by a person claiming an adverse interest touching rights of property vested in him. This is the only federal question presented by the record.

In support of this proposition, it is argued on behalf of the plaintiff in error that the supplemental bill set out, and sought a recovery upon, a cause of action distinct from that stated in the original bill. The original bill prayed for a decree against Walker upon his notes held by the bank, and for the satisfaction thereof a sale of the property held as security therefor. During the pendency of that bill precisely the same matters were put in issue in the Wilshire suit between Walker and the bank, and in that suit a decree was rendered finding the amount due. That decree in the Wilshire suit stands unreversed, and operates as an estoppel by way of *res adjudicata* between the parties. By way of proof or in pleading, it would be good as a bar in any subsequent suit between the same parties upon the same issues. Having been rendered after the institution of the present suit, it was competent for the complainant to bring it forward by a supplemental bill as conclusive evidence of the amount due for which it was entitled to take a decree, and as a complete answer to the defence set up by the plaintiff in error as the assignee of the bankrupt to the relief prayed for in the original bill, and to the relief

sought by the cross-bill. It was strictly new matter arising after the filing of the bill, properly set up by way of supplemental bill, in support of the relief originally prayed for. It can in no sense be considered as a new cause of action. It was not a bill to enforce the decree, nor was the complainant obliged to rely upon it as the sole ground of recovery, on the ground that the original cause of action had become merged in it. If the notes were merged in the decree, it was simply a change in the nature of the evidence to support the complainant's title to relief; the indebtedness remained the same, and the equity of the complainant to a foreclosure and sale of the securities remained unchanged. The statute of limitations, therefore, invoked by the plaintiff in error has no application.

This being the only federal question arising upon the record, and having, in our opinion, been decided correctly by the Supreme Court of Illinois, it is not within our province to consider any other question in the case.

The judgment of the Supreme Court of Illinois is, therefore, affirmed.

TAYLOR *v.* HOLMES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 209. Argued April 5, 6, 1888. — Decided May 14, 1888.

A bill in equity filed in the Circuit Court of the United States in 1882 by a stockholder in a New York corporation, whose corporate term expired in 1878, to correct a deed of land in North Carolina made to the corporation in 1853, is barred by the statute of limitations in North Carolina, and by the general principles of courts of equity with regard to laches, unless a better reason for not instituting the suit earlier is given than the one given in this suit.

A stockholder in a corporation which has passed the term of its corporate existence, and has long ceased to exercise its corporate franchises, who desires to obtain equitable relief for it, must, in order to maintain an action therefor in his own name, show that he has endeavored in vain to

secure action on the part of the directors, if there are any, or to have the stockholders elect a new board of directors, and must disclose when he acquired his interest in the corporation.

BILL IN EQUITY. The case is stated in the opinion.

Mr. Clarence R. Conger for appellants.

Mr. Samuel F. Phillips for appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Western District of North Carolina.

A bill in chancery was brought in that court by Isaac Taylor, a citizen of the State of Massachusetts, and Sallie A. Howes, a citizen of the State of New Jersey, as they declare, "for themselves individually, each as a holder and owner of shares of the capital stock of the Gold Hill Mining Company, as well as for and in behalf of all other stockholders of the said company who may desire hereafter to unite with them," against Moses L. Holmes, Reuben J. Holmes, Ephraim Manney and Valentine Manney, all citizens of the State of North Carolina. To this there was a demurrer, which was sustained, and a decree rendered dismissing the bill.

The Gold Hill Mining Company, according to the bill, was duly incorporated under the laws of the State of New York, August 30, 1853; its capital stock fixed at $1,000,000 and its shares at the par value of five dollars each. Its term of existence was to be twenty-five years. It also appears from the bill, that shortly after its organization, to wit, September 1, 1853, this corporation bought of Moses L. Holmes, one of the defendants, the Gold Hill mines and mining property, consisting of twelve lots and tracts of land lying in the counties of Rowan and Cabarrus, in the State of North Carolina; that the company expended large sums of money in the pursuit of mining and in making improvements upon the lands of which it had possession, and that $20,000 or thereabouts was raised by assessments upon its stock. It would appear that this was

the condition of affairs before the outbreak of the war, in 1860, when the enterprise seemed to be a failure, and practical mining was abandoned. The bill also set up a foreclosure sale under a mortgage at which the property was purchased in by Moses L. Holmes and Reuben J. Holmes who have had undisturbed possession thereof ever since.

It is also alleged in the bill, that about July, 1861, the officers of the corporation, which had been in possession of the property, were driven off by the defendants, and that thereafter, by the death and resignation of its officers and directors or the greater part thereof, it became utterly disorganized and never held any meetings of its directors or stockholders since the year 1862, so that at the time of the filing of the bill there was but one director of the corporation living and surviving, within the knowledge of complainants; and it is alleged that he, by his acts and doing and connections with the defendants in and touching pretended claim or claims adversely to the interest of said corporation and its stockholders and creditors, has rendered himself incompetent to assert and protect the rights of said corporation and of complainants, and has refused and neglected and still refuses and neglects so to assert and protect the same.

One of the objects of the bill is to correct an alleged mistake in the original conveyance made by Moses L. Holmes, of the lands on which the mining operations were conducted, to this corporation; the allegation being that it was intended to convey to it a perfect title in fee simple, whereas, wanting the words of limitation to heirs or assigns, and other defects, it did not convey such a title. These matters are set forth with much particularity and at great extent in the bill of the complainant, but as the decision of the court does not turn upon them nor upon another question which has been raised connected therewith, as to whether or not one of the deeds was delivered as an escrow or absolutely, we need not here consider them further.

The court below sustained the demurrer to the bill upon two principal grounds: First, that the suit was barred by the statute of limitations and by the general doctrine of laches as

applicable in courts of chancery. Second, that no sufficient reason is shown why the suit should be brought by two stockholders instead of by the corporation itself, in its own name. We think both of these grounds or either of them sufficient to sustain the position taken by the court below.

It is, however, alleged that the corporation itself is extinct by reason of the limitation placed upon its existence, under the articles of incorporation, by which it expired on the 30th day of August, 1878. But, under the laws of New York, the existence of such a corporation was continued after the period for which it was limited for the purpose of winding up its business, and for the purpose of collecting and distributing its assets and paying its debts. Although the allegation of the bill is that many of the directors of the company are dead, still it is shown that one of them survives, and no assertion is made that there was any application to this surviving director on the part of the defendants for the purpose of instituting any proceedings looking to the rectification of this deed or for the recovery of the real estate in North Carolina; nor does it appear that there was any request made to him to bring any suit either at law or in chancery for that purpose. No effort was made to call together the stockholders to take any action on the part of the company, or to elect other directors, or to obtain any united action in the assertion of the claims now set up.

Although there is in the bill a declaration that the two complainants are owners of a majority of the stock of the Gold Hill Mining Company, there is no statement as to when or how they became such, or whether they were such stockholders during the times that injuries were inflicted, of which they now complain, in regard to the taking possession of the property by the defendants, or whether they became stockholders afterwards. In short, there is no such averment of their relation to the corporation or of their interest in the matter, about which they now seek relief, as brings this action within the principle of the decisions of this court upon the subject. *Hawes* v. *Oakland*, 104 U. S. 450.

Under the statute of limitations of the State of North Caro-

lina, or upon the general principles of courts of equity with regard to laches, the complainants are barred of relief in the present case.

The mistake sought to be corrected, which is made the foundation of the present suit, occurred in 1853. This suit was brought in 1882, after the lapse of nearly thirty years, during all of which time the action might have been brought, so far as relates to the correction of the alleged mistake in the deed. During seven or eight years of this time the corporation was in full existence and operation; it had the means to prosecute this suit and had an opportunity of knowing, or at least its principal members must have known, all the facts which are now brought to the consideration of the court, and even up to the time when this suit was commenced there was a director surviving who had never been discharged or resigned. There was no reason, if stockholders were proper persons to bring this action, why proceeding should not have been begun by them upon the practical dissolution of the company in 1862, after which time, as the complainants allege, no corporate organization was kept up, no work or business done, and no attempt made by any of the directors to act upon any of the rights of the corporation or to exercise their authority in the conduct of its affairs. If we allow some deduction for the period of the war, which closed in 1865, there still remains the long delay between that time and the bringing of this suit in 1882, a period of about seventeen years. This lapse of time requires some better account in regard to the reasons why this suit was not earlier instituted than is given in the present bill. It is obvious that during all this time, and, indeed, from the year 1861, when, as the bill declares, the defendants took possession of the property, it has been held by them adversely to the claim of the Gold Hill Mining Company, and to the claim of the complainants. No sufficient reason is given why relief was not sought earlier. During all this period the shares of the corporation seem to have been of no value, so that the complainants may have bought them in the market for a very inconsiderable sum and may now be prosecuting a suit for relief which, if sustainable at all, ought to inure to the benefit of other parties. *Clarke* v. *Boorman*, 18 Wall. 493.

Statement of the Case.

These questions have been too frequently discussed in this court to need further comment. We concur with the Circuit Court that the bill is without merit, and believe that it was rightfully dismissed. The decree is, therefore,

Affirmed.

FREEDMAN'S SAVING AND TRUST COMPANY *v.* SHEPHERD.

SHEPHERD *v.* THOMPSON.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 230, 256. Argued April 17, 18, 1888. — Decided April 30, 1888.

When a mortgage contains no provision for the payment of rents and profits to the mortgagee while the mortgagor remains in possession, the mortgagee is not entitled, — as against the owner of the equity of redemption, — to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf; even though the income may be expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon failure by the mortgagor to perform the conditions of the mortgage.

Section 3737 of the Revised Statutes respecting the transfer of contracts with the United States does not embrace a lease of real estate, to be used for public purposes, under which the lessor is not required to perform any service for the government, and has nothing to do, in respect of the lease, but to receive from time to time the rent agreed to be paid.

When the government, as lessee of real estate occupied by it, recognizes through its proper officers a transfer of the property and an assignment of the lease, and an assignment of rent under it, and pays the rent, there is nothing in § 3477 Rev. Stat. respecting transfers and assignments of claims against the United States which invalidates that transaction for the benefit of a third party.

The court stated the case as follows:

These consolidated causes involve the conflicting claims of the parties: *first*, to the proceeds of two drafts, one for $1800, and the other for $3475, issued by the United States Treasury in payment of the rent of lot four, square three hundred and seventy-seven, with the improvements thereon, in the city of

Statement of the Case.

Washington, and made payable to the order of A. C. Bradley, to the use of Alexander R. Shepherd, to the use of George Taylor, Peter F. Bacon, and Samuel Cross, trustees; *second*, to a balance of $787.50 in the hands of A. C. Bradley, who was appointed, in the first of the above named causes, receiver of said premises with authority to collect the rents due and to become due for use and occupation of the same by the United States.

The final decree awarded the proceeds of the two drafts to Thompson, appellee in each of the causes, and the money in the hands of the receiver to the trustees of Shepherd. Of that decree both the Freedman's Savings and Trust Company and Shepherd complain.

This controversy has been greatly tangled by an unusual number of pleadings, affidavits, motions, rules and orders. But the facts, so far as it is necessary to state them, are as follows:

The Freedman's Savings and Trust Company (to be hereafter called the Trust Company) sold and conveyed this property to A. C. Bradley; and for the unpaid purchase money the latter executed his five several notes for $2400, $2650, $2900, $3150, and $5900, payable in one, two, three, four and five years from June 9, 1873, with interest at eight per centum per annum, payable semiannually.

For the purpose of securing the payment of those notes Bradley, by deed of trust, in the nature of a mortgage, duly recorded on the 18th of June, 1873, conveyed the property to John W. Alvord and George W. Stickney, together with "all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments" appertaining to the same, and "all the estate, right, title, interest, and claim whatsoever, either at law or in equity," of the grantor in the premises, in trust to permit Bradley, his heirs or assigns, to use and occupy the premises, and take the rents, issues, and profits thereof to their sole use and benefit, "until default be made in the payment of said notes or any of them, or any instalment of interest due thereon, or any proper cost, charges, commission, half commission, or expense in and about the same;" and

upon the further trust, such default having occurred, to sell the property at public auction, after at least twenty days' notice of the time, place, and terms of sale, and convey the same in fee simple to the purchaser.

Prior to the execution of this deed, Bradley, by a formal instrument of writing, to which the Postmaster General was a party, had leased the premises to the United States, at an annual rent of $4200, for the term of three years from June 5, 1873, with the privilege to the government of extending the term for two additional years. On the 27th of August, 1874, he conveyed to Alexander R. Shepherd; and, on the 21st of November of the same year, gave written notice to the Postmaster General of Shepherd's purchase. He also assigned and transferred the lease to the latter, with authority to collect the rent.

It should be stated in this connection that in his purchase Bradley really represented Shepherd, the latter verbally assuming to pay the notes given to the Trust Company.

On the 15th of November, 1876, Shepherd made a conveyance to George Taylor, Henry A. Willard, (who was succeeded by Peter F. Bacon,) and Samuel Cross, of a large amount of property, *including the premises in controversy*, in trust to secure his three notes of $100,000 each. That conveyance contained a covenant upon the part of Shepherd that all the rents, profits, issues, and proceeds of the trust property coming to his hands should be applied by him solely to the benefit and advantage of the creditors whose debts were secured by the deed.

The rent reserved for the year ending June 30, 1876, not having been paid, Shepherd caused suit to be brought in the Court of Claims, in the name of Bradley, against the United States, to the use of Taylor, Bacon, and Cross, trustees. In that suit judgment was rendered against the government for only $1800, and was affirmed by this court at its October term, 1878. *Bradley* v. *United States*, 98 U. S. 104. Pending the appeal in that case a second suit was brought for the rent reserved for the years ending June 30, 1877, and June 30, 1878. But the decision in the first suit rendered the further prosecution of the second suit unnecessary.

Statement of the Case

In consideration of the indebtedness described in a deed executed by Shepherd, March 10, 1873, to William Thompson, as trustee, Bradley and Shepherd, by writing, dated June 21, 1877, pledged the demand against the United States for use and occupation of these premises, as security for the payment of said indebtedness, with interest thereon at the rate of eight per cent per annum until paid; and, in the same instrument, "covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of the said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay." To this pledge and agreement the trustees named in Shepherd's deed of the 15th of November, 1876, gave their written assent.

The premises having been advertised to be sold on the 3d of August, 1877, under the deed of trust of June 18, 1873, because of default in the payment of interest and principal, Shepherd and the trustees in the deed of November 15, 1876, instituted, August 2, 1877, a suit of equity, being the first named of the above causes, to enjoin the sale. The ground alleged for the injunction was the pendency of a suit brought by Mrs. McGhan and Edward Clark, her trustee, (*Clark* v. *Trust Company*, 100 U. S. 149,) which involved the title of the Trust Company to the property conveyed to Bradley, and by the latter to Shepherd. A temporary injunction of the character asked was granted. The Trust Company answered the original bill. It also filed, October 25, 1887, its cross-bill against the plaintiffs, in which, after alleging the insolvency of Shepherd and Bradley, its fear that the property would not sell for enough to pay the debts secured by the mortgage, and the taxes on it, and asserting the right of its creditors to have the rents thereof applied to its claims, in preference to the debts held by other creditors of Shepherd, it prayed that Shepherd, Taylor, Cross, and Bacon be perpetually restrained from applying for or receiving any rents or sums of money due from the United States on account of the use and occupation

of the premises, until the final determination of this cause and of the equity suit brought by Mrs. McGhan and Clark; and that a receiver be appointed to collect the rents due from the United States on account of the use and occupation of the premises.

On the 18th of March, 1878, the case was heard on the motion of the Trust Company for a receiver and an injunction, and an order was made enjoining the complainants, "from collecting or receiving any moneys or other thing of value from the United States on account of the lease made between the United States and A. C. Bradley, and bearing date June 6, 1873, for the premises involved in this cause."

On the 12th of March, 1879, the Trust Company, by petition, asked the appointment of a receiver to take charge of the property and to collect the rents, during and after its occupancy by the government, and that Shepherd and his co-complainants be enjoined from receiving from the United States any of said rents.

On the 10th of May, 1879, the cause was heard upon the matters embraced in that petition, and on motion of the Trust Company, and with the consent of the other parties, Bradley was appointed receiver in the cause. He was directed to take charge of the property, and collect the rents therefor, "excepting, however, the rents accrued and to accrue from the 6th day of June, 1878, to the 1st day of July, 1879, which have been or are to be collected and received by the said Alexander R. Shepherd or his assigns." It was further ordered that the parties be enjoined from applying for or receiving any moneys due or to become due on account of the use and occupation of the premises, save and except the rents for the period just named.

Subsequently, upon the petition of Bradley, as receiver, Nathaniel Wilson was made a party to the cause — he having, in his capacity as an attorney, received the proceeds of the draft for $1800 issued by the United States in discharge of the judgment for the rent of the premises for the year ending June 30, 1876, and a draft for the rent accruing after that date and up to June 6, 1878. Wilson appeared and answered,

stating that he held the proceeds of the draft for $1800, less certain sums deducted therefrom, and, also, the draft for $3475, subject to the order of the court.

John W. Thompson filed a petition praying leave to intervene for the protection of his interests. This petition was afterwards withdrawn, and he instituted an original suit — the second of the above named causes — against Bradley, Shepherd, the Trust Company, the trustees in Shepherd's deed of November 15, 1876, William Thompson, the trustee in the deed of March 10, 1873, and Nathaniel Wilson. From the pleadings and evidence in that suit it appears that Thompson holds Shepherd's two notes of $7000 and $8000, on which, at the time he sued, there was due a balance of $11,677.28, with interest at the rate of 8 per cent per annum on $8000 thereof from March 10, 1875, and on $3677.28 from June 22, 1875. These notes constituted the indebtedness referred to in the deed of trust to William Thompson, to secure the payment of which, Bradley and Shepherd, with the consent of the latter's trustees, executed the writing of June 21, 1877. Thompson's suit was consolidated with the one brought by Shepherd.

On the 18th of January, 1880, the restraining order made August 2, 1877, in Shepherd's suit, was set aside; and, on the 28th of February, 1880, the property having in the meantime been sold under Bradley's deed and purchased by the Commissioners of the Trust Company — leaving due on Bradley's notes more than $11,000 — the receiver was directed to deliver possession to the Commissioners, who were authorized to apply for, collect, and receive the rents, issues and profits of the property thereafter falling due.

The amount of rent collected by the receiver, less his commission, was $787.50. The amount in the hands of Wilson, including the draft for $3475, was $4675.

The final decree was of the character indicated in the beginning of the opinion. In respect to the draft for $3475, the decree required Bradley, Shepherd, Taylor, Bacon and Cross to indorse the same, and directed its collection by Wilson, and the payment by him to Thompson of the proceeds, together

with the balance in his hands of the $1800 draft. It was further ordered that the $787.50 in the hands of the receiver be paid to the trustees of Shepherd.

Mr. William H. Mattingly for Shepherd. *Mr. A. C. Bradley* was with him on the brief.

Mr. Enoch Totten for the Freedman's Savings and Trust Company.

Mr. H. H. Wells and *Mr. Martin F. Morris* for Thompson.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

What rights did the Trust Company acquire, under Bradley's deed, in respect to the income or rents of the mortgaged property, accruing after the execution of that instrument? This is the principal question presented for our consideration, and will be first examined.

In *Gillman* v. *Ill. & Miss. Tel. Co.*, 91 U. S. 603, 616, the question was as to the disposition of certain earnings of a railroad, accruing after a decree of foreclosure and sale, and before the purchaser at the sale was let into possession. The first, in point of time, of the mortgages conveying the property to secure the company's bonds, provided, among other things, that it might remain in possession and operate the road, enjoying the revenues thereof, until default occurred in paying the interest or the principal of its bonds at maturity; and if such default continued six months, or if the company failed to set apart, deposit, and apply certain moneys, as required by the mortgage, then the trustees might, and it should be their duty, to enter upon and take possession of and, by agents, operate the mortgaged property. The second mortgage contained substantially the same provisions. After the decree of foreclosure and sale was passed, a judgment creditor of the company, proceeding under the local law, garnished, in the hands of the company's agents at its various stations, moneys received by them from the operation of the road, the company

having been permitted to remain in possession up to the time of the sale under the decree. The trustees in the mortgage claimed that these moneys should be applied in payment of the balance remaining unpaid on their mortgage bonds. This claim was denied. The court — following the previous case of *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459 — said: "It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver and clothe him with the duty of taking charge of the road and receiving its earnings, within such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed, and possession delivered over to the vendee. Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime. It follows that neither, during that period, was in any wise affected by the action of the court." Again: "It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profit could be made. . . . If the mortgagees were not satisfied, they had the remedy in their own hands, and could, at any moment, invoke the aid of the law, or interpose themselves without it. They did neither."

In *American Bridge Co.* v. *Heidlebach*, 94 U. S. 798, 800, the mortgage included the rents, issues and profits of the mortgaged property, so far as it was necessary to keep it in repair, and pledged such rents, issues and profits to the payment of the interest on the mortgage bonds as it matured, and to the creation of a sinking fund for the redemption and payment of the principal. In the event of a continuous default for six months in meeting the interest, the trustees, upon the written request of the holders of one-half of the outstanding bonds, were authorized to take possession of the mortgaged

premises, and receive all rents and claims due and to become due to the company. In a contest between the trustees and a judgment creditor, as to which was entitled to certain moneys in the hands of the mortgagor, the decision was in favor of the creditor, the court saying: "In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver appointed, and possession delivered to him. In either case, the income would thereafter have been theirs. Until one or the other was done, the mortgagor, as Lord Mansfield said in *Chinnery* v. *Black*, 3 Doug. 390, was 'owner to all the world, and entitled to all the profit made.'"

In *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 392, it was held that a bond given on appeal with supersedeas, from a final decree of foreclosure and sale, did not cover rents and profits, or the use and detention of the property, pending the appeal. The court said that "in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself — the specific thing — which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. . . . The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. . . . But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly."

It is, of course, competent for the parties to provide, in the mortgage, for the payment of rents and profits to the mortgagee, while the mortgagor remains in possession. But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver, *Teal* v. *Walker*, 111 U. S. 242; *Grant* v. *Phœnix Life Ins. Co.*, 121 U. S. 105, 117; or until, in proper

form, he demands and is refused possession. *Dow* v. *Memphis Railroad Co.*, 124 U. S. 652, 654. See also *Sage* v. *Memphis and Little Rock Railroad Co.*, 125 U. S. 361.

The principles announced in these cases are decisive against the claim of the Trust Company to the rents of the property represented by the two drafts delivered by the United States to Wilson. Bradley's deed pledged the property, not the rents accruing therefrom, as security for the payment of his notes. It is true, it provides, generally, that the mortgagor may remain in possession and receive rents and profits, until there is default upon his part. But the only effect of that provision was to open the way to compel him to submit to a sale and thereby lose possession. The deed did not give the mortgagee or the trustees the right, immediately upon such default, to take possession and appropriate the rents of the property. It only gave the trustees authority, when such default occurred, to sell upon short notice, and, in that way, oust the mortgagor, and suspend his right to further appropriate the income of the property. Even if the deed had expressly pledged the income as security for the debts named, the mortgagor, according to the doctrines of the cases cited, would have been entitled to the income, until, at least, possession was demanded under the deed; or until his possession was disturbed by a sale under the deed of trust or, in advance of a sale, by having a receiver appointed for the benefit of the mortgagee. As was said in *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 395, "courts of equity always have the power where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property, by means of a receiver, and preserve not only the corpus, but the rents and profits, for the satisfaction of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection."

In the present case, it appears that prior to the time fixed for the sale under Bradley's deed of trust, and before the Trust Company filed its cross-bill asking, among other things, for a

receiver of the rents of the mortgaged property, Bradley and Shepherd, with the consent of Shepherd's trustees, had pledged the rents of the property as security for Thompson's debts. As Bradley's deed of trust did not pledge the rents as security for his notes to the Trust Company, the pledge of such rents by himself and Shepherd, his assignee, for Thompson's benefit, did not violate any right secured to it; for, as we have shown, until a sale was had, pursuant to the deed of trust, and possession taken under such sale, it had no right, by the terms of the deed, to take the income of the trust property. So that, if a receiver had been appointed immediately upon the filing, October 25, 1877, of the cross-bill of the Trust Company, and if all the rents represented by the two drafts of $1800 and $3475 had been collected by the receiver, they would still, in virtue of the assignment of June 21, 1877, by Bradley and Shepherd, have belonged to Thompson, *as between him and the Trust Company;* unless, as contended, the transfer by Bradley to Shepherd of the lease to the United States, and their assignment for the benefit of Thompson, are absolutely void, for every purpose, and as to everybody, under the provisions of the statutes relating to the transfer and assignment of contracts with, or claims against, the United States.

It is insisted by the Trust Company that the transfer by Bradley to Shepherd of the lease of June 6, 1873, was void under § 3737 of the Revised Statutes, which provides: "No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States."

This provision was brought forward from an act of Congress, approved July 17, 1862, entitled "An act to define the pay and emoluments of certain officers of the army, and for other purposes." 12 Stat. 594, 596. In the original act it immediately followed a section providing "that all contracts made for, or orders given for the purchase of goods or sup-

plies by any department of the government, shall be promptly reported to Congress by the proper head of such department, if Congress shall at the time be in session, and if not in session, said reports shall be made at the commencement of the next ensuing session." We are of opinion that, whatever may be the scope and effect of § 3737, it does not embrace a lease of real estate to be used for public purposes, under which the lessor is not required to perform any service for the government, and has nothing to do, in respect to the lease, except to receive from time to time the rent agreed to be paid. The assignment of such a lease is not within the mischief which Congress intended to prevent. Although a lease, such as Bradley made, is a "contract," in the broadest sense of that word, we are not prepared to hold that it is of the class of contracts, the transfer of which or of any interest therein is prohibited by § 3737.

It is also contended that the assignment made on June 21, 1877, by Bradley and Shepherd is void under § 3477 of the Revised Statutes, which provides that "all transfers and assignments made of any claim upon the United States, or of any part of it or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

This court has frequently had occasion to construe this section. *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Spofford* v. *Kirk*, 97 U. S. 484; *Goodman* v. *Niblack*, 102 U. S. 556; *Bailey* v. *United States*, 109 U. S. 432; *St. Paul &c. Railroad* v. *United States*, 112 U. S. 733; *Hobbs* v. *McLean*, 117 U. S. 567. Undoubtedly, the lease made by Bradley to the United States created, in his favor what, in some sense, was a "claim upon the United States" for each year's rent as it fell due. And, if the statute

embraces a claim of such a character, there could not have been any valid transfer or assignment of it in advance of its allowance, which could have been made the basis of a suit by the assignee against the United States, or which would compel the government to recognize the transfer or assignment. It is, perhaps, also true that, under some circumstances, the assignor, before the allowance of the claim and the issuing of the warrant, may disregard such an assignment altogether.

But when the government ascertained the amount of rent due under Bradley's lease, and, with his consent, allowed the same to him for the use of Shepherd, for the use of Taylor, Bacon, and Cross, trustees, we perceive nothing in the words or the policy of the statute preventing Thompson from asserting his rights either against the parties or any of them, named in the warrants issued by the government, or against the Trust Company, the mortgagee of the premises. The object of the statute, as was said in *Bailey* v. *United States*, 109 U. S. 432, was to protect the government and not the claimant, and to prevent frauds upon the Treasury; and that "an effectual means to that end was to authorize the officers of the government to disregard any assignment or transfer of the claim, or any power of attorney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof." Here, the officers of the government chose to recognize the assignment, and of their action neither Bradley nor Shepherd, nor Shepherd's trustees, can rightfully complain. The government is acquitted of any liability in respect to the claim for rent, for its officers have acted in conformity with the directions, not only of the original claimant, but of his assignee, Shepherd, and of Shepherd's trustees. The simple question is, whether the money received from the government shall be diverted from the purpose to which Bradley, Shepherd, and Shepherd's trustees agreed in writing that it should be devoted, namely, to the payment of the debts Thompson holds against Shepherd. This question must be answered in the negative; and in so adjudging we do not contravene the letter or the spirit of the statute relating to the assignment of claims upon the United States.

Syllabus.

It only remains to say a word in reference to that part of the decree giving to Shepherd's trustees the rent which Bradley, as receiver, collected. We have already shown that Bradley, not having pledged the income of the property to the Trust Company, could pledge it as security for debts held against him by other creditors. After executing the deed of 1873, he conveyed the premises to Shepherd, and also assigned to him the benefit of the lease made to the government. Shepherd included the premises in his deed to Taylor and others of November 15, 1876, and expressly agreed that the rents, issues, and profits therefrom should be applied in payment of the debts named in that deed. The right of those trustees to the rents, issues, and profits which accrued before any sale under Bradley's deed to the Trust Company, and prior to actual possession being taken under such sale, was, consequently, superior to any that company had. That right could not be defeated by anything the company did, whether by means of a receiver or otherwise. Whether the money in the hands of the receiver belonged to Thompson rather than to Shepherd's trustees is a question not before us, since Thompson has not appealed from the decree.

Upon the whole case, we are of opinion that there is no error in the decree to the prejudice of either of the appellants, and it is, in all respects,

Affirmed.

ROBERTSON *v.* SICHEL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 269. Argued and Submitted May 1, 1888. — Decided May 14, 1888.

A collector of customs is not personally liable for a tort committed by his subordinates, in negligently keeping the trunk of an arriving passenger on a pier, instead of sending it to the public store, so that it was destroyed by fire; where there is no evidence to connect the collector personally with the wrong, or that the subordinates were not competent, or were not properly selected for their positions.

Statement of the Case.

THIS was an action at law, brought in the city court of the city of New York, by Emilie Sichel, an infant, by Joseph Sichel, her guardian *ad litem*, against William H. Robertson, collector of customs for the port and collection district of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York.

The object of the suit was to recover damages for the loss of the contents of a trunk belonging to the plaintiff, who was a passenger by the steamship Egypt of the Inman line, from Liverpool, and arrived at New York, at the pier of the ship, on the 31st of January, 1883. She was sixteen years of age, and was a first-cabin passenger. She made a baggage declaration, under oath, which stated that she had two trunks and two bags, containing "wearing apparel in actual use and personal effects not merchandise." She declared "nothing new or dutiable." Her baggage was examined on the dock, and one trunk was detained by the customs officers, who gave her a receipt therefor, signed by an inspector, which stated that the inspector had sent the one trunk, for appraisement, to the public store, under a baggage permit. She was directed by the officers to call, the next day, at the public store to receive the trunk. This trunk contained her personal effects, which cost her $400. The only thing in the trunk not wholly intended for her own use was ten pounds of chocolate, valued at about $2.50, part of which she ate, and she intended to eat the balance in company with some of her young friends. This was her first visit to America. She was a native of Germany, and at the time of her arrival was unfamiliar with our language and customs. She did not know and could not understand the nature and effect of the baggage declaration which she was asked to sign, and it was not explained to her. In the trunk, with her clothing and wearing apparel, were some paper boxes containing some brass ornamental jewelry on cards, given to her abroad, of the value in all of about one dollar, some of which she had worn, some old lace curtains, six table-cloths and twelve napkins, a gift from her mother, the ten pounds of chocolate, and three corsets, one of which she had worn. On the next day, the

usual order was made, on an application signed by the plaintiff, for an appraisement of the contents of the trunk. The plaintiff demanded the trunk at the public store, but did not receive it, because it had been destroyed by fire, on the pier of the ship, on the night of January 31, 1883. It was proved on the trial that, on the morning after the arrival of the ship, the deputy collector issued an order to the clerk in the collector's department at the custom house for the appraisal of the trunk, and that there could be no appraisal without a permit from the collector.

At the close of the plaintiff's case, the defendant asked the court to direct a verdict for him, on the ground that, the action being one for personal negligence, the plaintiff had not brought home to the collector personally any connection with the trunk at the time it was destroyed, and that, if any negligence was to be imputed to the subordinate officers of the customs, such negligence could not be imputed to the collector. The court refused to grant the motion, and the defendant excepted.

Evidence was then introduced on the part of the defendant tending to show that the inspector on the dock who examined the trunk discovered what, in the exercise of his discretion, he determined to be dutiable articles; that he reported to his superior officer that he thought the trunk contained dutiable articles and that officer told him to see what else he could find; that he found other dutiable articles; that he attempted to find an appraiser to appraise and assess duties upon those articles, but did not find one; that he reported to the staff officer having charge of the passengers and their baggage from that steamer, and under his advice marked the trunk for the public store, to be examined by the proper examiner and have the duties assessed, under a section of the regulations for the government of officers of the customs under the superintendence and direction of the surveyor of the port of New York, which was admitted in evidence, and was as follows: "In the absence of the entry clerks or appraiser, dutiable articles taken from passengers' baggage will be sent by the inspector as soon as possible to the public store, and the pas-

senger will be furnished by the inspector with the usual baggage certificate;" that, the trunk having been thus marked for the public store, and a receipt given to the plaintiff, it was put into the charge of the discharging officers of the vessel; that the inspectors were allowed to send goods to the public store for appraisement, only through a custom-house cartman; that the discharging officer who received the plaintiff's trunk did not send it to the storehouse, because there was no cartman on the pier to take it away, and none came to do so, though an effort was made to procure one; that the trunk remained on the pier, under his custody, and was totally consumed by fire on the night of the 31st of January, the officers who were there being driven away by the flames; and that the fire occurred between 2 and 3 o'clock A.M. of the day following that of the arrival of the steamer.

It also appeared in evidence that, under article 431 of the customs regulations, it was the duty of the collector, on the arrival of any steamer of a regular line from a foreign port, to detail an experienced entry clerk, who, with a similar clerk to be designated by the naval officer and an assistant appraiser or examiner to be detailed by the appraiser, should, together with the inspector on board, examine all the passengers' baggage, place the dutiable value upon the same, and, if dutiable articles were found, appraise the same and assess the duty thereon. It also appeared that all those officers were on the dock on that day.

The following regulations were then put in evidence:

"The Laws and Regulations for the Government of Officers of Customs under the superintendence of Surveyors of Ports. 1877."

"Article 104. Whenever any trunk or package brought by a passenger as baggage contains articles subject to duty and the value thereof exceeds $500, or if the quantity or variety of the dutiable articles is such that a proper examination, classification, or appraisement thereof cannot be made at the vessel, the trunk or package will be sent to the public store for appraisement."

"Article 117. In the absence of the entry clerk or ap-

praiser, dutiable articles taken from passengers' baggage will be sent by the inspector, as soon as possible, to the appraiser's store and the passenger will be furnished by the inspector with the usual 'baggage certificate,' which will be in the following form:

"*Inspector's certificate of goods sent to public store under baggage permit.*

"PORT OF ———, ——— —, 18—,

On board ship.

"I have sent to public store under 'baggage permit' the following articles said to belong to ———.

"(Describe the articles.) ——— ———,

Inspector."

By the government's report in this case the value of the property in Miss Sichel's trunk was alleged to be $100 only, while the plaintiff did not claim the value to be over $400. Peterson, the government inspector, did not make a written report of the case to the government until about two months after the arrival of the steamer. He did this at the request of the surveyor, and it was no part of his duty to make it as requested. The same inspector Peterson had signed and issued the certificate on the baggage declaration. There was an appraiser on the pier in question some time on that day. The trunk in question was the only seizure or detention of passengers' baggage made on that dock on the day in question.

The defendant himself being put upon the stand and duly sworn, testified that he was the collector of the port of New York; that he had in the neighborhood of twelve hundred subordinates under him; that, approximately, the average annual importations into the port of New York, passed through the custom house, were of the value of five hundred millions of dollars; that he knew nothing about the trunk imported by Emilie Sichel by the Egypt on January 31st, at the time of its importation; that he was not on the dock at the time; that it was no part of his duty to pay any attention to the actual arrival of the passengers' baggage, or pass-

ing it through the custom house, or ordering it to the public store, or examining it to see if there were any dutiable goods, or to have anything to do with it; that, as a matter of fact, he had nothing to do with it; and that the first time his attention was called to the matter of this trunk was long after the fire, some time in September, 1883.

The evidence being closed, the defendant moved the court to direct a verdict in his favor upon the same grounds on which the motion was made at the close of the plaintiff's case, that is to say, that there was no evidence in the case to connect the defendant with the destruction of the trunk; that in the case of a public officer, the doctrine of law *respondeat superior* did not apply; and that, before there could be any recovery from the public officer it must be shown that he was personally responsible himself, and that the negligence was his own act. The court refused to grant this motion, and the defendant excepted.

The defendant then requested the court to charge as follows:

"1. That a public officer is not responsible for the negligence of his subordinates.

"2. That the defendant is liable only for the neglect of some duty devolved upon him personally and not for the neglect of duty of any other person.

"3. That unless the jury find that the loss of this trunk was the direct result of some personal carelessness or negligence on the part of the defendant there can be no recovery.

"4. That it is not sufficient to show that the loss may have been the result of negligence on the part of the collector. It is necessary to show that it was.

"5. That the jury cannot find a verdict in favor of the plaintiff if they find that the loss of this trunk was due to the personal negligence or violation of statutes or regulations on the part of the customs officers other than the defendant personally.

"6. That the inspector who examined plaintiff's trunk, having found therein what he believed to be dutiable articles, was obliged to turn said trunk over to others of the officers of the customs for appraisement and assessment of duty, and

until such appraisement and assessment of duty and the payment of the duty as assessed the plaintiff was not entitled to the possession of the trunk.

"7. That the defendant is not responsible in this action for the withholding the plaintiff's trunk and its contents.

"8. That if the customs officials at the vessel misinterpreted their duty, and did an act which was in law a trespass or conversion, the defendant is not responsible, he not having been present and not having been a party to the wrong interpretation of duty acted on by the customs officers at the vessel.

"9. That the defendant is not responsible for the trespasses, conversion, or other faults of his subordinates committed by them even in the line of their duty, unless he was personally a party to the same.

"10. That the law, as provided in § 2652 of the Revised Statutes, made it the duty of the customs officers at the vessel by which the plaintiff's trunk was imported, to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the laws.

"11. That it appears by the evidence in this case that one of the instructions by the Secretary for the guidance of the officers at the vessel in which the plaintiff's trunk came was a provision that, whenever any trunk or package brought by a passenger as baggage contains articles subject to duty, the value whereof exceeds five hundred dollars, or, if the quantity or variety of dutiable articles is such that the proper classification and examination for appraisement thereof cannot be made, the trunk or package will be sent to the public store for appraisement.

"12. That this instruction of the Secretary had and has the force of law for the facts in this case.

"13. That the instructions devolved upon the customs officials at the vessel a discretion to determine whether the quantity and variety of the dutiable articles was such that the proper classification and examination for appraisement thereof could not be made at the vessel, and, if they determined it could not be, to send the trunk and its contents to the public store for appraisement.

"14. That in the exercise of this discretion those officers, and the collector as their superior, are not responsible for any error of judgment in making the determination whether the quantity or variety of the dutiable articles was such, prior to sending the trunk to the public store.

"15. That the officers at the vessel, and the collector as their superior, can, if at all, only be held responsible for bad faith in the exercise of the discretion thus devolved upon them by the regulation established by the Secretary, under the law."

The court charged the jury, that if one of the subordinate officers of the customs, in the course of the performance of his duty, did an absolute wrong to the plaintiff, such as to take her trunk from her and keep it from her when she wanted it and was by law entitled to it, the defendant would be liable. The defendant excepted to this charge. The court gave further instructions, which bore upon the matters set forth in the defendant's request to charge, but which, in the view we take of the case, it is not important to notice. The bill of exceptions states, that the court did not comply with the defendant's requests to charge further than as appears by the charge as stated, and that the defendant excepted to the refusal to charge as to each request separately, so far as the court did refuse.

The jury found a verdict for the plaintiff for $459. The court ordered that a certificate of probable cause be entered, and on the verdict, with costs added, a judgment was entered for the plaintiff for $502.96, to review which the defendant brought a writ of error.

Mr. Solicitor General for plaintiff in error.

Mr. Edward Jacobs for defendant in error.

Mr. Justice Blatchford, after stating the case as above reported, delivered the opinion of the court.

We are of opinion that there was error in the charge of the court, and that the defendant was not liable for the wrong, if any, committed by his subordinates, on the facts of this case.

There is nothing in the evidence to connect the defendant personally with any such wrong. No evidence was given that the officers in question were not competent, or were not properly selected for their respective positions. The subordinate who was guilty of the wrong, if any, would undoubtedly be liable personally for the tort, but to permit a recovery against the collector, on the facts of this case, would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.

This principle is well established by authority. It is not affected by the fact that a statutory action is given to an importer, to recover back, in certain cases, an excess of duties paid under protest; nor by the fact that a superior officer may be held liable for unlawful fees exacted by his subordinate, where lawful fees are prescribed by statute, and where such fees are given by law to the superior, or for the act of a deputy performed in the ordinary line of his official duty as prescribed by law. The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests. Story on Agency, § 319; *Seymour* v. *Van Slyck*, 8 Wend. 403, 422; *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *Gibbons* v. *United States*, 8 Wall. 269; *Whiteside* v. *United States*, 93 U. S. 247, 257; *Hart* v. *United States*, 95 U. S. 316, 318; *Moffat* v. *United States*, 112 U. S. 24, 31; *Schmalz's Case*, 4 C. Cl. 142.

The head of a department, or other superior functionary, is not in a different position. A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the sub-

agents or servants or other persons properly employed by or under him, in the discharge of his official duties. Story on Agency, § 319.

In *Keenan* v. *Southworth*, 110 Mass. 474, it was held, that a postmaster was not liable for the loss of a letter, occasioned by the negligence or wrongful conduct of his clerk. The court said: "The law is well settled, in England and America, that the postmaster general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders." The court cited, to sustain this view, *Lane* v. *Cotton*, 1 Ld. Raym. 646; *S. C.* 12 Mod. 472; *Whitfield* v. *Le Despencer*, Cowp. 754; *Dunlop* v. *Munroe*, 7 Cranch, 242; *Schroyer* v. *Lynch*, 8 Watts, 453; *Bishop* v. *Williamson*, 2 Fairf. (Maine), 495; *Hutchins* v. *Brackett*, 2 Foster (22 N. H.), 252.

To the same purport are *Bailey* v. *The Mayor*, 3 Hill, 531; *Conwell* v. *Voorhees*, 13 Ohio, 523, 543; Story on Bailments, §§ 462, 463; 1 Bell Com. 468, 5th ed.; 2 Kent Com., 4th ed., 610, 611.

The very question here involved came before the Circuit Court of the United States for the Southern District of New York, in the case of *Brissac* v. *Lawrence*, 2 Blatchford, 121, in June, 1850. The defendant was the collector of the port of New York. Imported goods belonging to the plaintiff had been deposited in a custom-house warehouse, and were either lost or mislaid there, or were delivered to some person not entitled to them. At the trial it was sought to show carelessness on the part of the defendant, as the head of the custom-house department, in the manner in which the books of the warehouse were kept, and also that the book-keeper was a person of intemperate habits and unfit for the situation. On the other hand, it was proved that the books were kept in conformity with the mode usually adopted at the time for keeping books of that kind; that the intemperate book-keeper had been discharged; and that, during a period of nineteen months, out of two hundred thousand packages of goods which had

been received at the warehouse in question, only two packages had been lost. Mr. Justice Nelson, in charging the jury, submitted to them the question whether the collector had been guilty of personal negligence in respect to the goods. In the course of the charge, the court said: "The collector is not personally responsible for the negligence of his subordinates in the custom-house department, and, therefore, he is not responsible for the negligence of persons employed in the warehouse department. . . . In order to charge the defendant with the loss, it is necessary that the plaintiffs should satisfy you, by affirmative and responsible testimony, that the collector was personally guilty of negligence in the discharge of his duty, either by misdeed or by omission. . . . This is a suit against the collector, who did not have charge of the goods; and, in order to render him liable, you must find him to have been guilty of personal neglect, misfeasance, or wrong. . . . In view of the fact that the collector of New York has charge of all the business from which two-thirds of the entire revenue of the United States is collected, and has thousands of subordinates, and upon the evidence that only one package out of every one hundred thousand which passed through the hands of those subordinates has been lost, it is strange that this case has been so urgently pressed, with the idea that, upon any principle of equity, much less of law, there could be any liability on the part of the collector." The jury found a verdict for the defendant. (See, also, *United States* v. *Brodhead*, 3 Law Reporter, 95; Wharton on Agency, § 550.)

The judgment of the Circuit Court is reversed, and the case is remanded to that court with a direction to grant a new trial.

STUART *v.* GAY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 255. Submitted April 26, 1888. — Decided May 14, 1888.

When a decree of foreclosure and sale of mortgaged property grants to the purchaser a credit for part of the purchase money, reserving a lien upon the property to enforce its payment, the court may, if the purchaser make default, and no rights of innocent third parties have intervened, order a resale of the property upon a rule to the purchaser to show cause why it should not be done.

The decree of foreclosure in this case conferred upon the purchaser at the foreclosure sale no such right of acquiring the securities of the lower classes to be paid from the fund realized from the sale, as would authorize him, as such purchaser, to dispute, in a proceeding in the original suit for foreclosure to compel payment of the amount remaining due of the purchase money, the computations by the master, confirmed by the decree of the court, of the amounts which the creditors of the higher classes were to receive from the fund.

In marshalling the classes of debts entitled to be paid out of a fund arising from a sale of mortgaged property under a decree of foreclosure, it is immaterial whether the master calculates the interest to a day prior to the date of the decree of sale, or up to that day, for the purpose of determining the principal sum that is to bear interest thereafter.

THE decrees which are the subject of the present appeal were rendered in a suit brought to enforce certain deeds of trust and mortgage liens upon a tract of land in Greenbrier County, West Virginia, known as the White Sulphur Springs, in which it became necessary to sell the property for the payment of debts, and to marshall the liens on the same in the order of their priority. The bill was filed in March, 1868, by Charles S. Gay and his wife and others, creditors and lien holders, suing as well for themselves as for all other creditors having liens on the real estate, the title to which, subject to the incumbrances, was then vested in the White Sulphur Springs Company. A portion of the indebtedness was represented by negotiable bonds, with coupons representing accruing interest thereon, and some of these had been severed

from the principal obligation and bought for value by other holders.

On April 23, 1868, the cause was referred to a master to report the amount and priorities of all liens upon the property, whether created by mortgage, deed of trust, judgment, or otherwise. On April 21, 1876, the master filed a report giving a statement of the liens, the name of each creditor, with the amount of the principal debt due to each, the amount of the interest accrued thereon, and showing the total debt in each case, including principal and interest. The indebtedness was classified according to the order of priority of the liens. The first six classes of debts enumerated in this report are the only ones material to be considered, as in any event they absorb the whole amount for which the property was subsequently sold. In the aggregate they amounted to $299,857.88, of which $185,133.27 is principal, and $114,724.61 is interest. The interest was calculated to and aggregated as of the same date, October 15, 1875, as to all the debts except the debts in the first class known as the Singleton trust debt, upon which the unpaid interest, amounting to $36,000, was calculated to July 1, 1868; the master reporting that all interest accrued on this debt after that date had been paid.

On April 28, 1876, the court by a decree confirmed this report, no exception having been taken thereto, the decree having in fact been entered by the consent of parties. That decree also contained a clause declaring that the interest on the Singleton debt of $36,000, which had remained unpaid from July 1, 1868, should constitute a principal sum, bearing interest from the date of the decree. There was no express declaration in the decree in respect to the computation of interest on the other debts after October 15, 1875.

On May 5, 1877, a decree of sale was made in which there was no finding of any specific amount due, in default of the payment of which the property should be sold, but a recital that it appeared to the court "that it is now for the interest of all the parties to this suit and of all others interested in the subject involved therein, and there being now no objection, except on the part of the White Sulphur Springs Company, that

there shall be a sale of the property known as the White Sulphur Springs property, and an application of proceeds of said sale among the parties entitled thereto, according to their legal rights and priorities." The decree appointed commissioners to make the sale, who were required to receive from the purchaser the payment of ten per cent of the purchase money in cash at the time of the sale, and for the residue giving a credit of one, two, three, four, and five years, in equal instalments, with interest thereon from the day of sale, and requiring good personal security for the payment of the first of said annual instalments, and retaining the title as further security for all of said instalments, or, in lieu of such personal security required of the purchaser for the first instalment of purchase money, the commissioners were authorized to receive from the purchaser as collateral security therefor any evidences of debt proved in the cause, and which it may appear to the commissioners will certainly be paid from the proceeds of the sale, and which may belong to the purchaser offering the same as collateral security, the just and fair amount of which collateral shall be determined by the commissioners.

On May 4, 1878, no sale having been made, the court entered a decree reciting that the interest on three bonds known as Erskine bonds, being those reported in class No. 6 by the master, and being designated as No. 1, 2, and 3 of that class, for the year ending October 15, 1868, and on the Beard bond, designated as No. 4, in the same class, from October 15, 1868, to October 15, 1877, except four per cent for the two years ending October 15, 1875, and October 15, 1877, had not been paid; that the property was ample to pay these bonds, principal and interest, as well as all prior liens, and that a sale of the property had been postponed in the interest of subsequent liens; and adjudged that the said unpaid interest on said bonds should stand on the same footing with the interest on said bonds which is evidenced by coupons, and bear interest from the dates at which said interest became due until paid, and that the assignees and holders of the interest of said bonds for said years, or any part thereof which had been assigned and transferred by the holders of the bonds, should be entitled to have

priority over said bonds, coupons, and other interest not transferred; such interest, however, transferred as aforesaid, to be entitled to priority according to the dates of its maturity.

On May 4, 1880, a decree was rendered confirming a sale of the premises previously reported as having been made by the commissioner for that purpose, to William A. Stuart, for $340,000, wherein it was directed that the purchaser be at once put in possession of the property, the title thereto being retained by the court as security for the payment of the purchase money. The commissioners were directed to proceed to collect from the purchaser the cash payment of ten per cent upon the aggregate of the purchase money. The decree also contained a declaration that the court "will hereafter make such orders as may be proper for the collection of the deferred instalments of the purchase money and the distribution of the same among the parties to this suit, according to their respective rights and interests." The commissioners in their report of the sale stated that they had taken from the purchaser his five bonds, each for the sum of $61,290, payable, respectively, at one, two, three, four, and five years, bearing six per cent interest from the day of sale, and on the bond due one year after date that they had taken personal security.

On March 1, 1882, a decree was made appointing a special commissioner for that purpose, and directing him to execute to William Stuart a deed with a special warranty for all the property purchased by him at the sale made on March 31, 1880, in pursuance of the decree of sale previously rendered in the cause; and directing that the deed reserve a lien upon its face for the unpaid purchase money until the same is fully paid off and discharged. The commissioner was further authorized and directed to settle with the said Stuart at any time, upon his application, so far as the bonds for the purchase money had already matured, or as the same should thereafter mature, "by crediting upon the said bonds the amounts to which the said William A. Stuart is entitled to credit for the liens held by him, as recognized by the previous decrees of this court establishing the order and priority of liens, and by receiving from him in cash so much of the

amount of said bonds as may be going to other lien holders;" and the commissioner "is also authorized to cancel and deliver to said William A. Stuart any one or more of his said bonds, whether the same have matured or not, on being satisfied that the said Stuart is then holder and owner of all the claims payable out of the proceeds of such bond or bonds." The commissioner was also instructed to report to the court from time to time his proceedings under the decree.

On January 5, 1884, a decree was made upon a report of the commissioners of sale asking to be instructed as to the proper manner of disbursing the fund. It was therein ordered and decreed "that the commissioners of sale, in disbursing and distributing the proceeds of the sale of the White Sulphur Springs property heretofore made by them under a decree of this court in this cause, and in paying therewith the debts heretofore reported and decreed to be paid, shall calculate interest upon the aggregate amount of the principal and interest thereof, aggregated as of October 15, 1875, the date to which the calculations are brought in the report of commissioner H. M. Mathews, heretofore made, filed, and confirmed in this cause, and not upon the original principals alone."

On May 12, 1885, the commissioners of sale reported that the fourth and fifth bonds executed by Stuart, the purchaser, were past due and unpaid, each of said bonds being for the sum of $61,290, with interest from March 30, 1880, on which there was due at the date of said report the sum of $160,212.06. An order was thereon entered that a rule issue against the said William A. Stuart, returnable on the 23d day of the same month, requiring him to appear and show cause why the property sold as aforesaid by the commissioners of sale in this cause to him should not be resold at public auction for cash to pay the unsatisfied instalments of purchase money due by him as aforesaid, and why a decree should not be made against him for so much of the unpaid purchase money as the property upon a resale might not pay off and discharge, together with the costs of the proceedings. This rule having been returned served, Stuart, by leave of the court,

filed a petition praying that the decree of January 5, 1884, be vacated, and that in lieu thereof the commissioners of sale be directed, in distributing the proceeds of the sale of said real estate and paying the five first liens thereon, to calculate the interest on the original principal of each of said liens, and not upon the principal and interest thereof aggregated and compounded as directed by the decree of January 5, 1884. In that petition he sets forth that by computing interest on the principal sums, as set out in the master's report of April 21, 1876, included in the first six classes, there would be due in the aggregate about the sum of $330,000 on the day of sale, and that according to that calculation the net proceeds of the sale, after deducting the costs of suit, would pay off in full the five first liens and about $130,000 on the sixth, but a very much less amount computing interest on the principal and interest aggregated of said liens from October 15, 1875. The petition further alleges that before the sale of the real estate to himself, he became the purchaser of a large number of the debts reported as liens in the sixth class, and thus became entitled to all of the proceeds of the sale applicable to that class, with certain exceptions therein stated. The petition thereupon states that by the order of January 5, 1884, made long after the sale, and after the petitioner had become entitled to the proceeds thereof applicable to the larger part of the sixth class of debts, the interest-bearing fund of said six first liens was changed from $185,133.27, the original principal of said liens, to the sum of $299,857.88, the principal and interest of said liens aggregated as of October 15, 1875, and the sum of $114,724.61 interest on said six first liens is thus made to bear interest for almost four and one-half years before sale is made, and also after sale until reached in their proper order of priority as the purchase money of said real estate fell due under the said sale, and that in this way a sum over $30,000 of the proceeds of said sale is applied to the payment of interest upon the interest of said liens, the principal part of which will, under said order of January 5, 1884, be applicable to the interest computed on the said sixth lien, and the entire amount of which will be deducted from the

principal of the debts in the said sixth lien, all of which principal is owned and controlled by the petitioner except $907.67. On May 25, 1885, this petition was considered, its prayer for relief denied, and the decree of January 5, 1884, confirmed. Stuart then moved the court to quash and discharge the rule awarded against him on a previous day of the term, which motion the court overruled; and thereupon, by leave of the court, he filed an answer to the rule; when a decree was rendered finding due from Stuart on account of the purchase money for the said sale, the sum of $160,212.06, with interest thereon from May 12, 1885, for the payment of which a decree was rendered against him, and that unless within thirty days from that date he should pay the amount decreed against him, the commissioners should proceed, upon proper notice, to resell the property heretofore sold in the cause and bought by him, at public auction, to the highest bidder for cash. From this decree Stuart prayed an appeal, which the court refused to allow "because the decrees in this cause fixing the rights of the parties, determining the amounts, dignities, and priorities of the debts, and directing sale of the property, were all entered more than five years ago, and the decree of January 5, 1884, was simply explanatory of a former decree."

Subsequently, on July 2, 1885, a petition for an appeal was presented by Stuart to Mr. Justice Harlan of this court, praying an appeal which was allowed, from the decree of January 5, 1884, compounding the interest on the debts theretofore reported in said cause against the company as of October 15, 1875, and directing the commissioners, in distributing the proceeds of the sale of the company's property, to pay interest upon the interest on the said debts as of the date last aforesaid, and from the decree rendered May 25, 1885, rejecting the petition for relief from the decree of January 5, 1884, and directing a resale of the property. The errors assigned are nine in number, but may be reduced to two:

First. That the decree of January 5, 1884, is erroneous in aggregating all the principal and interest of all the debts reported against the White Sulphur Springs Company as of the 15th day of October, 1875, as stated in said Commissioner

Citations for Appellees.

Mathews's report, and making said aggregate an interest-bearing fund as of that date. And in reference to this it is stated that "the court, by its decrees of April 28, 1875, and of May 4, 1878, had adjudicated just how much of the interest on these debts should bear interest and from what time, viz., $36,000 of the Singleton debt from April 28, 1876; one year's interest on the Erskine debt from October 15, 1868; and the interest on the S. C. Beard debt of $907.67 for the years ending October 15, 1868, to October 15, 1877, subject to certain credits, and gave special reasons therefor; and it was error in the court to reverse or modify the adjudication so made, especially after your petitioner had become the owner of liens affected by said adjudication and the purchaser of the property, with the right to use said liens in payment therefor, relying upon the adjudication aforesaid, and as the same had been adjudicated" in accordance with the decree of March 1, 1882.

Second. The decree of May 25, 1885, is erroneous in overruling the motion to quash and discharge the rule for a resale, and in decreeing a resale of the property upon the rule after the court had parted with the title thereto, and had conveyed the property to the appellant, retaining a vendor's lien in the deed for the unpaid purchase money.

Mr. E. B. Knight for appellant cited: *Ballard* v. *Whitlock*, 18 Grattan, 235; *Clarkson* v. *Read*, 15 Grattan, 288; *Glenn* v. *Blackford*, 23 West Va. 182; *Wiswall* v. *Sampson*, 14 How. 52; *Story* v. *Livingston*, 13 Pet. 359; *Lightfoot* v. *Price*, 4 Hen. & Munf. 431; *Genin* v. *Ingersoll*, 11 West Va. 549; *Lamb* v. *Cecil*, 25 West Va. 288.

Mr. John E. Kenna and *Mr. Alexander F. Mathews* for appellees cited: *Fleming* v. *Holt*, 12 West Va. 143; *Ruffner* v. *Hewitt*, 14 West Va. 737; *Sneed* v. *Wister*, 8 Wheat. 691; *Koshkonong* v. *Burton*, 104 U. S. 668; *Railroad Co.* v. *Turrill*, 101 U. S. 836; *Holden* v. *Trust Co.*, 100 U. S. 72; *Goddard* v. *Foster*, 17 Wall. 123; *Cromwell* v. *Sac County*, 94 U. S. 351; *Hemmenway* v. *Fisher*, 20 How. 255; *Perkins* v.

Fourniquet, 14 How. 328; *Mitchell* v. *Harmony*, 13 How. 115; *Simmons* v. *Garrett*, McCahon (Kansas), 82; *Reeside* v. *United States*, Devereux C. Cl. 216; *Young* v. *Godbe*, 15 Wall. 562; *Burgess* v. *Seligman*, 107 U. S. 20; *Bickman* v. *Cross*, 2 Ves. Sen. 471; *Binnet* v. *Edwards*, 2 Vern. 392; *Bacon* v. *Clark*, 1 P. Wms. 478; *Turner* v. *Turner*, 1 Jacob & Walker, 39; *Brown* v. *Barkham*, 1 P. Wms. 652; *Astley* v. *Powis*, 1 Ves. Sen. 495; *Raphael* v. *Boehm*, 11 Ves. 92; *Dunbar* v. *Woodcock*, 10 Leigh, 628; *Requa* v. *Rea*, 2 Paige, 339; *Harding* v. *Harding*, 4 Myln. & Cr. 514; *Clarkson* v. *Read*, 15 Grattan, 288.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

The appellant cannot justly complain of the decree for a resale on the ground that it was rendered upon a rule to show cause. It does not appear that he was or could have been prejudiced by the summary nature of the procedure. He had full opportunity to answer, and was heard upon all the matters of defence, both in his answer to the rule and his petition for a rehearing of the decree of January 5, 1884. All the equities to which the appellant conceived himself entitled were fairly and fully before the court. No rights of innocent strangers had intervened, although the appellant had conveyed his title to the White Sulphur Springs Company. That company acquired its interest *pendente lite*, and with full notice from the record that the purchase money was in part unpaid, and that there was a subsisting lien reserved as security for its payment. The action of the court was simply to enforce its own decree against a purchaser from itself to compel compliance on his part with his contract. The cause was open and pending, awaiting a final decree distributing the proceeds of the sale, in which no further step could be taken until those proceeds were paid into court in compliance with its orders. For that purpose the court had control of the title to the real estate sold by virtue of the decree for sale, and the reservation of a lien for the unpaid purchase money expressed in the deed.

There was no reason for a resort to an original bill; the most suitable and convenient practice was to enforce the obligation of the purchaser in the same cause by a supplemental proceeding, and it was within the discretion of the court to adopt as the proper method in this case the form of a rule to show cause.

Such is the clear implication from what was said by this court in *Koontz* v. *Northern Bank*, 16 Wall. 196, 202: "If . . . the court was deceived by the report of the receiver or master, and the purchaser participated in creating the deception, it could undoubtedly, at any time before the rights of innocent purchasers had intervened, have set the whole proceedings, including the deed, aside. But after the rights of such third parties had intervened its authority in that respect could only be exercised consistently with protection to those rights."

The rule is thus laid down in 2 Daniell's Chancery Practice, 1282, c. 29, § 1: "According, however, to the present practice, a more complete remedy is afforded against a purchaser refusing without cause to fulfil his contract; for the plaintiff may obtain an order for the estate to be resold and for the purchaser to pay, as well the expenses arising from the non-completion of the purchase, the application, and the resale, as also any deficiency in price arising upon the second sale. This order was made by Lord Cottenham in *Harding* v. *Harding*, 4 Myln. & Cr. 514, after consultation with the other judges of the court; and although in that case the purchaser was a defendant in the cause, it does not seem that that fact was considered as necessary in order to enable such an order to be made." In *Campbell* v. *Gardner*, 3 Stockton (11 N. J. Eq.) 423, 425, it was held that after a sale upon an execution out of a court of chancery, and a delivery of the deed, the court may, upon a proper cause made, open a sale upon a petition, and it is not a valid objection to this course that the deed has become a matter of record. If a resale is ordered, the court may require the first purchaser to release to the purchaser on the resale all the title he may have acquired, so that the title may stand upon the record wholly disembarrassed. See *Conover* v. *Walling*, 2 McCarter (15 N. J. Eq.) 173.

As the court below committed no error to the prejudice of the appellant in the mode of the procedure, we have to consider whether it disallowed any substantial equity to which he was entitled. The equity of the appellant, then asserted and here renewed, arises upon his construction of the orders and decrees of the court. The decree of March 1, 1882, upon the authority of which the deed was executed and delivered to the purchaser, and which directed that a lien should be reserved therein for the unpaid purchase money until the same is fully paid off and discharged, also directed the commissioners to settle with the purchaser upon his application, so far as the bonds for the purchase money had already matured, or as the same should thereafter mature, "by crediting upon the said bonds the amounts to which the said William A. Stuart is entitled to credit for the liens held by him, as recognized by the previous decrees of this court establishing the order and priority of liens, and by receiving from him in cash so much of the amount of said bonds as may be going to other lien holders." And the commissioners were "also authorized to cancel and deliver to said William A. Stuart any one or more of his said bonds, whether the same have matured or not, on being satisfied that the said Stuart is then holder and owner of all the claims payable out of the proceeds of such bond or bonds."

It appears that in pursuance of this authority, the commissioners of sale, on October 20, 1883, received from Stuart certain securities designated by reference to the list and classification contained in the master's report of April 21, 1876, specifying the amount of the principal sum represented by each, but without any calculation of interest, or any statement of the aggregate amount which on account thereof was to be credited on the bonds of the purchaser given for the purchase money. The language of the receipt given by the commissioners is: "Received of W. A. Stuart the above securities, which are applied first to the discharge of the three purchase-money bonds of said Stuart first falling due, given for the Greenbrier White Sulphur Springs property sold by the United States District Court, at Charleston, the said bonds

being for $61,290 each, and bearing interest from March 31, 1880, and which are this day delivered to said Stuart. The amount covered by this list of securities, after discharging the three bonds aforesaid, is to be by us credited on the fourth bond of said Stuart of like amount with each of the other three and bearing interest from same time."

The specific claim made by the appellant is, that he is entitled to have these securities credited on his purchase-money bonds at an amount in the aggregate ascertained by a calculation of simple interest, upon the face of the principal sum, from the time when interest began to accrue and became in default until the date of their application to the payment of the purchase-money bonds, with the exception of the instances where by previous decrees interest upon interest had been expressly allowed; whereas the rule adopted by the court by the order of January 5, 1884, required the commissioners of sale, in distributing the proceeds of sale, and in paying therewith the debts reported and decreed to be paid, to calculate interest upon the aggregate amount of principal and interest thereof aggregated as of October 15, 1875, the date to which the calculations are brought in the report of the master filed April 21, 1876.

It is complained of this decree that it was made after the rights of the parties had become fixed by what had already been done under the previous orders of the court, and that the situation of the appellant was thereby altered greatly to his disadvantage. In reliance upon his construction of the previous orders of the court, the appellant had become the purchaser of almost all the obligations enumerated in the sixth class of the master's report in the expectation that, upon a calculation of the amount due to those entitled to priority, the obligations thus acquired by him would be satisfied, or nearly so, out of the proceeds of the sale. The transactions by which he acquired the ownership of these claims took place, respectively, on April 23, 1875, March 15, 1876, and March 31, 1880, the last being the date of the sale.

It is evident, in the first place, that the cause of complaint asserted by the appellant does not belong to him legitimately

in his capacity as purchaser. The decree for sale rendered May 15, 1877, did not contemplate payment of the purchase money otherwise than in money. It gave a credit running through a period of five years in equal annual instalments, with interest on each. There was nothing in the decree which authorized the purchaser to assume that he would not be called upon to pay each instalment as it fell due in cash. As a purchaser, therefore, bound for the payment of specific sums at given dates, and who cannot be compelled to pay more, and has no right to expect to pay less, it must be a matter of indifference how the proceeds of that sale shall be distributed among the creditors entitled thereto. The different modes of computing interest on the debts to be paid may affect relatively the creditors themselves, giving to one class more and to the other less, but it can make no difference in the amount of the fund to be distributed arising from the proceeds of the sale. The complaint of the appellant, therefore, if he has any, must be put forward in his capacity as a creditor in respect to his rights upon distribution; but upon the view most favorable to him the distribution of the proceeds of the sale, and all questions arising thereon as between creditors, were before the court and undecided, except in the instances already referred to where express declarations were made in respect to the mode of computing interest upon interest in individual cases. The appellant was bound to know, and ought to have acted upon the assumption, that all possible matters of question to arise upon the distribution of the proceeds of the sale were still open for the final decision of the court. If he chose to act upon his individual judgment of what that decision would be, he acted at his peril. The decree of January 5, 1884, was such a decision, directing the mode of calculating interest upon the debt in distributing the proceeds of sale, and there is nothing in it inconsistent with any prior decision or decree of the court upon the same subject. Neither the decree of sale of May 5, 1877, nor the decree of March 1, 1882, directing the execution of the deed and reserving a lien for the unpaid purchase money, contained any direction as to the mode of computing interest upon the debts to be

paid. It cannot, therefore, be now held that the appellant has been misled to his disadvantage in having acted upon the faith of any of the previous decrees of the court in the cause.

The question, however, still recurs whether the rule for computing interest on the debts as the basis of distribution adopted by the court in its decree of January 5, 1884, is correct as a matter of law. On this point there is no reason for doubt. The decree of sale, as we have already stated, contained no finding of the amount of the indebtedness, nor of the persons to whom it was owing, and no order for its payment as a condition of redeeming the property from the necessity of sale. But the report of the master of April 21, 1876, contained a full and carefully prepared detail of all the items constituting the indebtedness, with a list of the creditors, a classification according to the order of priority in the matter of lien, and a calculation of interest to October 15, 1875, upon all debts, except those embraced in class No. 1, in respect to which special provision was subsequently made showing the total amount then due to each creditor. It is not stated anywhere in the record why the date of October 15, 1875, was selected by the master as a place of rest in the calculation of interest, but it must have been taken as the most convenient day for calculations in reference to closing the report, which evidently required considerable time for its preparation. If the calculation had been made as of the date of the decree for sale, with a view to the insertion therein of the amounts due to the several creditors, on payment of which the sale might be averted, the interest would have been brought down most properly to that date and added to the principal to constitute the whole sum then payable. If not paid at that time, the aggregate of principal and interest thus combined would have constituted the new principal, which, according to the uniform practice of the court, would bear interest from that date. In that case there could have been no complaint made against compounding interest. We think a similar effect must be given to the decree of the court confirming the master's report made April 28, 1876. It substantially declared the amount due October 15, 1875, as consisting of the principal

sums and interest to that date added for the purposes of the sale and distribution, and the decree of January 5, 1884, directing the calculation of interest for purposes of distribution upon the aggregate amount of the principal and interest as of October 15, 1875, was only a proper explanation of the decree of April 28, 1876, confirming the master's report. The date of the confirmation of that report was a suitable period in the progress of the cause, where the creditors were so numerous and the calculations so complicated, for the court to fix, for the information and guidance of all concerned, the amount severally due to each creditor with the order of priority in which he was entitled to be paid. The amounts to be found due necessarily embraced the principal sum with the accrued interest up to a fixed date, and from that period the aggregate became the sum of the debt, the whole of which thenceforth properly carried interest. No exception was taken to the report; it was confirmed by the court; and, in our opinion, it cannot reasonably bear any other construction than that which the court subsequently placed upon it.

Upon the whole case, no injustice has been done the appellant; and the decree of the District Court of West Virginia is *Affirmed.*

EASTON *v.* GERMAN-AMERICAN BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 291. Argued May 4, 1888. — Decided May 14, 1888.

A creditor whose debt is secured by a deed of trust of real estate to a third party as trustee, may purchase the property at a sale by the trustee under the terms of the trust; and if he credits the debtor on the mortgage debt with the amount of the purchase money, it is in fact and in law a money payment to the use and benefit of the debtor.

The plaintiff in error acquired by the purchase from the assignee in bankruptcy no interest either in the debt of the bankrupt to the defendant in error, or in the real estate conveyed in trust to secure it.

Statement of the Case.

THE court stated the case as follows:

On April 14, 1875, the firm of Bowen Brothers, of Chicago, borrowed of the German-American Bank of New York the sum of $27,500, for which they gave their promissory notes, payable, respectively, in two, three, and four months from date. As collateral security for the payment of the loan they deposited with the bank forty bonds executed by themselves, payable to bearer five years from date, with interest semi-annually, of the denomination of $1000 each, dated April 1, 1873, the payment of which was secured by a deed of trust made by the individual members of the firm to George W. Smith, conveying to him certain real estate therein described, situated in Cook County, Illinois. By the terms of the written agreement, under which the collateral security was deposited, the bank was authorized, on non-payment of the notes at maturity, to sell the bonds either at the board of brokers, at public auction, or at private sale, and without notice, and to apply the proceeds of the sale to the payment thereof. These collateral bonds thus deposited were part of a series of one hundred of like tenor and amount, all secured by the deed of trust to Smith. That deed of trust provided that, in case of default in the payment of the bonds or interest, it should be lawful for the trustee, on the application of the holder of any of the bonds, to sell the real estate or any part thereof, and all the right and equity of redemption of the grantors therein, at public vendue, to the highest bidder, for cash, and, upon making such sale, to execute and deliver a deed of conveyance in fee of the premises sold. In January, 1877, the trustee in the trust deed, upon the application of the State Savings Institution of Chicago, the holder of thirty-two of the bonds upon which there had been a default for non-payment of interest, sold the real estate in strict conformity with the terms of the power in the trust deed, after due notice, at public auction, to Wirt Dexter, for the sum of $50,000, and conveyed the premises to the purchaser in pursuance of the same. Dexter, in making the bid and purchase of the premises at public auction, acted as agent for the holders of all the bonds,

including the German-American Bank, he having been authorized by them to bid for and purchase the property for them jointly. Thereafter he conveyed an undivided forty one-hundredths of the property purchased by him, and in a partition suit that interest in the real estate was set off, to the German-American Bank in severalty. Dexter paid no money in bidding in the property except the actual costs of the sale, but the trustee credited upon the bonds held by the German-American Bank forty one-hundredths of the amount of the bid, being $472 upon each bond; and the whole sum, amounting to $18,880, was indorsed as a payment on the three notes. The German-American Bank continued to hold title to the real estate conveyed to it by Dexter until February 8, 1881, when, in consideration of $56,000, the bank conveyed the same in fee to John C. Dore, and thereafter, in February, 1882, also delivered to Dore the forty bonds then in its possession with the credits indorsed thereon. These bonds were delivered to Dore in accordance with an agreement dated February 19, 1881, which recited that Dore "desires to obtain possession and ownership of said forty bonds in connection with the purchase of said property from said bank."

In the meantime, the members of the firm of Bowen Brothers, on November 10, 1877, were adjudged bankrupts on a petition filed on June 2 of that year; and during 1878 they severally received their final discharges in bankruptcy. On April 21, 1880, Robert E. Jenkins, assignee in bankruptcy of the Bowen Brothers, by an order of the court, sold all his right, title, interest, and claim as assignee, and all right, title, interest, and claim of the bankrupts in and to the land described in the trust deed, to Carl F. Hermann for the sum of $840, and afterwards conveyed the same to him by deed dated and acknowledged May 13, 1880. The assignee also on April 21, 1880, sold to the appellant, Charles L. Easton, for the sum of $5, the claim against the German-American Bank of New York "for interest in all collaterals pledged with said bank by said bankrupts or either of them;" and by a deed dated May 15, 1880, assigned the same by the same description to him.

Statement of the Case.

It was not denied that John C. Dore purchased the land from the German-American Bank with knowledge of the previous conveyances by the assignee in bankruptcy, to Hermann and to Charles L. Easton.

On February 24, 1881, James H. Easton, a brother of the appellant, having succeeded to the title of Hermann to the land in question, filed a bill in equity in the Circuit Court of the United States for the Northern District of Illinois, against the German-American Bank, to which, by an amended and supplemental bill, John C. Dore was also made a defendant, in which were set forth substantially the facts stated in the present bill of complaint, and praying for an account against the German-American Bank, and that the complainant might be permitted to redeem the land on payment of what might be found due on the original loan to Bowen Brothers. It is admitted that this suit was brought in the name of James H. Easton, for the benefit of Josiah H. Helmer, the latter having previously acquired the title of Hermann and conveyed it to James H. Easton in order to enable the suit to be brought in the Circuit Court of the United States. Helmer himself had previously brought an action of ejectment to recover possession of the land. The ejectment suit was abandoned when the bill in equity was filed; and pending the bill, in September, 1883, before the commencement of the present suit, a settlement was made between Helmer and Dore, whereby, in consideration of a certain sum paid by Dore, both Helmer and James H. Easton, the latter at Helmer's request, by separate deeds released all their right, title, and interest in and to the lands in question to one Berger for the benefit of Dore.

On January 27, 1884, the present bill in equity was filed, wherein Charles L. Easton, claiming title by virtue of the deed of assignment made to him by Jenkins as assignee in bankruptcy of the Bowen Brothers, seeks to hold the German-American Bank accountable to him for the sum of $56,000, as the proceeds of the collaterals held by it realized from the sale of the real estate conveyed to the bank by Dexter, and a decree for any sum found due to it by reason thereof after payment from the said proceeds of the original indebtedness of Bowen Brothers to the bank.

Opinion of the Court.

The case was heard in the Circuit Court upon the pleadings and proofs disclosing the state of facts already recited, when a decree was rendered dismissing the bill for want of equity. From this decree the present appeal has been taken.

Mr. Charles P. Crosby and *Mr. Charles L. Easton*, in person, for appellant.

Mr. Edward Salomon for appellee.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

The right of the complainant to the relief prayed for is based upon the contention that the German-American Bank originally held the bonds secured by the deed of trust as a pledge given by way of security for the repayment of the loan to Bowen Brothers; that it has never sold that pledge, in pursuance of the terms of the agreement between the parties, and as required by law; that the land itself, the title to which was conveyed by Bowen Brothers to Smith in trust, was a mere incident to the pledge and a part of it; that notwithstanding the form of a sale under the trust deed by the trustee to Dexter, there was no sale in fact, and in law the conveyance by Dexter to the bank operated only to convey the title to the bank in the same capacity in which it held the bonds as collateral, that is, as trustee for the debtors; that the subsequent sale by the bank to Dore was the first effective conveyance of an absolute title, but was made by the bank in its capacity as trustee for the Bowens; and that as such the complainant, having succeeded to the Bowens' rights, is entitled to require the bank to account for its proceeds.

Where personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgor, but, if so, it can be only where the pledgor holds as agent of the pledgee. By virtue of the pledge, the pledgee has the right by law, on the default of the pledgor, to sell the property pledged in satisfaction of the pledgor's obligation. As in that

transaction the pledgee is the vendor, he cannot also be the vendee. In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale.

The same principle applies with a like result where real estate is conveyed by a debtor directly to a creditor as security for the payment of an obligation, with a power to sell in case of default. There the creditor is also a trustee to sell, and cannot purchase the property at his own sale for his own use.

In the present case, the bonds of the Bowen Brothers, secured by the deed of trust, were pledged to the German-American Bank as security for the repayment of the loan made to the Bowen Brothers, but those bonds have not in fact been sold, unless the transfer of them by the bank to Dore be considered a sale. It was not such, however, in point of fact or of law; nothing was paid for them, and they were delivered to Dore merely as muniments of title in connection with his purchase of the real estate. At that time they were of no value, for they were merely the personal obligations of the Bowen Brothers, from which they had been released by the discharge in bankruptcy. No suit could have been maintained upon them as against the only obligors by whose discharge in bankruptcy they had lost their character as well as their value as property.

The equity of the complainant, therefore, if he have any, must be considered as transferred from the bonds themselves, viewed as instruments and obligations, to the money which had been received on account of them by virtue of the sale of the real estate by the bank to Dore. Whether the complainant can now assert any equitable interest in that money depends in the first place on the nature of the title which the bank acquired by the conveyance to it from Dexter; and whether the principles of a pledge, and of a trust arising thereon, apply to the real estate conveyed by the Bowens to Smith as a trustee to secure the payment of the bonds.

It is very plain, we think, that these principles do not apply. The land in question was conveyed by the debtor, not directly to the creditor, but to a stranger. That stranger, by virtue of the conveyance, held the legal title in trust for the purpose of sale according to the power contained in it. That power he executed in strict accordance with its terms. A default has been made by the debtor, and at the request of a part of the creditors he was required to sell the property at public auction to the highest bidder, without limit or condition, in order that the proceeds of the sale might be applied to the payment of the debt, to secure which the land had been conveyed in trust. The sale was made under the direction and control of the trustee, but, as the creditors who held the obligations of the debtors were not themselves trustees, there was nothing, either at law or in equity, to prevent their being bidders and becoming buyers at the trustee's sale. In reference to that sale they occupied no position towards the debtor of trust or confidence. They were charged in respect to it with no duty whatever. They had an interest in it that the property should produce enough to satisfy the debts which it had been given to secure. Beyond that they had neither interest nor duty, and in their own interest the creditors had a right to bid so as to prevent the property from being sacrificed at the sale below its value in order that it might be made to produce the largest amount towards payment of the debt.

The relation of a creditor secured by such a deed of trust to a sale made under a power given to a stranger as trustee does not differ from that of a mortgagee of real estate sold under judicial proceedings for foreclosure by a decree of a court of equity. At such a sale nothing is more common than for the mortgagee to become the purchaser; and it is as beneficial to the debtor as to himself that he should be permitted to enhance the competition at such a sale in order to protect his own interests. In that respect, his own interest coincides with that of his debtor, as it is for their mutual benefit that the property should not be sacrificed so as to leave any part of the debt unpaid.

It is argued, however, that in the present instance the sale

to Dexter was a sale only in form, and not in fact, because no money passed. This, however, is an error, because the whole amount bid by Dexter at the sale, which was the consideration for the conveyance to him by the trustee, was at once credited by the principal creditors, for whom he was acting as agent, as a credit of cash upon the overdue obligations of the debtor. In fact and in law it was a payment of money to the use and benefit of the debtors in pursuance of their authority.

In addition to this, there is another ground which equally supports the decree below. As already recited, the assignee in bankruptcy, in pursuance of an order of the court, sold and conveyed to Hermann all the interest which he as assignee and the Bowens as bankrupts had in and to the real estate in question; and by subsequent conveyances whatever title, if any, thereby passed has become vested in Dore for his use. All that was conveyed by the assignee to Charles L. Easton, the complainant in this suit, was the interest of the assignee and of the bankrupts "in all collaterals pledged with said bank by said bankrupts or either of them." If this can be considered as the conveyance of any interest in the real estate, it was ineffectual and void, because that interest had been previously conveyed by the same grantor to Hermann. If it is limited to the bonds of the Bowen Brothers secured by the deed of trust, it is equally ineffective, because there was nothing to convey. These bonds were the mere personal obligations of the bankrupts themselves, in which neither they nor their assignee had any right of property, and which had become extinguished as obligations in the hands of any one by the bankrupts' certificate of discharge.

For these reasons the decree of the Circuit Court is

Affirmed.

CALLAN *v.* WILSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1318. Argued January 16, 1888. — Decided May 14, 1888.

The provision in article 3 of the Constitution of the United States that "the trial of all crimes, except in cases of impeachment, shall be by jury," is to be construed in the light of the principles which, at common law, determined whether or not a person accused of crime was entitled to be tried by a jury; and thus construed, it embraces not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanors the punishment of which may involve the deprivation of the liberty of the citizen.

The provisions in the Constitution of the United States relating to trial by jury are in force in the District of Columbia.

A person accused of a conspiracy to prevent another person from pursuing a lawful avocation, and, by intimidation and molestation, to reduce him to beggary and want, is entitled, under the provisions of the Constitution of the United States, to a trial by jury.

The Police Court of the District of Columbia is without constitutional power to try, convict, and sentence to punishment a person accused of a conspiracy to prevent another person from pursuing his calling and trade anywhere in the United States and to boycott, injure, molest, oppress, intimidate and reduce him to beggary and want, although the Revised Statutes relating to the District of Columbia provide that "any party deeming himself aggrieved by the judgment of the Police Court may appeal to the Supreme Court" of the District.

THE court stated the case as follows:

This was an appeal from a judgment refusing, upon writ of *habeas corpus*, to discharge the appellant from the custody of the appellee as Marshal of the District of Columbia. It appears that by an information filed by the United States in the Police Court of the District, the petitioner, with others, was charged with the crime of conspiracy, and having been found guilty by the court was sentenced to pay a fine of twenty-five dollars, and upon default in its payment to suffer imprisonment in jail for the period of thirty days. He perfected an appeal to the Supreme Court of the District, but having subsequently withdrawn it, and having refused to pay the fine im-

posed upon him, he was committed to the custody of the Marshal, to the end that the sentence might be carried into effect.

The contention of the petitioner was that he is restrained of his liberty in violation of the Constitution. The various grounds of this contention will be considered, so far as it is necessary to do so, after we shall have ascertained the precise nature of the offence of which the petitioner was found guilty.

The information showed that one Franz Krause, Louis Naecker, August Naecker, Charles Arndt, Louis Naecker, Jr., Herman Feige, Gustav A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Caspar Windus, Ernest Arndt, and Christian Feige were, during the months of July and August, 1887, residents of this District, each pursuing the calling of a musician;

That, during those months, there was in the District an association or organization of musicians, by the name of "The Washington Musical Assembly, No. 4308, K. of L.," containing one hundred and fifty members, and a branch of a larger association known as "The Knights of Labor of America," extending throughout the United States, and having a membership of five hundred thousand persons, of which ten thousand were residents of this District;

That, during the period named, Edward C. Linden, Louis P. Wild, John N. Pistorio, James C. Callan (the appellant), Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer and Frank Pistorio were members of the said local assembly, each pursuing the calling of a musician;

That, on the 17th of July, 1887, said local association imposed upon Franz Krause, one of its members, two fines, one of $25 and the other of $50, which he refused to pay upon the ground that they were illegal; and

That said Linden, Wild, Pistorio, Callan, Caldwell, Sloan, Fallon, Fischer, with sundry other persons, whose names were unknown, did, on the 7th day of August, 1887, unlawfully and maliciously combine, conspire, and confederate together to extort from Krause the sum of $75 on account of said fines; to

prevent the parties first above named — Krause, Naecker, and others — and each of them, from pursuing their calling and trade anywhere in the United States; and to "boycott," injure, molest, oppress, intimidate, and reduce to beggary and want, not only said persons and each of them, but any person who should work with or for them, or should employ them or either of them.

The information charged that the manner in which the defendants, so conspiring, proposed to effect said result, was to refuse to work as musicians, or in any other capacity, with or for the persons first above named, or with or for any person, firm, or corporation, working with or employing them; to request and procure all other members of said organizations, and all other workmen and tradesmen, not to work as musicians, or in any capacity, with or for them or either of them, or for any person, firm, or corporation that employed or worked with them or either of them, and to warn and threaten every person, firm, or corporation that employed or proposed to employ the said persons, or either of them, that if they did not forthwith cease to so employ them and refuse to employ them, and each of them, such person, firm, or corporation, so warned and threatened, would be deprived of any custom or patronage, as well from the persons so combining and conspiring as from all other members of said organization in and out of the District.

The information further charged that, on the 8th day of August, 1887, the said persons, among whom was the appellant, in execution of the purpose of said conspiracy, combination, and confederacy, sent and delivered to each member of "The Washington Musical Assembly, No. 4308, K. of L.," and to divers other persons in the District whose names are unknown, a certain printed circular of the tenor following:

"Sanctuary Washington Musical Assembly, 4308, K. of L.,
"Washington, D. C., *August* 8th, 1887.

"Dear Sir and Brother: In accordance with a resolution of this assembly and in compliance with the constitution and by-laws of the order, you are hereby notified that the following-

named members of this assembly are hereby suspended for having performed with F. Krause, in direct violation of the official notice of said Krause's suspension from this assembly. You will, therefore, not engage or perform, directly or indirectly, with any of them — Louis Naecker, August Naecker, Charles Arndt, Louis Naecker, Jr., Herman Feige, Gus. A. Bruder, Fritz Boetcher, Herman Arndt, Julius Schultz, Louis Brandt, Caspar Windus, Ernest Arndt, Christian Feige.

"By order of the assembly.

"[SEAL.] E. C. LINDEN, JR.,
"*Recording Sec'y.*"

To this information the defendants interposed a demurrer, which was overruled. They united in requesting a trial by jury. That request was denied, and a trial was had before the court, without the intervention of a jury, and with the result already stated.

Mr. J. H. Ralston for appellant. *Mr. Charles S. Moore* was with him on the brief.

Mr. Assistant Attorney General Maury for appellee.

The conspiracy laid in the information is not an "infamous crime," within the meaning of the Fifth Amendment to the Constitution, the punishment of the offence not being by confinement in a penitentiary, and the offence itself not being *crimen falsi*. *Ex parte Wilson*, 114 U. S. 417: *Mackin* v. *United States*, 117 U. S. 348.

It would seem that the Constitution does not require that the right of trial by jury shall be secured to the people of this District. Article 3, § 2, does not appear to contain such a requirement, when attentively considered, in the light of contemporaneous construction.

Mr. Madison in the first Congress moved the appointment of a select committee on the subject of amending the Constitution. 1 Debates in Congress, O. S. 448. This and the amendments proposed by the several States were referred to a committee. Ib. 690

The articles of the committee's report covering, *inter alia*, the third paragraph of the second section of the third article of the Constitution are the thirteenth and fourteenth, and are as follows:

"THIRTEENTH. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

"FOURTEENTH. The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial jury *of the vicinage*, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury; *but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place* WITHIN THE SAME STATE."

Now it was evidently upon the idea that what was contained in these two articles was more than the full equivalent of the third paragraph of the second section of the third article of the Constitution, that the committee recommended that that paragraph should be stricken out and article 13 of the report inserted in its room. 1 Debates, O. S. 784.

It is manifest that the sole purpose of the committee was to provide for the trial by jury of crimes committed *within the States*, and nowhere else, and this intention is carried out by the provision of the Sixth Amendment securing the right to trial by jury "*in the State and district wherein the crime shall have been committed.*"

But to complete the history of this Sixth Amendment, it is necessary to lay before the court the amendment recommended by Mr. Madison for insertion in the Constitution in place of the third clause or paragraph of the second section of the

third article, which was to be stricken out. It is as follows:

"*Seventhly*, That in article 3, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:

"The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger), shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.

"In cases of crimes committed *not within any county*, the trial may by law be *in such county* as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate."

It would seem from the context that the reference to "crimes committed *not within any county*" is, as in the previous paragraph, to crimes committed within the jurisdiction of a State, although without the limits of a county, as, for example, crimes committed on the high seas within the limit up to which the state law is allowed to have effect. The subsequent words that in such cases "the trial may by law be *in such county* as the laws shall have prescribed" would seem to call for that meaning.

But, supposing a constitutional guaranty of trial by jury to exist, it has not been denied.

The language of the Sixth Amendment is "*shall enjoy the right*" to a trial by jury. The original language of the Constitution was that "the trial of all crimes except in cases of impeachment *shall* be by jury."

This marked change of phraseology could not have been adopted without an intention to convey in the amendment a sense different from that of the third article. We know from the debates in the House (the Senate sat at that time with closed doors) that the disposition among the friends of the Constitution was to make no changes in it that could possibly be avoided, which is an additional argument strongly in favor of our position.

We submit, then, that it is clear that the requirement of the Sixth Amendment that the accused shall *enjoy the right* of trial by jury is a *lex pro se introducta* which is largely subject to the will of the accused, and not a mode of trial forced upon him as it was by the provision of the Constitution which was supplanted by the Amendment.

This being established, we have made a great stride towards the solution of the question in hand.

The legislation complained of is not a novelty, but has its exemplar in many of the States.

The offences to which the jurisdiction of the police court extends are "simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offences against the laws and ordinances of the District in force therein." § 1049, Rev. Stat. District of Columbia.

Any person who feels aggrieved by the judgment of the police court may appeal to the Supreme Court of the District, § 1073, where his appeal shall be tried by a jury "*as though the case had originated therein*, and the judgment of the Supreme Court shall be final in the case." Section 773.

Mr. Dillon in his work on Municipal Corporations, Vol. 1, § 367, thus states the law with reference to this kind of legislation after a survey of the authorities. He says: "It is, however, the prevailing doctrine that although the charge or matter in the municipal or local courts be one in respect of which the party is entitled to a trial by jury, yet if by an appeal, clogged with no unreasonable restrictions, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceeding in the first instance.

See, also, *City of Emporia* v. *Volmer*, 12 Kansas, 622; *Byers* v. *Commonwealth*, 42 Penn. St. 89; *McGear* v. *Woodruff*, 33 N. J. Law (4 Vroom), 213; *State* v. *Young*, 3 Kansas, 445; *Jones* v. *Robbins*, 8 Gray, 329; *Commonwealth* v. *Whitney*, 108 Mass. 5; *Dillingham* v. *State*, 5 Ohio St. 280; Cooley's Const. Lim. [410] note 5, and 507, 5th ed.

The only case opposed to the view contended for by us is *Ex parte Dana*, 7 Ben. 1, where it was held that the very legislation now in question was unconstitutional on the ground that the guaranty of jury trial cannot be satisfied, at least in criminal cases, by the mere privilege to have a trial by jury on condition of first submitting to a trial without it, and then, in case of conviction, taking an appeal.

It is proper to call the attention of the court to the view, supported by authority, that the guaranty of trial by jury has never been understood to embrace petty offences. *Byers* v. *Commonwealth*, 42 Penn. St. 89, *per* Strong J.; *McGear* v. *Woodruff*, 33 N. J. Law (4 Vroom), 213.

Mr. Justice Harlan, after stating the case as above reported, delivered the opinion of the court.

It is contended by the appellant that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid. This precise question is now, for the first time, presented for determination by this court. If the appellant's position be sustained, it will follow that the statute, (Rev. Stat. Dist. Col. § 1064,) dispensing with a petit jury, in prosecutions by information in the police court, is inapplicable to cases like the present one.

The third article of the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The Fifth Amend-

ment provides that no person shall "be deprived of life, liberty, or property, without due process of law." By the Sixth Amendment it is declared that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The contention of the appellant is, that the offence with which he is charged is a "crime" within the meaning of the third article of the Constitution, and that he was entitled to be tried by a jury; that his trial by the police court, without a jury, was not "due process of law" within the meaning of the Fifth Amendment; and that, in any event, the prosecution against him was a "criminal prosecution," in which he was entitled, by the Sixth Amendment, to a speedy and public trial by an impartial jury.

The contention of the government is, that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia; that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offences committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas, and in the District of Columbia and in places to be thereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock-yards; and, consequently, that that Amendment should be deemed to have superseded so much of the third article of the Constitution as relates to the trial of crimes by a jury.

Upon a careful examination of this position we are of opin-

ion that it cannot be sustained without violence to the letter and spirit of the Constitution.

The third article of the Constitution provides for a jury in the trial of "all crimes, except in cases of impeachment." The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them. Mr. Justice Story says that the amendment, "in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed, (which district shall be previously ascertained by law,) and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes." Story on the Constitution, § 1791. And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those

rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases. In the Draft of a Constitution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the 4th section of article XI read that "the trial of all criminal offences (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury." 1 Elliott's Deb., 2d ed., 229. But that article was, by unanimous vote, amended so as to read: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct." Id. 270. The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offences committed out of any State." 3 Madison Papers, 144. In *Reynolds* v. *United States*, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster* v. *Reid*, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law. We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States.

It is next insisted that the constitutional guarantee of trial by jury in all criminal prosecutions — even supposing it to exist for the people of the District — has not been denied. Passing by so much of the argument as rests upon the slight

difference in phraseology between the third article and the Sixth Amendment — the former declaring that the trial of all crimes "shall be" by jury, and the latter that the accused shall "enjoy the right" to trial in that mode — we come to the consideration of the main proposition advanced, on behalf of the government, upon this branch of the case. It is this: That the requirements of the Constitution are fully met, where the accused is accorded, at some stage of the prosecution against him, the right of trial by jury. Such right, it is argued, is sufficiently recognized in the following sections of the Revised Statutes of the District of Columbia, defining and regulating the power and jurisdiction of the police court:

"SEC. 1073. Any party deeming himself aggrieved by the judgment of the police court may appeal to the Supreme Court.

"SEC. 1074. In all appeals the party applying for appeal shall enter into recognizance, with sufficient surety to be approved by the judge, for his appearance at the criminal term of the Supreme Court then in session, or at the next term thereof if the criminal term be not then in session, there to prosecute the appeal and to abide by the judgment of the Supreme Court.

"SEC. 1075. Upon such recognizance being given all further proceedings in police court shall be stayed."

"SEC. 1077. Upon the failure of any party appealing from the judgment of the police court to the Supreme Court to enter into recognizance, as provided for in section ten hundred and seventy-four, he shall be committed to jail to await his trial upon his appeal, and the trial shall be had in the Supreme Court as though such recognizance had been entered into."

"SEC. 773. Appeals from the police court shall be tried on the information filed in the court below, certified to Supreme Court, by a jury in attendance thereat, as though the case had originated therein, and the judgment in the Supreme Court shall be final in the case."

These provisions, undoubtedly, secure the right of appeal from the police court to the Supreme Court of the District, and a trial by jury in the latter court. But the fact remains

that the accused may, under the statute, be tried in the court of original jurisdiction, upon the issue of guilt or innocence; and by its judgment, unless he gives security for his appearance in another court, he may be deprived of his liberty. The police court is not, in such cases, an examining court merely, but a trial court, in the fullest sense of those words.

According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offences that may be proceeded against summarily, and without a jury; and, in respect to other offences, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused. *Byers* v. *Commonwealth*, 42 Penn. St. 89, 94, affords an illustration of the first of the above classes. It was there held that while the founders of the Commonwealth of Pennsylvania brought with them to their new abode the right of trial by jury, and while that mode of trial was considered the right of every Englishman, too sacred to be surrendered or taken away, "summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common-law right to a trial by jury." So, in *State* v. *Glenn*, 54 Maryland, 572, 600, 605, it was said that "in England, notwithstanding the provision in the Magna Charta of King John, art. 46, and in that of 9 Hen. 3, c. 29, which declares that no freeman shall be taken, imprisoned, or condemned, 'but by lawful judgment of his peers, or by the law of the land,' it has been the constant course of legislation in that kingdom, for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of parties for minor and statutory police offences. . . . And when it is declared that the party is entitled to a speedy trial by an impartial jury, that must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure, as theretofore practised, been the subjects of jury trial. It could never have been intended to embrace every species of accusation involving either criminal or penal consequences." So, also, in New

Jersey, where the constitution guaranteed that "the right of trial by jury shall remain inviolate," the court said: "Extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of the peace and petty offences, and these statutes are not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury. . . . This constitutional provision does not prevent the enforcement of the by-laws of a municipal corporation without a jury trial." *McGear* v. *Woodruff*, 4 Vroom, 213, 217. In *State* v. *Conlin*, 27 Vermont, 318, 323, the court sustains the right of the legislature to provide for the punishment of minor offences, having reference to the internal police of the State, "with fine only, or imprisonment in the county jail for a brief and limited period." See, also, *Williams* v. *Augusta*, 4 Georgia, 509.

The doctrines of many of the cases are thus summarized by Mr. Dillon in his work on Municipal Corporations (Vol. I, § 433): "Violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as, for example, those concerning markets, streets, water-works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the State, the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends."

The same author says, in respect to the other class of cases above referred to: "It is, however, the prevailing doctrine, that although the charge or matter in the municipal or local courts be one in respect of which the party is entitled to a trial by jury, yet if by an appeal, clogged with no unreasonable restrictions, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceedings in the first instance." Vol. I, § 439. See also *City of Emporia* v. *Volmer*, 12 Kansas, 622, 630. Perhaps the strongest expressions, in this direction, are to be found in *Jones*

v. *Robbins*, 8 Gray, 329, 341, in which it was said, on behalf of the majority of the Supreme Judicial Court of Massachusetts: "And we believe it has been generally understood and practised here and in Maine, and perhaps in other States having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment of the court appealed to."

Somewhat different views have been expressed by the District Court of the United States for the Southern District of New York. Charles A. Dana having been charged by information in the Police Court of the District of Columbia with having published a libel, and having been arrested in New York, the warrant to authorize his being brought here was refused and he was discharged, upon the ground that, if brought to this District, he would be tried in a manner forbidden by the Constitution. Mr. Justice Blatchford said *In re Dana*, 7 Benedict, 14: "Even if it were to be conceded that notwithstanding the provision in the Constitution, that 'the trial of *all* crimes, except in cases of impeachment, shall be by jury,' Congress has the right to provide for the trial, in the District of Columbia, by a court without a jury, of such offences as were, by the laws and usages in force at the time of the adoption of the Constitution, triable without a jury, it is a matter of history, that the offence of libel was always triable, and tried, by a jury. It is, therefore, one of the crimes which must, under the Constitution, be tried by a jury. The act of 1870 provides that the information in this case shall not be tried by a jury, but shall be tried by a court. It is true that it gives to the defendant, after judgment, if he deems himself

aggrieved thereby, the right to appeal to another court, where the information must be tried by a jury. But this does not remove the objection. If Congress has the power to deprive the defendant of his right to a trial by jury, for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court, without a jury, on several successive convictions, before allowing a trial by a jury. In my judgment, the accused is entitled, not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury."

Without further reference to the authorities, and conceding, that there is a class of petty or minor offences, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury, we are of opinion that the offence with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his codefendants is by no means a petty or trivial offence. "The general rule of the common law," the Supreme Judicial Court of Massachusetts said in *Commonwealth* v. *Hunt*, 4 Met. 111, 121, "is, that it is a criminal and indictable offence, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual." In *State* v. *Burnham*, 15 N. H. 396, 401, it was held that "combinations against law or against individuals are always dangerous to the public peace and to public security. To guard against the union of individuals to effect an unlawful design is not easy, and to detect and punish them is often extremely difficult." Hawkins, in discussing the nature of conspiracies as offences against public justice, and referring especially to the statute of 21 Edw. I, relating to confederacies to procure the indictment of an innocent person, says that "notwithstanding the injury intended to the party against whom such

a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law." 1 Hawk. P. C. c. 72, § 3. So in *Regina* v. *Parnell*, 14 Cox C. C. 508, 514, it was observed that an "agreement to effect an injury or wrong to another by two or more persons is constituted an offence, because the wrong to be effected by a combination assumes a formidable character. When done by one alone it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of the combination." Tomlin says that "the word conspiracy was formerly used almost exclusively for an agreement of two or more persons falsely to indict one, or to procure him to be indicted, of felony," but that "now it is no less commonly used for the unlawful combinations of journeymen to raise their wages, or to refuse working, except on certain stipulated conditions." Toml. Law Dict., Title Conspiracy. See, also, *Commonwealth* v. *Carlisle*, Brightly (Penn.), 40; 3 Whart. Crim. Law, § 1337 *et seq.*, 8th ed.; 2 Archibold's Cr. Pr. & Pl. (Pomeroy's ed.) 1830, note.

These authorities are sufficient to show the nature of the crime of conspiracy at common law. It is an offence of a grave character, affecting the public at large, and we are unable to hold that a person charged with having committed it in this District is not entitled to a jury, when put upon his trial. The jurisdiction of the Police Court, as defined by existing statutes, does not extend to the trial of infamous crimes or offences punishable by imprisonment in the penitentiary. But the argument, made in behalf of the government, implies that if Congress should provide the Police Court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted — even for crimes punishable by confinement in the penitentiary — such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the Police Court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution.

Syllabus.

Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

For the reasons stated,

The judgment is reversed, and the cause remanded with directions to discharge the appellant from custody.

JOYCE *v.* CHILLICOTHE FOUNDRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 149. Argued January 26, 1888. — Decided May 14, 1888.

Claim 1 of letters patent No. 154,989, granted to Jacob O. Joyce, September 15, 1874, for an improvement in lifting-jacks, namely, "A pawl for lever-jack with two or more teeth, and adapted to move in inclined slots, grooves, or guides formed in the frame, substantially as described," must be construed as limited to a pawl which acts wholly by gravity, and not at all by a spring, to press it against the teeth of the ratchet-bar.

Such claim is not infringed by a jack in which a spring is used to press the pawl against the teeth of the ratchet-bar, and in which there are no slots, guides or grooves formed in the frame, to guide the pawl.

IN EQUITY for the infringement of letters patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. E. E. Wood for appellant. *Mr. Edward Boyd* was with him on the brief.

No appearance for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

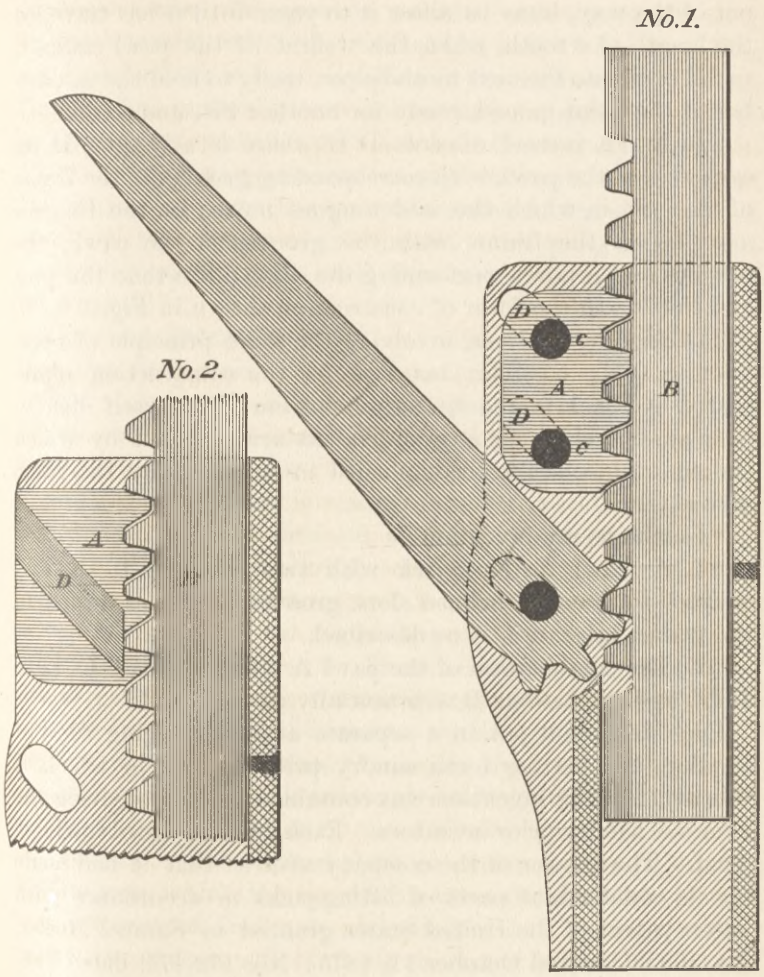
This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of Ohio, by Jacob O. Joyce against the Chillicothe Foundry and Machine Works Company and F. M. De Weese, to recover for the infringement of letters patent of the United States, No. 154,989, granted to Jacob O. Joyce, September 15, 1874, for an improvement in lifting-jacks, on an application filed March 16, 1874.

The specification, claims, and drawings of the patent are as follows:

"Be it known that I, Jacob O. Joyce, of Carlisle Station, Warren County, Ohio, have invented certain improvements in lever-jacks, of which the following is a specification:

"My invention relates to the pawl of such jacks; and its objects are, first, to substitute the weight of the pawl, sliding in inclined slots, grooves, or guides, for the elastic spring usually employed to press it against the teeth of the ratchet-bar; and, second, to obtain greater strength by dividing the load among several teeth of the pawl and ratchet-bar, instead of supporting it all on one tooth, as is commonly done.

"Figure 1 of the accompanying drawings [see next page] is a vertical section of so much of a jack as is necessary to show my improvements; and Fig. 2 is a modification of the same, in which the pins and slots of Fig. 1 are exchanged for the tongue and groove in Fig. 2.



"Referring to Fig. 1, A is the pawl, having teeth that engage with the teeth of the ratchet-bar B. D D′ are slots in the frame of the jack, inclined to the axis of the ratchet-bar at the angle of about forty-five degrees, in which slots move the pins C C′ of the pawl A.

"The operation is seen at a glance. When the ratchet-bar is raised its teeth crowd or slide the pawl up the inclined slots

out of the way, so as to allow it to pass, until it has travelled the length of a tooth, when the weight of the pawl causes it to fall back into the next tooth below, ready to hold the ratchet-bar at the point gained, ready for another lift, and so on.

"In Fig. 2, instead of slots D D', there is a tongue, D, on each side of the pawl, with corresponding grooves in the frame of the jack, in which the said tongues move; or the tongues may be on the frame, with the grooves in the pawl; the tongues and grooves performing the same office that the pins and slots do in the form of construction shown in Fig. 1.

"Other modifications, involving the same principle of operation, may be possible; but I prefer the construction represented in Fig. 1, at the same time not limiting myself strictly to that, but claiming any equivalent arrangement by which the same objects are accomplished in substantially the same manner.

"I claim as my invention —

"1. A pawl for lever-jack with two or more teeth, and adapted to move in inclined slots, grooves, or guides formed in the frame, substantially as described.

"2. The combination of the pawl A with its pins C C', slots D D', and ratchet-bar B, substantially as described."

Each defendant put in a separate answer, alleging want of novelty, and setting forth sundry prior patents in which, it was averred, the invention was contained, and also giving the names of sundry prior inventors. Each answer denied infringement. The answer of the company averred that it had made for its codefendant parts of lifting-jacks in accordance with letters patent of the United States granted to Samuel Mosler, No. 168,663, dated October 11, 1875; No. 172,471, dated January 18, 1876; and No. 194,711, dated August 28, 1877. Issue was joined and proofs were taken on both sides, and the Circuit Court dismissed the bill, with costs. Its decision is reported in 15 Fed. Rep. 260.

In the opinion of the Circuit Court it is said: "The specification describes, and the drawings show, a frame with parallel sides, between which a pawl moves in parallel slots in the frame, forming guideways inclined toward the vertically mov-

ing ratchet-bar. The pawl is provided with a series of teeth on the face adjacent to the ratchet-bar, and, at opposite sides, with projections or lugs engaging in the inclined slots of the frame. The guide-slots are inclined at an angle of 45 degrees or thereabouts, and the pawl is actuated slowly by gravity to move down the inclines, and engage its teeth with those of the ratchet-bar; and the patentee states, in his specification, as one of the objects of the invention, his purpose to utilize the gravity of the pawl itself, thus arranged, as a substitute for a spring."

The clear statement of the specification in this respect is, that the first object of the invention is "to substitute the weight of the pawl, sliding in inclined slots, grooves, or guides, for the elastic spring usually employed to press it against the teeth of the ratchet-bar." The specification also says, that, "when the ratchet-bar is raised, its teeth crowd or slide the pawl up the inclined slots out of the way, so as to allow it to pass, until it has travelled the length of a tooth, when the weight of the pawl causes it to fall back into the next tooth below, ready to hold the ratchet-bar at the point gained, ready for another lift, and so on." These are plain statements, that the weight of the pawl, unaided by any spring, is to be used to cause the pawl to fall back into the next tooth below, after the ratchet-bar has travelled the length of a tooth, such weight of the pawl being employed to press it against the teeth of the ratchet-bar, in place of the use of an elastic spring for that purpose. The inclined slots, grooves, or guides formed in the frame in which the pawl moves, are the slots D D′, made in the frame of the jack, and "inclined to the axis of the ratchet-bar at the angle of about forty-five degrees," in which slots the pins C C′ of the pawl move. The specification states that, instead of such slots in the frame of the jack, there may be grooves in such frame, one on each side of the pawl, in which a tongue on each side of the pawl moves; or there may be tongues on the frame and grooves in the pawl; the tongues and grooves performing the same office that the pins and slots do in the first form of construction.

In the opinion of the Circuit Court the following statement

is made as to the defendants' jack, which we deem to be correct: "The defendants manufacture a jack having a many-toothed pawl resting at its bottom upon a seat slightly inclined toward the rack-bar, and actuated by a spring placed behind it within the frame. The inclination of the seat is not sufficient to actuate the pawl by gravity, nor are there any slots or other means of guiding the pawl in the sides of the frame; the function of the inclined seat being rather to assist the spring in preventing a backward slip of the pawl when under pressure, than to facilitate the forward movement of the pawl, although to the latter result it may contribute in a slight degree."

The plaintiff claims that the defendants use their spring to start the movement of the pawl upon an incline having a less angle than that mentioned in the specification of the patent, and employ an inclined seat for the pawl to effect the holding of the load; and that they thus infringe the first claim of the patent. But we are of opinion, upon the whole evidence, that in the defendants' jack the spring is used to press the pawl against the teeth of the ratchet-bar, within the meaning of the specification of the patent; that the jack made by the defendants would not be and is not, as constructed by them, and put upon the market, a practically operative instrument without the use of the spring; that the pawl in it will not operate by gravity alone so as to make it an efficient or safe machine; and that there are no slots, grooves, or guides formed in the frame, to guide the pawl, in the sense of the first claim of the plaintiff's patent.

We concur with the court below in holding that the first claim of the patent must be limited to a pawl moving by gravity alone in inclined slots, grooves, or guides formed in the frame, and that, therefore, there has been no infringement of the first claim.

It is not alleged that the second claim has been infringed.

The decree of the Circuit Court is affirmed.

FLOWER *v.* DETROIT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 203. Argued April 3, 1888. — Decided May 14, 1888.

Claim 1 of reissued letters patent No. 6990, granted March 14, 1876, to Thomas R. Bailey, Jr., for an "improvement in hydrants," namely, "In combination with a hydrant or fire-plug, a detached and surrounding casing C, said casing adapted to have an independent up and down motion sufficient to receive the entire movement imparted by the upheaval of the surrounding earth by freezing, without derangement or disturbance of the hydrant or plug proper, substantially as shown," is invalid, as being an unlawful expansion of the original patent.

The drawing of the original patent was materially altered, and new matter was introduced into the specification of the reissue.

The decision in *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87, applied to this case.

In the present case the reissue was not applied for until nearly eight years after the original patent was granted, and the reissue was taken with the manifest intention of covering, by an enlarged claim, structures which in the meantime had gone into extensive public use, and which were not covered by any claim of the original patent.

Claim 3 of the reissue, namely, "The combination of the hydrant or fire-plug pipe A, supply pipe B, valve D, casing C, and stuffing-box H, substantially as and for the purpose shown," is either an unlawful expansion, in regard to the casing, of what is found in the original patent, or, if construed narrowly, in regard to the casing, is anticipated, on the question of novelty.

In equity, for the infringement of letters patent. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. Edward J. Hill for appellants.

Mr. George L. Roberts for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Michigan, by James

Flower, Thomas Flower, and George Flower, against the City of Detroit, the Fire Commission of the City of Detroit, Benjamin Vernon, president thereof, and the Board of Water Commissioners of the City of Detroit, for the infringement of reissued letters patent No. 6990, granted March 14, 1876, on an application filed February 17, 1876, to Thomas R. Bailey, Jr., for an "improvement in hydrants," the original patent, No. 75,344, having been granted to said Bailey, March 10, 1868. Among the defences set up in the answer, it was alleged that new matter, not constituting any substantial part of the alleged invention upon which the original patent was granted, was introduced into the specification of the reissue, and that the reissue is not for the same invention as the original patent, and is void.

The specifications and claims of the original and of the reissue are here placed side by side in parallel columns, the parts in each which are not found in the other being in italic.

Original.	*Reissue.*
"To all whom it may concern:	"To all whom it may concern:
Be it known that I, T. R. Bailey, Jr., of Lockport, in the county of Niagara, and State of New York, have invented a new and improved hydrant fire-plug; and I do hereby declare *that* the following *is* a full, clear and exact description thereof, which will enable *those* skilled in the art to make and use the same, reference being had to the accompanying *drawings*, *forming* part of this specification.	Be it known that I, T. R. Bailey, Jr., of Lockport, in the county of Niagara, and State of New York, have invented a new and improved hydrant fire-plug; and I do hereby declare the following *to be* a full, clear and exact description thereof, which will enable *others* skilled in the art *to which my invention relates* to make and use the same, reference being had to the accompanying *drawing*, *which forms a* part of this specification.
This invention relates to *a*	This invention relates to

new and improved method of constructing fire-plugs or hydrants; *and the invention consists in operating a cylinder-valve in a suitable case, and in the arrangement and combination of parts connected therewith, as hereinafter described.*

Figure 1 represents a longitudinal central section of *the* hydrant, *showing the parts of which it is composed and the manner of their arrangement.* Fig. 2 *is* a cross-section of *Fig. 1* through *the line x x.*

Similar letters of reference indicate corresponding parts.

A represents the hydrant-tube, from which *the* water is discharged. B is the horizontal section which is connected with the 'water-main,' and which *forms* the valve-chamber.

C is a loose casing around the hydrant-tube, *for protecting the tube from dirt, etc.* D is the cylinder-valve, *which has* its seat at its lower end, *on* elastic *or leather* packing, secured in a groove, as *seen in the drawing* at *a.* E is a rod, having a screw thread on its upper end, by which the valve

improvements in the construction of fire-plugs or hydrants.

In the drawing, Figure 1 represents a longitudinal central section of *a* hydrant *according to my invention;*

Fig. 2, a cross-section of *the same* through *lines x x of Fig. 1.*

My invention consists in the following parts and combinations, as hereinafter specified and claimed, wherein

A represents the hydrant-tube, from which water is discharged. B is the horizontal section which is connected with the water-main, and which *may form* the valve-chamber.

C is a loose *movable* casing around the hydrant-tube. D is the cylinder-valve, *having* its seat at its lower end, *upon suitable* elastic packing, secured in a groove, as *shown* at *a.* E is a rod, having a screw thread on its upper end, by which the valve is operated. F is a sleeve-nut *engaged* with

is operated. F is a sleeve-nut, *which engages* with the screw on the rod, *raising* and lowering *it* as the nut is turned. This nut is turned by a wrench on the head G.

The sleeve-nut is *secured* in the cap of the hydrant by a collar, and packing under the hollow cylinder stuffing-box H, *as seen in the drawing.* J is a yoke, which is attached to the rod E by a set-screw, and *which* is *secured* in the tube A, and prevented from turning, as it moves up and down, by projecting lugs, as *seen in* Fig. 2; *and* it will be *seen* that the arrangement is such that the rod and valve may be raised and lowered without being rotated. *This secures* a uniform and perfect bearing of the valve on its seat, the packing *a* remaining undisturbed.

Provision is made for the discharge of the waste water by an orifice beneath the valve D, *marked f*, which orifice is opened and closed by a valve *marked g, as seen in the drawing. h is* a wing *on* the top of this valve.

As the cylinder-valve D descends the angular flange *i* on its inside *strikes* the wing *h and* raises the valve, as *seen* the screw-*nut* on the rod *E*, *lifting* and lowering *said rod* as the nut is turned *one way or another.* This nut is turned by a wrench *or crank, or other suitable device* on the head G.

The sleeve-nut is *screwed* in the cap of the hydrant by a collar, and packing under the hollow cylinder stuffing-box H. J is a yoke, which is attached to the rod E by a set-screw, *or its equivalent*, and *it* is *screwed* in the tube A, and prevented from turning, as it moves up and down, by projecting lugs, as *shown in detail at* Fig. 2. It will be *noticed* that the arrangement is such that the rod and valve may be raised and lowered without being rotated, *thus securing* a uniform and perfect bearing of the valve on its seat, the packing *a* remaining undisturbed.

Provision is made for the discharge of the waste water by an orifice, *f*, beneath the valve D, which orifice is opened and closed by a valve *g.* A wing *h is provided upon* the top of this valve.

As the cylinder-valve D descends, the angular flange *i* on its inside, *striking* the wing *h*, raises the valve, as *shown* in

in the drawing, *thus allowing* any water which may remain in the hydrant to escape through the orifice *f* and aperture *k*. *It will be thus seen that no water will be left in the hydrant to freeze in cold weather.*

The tube *A* is secured to the horizontal section B by a ring-nut, *m*, which contains recesses for packing-rings around the valve, as *seen* at *n n*. Packing *around* the valve is secured by another ring-nut *o*, and also under the end of the tube A, as *seen* in the *drawing.*

P represents the discharge-pipe, with a screw for the attachment of the hose, and a cap-piece for covering the pipe when the hydrant is not in use.

the drawing, *and allows* any water which may remain in the hydrant to escape *down* through the orifice *f* and aperture *K*, *thus preventing any retention of water above the freezing level.*

The tube *A'* is secured to the horizontal section B by a ring-nut, *m*, which contains recesses for packing-rings around the valve, as *shown* at *n*. Packing *about* the valve is *also* secured by another ring-nut *o*, and also under the end of the tube A, as *shown* in the *drawings.*

P represents the discharge-pipe, with a screw for the attachment of the hose, and a cap-piece for covering the pipe when the hydrant is not in use.

It will be observed that the casing C loosely rests upon the main B, or upon a branch projecting upward from the same. This casing extends upward, enveloping the main portion of the water-pipe A, at least that portion which is subterranean. Said casing extends upwards and fits loosely about the plug or hydrant at the portion A'. *Above the upper terminus of the casing C is provided the bead a upon the*

hydrant proper. Sufficient space is left between the bead a and the upper terminus of the casing C to permit of sufficient up-and-down play of the said casing C, for the purpose which will hereafter more fully appear. This distance between the bead and casing may be adjusted to any desired distance, thus lengthening or shortening it, by means of its screw attachment at its base.

The main function of the casing C is to prevent derangement of parts during cold weather by the ground alternately freezing and thawing around the hydrant or plug. This process of freezing causes the surrounding earth, by its expansion, to lift or upheave, and thus be liable to derange the hydrant or plug. This upheaval or movement is received by the casing C, which, by its capability of sliding loosely up and down, will accommodate the upheaval of the earth above mentioned, without any liability to derange the plug or hydrant. This is the chief function of the casing C, although it likewise serves the purpose of protection to the water-pipe A.

Having thus described my invention, I claim *as new and* What I claim *is*—

desire to secure by Letters Patent —

1. A hydrant or *water* plug, *constructed substantially as shown and described, — that is to say, with the parts* A *and* B *connected together, as shown,*

and with a cylinder-valve and *a* waste-*water* valve connected and operated *in combination* substantially as herein *specified.*

2. *The arrangement of the parts* A, B, valve D, *case* C, and stuffing-box H, as *herein described*, for the purpose *specified.*"

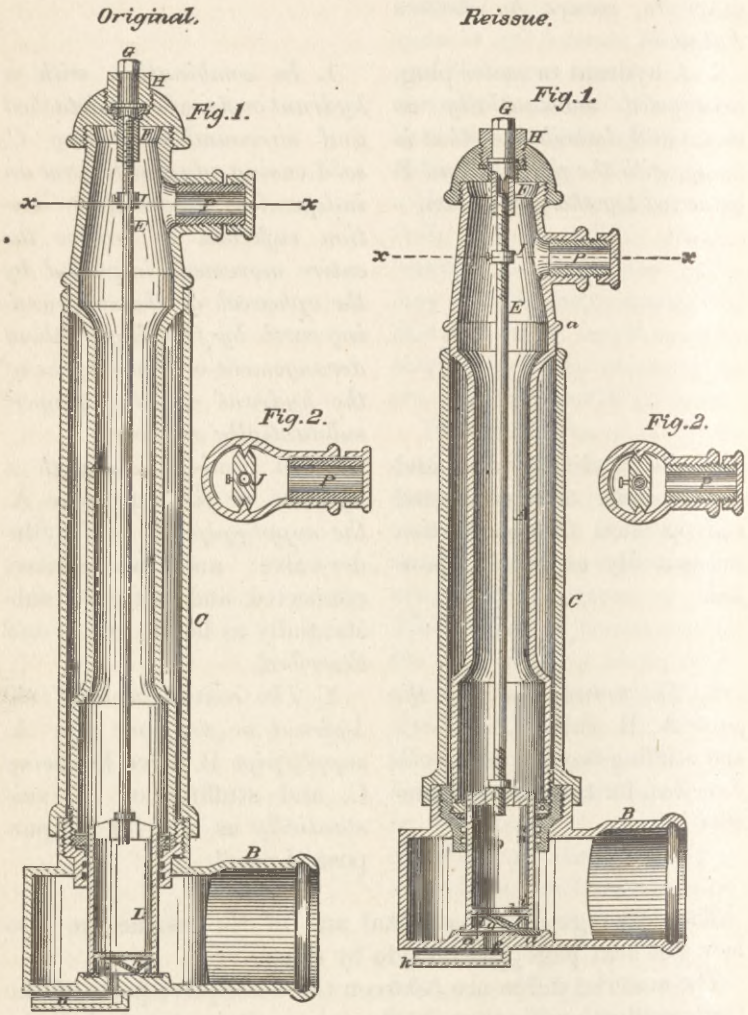
1. *In combination with a hydrant or fire-plug, a detached and surrounding casing C, said casing adapted to have an independent up-and-down motion sufficient to receive the entire movement imparted by the upheaval of the surrounding earth by freezing, without derangement or disturbance of the hydrant or plug proper, substantially as shown.*

2. *In combination with* a hydrant or *fire*-plug *pipe* A, *the supply-pipe* B, *and* cylinder-valve and waste-valve, connected and operated substantially as herein *shown and described.*

3. *The combination of the hydrant or fire-plug pipe* A, *supply-pipe* B, valve D, *casing* C, and stuffing-box H, *substantially* as *and* for the purpose *shown.*"

The drawings of the original and of the reissue are also here [see next page] placed side by side:

The material difference between the descriptive parts of the two specifications is that, in the reissue, it is stated that the casing C is movable, and that sufficient space is left between the bead *a* upon the hydrant proper, and the upper terminus of the casing C, to permit of sufficient up-and-down play of the casing C to allow it to slide loosely up and down, to accommodate the upward and downward movement of the earth during the process of freezing and thawing, without any



liability to derange the plug or hydrant. The casing could not thus slide loosely up and down, unless sufficient space were left between the bead *a* and the upper terminus of the casing. No suggestion of such arrangement is found in the specification of the original patent, and the drawing of that patent shows no space between the upper terminus of the casing and

the bead or flange above it. This is new matter introduced into the specification of the reissue, contrary to the express inhibition of § 4916 of the Revised Statutes.

Claim 1 of the reissue is for an invention not indicated or suggested in the original patent, namely, the independent up-and-down motion of the casing. In addition to this, the drawing of the original patent shows a close contact between the top of the casing and the bead or flange above it, so as absolutely to forbid any such independent up-and-down motion of the casing as is covered by the first claim of the reissue, while the drawing, Figure 1, of the reissue, shows a sufficient space between the top of the casing and the bead or flange above it to admit of such independent up-and-down motion.

Issue having been joined, proofs were taken on both sides, and the Circuit Court entered a decree dismissing the bill, from which the plaintiffs have appealed. Its opinion accompanies the record, and is reported in 22 Fed. Rep. 292. It held that the reissued patent was invalid, as matter of law, upon a comparison of the original with the reissue. We concur in this view.

It is sought to sustain the validity of the reissue by attempting to show that the model filed in the Patent Office with the original application exhibited the invention covered by the first claim of the reissue. It is doubtful whether that fact is satisfactorily established. But, irrespective of this, the case falls directly within the recent decision of this court in *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87. It was held in that case, that what was suggested in the original specification, drawings, or patent office model is not to be considered as a part of the invention intended to have been covered by the original patent, unless it can be seen from a comparison of the two patents that the invention which the original patent was intended to cover embraced the things thus suggested or indicated in the original specification, drawings, or patent office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent. (See, also, *Hoskin* v. *Fisher*, 125 U. S. 217.) In the present

case, it cannot be seen from a comparison of the two patents that the original specification indicated that what is covered by the first claim of the reissue was intended to have been secured by the original.

In the present case, also, the reissue was not applied for until nearly eight years after the original patent was granted, and the reissue was taken with the manifest intention of covering, by an enlarged claim, structures which in the meantime had gone into extensive public use, and which were not covered by any claim of the original patent.

Infringement is alleged only of claims 1 and 3 of the reissue. As to the casing C of the third claim, it cannot, any more than the casing C of the first claim, be held to cover a casing which has the independent up-and-down motion referred to. Such casing must be construed to be the casing exhibited in the drawing annexed to the original patent, that is, one in which the up-and-down play is restricted by the overlapping bead or flange. On any other construction, claim 3 is an unlawful expansion, in regard to the casing, of what is found in the original patent. In addition to this, if the casing of claim 3 is only a casing which has no end play, it is anticipated by what is shown in letters patent No. 19,206, granted to Race and Mathews, January 26, 1858, which patent was the subject of the decision of this court in *Mathews* v. *Machine Co.*, 105 U. S. 54.

The decree of the Circuit Court is affirmed.

ARTHUR'S EXECUTORS *v.* VIETOR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 268. Argued May 2, 3, 1888. — Decided May 14, 1888.

Hosiery, composed of wool and cotton, was imported in 1873. The collector assessed the duties at 35 per cent ad valorem, and 50 cents a pound, less 10 per cent, under § 2 of the act of March 2d, 1867, c.

197, 14 Stat. 561, as manufactures made in part of wool, "not herein otherwise provided for." The importer claimed that the goods were dutiable under § 22 of the act of March 2, 1861, c. 68, 12 Stat. 191, and § 13 of the act of July 14, 1862, c. 163, 12 Stat. 556, as stockings made on frames, worn by men, women, and children, at 35 per cent ad valorem, less 10 per cent. In a suit to recover back the excess of duties, the court directed a verdict for the importer: *Held*, that this was error, because the hosiery was not otherwise provided for in the act of 1867, and was a manufacture made in part of wool.

The case of *Vietor* v. *Arthur*, 104 U. S. 498, commented on, and explained, and distinguished.

This action was commenced by the defendants in error as plaintiffs in the court below, to recover an excess of duties alleged to have been paid under protest on an importation of hosiery into the port of New York. Trial and verdict for the plaintiffs under direction of the court, and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion.

Mr. Solicitor General for plaintiffs in error.

Mr. Stephen G. Clarke for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, commenced in the Superior Court of the city of New York, by Frederick Vietor, George F. Vietor, Carl Vietor, Thomas Vietor, Jr., and Fritz Achelis, against Chester A. Arthur, collector of the port of New York, to recover an alleged excess of duties paid under protest on goods entered at the custom house in New York, from April, 1873, to November, 1873, prior to the enactment of the Revised Statutes.

The goods were hosiery. The appraiser returned the hosiery in some cases as "knit goods, wool hosiery, over 80, 50, 35, less 10 per cent;" in other cases as "worsted knit goods," etc. The collector liquidated the duties on the hosiery at the rate of 35 per cent ad valorem and 50 cents a pound, less a deduction of ten per cent. The plaintiffs protested in writing against the liquidation, "because said merchandise, being merino hosiery, and similar articles made on frames, not other-

wise provided for, is only liable to duty under the 22d section of the tariff act of March 2d, 1861, and the 13th section of the tariff act of July 16th, 1862, at the rate of 35 per centum ad valorem, less 10 per cent under the 2d section of the act of June 6th, 1872, as manufactures wholly or in part of wool, or hair of the alpaca, goat, or other like animal."

All of the goods involved contained from 10 to 20 per cent of either wool or worsted, the other component material being cotton. The wool or worsted formed an appreciable portion of the value of the goods. There is nothing in the case to show the value of, or the amount of duties assessed on, the wool and cotton goods, as distinguished from the worsted and cotton goods.

The plaintiffs offered evidence tending to show that the articles imported by them, similar to samples introduced by them in evidence, were stockings, were worn by men, women, and children, and were made on frames. The plaintiffs claimed that the goods were dutiable under § 22 of the act of March 2, 1861, c. 68, 12 Stat. 191, under a provision imposing a duty of 30 per cent on "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women, or children, and not otherwise provided for;" and § 13 of the act of July 14, 1862, c. 163, 12 Stat. 556, which imposed, from and after the 1st of August, 1862, an additional duty of five per cent ad valorem on "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women, and children, and not otherwise provided for;" and the provision of § 2 of the act of June 6, 1872, c. 315, 17 Stat. 231, which enacts that after the 1st of August, 1872, in lieu of the duties imposed by law upon the articles enumerated in that section, there should be paid 90 per cent of the several rates of duty then imposed by law upon such articles severally, "it being the intent of this section to reduce existing duties on said articles ten per centum of such duties, that is to say. . . . On all wools, hair of the alpaca, goat, and other animals, and all manufactures wholly

or in part of wool or hair of the alpaca, and other like animals, except as hereinafter provided."

The duties levied by the collector, and claimed by the defendant at the trial to have been the proper rate of duty, were assessed under § 2 of the act of March 2, 1867, c. 197, 14 Stat. 561, which imposed the following duties: "On woollen cloths, woollen shawls, and all manufactures of wool of every description made wholly or in part of wool, not herein otherwise provided for, fifty cents per pound, and, in addition thereto, thirty-five per centum ad valorem. On flannels, blankets, hats of wool, knit goods, balmorals, woollen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals, except such as are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound, twenty cents per pound; valued at above forty cents per pound and not exceeding sixty cents per pound, thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, forty cents per pound; valued at above eighty cents per pound, fifty cents per pound; and, in addition thereto, upon all the above named articles, thirty-five per centum ad valorem."

At the trial, after the plaintiffs had rested, the defendant offered evidence tending to show that knit goods are textile fabrics composed of a single thread united in a series of loops, corresponding to the old-fashioned hand-knitting process, and that the plaintiffs' importations were so made; and, further, that all fabrics made on frames are knit goods. The defendant then rested. The plaintiffs then offered evidence tending to show that the term "knit goods" used in trade and commerce has no different or other meaning than its meaning among men in general; that there are knit goods known to trade and commerce which were not made on frames, but which were made by hand, and that there are other goods, as caps, gloves, leggins, mits, socks, stockings, and drawers, made in whole or in part of worsted, worn by men, women, and children, which are made on a frame and knit, and which are also knit by hand; that, while the result of knitting by hand, and

of the manufacture on a frame of a fabric consisting of a single thread, is the production of a textile fabric composed of a series of connecting loops which are alike in each case, yet the processes by which they are produced are dissimilar; that the result of the process of manufacturing upon frames and knitting by hand is the same, although the two processes are dissimilar; also, that there are no textile fabrics made on frames which are known in trade and commerce, except fabrics composed of cotton, wool or worsted, silk, linen, or a mixture of these materials. Both parties then rested.

The plaintiffs then moved the court to direct the jury to find a verdict in their favor, which motion was granted. To such ruling the defendant excepted. The jury found a verdict for the plaintiffs. The amount was, by agreement of the parties, adjusted at the custom house, and a judgment was entered for the plaintiffs, including costs, for $1897.96, to review which the defendant has brought a writ of error.

We think that it was error in the court to have directed a verdict for the plaintiffs. The act of 1867 is entitled "An Act to provide increased Revenue from imported Wool, and for other Purposes." Section 1 of the act relates to duties on "unmanufactured wool, hair of the alpaca, goat, and other like animals, imported from foreign countries." Section 2 provides for the following duty: "On woollen cloths, woollen shawls, and all manufactures of wool of every description made wholly or in part of wool, not herein otherwise provided for, fifty cents per pound, and, in addition thereto, thirty-five per centum ad valorem." This clause clearly covers stockings such as some of those in the present case, composed of wool and cotton, because they were made in part of wool.

The next question is, whether they were "herein otherwise provided for," that is, otherwise provided for in that act of 1867. We have recently held, in the case of *Arthur* v. *Butterfield*, 125 U. S. 70, 76, that the words "not otherwise herein provided for," in an act providing for customs duties, mean, not otherwise provided for in the act of which they are a part. The words in the present case are "not herein otherwise provided for," which are identical in meaning. Section 2 of the

act of 1867 goes on to provide for duties on many manufactured articles made wholly or in part of wool, namely, "women's and children's dress goods and real or imitation Italian cloths, composed wholly or in part of wool;" "clothing ready made, and wearing apparel of every description, and balmoral skirts and skirting, and goods of similar description or used for like purposes, composed wholly or in part of wool;" "webbings, beltings," etc., made of wool, or of which wool is a component material; and carpets of various kinds and carpetings of wool.

The clause of § 2 of the act of 1867, above quoted, which covers "knit goods," expressly excepts "such as are composed in part of wool:" and the clause relating to duties on "wearing apparel of every description . . . composed wholly or in part of wool," made up or manufactured wholly or in part by the manufacturer, expressly excepts "knit goods." It is stated in the bill of exceptions that the stockings in question were made on frames, and that all fabrics made on frames are knit goods.

According to the bill of exceptions, some of the goods in question here were properly assessed by the collector, under the act of 1867, at the rate of 50 cents a pound and 35 per cent ad valorem, less ten per cent, and it was improper to direct a verdict for the plaintiffs as to those goods. After the verdict was rendered, on the 10th of December, 1883, and before judgment, the defendant made a motion for a new trial, the decision on which is reported in 22 Blatchford, 39. The motion was denied, on the ground that the articles in question, as stockings made on frames, were specifically made dutiable by that name in the acts of 1861 and 1862, and had been dutiable *eo nomine*, by different enactments, since 1842; and that the general language of the act of 1867 did not affect the specific description in the acts of 1861 and 1862. Particular reference was made in the decision to the opinion of this court in *Vietor* v. *Arthur*, 104 U. S. 498. The goods in that case were imported after the enactment of the Revised Statutes, on the 22d of June, 1874, and were stockings, some of them wholly of worsted and others of cotton

and worsted, cotton being the material of chief value, and they were intended to be worn by men, women, and children, and were made on frames, and were also knit goods. The collector had exacted upon them a duty at the rate of 90 per cent of 50 cents a pound and 35 per cent ad valorem, as knit goods, under Schedule L of § 2504 of the Revised Statutes. The importer claimed that they were dutiable as stockings made on frames, worn by men, women, or children, under Schedule M of the same section. Judgment having been entered for the defendant, this court reversed it, on the ground that, as between the descriptions in the two schedules in the same section of the Revised Statutes, the goods must be considered as having been provided for under the designation of stockings made on frames, worn by men, women, or children, in Schedule M, and as not being liable to the higher duty prescribed by Schedule L, because, although Schedule L was broad enough to comprehend them, yet, as Schedule M covered them by a specific designation, and they had been dutiable as stockings made on frames, *eo nomine*, since 1842, and by four different enactments, they fell within Schedule M. That decision does not apply to the present case, for here the only question is whether the stockings, so far as they have wool in them, being manufactures made in part of wool, and dutiable as such by the act of 1867, were otherwise provided for in that act. It is clear that they were not.

Inasmuch as the verdict directed covered the stockings which contained wool and cotton, and the judgment is a unit, and the direction of a verdict was wrong as to those goods,

The judgment is reversed, and the case is remanded to the Circuit Court with a direction to grant a new trial.

BROWN v. DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

No. 224. Submitted April 13, 1888. — Decided May 14, 1888.

A proposition to pave streets in a municipality, made in writing by a contractor to the head of a board consisting of several members which by law was charged with the care and paving of the streets, although considered and agreed to by the head of the board, and although by his directions the secretary of the board wrote under it that it was "accepted by order of the board" and affixed his signature as secretary thereto, is not a "contract in writing signed by the parties making the same," if the action of the secretary was made without official acceptance of the proposition by the board, and without authority from them to write it.

On the facts in this case the court holds: (1) that the alleged contract with the board of public works was not a valid contract; (2) that it was never ratified by the board; (3) that it was never ratified by Congress; (4) that the portion of the plaintiff's claim which was for work performed was rejected by the board of audit, and that the Court of Claims was therefore without jurisdiction to entertain it.

THE case is stated in the opinion.

Mr. C. C. Cole and *Mr. Fillmore Beall* for appellant.

Mr. Attorney General and *Mr. Assistant Attorney General Howard* for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the appellant, Talmadge E. Brown, who sued in that court to recover a judgment against the District of Columbia, appellee, for $200,000, in satisfaction of his claim for damages for breach of an alleged contract, and for work and labor performed and materials furnished in the paving of certain streets in the cities of Washington and Georgetown.

The petition was filed November 16, 1880, and contains four counts, the first of which is in substance as follows: That

from 1869 to 1874, inclusive, petitioner, William W. Ballard, and Edward L. Marsh, all of whom were citizens of the United States, were in partnership under the name of the Ballard Pavement Company, their business consisting in grading, paving, etc., streets, sidewalks, etc.; that on or about December 10, 1872, said company made and completed a contract with the District of Columbia, whereby said company became bound to pave with wood pavement such streets, or parts of streets, in the cities of Washington and Georgetown, in the said District of Columbia, as the board of public works of said District should designate from time to time, to the amount of 75,000 square yards, said work to be assigned and completed during 1873, and at the price of $3.50 per square yard, and also to do such grading, hauling, filling, and setting of curbing on the streets paved by said company, and at the board prices, as the said board of public works should order or direct; that by the terms of said contract the said work was to be paid for as the same progressed; that at the time the said board of public works of the said District of Columbia made and entered into said contract with said pavement company the said board had full power and authority to make the same in the manner and form the same was made; and that said contract was in the words and figures following, to wit:

"*The Ballard Pavement Company, Washington, D. C.:*

"Your proposition of this date, as follows:

"'The Ballard Pavement Company hereby make proposals for the following work, with accompanying conditions:

"'We will put down preserved wood pavement as follows: The Ballard block, the Perry block, or the wedge-shaped block, such as laid by Filbert & Taylor, in this city, as the contractors may elect, either to stand five inches high, for three dollars and fifty cents per square yard, and we hereby ask for seventy-five thousand square yards, contractors to have during the year 1873 within which to complete this work, the board not to stop the work without a gross violation of the contract on the part of the contractors, the streets to be designated by the board at such times as the company

shall be ready to commence work, said work to be paid for as the same progresses.

"'We also hereby apply for a separate and a further contract for so much of the grading, hauling, and filling as is not embraced in the contract for paving, and for setting the curbing on the streets, to be paved by us at board prices, subject to the conditions of the paving contract.'

"Is this day accepted.

"By order of the Board: CHARLES S. JOHNSON,
"*Ass't Secretary.*"

The petition then alleges that in pursuance of said contract, and in part execution and performance thereof, said board of public works designated nine different pieces of work to be done by the company; all of which was done by it, to an aggregate amount of about 35,000 square yards, and that said company was prepared and ready to do all the rest of the 75,000 square yards specified in said contract, but that said board of public works failed and refused to designate any more work to be done by the company, whereby said company was damaged in the sum of $100,000; that said contract of December 10, 1872, was in effect ratified and confirmed, and the right of action thereon recognized and approved, by virtue of several acts and resolutions of Congress, among which are the act of June 20, 1874, resolution of December 21, 1874, act of March 3, 1875, joint resolution of March 14, 1876, act of June 11, 1878, and the act of June 16, 1880; and that the claims herein made were never rejected by the board of audit. The petition then alleges that on the 20th day of June, 1874, said W. W. Ballard and E. L. Marsh, for a full and valuable consideration, sold and assigned in writing all and singular their respective rights, interests, and claims in and to the cause of action herein set forth, whereby the plaintiff, Talmadge E. Brown, became the sole owner of said claim and cause of action, and is now the owner thereof, and has made no assignment or transfer of the same or any part thereof to any one, but still owns and holds the whole thereof in his own right.

The matters set up in the second, third, and fourth counts of the petition (which are, as claimant states, "only different forms of statement for the same claim") have relation to the work done by the pavement company under the alleged contract of December 10, 1872, amounting in value to $129,569.85, for which they received certificates of the auditor of the board that they afterward sold in the market for about 50 cents on the dollar, realizing therefrom only $69,784.92. The second count relates to the work actually done, and avers that only one-half thereof has been paid for. The third count sets up the doing of the work, and the issuance of auditor's certificates therefor, under such circumstances as are claimed constituted the company an agent for the District to dispose of the certificates at their value, which was 50 cents on the dollar. And the fourth count sets up the doing of the work, the issuance and delivery to the pavement company of auditor's certificates, which are claimed to have been chattels, and a commodity only, and which were worth 50 per cent of their face value. It is to recover from the District of Columbia the other half of the value of these auditor's certificates that the claimant brings this action on these three counts.

To this petition the District of Columbia interposed a general denial, and also a special plea to the first count thereof, which set up a former adjudication of the matters involved in said first count in the Supreme Court of the District of Columbia. Replication was filed, issue was joined, and the case having been heard before the Court of Claims, that court, upon the evidence, found in favor of the District of Columbia and rendered judgment dismissing the claimant's petition. The separate findings of fact of the court below are seventeen in number, and are too lengthy to be incorporated in this opinion. The material facts will be referred to as we proceed.

The decision of the Court of Claims was based upon three grounds: (1) That the contract sued on was not a contract made with the board of public works of the District of Columbia, and was not one in writing as contemplated in § 37 of the act of February 21, 1871, 16 Stat. 419, 427; (2) that the claim set up in the first count of the petition was *res adjudicata*, it hav-

ing been once adjudicated by the Supreme Court of the District of Columbia adversely to the Ballard Pavement Company, of which the plaintiff below is the successor; and (3) that, under the act of June 16, 1880, § 8, 21 Stat. 284, 286, the Court of Claims was prohibited from taking jurisdiction of the claim set up in said first count, because that claim had been once rejected by the board of audit of the District of Columbia.

The decision of the court was clearly right, and the principles on which the learned judge based his conclusion are clear and undeniable.

The appellant contends that the alleged contract sued upon meets the requirements of § 37 of the act of February 21, 1871, which provides that "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District;" and that the contract sued upon being a formal proposition in writing, and an acceptance thereof in writing signed by the secretary of the board, whose authority to sign the same is not denied, and whose genuine signature thereto is admitted, was a valid contract binding upon the parties.

Numerous authorities are cited to show that the written acceptance by one party of a written proposal made to him by another party creates a contract of the same force and effect, as if formal articles of agreement had been written out and signed by said parties. The legal principle asserted is sound, but the fallacy of the argument lies in the assumption that the proposition of the pavement company was in fact submitted to the board, and that the latter did in fact authorize the letter to be written by secretary Johnson accepting the said proposition. Are these assumptions borne out by the evidence adduced at the trial? Upon this point we quote from the 2d, 3d, 4th, 5th, and 6th findings of facts:

"In the early part of that month, (December, 1872,) the said William W. Ballard and the claimant were in the city of Washington, and they had verbal negotiations with Alexander R. Shepherd, then and afterwards a member and vice-president of the board of public works of the District of Columbia,

which negotiations led them to write and send to that board a paper, a copy of which is given in the letter signed 'Charles S. Johnson, Ass't Secretary.' [This letter is quoted in the early part of this decision.] The said Charles S. Johnson was a clerk in the employment of the board of public works and was styled 'assistant secretary.'

"The journal of said board does not show that said proposition was ever before the board, nor does any acceptance thereof by the board appear otherwise than by the statement of said letter; nor does it appear that said Johnson was authorized by said board to write said letter, unless it should be inferred from his being a clerk of the board and styled assistant secretary; nor does it appear that the board or any member of it, except Alexander R. Shepherd, either saw or knew of said letter before or on the said 10th of December, 1872; nor can the original proposition, as drawn up by the claimant and said Ballard, be anywhere found among the papers or files of the board or of the District of Columbia, though searched for there; nor can any copy of said Johnson's letter be found in the books or files of the board or of the said District, though searched for there, and though it was the practice of the board to keep press copies of the letters that went out of its office.

"In all the transactions hereinafter set forth, connected with the matter of paving streets by the said company, it does not appear that any member of the company was before the said board, at any meeting thereof, in relation to that work. Their intercourse in regard to it was almost wholly with said Alexander R. Shepherd. It took place sometimes at his store and sometimes at the office of the board. When it took place at his store it does not appear that any other member of the board was present; when it took place at the office of the board, if other members of the board were present, and any member of the company spoke to them about the matter of that work, they would refer him to said Shepherd. When the company desired work to be designated for them to do they called on said Shepherd, supposing that whenever he said anything about the work in the District he represented the board

of public works — was the mouthpiece of the board. The said company, after receiving said Johnson's letter, proceeded to make preparations for laying down wooden pavement on streets in the District of Columbia, and made a contract for three million feet of lumber, estimated by them to be sufficient to make 75,000 square yards of pavement. In the spring of the year 1873 the company notified the board, through said Shepherd, that they were ready to proceed with the work of paving streets, and requested that such work should be designated for them to do; but none was designated until the latter part of June or beginning of July, when some parts of streets were designated and the company entered on the work of paving them. After doing so, and before they were allowed to receive any certificates of measurement showing work to have been done, they were required to enter into a written contract embracing the work and to give bond for its performance. They at first declined to sign such a contract, claiming that the terms contained in it were different from those of their proposition of December 10, 1872; but they afterwards signed the following contracts."

The findings set out in full the contracts, and further show that the company entered into five of such contracts with the board of public works, the first bearing date July 5 and the last December 19, 1873; that all the work done by the company and every yard of pavement laid by it were done and laid under one of those several contracts; that every engineer's certificate of measurement gave on its face the number of one of those contracts as that under which the work named in the certificate had been done; that the company signed a receipt for every such certificate, and that upon those certificates the company received the auditor's certificates, which they voluntarily sold in the market for about fifty cents on the dollar.

In the face of these facts, found almost wholly from the evidence on the part of the claimant, we are of the opinion that we would not be justified in finding that the alleged contract of December 10, 1872 — the one sued on here — was such as the statute prescribes, or that it was a valid contract in any respect.

By the 37th section of the act approved February 21, 1871, the board of public works is provided for, to consist of five persons, whose duties and powers it is said shall embrace the regulation and repair of the streets and highways of the District of Columbia. In *Barnes* v. *The District of Columbia*, 91 U. S. 540, this court held that, under that act, the board of public works was not an independent body, acting for itself, but was a part of the municipal corporation of the District of Columbia, to which was given the exclusive control of the streets and alleys; that in those matters the board acts as the representative of the corporation, or is "like an ordinary agent of the corporation." We have seen from the findings in the trial below that the board had made no contract with the company on the 10th of December, 1872. It consisted of five members. Those members were the joint agents of the District of Columbia in the management of its streets and alleys, and a contract with the board to be binding upon the District must have been ratified by a majority of the members of the board.

The rule on this subject has been well stated by Dillon in his work on Municipal Corporations, § 283, as follows:

"As a *general rule*, it may be stated, that not only where the corporate power resides in a *select body*, as a city council, but where it has been delegated to a *committee* or *agents*, then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all of the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such a case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease."

It is said, however, by appellant's counsel, that, if the alleged contract of December 10th, 1872, was not originally

binding on the District of Columbia, it became valid and binding by reason of the fact that it was afterwards recognized by the parties, was performed in part by the District in designating the streets whereon the work should be done, by approving and accepting said work, and by the part performance of the contract on the part of the pavement company. In our apprehension no action of the board gives the slightest ground for this position. The refusal of the board to accept any of the work, or to allow any certificate of its amount to be given until after other contracts, entirely different in terms, were duly entered into, and bonds were given for their faithful performance, negatives any suggestion of recognition or ratification by the District of Columbia of the alleged contract of December 10th, 1872, or of any acquiescence in its part performance. This claim is utterly inconsistent with the conduct of the company. The very fact that it entered into these other contracts, different in terms from the alleged contract of December 10th, 1872, and accepted the certificates of the board issued for the work done under those contracts, (and those alone,) proves that it did not regard the verbal negotiations with Shepherd, and the unauthorized letter of Johnson thus disavowed by the board, as binding upon the District of Columbia.

The counsel for appellant further urge that, notwithstanding all this, the alleged contract sued on has been rendered valid by reason of the recognition of such contracts and the ratification thereof by Congress, citing the several acts of June 20, 1874, June 11, 1878, June 16, 1880, and the joint resolution of December 21, 1874.

We have not been referred to any particular section of any one of these acts that would work a confirmation or ratification of a transaction such as forms the basis of this suit. Nor does a close study of them disclose any such provision. On the contrary, by the act of June 16, 1880, § 8, 21 Stat. 284, 286, the Court of Claims is prohibited from taking jurisdiction of this claim as set up in the first count. That section provides that "No claim shall be presented to or considered by the Court of Claims under the provisions of this act which was rejected by the board of audit."

Now, it is shown by the record in this case that this identical claim (differing only in amount) was presented to the board of audit, and was disallowed by that board. The substance and the effect of the petition submitting such claim to the board of audit is substantially the same as that in the first count of the petition in this case. This is conclusively shown by the 15th finding:

"Upon the jacket wherein this petition and exhibit were inclosed this indorsement was made:

"'OFFICE BOARD OF AUDIT,
Washington, August 3, 1874.

"'CLASS 4, No. 239.

"'Claims against the board of public works for which no evidence of indebtedness has been issued.

"'Claims damages for breach of contract in the sum of $75,000.'

"And on the opposite side of said jacket was written:

"'The within claim against the board of public works has been examined and not allowed.'

"The board of audit kept a record of claims allowed and disallowed, in which appear the following:

"'RECORD OF CLAIMS, CLASS 4.

Date.	No. of claim.	Name.	Description of work.	Certificate No.	Claimed.	Allowed.	Disallowed.
1874. Aug.	3239	Ballard Pavement Company.	Breach of contract.	.....	75,000	.....	75,000

"And the members of the board of audit reported said claim to Congress in a list of disallowed claims."

The interest of the claimant in this case is the same as that of the Ballard Pavement Company, which presented the claim to the board of audit. He is the successor of that company. True, in that petition damages were claimed only to the extent of $75,000 for breach of the alleged contract of December 10, 1872, while here the claim for damages is laid at $100,000. That, however, is an immaterial matter. The

cause of action in each instance is the *breach of contract*, and the mere fact that in one instance the damages are laid at $75,000, while in the other at $100,000, does not change its identity.

The suggestion that the claim was not *rejected* by the board of audit within the meaning of § 8 of the act of June 16, 1880, *supra*, but was only *disallowed*, may be dismissed with the remark that the two words when used with reference to the disposition of claims are synonymous.

We think, therefore, that there was no jurisdiction in the Court of Claims to entertain this branch of the case.

We also concur with the court in holding that the judgment of the Supreme Court of the District of Columbia, in a suit brought on the 6th of January, 1875, by William W. Ballard, Edward L. Marsh, and the claimant, Talmadge E. Brown, against the District of Columbia, to recover damages alleged to have been sustained by them under the said proposition and said Johnson's letter sued on in this case, is a bar to the first count of the petition. *Gould* v. *Evansville &c. Railroad Co.*, 91 U. S. 526.

In no view that has been presented or that seems capable of presentation, can the alleged contract be considered binding upon the District of Columbia.

The judgment of the Court of Claims is affirmed.

ALLEN *v.* GILLETTE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 277. Argued and Submitted May 3, 1888. — Decided May 14, 1888.

The principle that a trustee may purchase the trust property at a judicial sale, brought about by a third party, which he had no part in procuring, and over which he could not have had control, is upheld by numerous decisions of this court, and of other courts of this country, and prevails in Texas.

Opinion of the Court.

In equity. Decree dismissing the bill. Complainant appealed. The case is stated in the bill.

Mr. J. T. Brady for appellant. *Mr. H. F. Ring* was with him on the brief.

Mr. T. N. Waul for appellee submitted on his brief.

Mr. Justice Lamar delivered the opinion of the court.

This is a suit in equity in the Circuit Court of the United States for the Eastern District of Texas. The bill sets forth that complainant, Fannie B. Allen, a citizen of Kentucky, is the granddaughter of James Morgan, who died in 1866 seized and possessed of an estate of 70,000 acres of land, and a homestead in Galveston, with some personal property. The land was unproductive and scattered throughout the State. The deceased devised his property to seven grandchildren, of whom complainant was the oldest, and who in 1866 married at the age of seventeen years.

By the terms of the will Henry F. Gillette, George Ball, both of Texas, and W. H. N. Smith, of North Carolina, were appointed executors. They were authorized, after probating said will and filing inventory and appraisement of the property, to administer the estate without any accountability to any judge or court. Gillette and Ball on being duly qualified entered upon the management of the estate.

On the 13th day of June, 1872, complainant and her husband, H. A. Allen, gave their note for $1200, payable six months from date, with 12 per cent interest, to the Banking and Insurance Company of Galveston, to secure the payment of which note they also executed a deed of trust on all complainant's interest in the various tracts of land described in said deed belonging to the estate. Complainant and her husband being unable to pay said note when it became due, the deed of trust was foreclosed, her interest in said estate was sold thereunder, and the said defendant, Gillette, became the purchaser of said interest at the foreclosure sale.

The complainant alleges, at length, that, being poor and in

needy circumstances, arising from the failure and refusal of said defendant to settle up the said estate so as to let her have her portion thereof, or to render it available to relieve her pressing necessities, she was induced by the advice of said defendant to borrow said money from the bank and to execute the said note and deed of trust, which she would not have done but for defendant's promise to make her said interest in the estate available, so as to pay off said note, and thus prevent the sale under the deed of trust. She further alleges that, by withholding from her information as to the condition and value of the estate and making no reports to the court, the defendant obtained an undue advantage over her, and was thereby enabled to bid in her interest for much less than it was worth at the time of the sale. After alleging other circumstances of wrongful conduct and dereliction of duty, she states that, owing to enforced absence from Texas, to her poverty, and to the ignorance in which she was kept as to the real facts relative to her father's estate, it was not until a few months before this suit was commenced that she, by accident, discovered that she had any lawful claim to recover of said defendant her interest in the lands purchased by him.

The bill closes with the prayer that she be allowed to redeem said land from the said defendant, Gillette, by paying said purchase money, and that, in the event of her being unable to redeem it within such reasonable time as the court might direct, then that the land be resold for her benefit, paying the defendant the amount of his advances and interest; that the said defendant be required to answer, under oath, each and every allegation of the bill, and to make a full account of all his actings and doings as executor of Morgan's estate.

The defendant denies the allegation that the note and mortgage were executed by said complainant at his (defendant's) suggestion, by his advice, or with his approval, and alleges, in specific detail, that each and all the statements in the bill as to his (defendant's) conversations, actions, or privity with said complainant and her husband, or said company, in any manner leading to or connected with said loan, note, and trust deed, are wholly untrue and unfounded; and avers that he

was entirely ignorant of the borrowing of the said money and of the execution of said note and deed of trust, and of any and all negotiations with reference thereto, or of any purpose of the kind on their part, until long afterwards, when he happened to see in a newspaper an advertisement of the sale to be made under the trust deed by complainant and her husband. The answer proceeds to give a full recital of the circumstances of defendant's purchase of said interest, declaring that having failed in his efforts to prevent said sale or to secure any better price to be paid, and that having ascertained that the property would be inevitably sold, he attended and purchased said interest, bidding the amount of said debts and expenses of the sale, and that said husband of complainant was present at the sale, repeating his assurance, previously given, of satisfaction at the purchase of defendant in his own personal right and for his own benefit, and without trust or liability to complainant. Defendant further alleges that the price was entirely adequate to the value of the interest at that time, and denies the allegations of complainant to the contrary; alleges that said lands were appraised at twenty-five cents per acre; that the indebtedness of the estate exceeded $20,000; that if settlement had been forced it would not have yielded sufficient to pay the indebtedness; and that the policy of paying off the debts gradually, by inducing creditors to accept lands in settlement and selling in small parcels on time, thus saving all the lands they possibly could for division among the grandchildren of Morgan, was known to, and approved by, the relations and friends of the other six minor children. He denies all concealment of the condition and indebtedness of the estate from complainant and her husband, who was a young man of good business qualifications, fully able, so far as defendant knows and believes, to maintain his family in comfort by economy and industry; and in specific detail shows how he (the defendant) acted in good faith, with all reasonable diligence, in the discharge of his trust to the creditors and devisees of the estate.

The case was set for hearing upon bill and answer, and the exhibits to the bill and answer respectively. Upon the trial, the court held that the complainant was not entitled to the

relief prayed for in the bill; that no fraud was shown to have been committed, and that the defendant acted in the purchase with good faith; and rendered a decree against complainant, dismissing her bill with costs.

The complainant in this case prayed that the defendant be required to answer upon oath, fully and distinctly, each allegation of the bill. He did answer, and repelled every allegation of suggestion or knowledge on the subject of complainant's transactions with the bank, or of any approval of them after he was informed of them. His answer is corroborated by the circumstances and facts developed. There is not in those circumstances the slightest trace of fraud, false representation, or unfair dealing on his part in making the purchase, or of inadequacy of the price paid. It is, perhaps, worthy of remark, that counsel for complainant, both in oral argument and printed brief, was particular to call especial attention of the court to the fact that it is not alleged "that the defendant was guilty of fraud of any kind, either express, implied, or constructive;" nor is it claimed that the facts alleged in the bill show fraud of any kind on the part of the defendant. The theory of his case is, that, on account of the fiduciary relation of the defendant, the law conclusively presumes that he made the purchase for the benefit of the complainant as the *cestui que trust;* and that he thereby acquired only the right of holding the property as a trust mortgagee, and was entitled to realize what he had paid for it in the same manner as a mortgagee realizes from his investment. This is the whole extent of the claim; — not that the purchase shall be set aside and declared void for fraud of any kind, either express or implied, but that it should be upheld and made to operate as a resulting trust for the benefit of the complainant.

It must be conceded that, as a general rule of equity jurisprudence, a trustee or person acting in a fiduciary character for the benefit of others cannot become a purchaser at his own sale, or acquire any interest therein without the express consent, or under a special permission given by a court of competent jurisdiction. The cases cited by counsel for appellant abundantly support this doctrine. It applies to executors

and administrators who are not permitted to derive a personal benefit from the manner in which they transact the business or manage the assets of the estates intrusted to them; but whatever advantage is derived by them from a purchase at an undervalue is for the common benefit of the estate.

In this case the precise nature of the trust, as well as the character and limits of the relations of the executor to the estate, are fixed with precision by the terms of the will, which is as follows:

"I do hereby constitute and declare the children of Son Kosinsko Morgan and his wife Caroline, to wit, Fannie Belle, Charles W., P. May, Maria Orphelia, and Nellie Latham, and Ellen Lee, the daughter of my daughter Othelia Lee, my residuary legatees, and to them in equal shares I will, devise, and bequeath all my estate and property, both real and personal, wherever the same may be, after all just debts against my estate and expenses accruing in the settlement thereof shall have been paid and discharged.

"I hereby constitute and appoint George Ball, of Galveston County, and H. F. Gillette, of Harris, both of the State of Texas, and Mr. Wm. H. N. Smith, of Murfreesborough, North Carolina, the executors of this my last will and testament (and to qualify without bond), with power, jointly or either two of them, to do all such acts and things, to sell any property necessary for the liquidation of debts, and to take all such steps and measures as may be necessary or expedient in the discharge or execution of the trust hereby reposed in them, and in payment and discharge of all the provisions and bequests herein contained, and in the administration of the estate and property devised and disposed of by virtue of this testament; and finally, it is my special desire that when this my last will and testament shall have been proven and recorded and an inventory and appraisement of my estate recorded in the probate court, neither such court nor any other shall have anything further to do with the administration of my estate, but my said executors, George Ball, H. F. Gillette, and W. H. N. Smith, or any two of them who shall qualify and act, shall have full control of my estate under the will,

without accountability to any judge or court further than before expressed by the will."

It is clear, that, with the exception of the exemption of the executors from accountability to the court in the details of administration, the trust created by this will is the same that attaches by operation of law to any executor, to wit, a trust to pay the debts of the estate and then to deliver over the remainder of the lands for partition among the devisees or heirs.

The subject matter of the trust in this case is the whole estate in its entirety: (1) for the common benefit of all the creditors; and (2) for the common benefit of all the heirs or devisees. Respecting these creditors or devisees in their separate and individual capacity, he is not the representative or guardian of their person or property, and can exercise no legal control over either. The disposition which a single creditor may make of his debt against the estate, or the sale or other disposition which an individual devisee may make of his individual interest in said estate, cannot interfere with the executor's control of the estate for the payment of the debts of the creditors, on the one hand, or for its ultimate partition among the devisees, on the other; and both are, therefore, matters entirely outside of his trust and his office.

We have already taken it as true that fraud is out of the question in this case, and that the defendant had no agency in the borrowing of the money and incumbering her separate interest as above described by the complainant. She had, in conjunction with her husband, absolute authority to contract that debt, and to convey her interest in the lands of the estate in trust to the bank, with a power, in case of default of payment, to sell said property. Having this right free from any power of interference on the part of the executor, Gillette, it must follow that the debt was a legal one, the incumbrance a valid one, and the sale under it by the trustee in the deed equally valid and legal. Up to this point the defendant occupies no relation of trust or confidence to the transaction. With no legal power over any of the contracting parties, with no right to interfere with the trustee, to whom full power by

the deed is lawfully given to sell the incumbered interest at public auction, he has no trusteeship in regard to it, no duty to perform in respect to it. The debt itself, incurred by complainant, constitutes no part of the liabilities of the estate which he, as executor, represents. The sale, when made, touched that estate nowhere, did not diminish its assets in the least, nor withdraw from it any lands subject to the debts of creditors, and to the ultimate partition of the devisees and their assigns.

There is nothing in the transaction, from its inception to its final consummation, that imposed upon the defendant any duty incompatible with his right as a purchaser at the sale.

The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control, is upheld by numerous decisions of this court and of other courts of this country. *Prevost* v. *Gratz*, 1 Pet. C. C. 364, 378; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Chorpening's Appeal*, 32 Penn. St. 315; *Fisk* v. *Sarber*, 6 W. & S. 18.

It is true that the rule upon this subject as stated by some text writers is more stringent than that stated in these cases. 1 Perry on Trusts, § 205; Hill on Trustees, 250. We think, however, that the language employed by them does not present a thorough and perfect generalization of the essential principles pervading the decisions upon this subject. They are in manifest conflict with the uniform current of decisions of the Supreme Court of Texas, which are our guides in this case. *Erskine* v. *De la Baum*, 3 Texas, 406, 417; *Howard* v. *Davis*, 6 Texas, 174; *Scott* v. *Mann*, 33 Texas, 725; *Goodgame* v. *Rushing*, 35 Texas, 722.

From all of which we are of the opinion that the decree of the court below was correct, and it is accordingly

Affirmed.

FALK *v.* MOEBS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 243. Argued April 20, 1888. — Decided May 14, 1888.

A promissory note which reads: "Four months after date we promise to pay to the order of George Moebs, Sec. & Treas., ten hundred sixty-one & $\frac{24}{100}$ dollars, at Merchants' & Manufacturers' National Bank, value received," signed: "Peninsular Cigar Co., Geo. Moebs, Sec. & Treas.," and indorsed: "Geo. Moebs, Sec. & Treas.," is a note drawn by, payable to, and indorsed by the corporation, and without ambiguity in the indorsement; and evidence is not admissible to show that it was the intention of the indorser in making the indorsement to bind himself personally.

THE court stated the case as follows:

The plaintiffs in error, Gustav Falk and Arnold Falk, who are citizens of the State of New York, brought suit in the Circuit Court of the United States for the Eastern District of Michigan against the defendant in error, George Moebs, upon nine certain promissory notes made by the Peninsular Cigar Company of Detroit, upon which they sought to charge Moebs personally as indorser. All of the notes were in form like the following, differing only as to amounts and the time of payment:

"$1061.24. DETROIT, MICH., *Aug. 4th*, 1880.

"Four (4) months after date we promise to pay to the order of Geo. Moebs, Sec. & Treas., ten hundred sixty-one & $\frac{24}{100}$ dollars, at Merchants' & Manufacturers' National Bank, value received.

"PENINSULAR CIGAR CO.,
"GEO. MOEBS, *Sec. & Treas.*

"Indorsed: 'Geo. Moebs, Sec. & Treas.'"

The first count of plaintiffs' declaration was special, and alleged in substance that on July 6, 1880, defendant was the secretary and treasurer of a body corporate known as the

Peninsular Cigar Company, then engaged in the business of manufacturing, buying and selling cigars and tobacco in the city of Detroit; that plaintiffs were then doing business as tobacco merchants in New York City; that the defendant, as secretary and treasurer of said Peninsular Cigar Company, applied to plaintiffs for the purchase of certain merchandise, and offered in payment therefor the notes of said Peninsular Cigar Company, and it was then agreed between the plaintiffs and defendant that plaintiffs were thereafter to sell and deliver the merchandise so applied for, and any other goods which defendant, in behalf of said company, might thereafter apply for, and that in payment therefor the defendant should execute and deliver to the plaintiffs the notes of the said Peninsular Cigar Company, payable to the order of the said defendant, and by him personally indorsed to said plaintiffs; that said defendant thereafter ordered from the plaintiffs certain merchandise of the value of $7449, and in accordance with said agreement and in payment for said merchandise, the defendant, upon the several dates indicated and specified in the several promissory notes heretofore mentioned, and with the intent and design of binding, charging, and obligating himself as an indorser upon said notes with the liability of an indorser as defined by the law merchant, made, executed, and delivered to the plaintiffs said nine promissory notes.

To this special count were added the common counts in assumpsit, with a notice thereunder written that the plaintiffs would, under the money counts, give in evidence nine certain promissory notes, copies of which were set out, and in which notice it was stated that said notes would constitute the sole bill of particulars of the plaintiffs' demand.

To the special count in the declaration the defendant demurred, and to the common counts he pleaded the general issue. The demurrer to the special count was sustained, and the plaintiffs at the next term of said court brought the cause on for trial upon the issue framed upon the common counts in the declaration. Upon the trial, which was had before said court and a jury, the plaintiffs offered in evidence the notes referred to, and also the deposition of Arnold Falk, one of

Argument for Plaintiffs in Error.

said plaintiffs, which it was claimed tended to show that it was the intention of the defendant to bind himself personally in making the said indorsement upon said notes; but this evidence was excluded on the ground that it was not evidence of the personal liability of the defendant. Upon the ruling of the court excluding this evidence error is alleged.

Mr. Carlos E. Warner for plaintiffs in error. *Mr. Levi T. Griffin* signed the brief which was filed for same.

I. The indorsement does not, in law, import a corporate obligation, but, upon the contrary, imports an individual obligation of Moebs, the indorser. *Carpenter* v. *Farnsworth*, 106 Mass. 561; *Slawson* v. *Loring*, 5 Allen, 340; *S. C.* 81 Am. Dec. 750; *Chadsey* v. *McCreery*, 27 Illinois, 253; *Robinson* v. *Kanawha Valley Bank*, 44 Ohio St. 441; *Tucker Manufacturing Co.* v. *Fairbanks*, 98 Mass. 101; *Moss* v. *Livingston*, 4 Comstock (N. Y.), 208; *Toledo Agricultural Works* v. *Heisser*, 51 Missouri, 128; *Hitchcock* v. *Buchanan*, 105 U. S. 416.

II. If we be not sustained in the foregoing contention, then we submit that the written evidence leading up to the indorsement and showing the intention of the parties in respect to it, and explaining the sense in which they regarded it, was admissible, and that the court therefore erred in excluding the notes and the accompanying testimony.

We do not understand, as between the immediate parties to this contract, that any different rule applies from that which applies to the construction of any other contract. It seems to us in any event, that the court cannot say absolutely as matter of law, that the indorsement in question imports absolutely the indorsement of the corporation. It does not in terms refer to the corporation. The notes were not made payable to the corporation. The utmost that can be claimed for the indorsement is, that it fails to show absolutely whether it was intended to bind the corporation or the individual; in other words, that the indorsement was ambiguous, and if ambiguous, there can be no question but that written evidence leading to and contemporaneous with it, may be resorted to for the purpose of giving proper construction to that indorsement.

Argument for Plaintiffs in Error.

As between immediate parties, a contemporaneous writing, or a subsequent written agreement, may control the effect of a bill, subject to the same conditions that would be requisite in the case of an ordinary contract. *Brown* v. *Langley*, 4 Mann. & Gr. 466; *Salmon* v. *Webb*, 3 H. L. Cas. 510; *Maillard* v. *Page*, 5 L. R. Ex. 312; *Davis* v. *Brown*, 94 U. S. 423; *Wade* v *Wade*, 36 Texas, 529; *Detroit* v. *Robinson*, 38 Michigan, 108; *Singer Manufacturing Co.* v. *Haines*, 36 Michigan, 385; *Lee* v. *Dick*, 10 Pet. 482; *Richmond, Fredricksburg &c. Railroad* v. *Snead*, 19 Grattan, 354; *Smith* v. *Alexander*, 31 Missouri, 193; *Mechanics Bank* v. *Bank of Columbia*, 5 Wheat. 336; *McClellan* v. *Reynolds*, 49 Missouri, 312; *Shuetze* v. *Bailey*, 40 Missouri, 69; *Musser* v. *Johnson*, 42 Missouri, 74; *S. C.* 97 Am. Dec. 316; *Pratt* v. *Beaupre*, 13 Minnesota, 187; *Kean* v. *Davis*, 1 Zabriskie (21 N. J. Law), 683; *S. C.* 47 Am. Dec. 182; *Hood* v. *Hallenbeck*, 7 Hun (N. Y.), 362; *Martin* v. *Cole*, 104 U. S. 30; *Brawley* v. *United States*, 96 U. S. 168, 173; *Baldwin* v. *Bank of Newbury*, 1 Wall. 234.

We submit: (1) That the notes themselves *prima facie* imported a personal and individual liability of the defendant, and that they should have been received in evidence; (2) That in any event, evidence should have been received showing the facts and circumstances under which said notes were executed and delivered by Moebs and received by the plaintiffs, and to whom the credit was actually given upon the indorsement, and that the court erred in excluding such testimony, and in directing a verdict for the defendant.

Mr. Elliott G. Stevenson for defendant in error. *Mr. Don M. Dickinson* was with him on the brief.

Mr. Justice Lamar, after stating the case as above reported, delivered the opinion of the court.

Error is not assigned in regard to the judgment of the court sustaining the demurrer to the special count of plaintiffs' declaration in the original assignment of errors annexed to and accompanying the writ of error. It is, however, assigned for error in the brief filed in this court by plaintiffs in error

that such judgment is erroneous, and oral argument has been addressed to us on that point.

For the purposes of this decision we do not deem it necessary to review *seriatim* all the errors assigned. In our opinion the first question to be considered is: Does the indorsement on the notes involved in this case, *in terms*, purport to be that of the Peninsular Cigar Company, or does it purport to be the personal indorsement of Moebs? In other words, can it be clearly ascertained from these instruments themselves who is, in law, the indorser of them? Is the indorsement plain and clear, or is it ambiguous?

It is contended on behalf of the plaintiffs in error that the indorsement, *in terms*, is that of Moebs personally; or, at most, that it is ambiguous and may be construed to be either that of the Peninsular Cigar Company, or the personal indorsement of Moebs. They, therefore, contend that the correspondence leading up to the making of these notes (and which is embraced in the deposition of Arnold Falk, before mentioned) should be considered and read with the notes and the indorsement upon them, not so much for the purpose of varying the terms of the contract embraced in the notes, as for the purpose of elucidating that contract, and for the purpose of showing who was in fact the indorser; — not for the purpose of showing what is the true construction of the language of the contracting party, but who *is* the contracting party. On the other hand, it is insisted with equal earnestness by the defendant in error, that the indorsement is unambiguous, and is in plain terms that of the Peninsular Cigar Company, and is not the personal indorsement of Moebs. He, therefore, contends that the evidence contained in the said deposition of Arnold Falk was rightfully rejected; and that to have admitted it as legal evidence would have been in effect to allow a contract in writing to be changed and modified, in an action at law, by extrinsic evidence, contrary to the rule of law which forbids such change or modification.

Upon this question it may be said that the authorities are not entirely harmonious. Indeed, there is much conflict among them. We do not find it essential, or even useful,

to discuss minutely every authority cited by the respective parties to this controversy, some of which are believed to have little relevancy to the subject under consideration. A discussion of a few of the leading ones which are believed to embody all the principles involved in this case, and to control it, will perhaps be sufficient.

Hitchcock v. *Buchanan*, 105 U. S. 416, is a case much in point on this subject. Indeed, it was considered by the learned District Judge below (who, nevertheless, disapproved of the ruling therein and dissented from the opinion of the court below) as practically controlling this case adversely to the plaintiffs in error. In that case a bill of exchange, as follows:

"$5477.13. OFFICE OF BELLEVILLE NAIL MILL CO., Belleville, Ills., Dec. 15th, 1875.

"Four months after date, pay to the order of John Stevens, Jr., cashier, fifty-four hundred and seventy-seven $\frac{13}{100}$ dollars, value received, and charge same to account of Belleville Nail Mill Co.

"WM. C. BUCHANAN, *Pres't.*

"JAMER C. WAUGH, *Sec'y.*

"To J. H. Pieper, Treas., Belleville, Illinois."

was held to be the bill of the company and not that of the individual signers; and it was also held that a declaration thereon against the latter as drawers, setting forth the instrument, and alleging it to be their bill of exchange, was bad on demurrer.

In *Carpenter* v. *Farnsworth*, 106 Mass. 561, a check drawn on the Boston National Bank, a copy of which is as follows:

"$19.20. BOSTON NATIONAL BANK, Boston, September 9, 1869.

"ÆTNA MILLS. "Pay to L. W. Chamberlain or J. E. Carpenter or order nineteen $\frac{20}{100}$ dollars.

"I. D. FARNSWORTH, *Treasurer.*"

was held to be the check of the Ætna Mills, and therefore binding upon the corporation, and not the treasurer, Farnsworth, personally.

In *Sayre* v. *Nichols*, 7 California, 535, a draft, of which the following is a copy:

"$3000. No. 2123.

"Adams & Co.'s Express and Banking House,
Mormon Island, Feb. 21, 1855.

"Pay to A. G. Sayre, or order, three thousand dollars, value received, and charge same to account of this office.

"C. P. Nichols,
"per G. W. Corey, *Agts.*

"To Messrs. Adams & Co., Sacramento.

"Indorsed: 'A. G. Sayre, G. W. C.'"

was held to be the draft of Adams & Co., and not the personal draft of the persons who signed it as agents in this case.

In *Garton* v. *Union City Bank*, 34 Michigan, 279, it was said: "A promissory note made payable to C. T. Allen, cashier, or order, indicates that it was made to him not as an individual, but as a bank officer, and that it was a contract with the bank; and in a suit upon it by the bank no indorsement by such cashier is necessary to the admission of the note in evidence."

To the same effect see *Mott* v. *Hicks*, 1 Cowen, 513, and cases there cited; *Bank of Genesee* v. *Patchin Bank*, 19 N. Y. 312, and authorities cited in Story on Agency, § 154.

In 1 Parsons on Notes and Bills, 92, it is said: "If the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable on the note, and the principal will not be liable. And although it could be proved that the agency was disclosed to the payee when the note was made, and that it was the understanding of all parties that the principal, and not the agent, should be held, this will not generally be sufficient, either to discharge the agent or to render the principal liable *on the note*," citing *Stackpole* v. *Arnold*, 11 Mass. 27. That case was an action against the defendant as maker of three promissory notes. The notes were signed by another person in his own name, and there

was nothing on the face of them to indicate any agency, or that the defendant had any connection with them. At the trial the person who signed the notes testified that they were given for premiums upon policies of insurance procured by him in the office kept by the plaintiff, at the request and for the use of the defendant, on property belonging to him, and that the witness acted merely as the factor of the defendant, and intended to bind him by the premium notes. The judge instructed the jury that, "if they believed the notes to have been made and signed for and in behalf of the defendant, the verdict ought to be for the plaintiff." It was held that the evidence was improperly admitted, and the instruction was erroneous.

The converse of the rule laid down in the last two cases cited would seem to be identical with that contended for on behalf of the defendant in error.

On the other hand, authorities to sustain the view of the case contended for on behalf of the plaintiffs in error are not wanting, either in number or in pertinence.

In *Kean* v. *Davis*, 1 Zabriskie (21 N. J. L.), 683, a bill of exchange of the following purport, addressed to William Thomson, Esq., Somerville, New Jersey, and indorsed — "The Elizabethtown and Somerville Railroad Company, by John Kean, President:"

"$500.00. ELIZABETHTOWN, *Sept.*, 1841.

"Six months after date, please pay to the order of the Elizabethtown and Somerville Railroad Company, five hundred dollars, value received, and charge as ordered.

"Your obed't serv't, JOHN KEAN,

"*President Elizabethtown and Somerville R. R. Co.*"

was held to be ambiguous on its face, not clearly showing whether John Kean individually or the railroad company was the drawer, and proof was admitted, in the language of the court, "not to aid in the construction of the instrument, but to prove whose instrument it is." To the same effect see *Chadsey* v. *McCreery*, 27 Illinois, 253; *Vater* v. *Lewis*, 36 Indiana, 288; *Hood* v. *Hallenbeck*, 7 Hun (N. Y.), 362.

Mechanics' Bank v. *The Bank of Columbia*, 5 Wheat. 326, is also claimed to be an authority in favor of the position taken by the plaintiffs in error. This was an action of assumpsit brought by the bank of Columbia against the Mechanics' Bank of Alexandria on the following check:

"No. 18. MECHANICS' BANK OF ALEXANDRIA,
June 25th, 1817.

"*Cashier of the Bank of Columbia*,

"Pay to the order of P. H. Minor, Esq., ten thousand dollars.

"$10,000. WM. PATON, Jr."

It was contended by the defendants that the check on its face was the individual check of Paton, and that evidence could not be received to show that it was in fact the check of the bank, and signed by Paton as cashier. On the other hand, the plaintiffs contended that the check upon its face did not purport to be the private check of Paton, but the check of the bank, drawn by him as cashier, and that the presumption was, that it was an official act. The court, however, decided that the check was ambiguous upon its face, that the marks indicating it to be the check of the bank predominated, and that the only ground upon which it could be contended that the check was the private check of Paton was that it had not below his name the initials for *cashier*. It was accordingly held that in such case testimony was admissible to explain the ambiguity and establish who was in fact the drawer of the check. The court say:

"But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction, to which must be added the circumstances that the cashier is the drawer and the teller the payee, and the form of ordinary checks deviated from by the substitution of *to order* for *to bearer*. The evidence, therefore, on the face of the bill, predominates in favor of its being

a bank transaction. Applying, then, the plaintiff's own principle to the case, and the restriction as to the production of parol or extrinsic evidence could have been only applicable to himself. But it is enough for the purposes of the defendant to establish that there existed, on the face of the paper, circumstances from which it might reasonably be inferred that it was either one or the other. In that case, it became indispensable to resort to extrinsic evidence to remove the doubt." p. 336.

The reasoning of the court in this last case leads irresistibly to the conclusion that, had the check under consideration been signed by Paton with the word "cashier" appended, there would have been no ambiguity in it, but it would have been clearly and unequivocally the check of the bank. And in this view the case seems to be not necessarily an authority in favor of the plaintiffs in error, but rather an authority against them, and in favor of the defendant in error.

In Daniel on Negotiable Instruments, § 415, it is said: "If a note be payable to an individual, with the mere suffix of his official character, such suffix will be regarded as mere *descriptio personæ*, and the individual is the payee," citing *Chadsey* v. *McCreery*, *Vater* v. *Lewis*, *supra*, and *Buffum* v. *Chadwick*, 8 Mass. 103. Continuing, he says, "In New York a different doctrine prevails," citing *Babcock* v. *Beman*, 1 Kernan (11 N. Y.), 209. But in § 416 the rule laid down would seem to be in favor of the contention of the defendant in error; for it is there said: "Where a note is payable to a corporation by its corporate name, and is then indorsed by an authorized agent or official, with the suffix of his ministerial position, it will be regarded that he acts for his principal, who is disclosed on the paper as the payee, and who, therefore, is the only person who can transfer the legal title," citing *Northampton Bank* v. *Pepoon*, 11 Mass. 288, and *Elwell* v. *Dodge*, 33 Barb. 336.

Many more authorities are cited and might be dwelt upon almost *ad infinitum*. A discussion of all of them would greatly protract this opinion, and would subserve no beneficial result. In all this vast conflict — we had almost said *an-*

archy — of the authorities bearing on the question under consideration, it is not easy to lay down any general rule on the subject which would be in harmony with all of them. It seems to us, however, that the case of *Hitchcock* v. *Buchanan*, *supra*, controls the case at bar. Both involve the same principles, and the decision in this, to be consistent with that of the former, must sustain the contention of the defendant in error. Neither do we think that the case of *Mechanics' Bank* v. *The Bank of Columbia*, *supra*, when considered in the light of the facts upon which it is based, in anywise conflicts with this conclusion.

We conclude, therefore, that the notes involved in this controversy, upon their face, are the notes of the corporation. In the language of the court below, they were "drawn by, payable to, and indorsed by, the corporation." There is no ambiguity in the indorsement, but, on the contrary, such indorsement is, *in terms*, that of the Peninsular Cigar Company.

This being true, it follows that the court below was right in excluding from the jury the evidence offered to explain away and modify the terms of such indorsement. *White* v. *National Bank*, 102 U. S. 658; *Martin* v. *Cole*, 104 U. S. 30; *Metcalf* v. *Williams*, 104 U. S. 93.

Entertaining these views, we find it unnecessary to consider any of the other questions presented and argued by counsel; as what we have said practically disposes of the case adversely to the plaintiffs in error.

The judgment of the court below is accordingly

Affirmed.

ROBERTSON *v.* DOWNING.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 267. Argued April 27, 1888. — Decided May 14, 1888.

Under Rev. Stat. § 2907, and the act of June 22, 1874, c. 391, 18 Stat. 186, § 14, p. 189, as construed by the Treasury Department for many years without any attempt to change it or until now to question its correctness.

goods imported into the United States from one country which, in transportation to the port of shipment pass through another country, are not subject to have the transportation charges in passing through that other country added to their original cost in order to determine their dutiable value.

When there has been a long acquiescence in a Department Regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.

When after duties have been liquidated a reliquidation takes place, the date of the reliquidation is the final liquidation for the purpose of protest.

Letters from the Secretary of the Treasury to a collector of customs, affirming an assessment of duty, and to an importer acknowledging the receipt of his appeal from the collector's assessment, are admissible in evidence to show that an appeal was taken.

The Treasury Department not having objected that an appeal was too early, this court must assume that there was good reason for its action.

This was an action to recover duties alleged to have been illegally assessed. Judgment for plaintiff. Defendant appealed. The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

No appearance for defendants in error.

Mr. Justice Field delivered the opinion of the court.

The plaintiffs below, the defendants in error here, in March, 1882, imported into the United States at the port of New York 5179 packages of steel rods from Mulheim, in Germany. They were shipped at the port of Antwerp, in Belgium, to which place they were brought by rail from Mulheim, where they were made. Antwerp is distant from the frontier of Germany between forty and fifty miles, and from Mulheim two hundred miles. The appraisers added to the invoice price of the articles at Mulheim eleven marks per ton to make the dutiable value of the articles, and four marks per ton for the charges incurred in their transportation to Antwerp. Upon their appraised value, including these charges, the defendant, who was at the time collector of the port of New York, on the 5th of May, 1882, ascertained and liquidated the duties. Subsequently, a reliquidation was made, by which two and one-half

per cent was deducted from the eleven marks. This reliquidation was completed on the 24th of May, 1882. Two days afterwards the plaintiffs made a formal protest against including in the dutiable value of the goods any sum for charges or otherwise in addition to the value stated in the invoice; but adding that they should pay the amount exacted, in order to get the goods, and then claim to have it refunded.

On the trial the plaintiffs put in evidence letters from the Acting Secretary of the Treasury, against the objection of the government, to show that an appeal was taken to the Secretary from the decision of the collector, and that it was affirmed. The counsel of the government excepted to their admission. The following are the letters:

"TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY,

Washington, D. C., August 14th, 1882.

"*Collector of Customs, New York,*

"Sir: The department is in receipt of your letter of the 27th ultimo, submitting the appeal (1996, 2050 H) of Messrs. Downing, Sheldon & Co., from your assessment of duty on additions made by the appraiser to the invoice and entered value of certain steel wire rods imported by them per Hermann, March 9th, 1882.

"The appraiser reports that an addition was made by him for charges under the Department's decision of July 20th, 1880, (S. S. H 4617,) for the reason that the invoice did not state that the price of the merchandise was 'free on board,' and that an addition for value was also made by him to make the usual market value of the merchandise.

"Your assessment of duty thereon is hereby affirmed.

"Very respectfully, H. F. FRENCH,

Acting Secretary."

"TREASURY DEPARTMENT,
OFFICE OF SECRETARY,
Washington, D. C., August 12, 1882.

"MESSRS. DOWNING, SHELDON & Co. (care of Kausche & Downing, P. O. box 3550, N. Y.):

"Gentlemen: This department is in receipt of your appeal, (No. 2050 H,) dated May 25, 1882, from the decision of the collector of the port of New York, assessing duty on certain merchandise, imported per Hermann, March 9, 1882.

"In reply, you are informed that the case has been disposed of by instructions this day addressed to the collector of customs at the port mentioned, to whom you are referred for particulars.

"Respectfully, H. F. FRENCH,
Acting Secretary."

The decision of the Secretary was made August 12, 1882. The plaintiffs paid the amount of duties exacted, and in October following brought the present action. The jury found in their favor for $130.96. The court, by consent of parties, reduced this sum to $47.64, and judgment for that amount, besides costs, was entered. This reduction was made, as we infer from the record, so as to cover only the increased duties exacted by reason of the addition for charges on transportation to Antwerp.

The question of importance presented is whether, under the statute, charges for transportation of goods imported from one country, which on their passage may pass through another country, should be added to the invoice value of the articles to make their dutiable value under § 2907 of the Revised Statutes, and § 14 of the act of June 22, 1874. Section 2907 provides that "in determining the dutiable value of merchandise, there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment, and transshipment, with all the expenses

included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and a half per centum; and brokerage, export duty, and all other actual or usual charges for putting up, preparing and packing for transportation or shipment."

Section 14 of the act of June 22, 1874, 18 Stat. 189, provides "that wherever any statute requires that, to the cost or market value of any goods, wares, and merchandise imported into the United States, there shall be added to the invoice thereof, or, upon the entry of such goods, wares and merchandise, charges for inland transportation, commissions, port duties, expenses of shipment, export duties, cost of packages, boxes, or other articles containing such goods, wares, and merchandise, or any other incidental expenses attending the packing, shipping, or exportation thereof from the country or place where purchased or manufactured, the omission, without intent thereby to defraud the revenue, to add and state the same on such invoice or entry shall not be cause of a forfeiture of such goods, wares, and merchandise, or of the value thereof; but in all cases where the same, or any part thereof, are omitted, it shall be the duty of the collector or appraiser to add the same, for the purposes of duty, to such invoice or entry, either in items or in gross, at such price or amount as he shall deem just and reasonable, (which price or amount shall, in the absence of protest, be conclusive,) and to impose and add thereto the further sum of one hundred per centum of the price or amount so added; which addition shall constitute a part of the dutiable value of such goods, wares, and merchandise, and shall be collectible as provided by law in respect to duties on imports."

In the execution of these statutes the Treasury Department has heretofore uniformly construed them to apply, so far as inland transportation is concerned, only to such transportation where the place of the growth, production, or manufacture of the article is in the same country as the port from which

the vessel sails on which the shipment is made, and not where such transportation is through other countries to reach a place of shipment. Thus, in a decision rendered September 12, 1882, where goods were forwarded from Brodenbach, in Austria, to Hamburg, transshipped to Hull, and then placed on the import vessel, the journey to the United States being continuous, the appellants claimed that no charges accruing after the goods left Austria should be added to make dutiable value, and the Treasury Department sustained the claim, observing as follows:

"This claim seems to be well founded, in view of the long established practice in such cases, and of articles 434–444 of the Regulations of 1874, which provide in substance that in the case of merchandise imported from an interior country through the ports of another country, or from the country of its production, manufacture, or procurement *via* another country, no charges shall be added for transportation accruing after the departure of the merchandise from the country of production, if the collector shall be satisfied that the merchandise was exported from such country with a *bona fide* intention of having it transported to the United States."

A decision by the department, made some years before, also illustrates the construction when the two places, that of production and that of shipment, though separated from each other by water, belong to the same country. The charges for railroad and steamboat transportation of goods from Dundee, in Scotland, to Liverpool, in England, were added to the invoice price to make the dutiable value of the articles imported into this country. The importers objected to these charges, and cited article 441 of the Regulations of 1874, referred to in the above decision, in support of their claim; but the Treasury Department held that the regulation was applicable only where the goods were transported to some port of another country from the country of production for shipment to the United States, by a practically continuous voyage, and was not applicable to shipments from Scotland through England, which are, to all intents and purposes, the same country.

This construction of the Treasury Department we think a

sound one. It places articles which are the growth, product, or manufacture of countries whose ports of easy shipment are found in other countries through which the goods must be carried, on a basis of equality with the products of those countries which have convenient ports of shipment. To preserve this equality the shippers are not obliged to confine their shipments to their own ports, when ports of other countries would be equally or more convenient to them. This construction of the department has been followed for many years, without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the government to question its correctness, except in the present instance. The regulation of a department of the government is not of course to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons. *United States* v. *Hill*, 120 U. S. 169, 182; *United States* v. *Philbrick*, 120 U. S. 52, 59; *Brown* v. *United States*, 113 U. S. 568, 571.

The technical objections taken by the government counsel we do not think tenable. The duties were not finally liquidated until the 24th of May, 1882. The time to protest did not begin to run until then. The previous liquidation on the 5th of May was necessarily abandoned by the corrections subsequently made. The letters of the Acting Secretary were sufficient evidence of the appeal from the decision of the collector. The question was not as to the contents of the appeal, but whether any appeal was taken. The acknowledgment of the Acting Secretary, who decided the matter appealed, was sufficient for that purpose, and also of the affirmance of the decision of the collector. The bill of exceptions also states when the decision of the Secretary was made. Of course that presupposes the receipt by him of the appeal. The date of "May 25th," in the letter of August 12, 1882, was evidently a misprint for "May 27th." But, if it were not so, the Treasury Department not having seen fit to place its decision upon the

ground that the appeal was too early, we must assume that there was good reason for its action.

Judgment affirmed.

ST. ROMES *v.* LEVEE STEAM COTTON PRESS COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 139. Argued January 20, 1888. — Decided May 14, 1888.

If, after transfer by the plaintiff of the subject of controversy in a litigation in Louisiana, the court, on being informed of the transfer, refuses to permit the suit to be discontinued by the plaintiff, a judgment does not make it *res judicata* as to the assignee.

Dismissal of a suit for want of parties does not make the subject of it *res judicata*.

If a corporation by negligence cancels a person's stock, and issues certificates therefor to a third party, the true owner may proceed against the corporation to obtain the replacement of his stock, or its value, without pursuing the purchaser or those who hold under him.

In a suit in Louisiana against a corporation for damages for refusal to permit a transfer of shares on its books, the prescription of ten years applies: but that prescription is not available in this case.

IN EQUITY. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. Charles Louque for appellant.

Mr. Assistant Attorney General Maury for appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit in equity instituted in the court below on the 9th of December, 1882, by the appellant, as heir of her mother and brothers, against the appellee, to compel the latter to issue to the appellant a certificate for sixty-six shares of its capital stock, which are charged to have been unlawfully cancelled and transferred to other parties without

authority; and to recover the dividends on said stock since the year 1853. The bill states that in 1845 the complainant's mother, widow de St. Romes, became the owner of said sixty-six shares of stock, and received two certificates therefor, one for 43 shares and the other for 23 shares; but that on the 29th of July, 1853, the defendant, without authority from the widow de St. Romes, by mistake and in fraud of her rights, cancelled said certificates, and has ever since refused to recognize her, her heirs or assigns, as the owners thereof; that in 1861 Madame de St. Romes sued the company for the dividends accruing on said stock, and, by judgment rendered in June, 1868, recovered the dividends for 1848, 1849, 1852, and 1853; that in April, 1876, the present complainant, as owner of said shares, instituted a suit in the Superior District Court of New Orleans against the appellee, which was ended by a nonsuit in 1882. The bill then states the amount of dividends declared by the defendant since 1853, and prays relief as above stated.

The defendant, in its answer, admits that the widow de St. Romes was owner of stock from 1845 to 1853; but that she transferred the same through her agent on the 29th of July, 1853, and has never owned them since; that her agent was Pierre Deverges, who acted as her attorney in fact in the management of her business for many years, being held out by her to the community as such, with power to dispose of her property; that the stock in question was sold by Deverges, as the widow's agent and attorney in fact, to one Cohen on the day mentioned, and transferred to him on the books of the company; and from that time Cohen and those claiming under him have been in possession of said stock, with right to all dividends; that to effect the sale of the stock the widow de St. Romes delivered her certificates of stock to her said agent, and he surrendered them to the defendant, and new certificates were issued to the purchaser. The answer further states that the books and papers of the defendant were destroyed by fire in 1859, and that its secretary, who superintended the transfer of its stock, and Deverges, have both been dead many years, and that the widow never assumed to assert any claim to the

stock, until the suit brought by her in 1861; it states that Cohen sold the sixty-six shares to Peschier & Forstall, who sold them to A. & M. Heine, who transferred them to one H. Gally, the present owner, and that these persons have successively owned and possessed said stock in good faith, by just title, and received the dividends thereon to the present time. The answer sets up the prescription of three years and of ten years. It further states that in 1871 the widow de St. Romes instituted suit in the Superior District Court of the parish of New Orleans against the defendant and the then owners of the stock, holding under said sale to Cohen, and claimed said stock and the dividends which accrued after 1854, which suit was finally decided by the Supreme Court of Louisiana in March, 1879; and, although the widow attempted, before the decision was announced, to withdraw the suit (then on appeal) on the pretence of an assignment of her interest therein to her son Eugene, in November, 1867, the court, under article 901 of the Code of Practice, refused to dismiss the case on that account, and gave judgment against the said widow de St. Romes on the ground of prescription. The answer sets up this judgment as *res judicata* in defence to the present suit. The answer further states that in April, 1876, the present complainant instituted suit against the defendant in the Superior Court for the parish of New Orleans, claiming the shares and dividends now sued for; which suit was finally dismissed for want of proper parties; the answer claims that this decision also makes the case *res judicata*, and precludes the complainant from a recovery in this suit. Some further supplemental pleadings were filed in the case, but they need not be stated here.

The material questions are, 1st, Whether the matter in controversy is *res judicata;* 2dly, Whether the suit is defective for want of proper parties; 3dly, Whether the claim is prescribed; and, 4thly, If none of these defences can be maintained, whether the stock was transferred by authority of Madame de St. Romes.

The first question requires us to direct our attention to the suits that were brought against the defendant in relation to the stock and its dividends. The first suit was commenced in

January, 1861, and terminated by the judgment of the Supreme Court of Louisiana in January, 1868. It was brought by Madame de St. Romes against the defendant to recover the dividends for the years 1848, 1849, 1852 and 1853, and to be recognized as holder and owner of the stock since 1853 and entitled to all dividends declared thereon since that time, with judgment for the same; or, in default of payment of said dividends, judgment for the value of the shares and interest thereon from 1853. The court gave judgment in the plaintiff's favor for the dividends of 1848, 1849, 1852 and 1853, which accrued before the transfer of the stock, not being satisfied of Deverges' authority to collect them; but as the alleged transferee of the stock was not a party to the suit, it was held that the plaintiff could not be justly recognized as owner of the stock in question; nevertheless her right to claim it in a direct action was reserved.

It is clear that nothing was determined in this action with regard to the validity of the sale and transfer of the stock. Near the close of the proceedings, on the 23d of November, 1867, Madame de St. Romes executed a transfer to her son Eugene de St. Romes of all her interest in the case then pending, and subrogated him to all her rights, claims and demands that might result against said company. On June 9th, 1868, this transfer was filed of record in the cause, and the money recovered in the suit was ordered to be paid to Eugene de St. Romes.

On the 20th of June, 1871, the widow de St. Romes commenced a new action against the defendant, praying that she might be recognized as the owner of the stock; that the cancelling of the certificates might be declared void and the transfer void, and that the defendant, the Levee Cotton Press Company, be ordered to pay her all the dividends which had accrued on the stock since 1853, with legal interest. In pursuance of the decision of the court in the previous case she made the then holders of the stock parties defendant.

During the progress of this suit, in May, 1874, Eugene de St. Romes died intestate, leaving as his sole heirs his mother, his brother Victor, and the present plaintiff, Ermance de St.

Romes. In August, 1874, Victor also died, intestate, leaving as his sole heirs his mother and his sister, Ermance. On the 21st of October, 1874, the widow de St. Romes, the mother, renounced the succession of her sons in favor of her daughter Ermance.

The suit still went on in the name of the widow, and in November, 1874, the Superior District Court dismissed the plaintiff's demand, on the ground that it was prescribed. The widow appealed, and the Supreme Court affirmed the judgment. Quoting the civil code, the court said: "Shares or interests in banks and other companies of commerce or industry are considered as movables (C. C. 466). Three years in good faith, except where the thing was let or stolen, gives a prescriptive title to movables (C. C. 3472). Ten years without title or good faith (C. C. 3475). The defendants possessed under a title and personally in good faith for eighteen years before this suit was brought."

Before this judgment was rendered, the plaintiff wished to dismiss the bill, by reason of having parted with her interest to her son Eugene; but, under article 901 of the Code of Practice, the court refused to dismiss it. Still, as she had actually parted with her interest, the decision is not binding on her transferee or his heirs. So that this judgment also fails to make the present case *res judicata*. The decision of the court, however, is instructive in relation to the law of Louisiana, and may assist us in the further consideration of the case.

Whilst this suit was in progress, on the 1st of April, 1876, the present complainant, Ermance de St. Romes, commenced a suit against the defendant in the Superior District Court to recover the dividends on the sixty-six shares of stock which accrued after the year 1853 down to the commencement of the suit. She based her claim on the allegation that she was the owner of the said shares of stock by inheritance from her brother Eugene, who was transferee of her mother, etc. The Supreme Court, on appeal, dismissed the action for want of proper parties, holding that the persons having possession and claiming to be the owners of the stock should be made parties, because their adverse right could not be disposed of in a suit

in which they were not parties; that the groundwork of the plaintiff's action was the ownership of the stock; that if she was not owner of the stock she could not claim the dividends; that the examination of the ownership in the absence of those to whom the stock had been transferred, and who were in possession of it, and had regularly received the dividends, would be barren of any practical result. This judgment was rendered in 1882. But a dismissal of a suit for want of parties does not render the subject of controversy *res judicata.* It leaves the merits unconsidered and undisposed of. We are of opinion that the defence of *res judicata* cannot be sustained.

In the same year (1882) in which the last judgment was rendered by the Supreme Court of Louisiana, the complainant filed her bill in the present suit, again without making the owners of the stock parties. She founds her claim, as in the former suit, upon her ownership of the stock, alleging that neither her mother nor her brothers ever authorized the transfer of it, and that the cancellation of the certificates was done by mistake, and was a fraud against the widow de St. Romes.

If the Supreme Court of Louisiana was right in dismissing the suit for want of proper parties, the present suit is obnoxious to the same objection. True, it has been developed in the pleadings, that the stock had been so often transferred and had become so blended with other stock, that it could not now be identified, and the present owners could not be ascertained. But is not that a result of the long delay of the complainant and those from whom she derived her interest? The present suit was not commenced until nearly thirty years after the transfer of the stock by Deverges as attorney in fact of Madame de St. Romes. Even if prescription has been sufficiently interrupted to give the complainant a *locus standi* in court, notwithstanding the lapse of time, she may nevertheless be subject to other disadvantages resulting therefrom which cannot be cured.

But was the Louisiana court right in its conclusion as to necessary parties? If a corporation has by negligence cancelled a person's stock, and issued certificates therefor to a

third party who has purchased it from one not authorized to sell it, is the true owner bound to pursue such purchaser, or may he directly call upon the corporation to do him right and justice by replacing his stock, or paying him for its value? The weight of authority would seem to be in favor of the latter alternative. See *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *Loring* v. *Salisbury Mills*, 125 Mass. 138; *Pratt* v. *Taunton Copper Co.*, 123 Mass. 110; *Pennsylvania Railroad Co.'s Appeal*, 86 Penn. St. 80; *Loring* v. *Frue*, 104 U. S. 223; *Salisbury Mills* v. *Townsend*, 109 Mass. 115.

Then will the plea of prescription avail the defendant? The Supreme Court of Louisiana decided in the second suit brought by the widow, 31 La. Ann. 224, 229, that three years' possession in good faith of a movable (which corporate stock is declared to be, Civil Code, 474 (466),) is sufficient to give good title. C. C. 3503 (3472). But that decision was based on the theory that the owner was bound to pursue her stock against those who had obtained possession of it, and in obedience to that view she had made them parties; and it was in reference to such persons that the prescription of three years was allowed. It could not apply to the defendant, because the defendant never had possession of the stock. It was answerable for carelessly and negligently allowing the transferees to obtain possession of it. It follows that the corporation cannot rely on the prescription of three years; but only on the prescription of one year, which is applicable to the commission of offences and *quasi* offences (and which was not pleaded); or on that of ten years, which is applicable to personal actions generally. Civ. Code, 3536 (3501), 3544 (3508). In *Case* v. *Citizens' Bank*, 100 U. S. 446, which was a suit to recover damages for refusal on the part of the Crescent City Bank to permit a transfer of shares on its books, Mr. Justice Clifford, delivering the opinion of the court, cited a number of Louisiana authorities, to show that in such a case as that the prescription of one year did not apply, but that the prescription of ten years did. The present case seems to belong to the same category. One of the cases referred to by Justice Clifford was that of *Percy* v. *White*, 7 Rob. 513, which was

a suit of stockholders against the directors of a bank for damages and losses sustained through their negligence, fraud and mismanagement of the affairs of the bank. The Supreme Court of Louisiana held this to be an action for damages *ex contractu* against mandataries, or agents. We have looked into the Louisiana reports to some extent and have not been able to find any decisions contrary to the general tenor of those on which this court relied in *Case* v. *The Citizens' Bank.*

If, therefore, the defendant can only plead prescription of ten years, the question remains, whether it is available in this case; and it would seem to be clear that it is not. For though the transfer complained of took place in 1853, the widow de St. Romes brought her action in 1861, after the lapse of only eight years; and it was not terminated until 1868. The complainant commenced her action in the state court in 1876, after an interval of only eight years, and this action was not terminated until 1882. The present action was commenced in the same year. So that there has never been an uninterrupted period of ten years in which prescription could run. It follows that the defence of prescription fails. Civil Code, art. 3518 (3484); *Riviere* v. *Spencer*, 2 Martin, 79, 83; *Badon* v. *Bahan*, 4 La. Ann. 467, 470; *Turner* v. *McMain*, 29 La. Ann. 298, 300.

The defendant's counsel feeling, no doubt, the uncertainty of the defences referred to, dwelt with much emphasis and ingenuity upon the presumptive proofs of the transfer of the stock being made by Deverges with the knowledge and authority of Madame de St. Romes. It is unnecessary to say more on this subject than that the proofs referred to fail to satisfy us that any authority was given, or that the transfer was acquiesced in. The Supreme Court of Louisiana entertained the same opinion in the case brought in 1861, and very clearly expressed it, although they made no decision on the subject in consequence of what they considered a want of proper parties.

The decree of the Circuit Court is reversed and the cause remanded with instructions to take further proceedings in conformity with this opinion.

ROBBINS *v.* ROLLINS'S EXECUTORS.

ROLLINS'S EXECUTORS *v.* ROBBINS.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 237, 861. Argued April 18, 19, 1888. — Decided May 14, 1888.

Analyzing the contract which is the subject of litigation, and which is set forth at length in the opinion, this court holds that the court below was in error in sustaining and allowing against Robbins Rollins's claim for the payment of the two mortgages or deeds of trust, and subrogating him to the rights of the mortgagees Low, and the Mutual Benefit Life Insurance Company; and that the deed of subrogation from the latter company to the German-American Savings Bank was wrong and unauthorized, and should be vacated and declared void without the necessity of the intervention of a cross-bill for that purpose.

IN EQUITY. Both parties appealed from the final decree. The case is stated in the opinion.

Mr. H. H. Wells and *Mr. Samuel Shellabarger* for Rollins's Executors.

Mr. John Selden and *Mr. George F. Edmunds* for Robbins.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The bill in this case was filed on the 25th of October, 1883, by Edward A. Rollins, of Philadelphia, against Zenas C. Robbins, of the city of Washington, to recover $122,000, with interest, and, on the failure of Robbins to pay the same, to have certain property in Washington, of which Rollins claims to be mortgagee in possession, sold to satisfy said claim. Rollins, the complainant, claims title to the matter in suit, by purchase in November, 1880, from one Keyser, the receiver of The German-American Bank; and said bank derived title from The German-American Savings Bank of Washington by purchase in October, 1877; and the latter acquired their principal interest in the matter from John Hitz, William F. Mattingly,

and Charles E. Prentiss by deeds dated in May and June, 1875 — the said Hitz, Mattingly, and Prentiss having procured the said interest for the said savings bank in the manner hereafter mentioned. The transactions out of which the controversy took its rise were as follows:

In 1873, the defendant Zenas C. Robbins was in possession of the property known as the Federal Building, situated on the southeast corner of Seventh Street and F Street northwest, in the city of Washington, immediately opposite the Post-Office Department Building, being one hundred feet on Seventh Street and 129 feet 3½ inches on F Street. Part of this property, namely, the one hundred feet front on Seventh Street, and forty feet deep on F Street, he owned in fee simple; the rest of it, 89 feet 3½ inches on F Street, and 100 feet deep, lying immediately in rear of the first part, he held by leases, with contracts giving him the privilege of purchasing the fee at any time during the continuance of the leases. This leasehold portion was divided into four lots fronting on F Street, and each running back from F Street one hundred feet in depth, and he had a separate lease and contract for privilege of purchase on each; the rent of each being sixty dollars per month, amounting to $2880 per annum for all four lots; and the purchase prices, at which he had the privilege of purchasing the lots, were respectively $8000, $12,000, $12,000, and $10,000 — the whole amounting to $42,000. The lot owned by Robbins in fee, fronting on Seventh and F streets, was incumbered by two mortgages, or deeds of trusts in the nature of mortgages, one for $10,000 held by one Daniel Low, and the other for $25,000 held by The Mutual Benefit Life Insurance Company of New Jersey. There was also a judgment lien of $10,500 on the leasehold property.

In or about August, 1873, the Board of Public Works of the city of Washington cut down the grade of the streets around Mr. Robbins's corner several feet, and rendered the buildings on his property somewhat insecure; the board, pretending that they were in danger of falling, in October, 1873, ordered them to be taken down and removed. Robbins remonstrated, and some arrangement was made for strengthening them.

Robbins claimed damages against the city for the injury done to his property, and an award of $4098 was afterwards made and paid to the bank, after it came into possession of the property as hereafter mentioned.

On the 10th of September, 1873, Hitz, the president of The German-American Savings Bank, and in its interest, made a contract with Robbins to purchase the whole property, of which the following is a copy:

"WASHINGTON, D. C., *September 10th*, 1873.

"Agreement between Zenas C. Robbins and John Hitz, both of the city of Washington, District of Columbia.

"The said Robbins does hereby agree to sell unto the said Hitz, his heirs or assigns, the real estate at the northwest corner of square numbered four hundred and fifty-six (456) in the city of Washington, D. C., for the sum of one hundred and seventy thousand dollars, said property fronting one hundred (100) feet on Seventh Street and one hundred and twenty-nine (129) feet four and one half (4½) inches, more or less, on F Street. Forty (40) feet on F Street, at the corner of Seventh Street, by one hundred (100) feet, more or less, in depth, is owned by said Robbins in fee. Twenty (20) feet on F Street, by one hundred (100) feet in depth, more or less, is a leasehold, with privilege of purchase, for $10,000.00. Twenty-three (23) feet on F Street by one hundred (100) feet in depth, more or less, is a leasehold, with like privilege, for $8000.00. Twenty-three (23) feet on F Street by like depth is leasehold, with like privilege, for $12,000.00. Twenty-three (23) feet four and one half (4½) inches on F Street by like depth is leasehold, with like privilege, for $12,000.00. Said sale is to date as October 1st, 1873.

"All taxes upon said property are to be paid by said Robbins, including the taxes for the year ending June 30th, 1873, and all rents up to October 1st, 1873, are to be received by him, provided none of said rents are payable in advance. All rents due on said leasehold property up to said October 1st, and all interest on incumbrances, are to be paid by said Robbins.

"All rents subsequent to said October 1st are to be received by said Hitz; said Hitz is to assume the incumbrances on said property, viz.:

Deed of trust to Daniel Low	$10,000 00
" " Mutual Benefit Life Ins. Co., Newark, N. J.	25,000 00
Purchase money under Larner lease	10,000 00
" " " Gideon "	8,000 00
" " " Shanks "	12,000 00
" " " lease from executors of Jacob Gideon	12,000 00
	$77,000 00
And the balance in cash or its equivalent . . .	93,000 00
	$170,000 00

"Any other incumbrances are to be paid by said Robbins, and the conveyance to said Hitz is to be free from any dower right in the wife of said Robbins.

"The purchase by said Hitz is conditional on his approval of the title to said property and the increase by the German-American Savings Bank of its capital stock according to law.

"Z. C. Robbins. [seal.]
"John Hitz. [seal.]"

Robbins in his testimony says that immediately after signing this contract he went to Virginia to visit some friends, and did not return until the first of November, 1873. He says that he then found the Bank in possession of all the property, and proceeds as follows:

"A few days after my return from Virginia Mr. Hitz came to me and made me this proposition: He said that if I preferred to change the sale into a lease of the property perhaps we could make a new negotiation, and he made this proposition — that he and his associates, Mr. Mattingly and Mr. Prentiss, would take the property on a ten years' lease; would pay the purchase money under the four leases; would pay the

incumbrances of record, amounting to $35,000; would pay me $600 a month during the term of the lease; pay all the taxes that might be assessed on the fee-simple property and leasehold estates, and would relieve me of all care and responsibility, expense, and charges of every name, nature, and description relating to the fee-simple and the leasehold estates during the whole term of the lease, provided I would embody in the lease the privilege of the purchase of my fee-simple property by the lessees for the sum of $93,000 at any time during the term of the lease. Another provision of the contract was, he gave me the option of a conveyance of the four leasehold estates by paying the several amounts of purchase money named in the leases, with eight per cent interest from the date of payment."

Thereupon the first agreement was abandoned, and the following agreement and lease, upon which the present rights and obligations of the parties depend, was entered into. We set it out at large, because it is the foundation of the whole controversy in the present suit, and almost every part of it is important in settling the rights of the litigants:

"This indenture, made this 25th day of October, A.D. 1873, by and between Zenas C. Robbins, of the first part, and John Hitz, William F. Mattingly, and Charles E. Prentiss, of the second part, all of the city of Washington, District of Columbia.

"Whereas the said party of the first part is seized in fee simple of all that certain parcel of land in square numbered four hundred and fifty-six (456), in the city of Washington, D. C., contained within the following metes and bounds: Beginning for the same at the northwest corner of said square and running thence east along the line of F Street forty (40) feet, and running south with this width one hundred (100) feet, it being the same that was conveyed to the said party of the first part by George S. and Juliana Gideon, executors of Jacob Gideon, deceased, by deed dated July 21, 1869, and recorded in Liber D, No. 10, folio 288 *et seq.*, of the land records of the District of Columbia:

"And whereas the said party of the first part has a lease-

hold interest in a certain part of lot numbered fourteen (14) in said square, particularly described in a certain indenture of lease from George S. Gideon, trustee for Catharine C. Gideon, to the said party of the first part, dated November 30, 1864, and duly recorded in Liber N, C. T., No. 52, folio 101 *et seq.*, of said land records, with the privilege of purchasing said property in fee simple for the sum of eight thousand ($8000) dollars, and has also a leasehold interest in a certain other part of said lot numbered fourteen (14), particularly described in a certain indenture of lease from Catharine N. Shanke and John Hitz and wife to the said party of the first part, dated May 31, 1865, and duly recorded in Liber N, C. T., No. 57, folio 456, of said land records, with the privilege of purchasing said property in fee simple for the sum of twelve thousand ($12,000) dollars; and has also a leasehold interest in a certain other portion of said lot fourteen (14) and a part of lot numbered fifteen (15) in said square, particularly described in a certain indenture of lease from George S. and Juliana Gideon, executors of Jacob Gideon, deceased, to the said party of the first part, dated May 31, 1865, and duly recorded in Liber N, C. T., No. 59, folio 128 *et seq.*, of said land records, with the privilege of purchasing said property in fee simple for the sum of twelve thousand ($12,000) dollars; and has also a leasehold interest in a certain part of lot numbered thirteen (13) in said square, particularly described in a certain indenture of lease from George S. Gideon, trustee for Christiana Larner, to the said party of the first part, dated November 30, 1864, and recorded in Liber N, C. T., No. 52, folio 106 *et seq.*, of said land records, with the privilege of purchasing said property in fee simple for the sum of ten thousand ($10,000) dollars, the whole of said property, fee simple, and leasehold interests, having a front on Seventh Street west in said square of one hundred (100) feet and on F Street north of one hundred and twenty-nine (129) feet three and one-half ($3\frac{1}{2}$) inches:

"Now, therefore, this indenture witnesseth: That the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained to be paid down and performed by the said parties of the

second part and the survivor of them, his heirs, executors, administrators or assigns, does hereby assign, transfer, and set over unto the said parties of the second part and the survivors and survivor of them, his executors, administrators, and assigns, all said leasehold interests in said several parcels of land and said leases, and the unexpired portion of said several terms, together with all the rights and privileges and subject to the obligations in said several leases contained, and does also hereby demise, lease, and to farm let unto the said parties of the second part and the survivors and survivor of them, his executors, administrators, and their and his assigns, all of said parcels of land so held in fee simple as aforesaid by the said party of the first part for the term of ten years from and after the first day of November, A.D. 1873, and thence next ensuing, and fully to be complete and ended, they and he yielding and paying unto the said party of the first part, his heirs and assigns, the sum of six hundred (600) dollars per month on the first day of each and every month during the said term, and observing and performing all and singular the covenants and agreements set forth in these presents on their and his part to be observed and performed; and the said parties of the second part, for themselves and each of their heirs, executors, and administrators, do hereby covenant with the said party of the first part, his heirs and assigns, in manner following, to wit: That they, the said parties of the second part, and the survivors and the survivor of them, his heirs, executors, and administrators and their and his assigns, shall and will pay or cause to be paid said monthly rent as hereinabove stipulated, and shall and will pay and cause to be paid the incumbrances of record against said property, or any portion thereof, the same being two deeds of trust of twenty-five thousand and ten thousand dollars, respectively, and shall and will exercise the said several privileges of purchasing in fee simple granted in said leases by paying or causing to be paid said several amounts of purchase money as provided in said leases, and shall and will pay or cause to be paid all taxes and assessments hereafter levied or imposed upon said property or any portion thereof; and the said party of the first part, for him-

self, his heirs, executors, administrators, and assigns, does hereby covenant with the said parties of the second part and the survivors and survivor of them, his heirs, executors, administrators, and their and his assigns, that he, the said party of the first part, his heirs or assigns, shall and will, at any time within said term of ten years, convey unto the said parties of the second part and the survivors and survivor of them and his heirs and their or his assigns, in fee simple, said parcels of land so held in fee simple as aforesaid by the said party of the first part, free and discharged from all right of dower on the part of the wife of the said party of the first part, on the payment to him, the said party of the first part, or his heirs, executors, administrators, or assigns, of the sum of ninety-three thousand dollars; and, further, that he, the said party of the first part, has full and lawful right to execute these presents, and that he, his heirs, executors, administrators, and assigns, will at any and all times hereafter, when requested so to do, execute and deliver any other or further assurance in law to the said parties of the second part and the survivors and survivor of them, his heirs, executors, and administrators, and their and his assigns, which their or his counsel learned in the law may advise, devise, or require; and it is hereby mutually understood and agreed by and between the parties hereto as follows, viz.: The said party of the first part or those claiming under or through him shall pay all taxes and assessments against or upon said property or any portion thereof up to November 1st, 1873, including the *pro rata* of taxes to this date for the year ending June 30, 1874, and shall also pay or cause to be paid interest on said incumbrances amounting to thirty-five thousand dollars up to said first day of November, and also all rents in leasehold interests to said November 1st, and shall also pay or cause to be paid any and all other incumbrances that may be upon or against said property or any part thereof. Should the said parties of the second part or those claiming under or through them be compelled to pay any sum or sums of money which under these presents ought or should be paid by the said party of the first part or those claiming under him, then the same, with interest at the rate of eight per cent per annum from the

date or dates of payment, shall be a lien upon said property. Should any one of the buildings on said parcels of land or a material portion thereof fall, either from its present condition or in attempting repairs upon the same, then, at the option of the said parties of the second part or those claiming under or through them, this indenture shall be held null and void, and any moneys expended shall be a lien upon said property and be refunded by the said party of the first part and those claiming under or through him, with interest as aforesaid. Should the said parties of the second part or those claiming under or through them fail to exercise said privileges of purchasing the said fee-simple interest in said property so held by said Robbins within said term of ten years from November 1st, 1873, then the said party of the first part, his heirs or assigns, shall be entitled to a conveyance of all of said property by refunding within one year from the expiration of said term of ten years all sums of money paid by the said parties of the second part or those claiming under them, with interest at the rate of eight per centum per annum in the purchase of the fee simple or any portion of said property and in relieving the same of incumbrances created by the said party of the first part. The said parties of the second part and those claiming under or through them shall have the right and privilege of tearing down, altering, or repairing any and all of the buildings on said premises, and of rebuilding or repairing, as they may deem proper. Should the German-American Savings Bank of the city of Washington increase its capital stock for the purpose of purchasing said property, then the said party of the first part is to have the privilege of subscribing for the same to the amount of twenty thousand dollars, upon the same terms as other subscribers.

"In testimony whereof the said parties of the first and second parts have hereunto set their hands and affixed their seals on the day and year first hereinbefore written.

"(Signed) "Z. C. Robbins.
"John Hitz.
"Wm. F. Mattingly.
"C. E. Prentiss."

If we analyze this document, we find that, like the first agreement, it treats of the entire property, freehold as well as leasehold, and instead of providing for an absolute sale, transfers the leases of the leasehold, with privilege of purchase, and leases the fee-simple part, with like privilege of purchase; the consideration, as before, being the same amount, $170,000, namely, $93,000 for the lot held by Robbins in fee simple, $35,000 to be paid to clear off the mortgages, and $42,000 to be paid to the owners of the four leasehold lots.

Looking at the agreement in parts, we find:

1st. Robbins, for and in consideration of the rents, covenants, and agreements to be paid and performed by the parties of the second part, assigns to them the leases of the four leasehold lots, with all the rights and privileges conferred thereby; and leases to them the lot held by him in fee simple for the term of ten years, at a rent of $600 per month.

2d. The parties of the second part, on their side, covenant and agree to pay the said monthly rent above stipulated, and the incumbrances of record against the said property, or any portion thereof, specifying the two deeds of trust for $10,000 and $25,000; and further agree, that they will exercise the several privileges of purchasing in fee simple the leasehold lots, by paying the several amounts provided in the leases, namely, [amounting in the aggregate to $42,000]; and further, to pay all taxes, and assessments to be levied on the property or any portion thereof.

Suppose the paper had ended here, could there have been a doubt that the payments to be made by the parties of the second part, namely, the reserved rent, the $35,000 for clearing off the mortgages, and the $42,000 for buying in the fee (for themselves) of the leasehold property, constituted the consideration of the lease and assignment made to them by Robbins in the first clause? The parties evidently regarded the privilege of purchasing the four leased lots on F Street for $42,000 as a valuable one. It does not seem at all improbable that Robbins should demand, and that the parties of the second part should be willing to give, $35,000 (the amount of his mortgages) for this privilege. This would make the four

lots cost them $77,000. If Robbins's 4000 square feet on Seventh Street were worth $93,000, it is not unreasonable to suppose the 8900 square feet fronting on F Street, and lying in the rear of the other, and almost necessary to it, should be worth $77,000. The remaining parts of the agreement are not in conflict with the construction suggested. In the next place,

3d. Robbins gives to the parties of the second part the privilege of purchasing his fee-simple lot at any time during the ten years' lease for the sum of $93,000.

4th. The agreement then provides that Robbins shall pay all interest, rents, taxes, and assessments up to the 1st of November, 1873; and it was further agreed, that if the second party should have to pay any sums of money which Robbins, under the agreement, ought to pay, they should be a lien on the property.

5th. It was provided that if any of the buildings should fall in repairing, etc., the second party should be released from the contract and refunded the amounts paid by them.

6th. It was agreed that if the second party should not exercise their option of buying Robbins's fee-simple property, he should for one year after the expiration of the ten years' term have the privilege of buying them out by refunding all payments they might have made.

Now, none of these provisional exigencies took place. The parties of the second part did not exercise their option of buying Robbins's fee-simple property; nor did he exercise his option of buying them out; and the buildings never fell. In all other respects both parties performed their respective parts of the agreement; Robbins paid all interest, taxes, rents, etc., up to November 1st, 1873, and paid off the $10,500 judgment lien on the leasehold property; and the parties of the second part and their successors in interest, The German-American Savings Bank and The German-American National Bank, paid the rent of $600 per month, paid off the two mortgages or deeds of trust, amounting together to $35,000, and all interest thereon, paid the rents of the leasehold lots, and bought in the fee simple thereof from the owners, at the stipulated amount of $42,000. So that, at the close of the transaction, the parties

stood as follows: Robbins owned his old fee-simple lot on the corner of Seventh and F streets, and the complainant, who purchased the interest of the other parties, owned the four lots on F Street.

This is the whole case; and we can hardly entertain a doubt respecting the rights of the parties. We think that the court below was in error in sustaining and allowing against Robbins the complainant's claim for the payment of the two mortgages or deeds of trust, and subrogating him to the rights of the mortgagees, Low and The Mutual Benefit Life Insurance Company. The deed of subrogation from the latter company to The German-American Savings Bank was entirely wrong and unauthorized, and should be vacated and declared void. Had a cross-bill been filed for that purpose, it should have been so decreed. Remedy can be had by an original bill.

The contract contains no stipulation whatever that the parties of the second part were in any event to have a return of the $35,000 paid in lifting the two mortgages, except in the event of Robbins availing himself of his option to have a conveyance of the whole property — an event which never took place. We cannot interpolate such a stipulation. It is not implied by anything that appears on the face of the contract; nor does anything in the surrounding circumstances authorize or require a construction of the contract that would import such a stipulation into it. The first agreement made with Hitz seems to us to have an entirely opposite effect.

On all the other points raised in the case, we think that the views of the court below were correct.

The decision is reversed and the cause remanded with directions to dismiss the bill of complaint with costs.

CALHOUN *v.* LANAUX.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 239. Submitted April 19, 1888. — Decided May 14, 1888.

The appointment by a Circuit Court of the United States of a receiver of a corporation organized under the laws of a State does not deprive a court of the State of jurisdiction to hear and determine an application for a mandamus directing a recorder of mortgages in the State to cancel and erase from the books of his office an inscription against property of the petitioner in favor of the corporation, the petition describing it as a mortgage on real estate, and setting forth the interest of the corporation.

This court questions the opinion of the Supreme Court of Louisiana that the Circuit Court of the United States would have no authority to order the erasure of an incumbrance from a mortgage book within the State.

The copies of orders made in this cause by the Circuit Court of the State after the entry of the final judgment to which the writ of error from the Supreme Court of the State was directed, although annexed to the petition for that writ, were too late in the cause to constitute a ground for importing a federal question into it.

THIS was a petition for a mandamus, addressed to a state court of the State of Louisiana. The Supreme Court of the State, to which the case was brought by writ of error, ordered the writ to issue. The federal question is stated in the opinion.

Mr. Joseph P. Hornor and *Mr. Francis W. Baker* for plaintiffs in error.

Mr. B. F. Jonas for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arose upon a petition filed in the Civil District Court for the parish of Orleans, January 23d, 1884, by Lanaux, the defendant in error, praying for a mandamus against Eugene May, the recorder of mortgages for the same parish, commanding him to cancel and erase from the books of his

office all inscriptions against certain property of the petitioner in favor of The Consolidated Association of the Planters of Louisiana, particularly certain inscriptions designated in the petition as being those of a mortgage on three certain lots in New Orleans, dated June 6th, 1843, given to secure the payment of a subscription for fifteen shares of the capital stock of the company, of $500 each. The State of Louisiana, through its Attorney General, the Consolidated Association of the Planters of Louisiana, through its liquidators, and Henry Denis and others, holders of bonds of the State, secured by pledge of the mortgage above mentioned, were made parties to the proceeding. The interest of the collateral parties arose in this way: The mortgage was originally given by one Lebau to secure the payment of his subscription for the fifteen shares of stock, and, with the like mortgages of other subscribers, and the other assets of the corporation, was pledged by the company to the State, as security for paying certain bonds, issued by the State in favor and aid of the company. Hence the interest of the State. The other parties were holders of these bonds of the State, and claimed to be subrogated to its rights. The petitioner alleged that by an act of the Legislature of Louisiana, passed in 1847, and by the action of the liquidators of the company, (which had become insolvent,) the stockholders were called upon to contribute $102 per share, as a fund to meet the obligations of the State, payable in yearly instalments of $6 each for the period of seventeen years; and that all these instalments had been paid on the fifteen shares secured by the mortgage in question. The petitioner further stated that in the case of *The Association* v. *Lord*, one of the stockholders *in consimili casu*, 35 La. Ann. 425, the Supreme Court of Louisiana had decided that the payment of the said instalments discharged the obligations of the stockholders both as to the subscription and mortgage. He further stated that the mortgage kept his lots out of commerce, and that he had no adequate relief except by mandamus to the recorder.

Prior to the filing of this petition, the Circuit Court of the United States for the Eastern District of Louisiana had

appointed receivers of the said Consolidated Association of Planters, and a copy of the petition was served on them.

The Attorney General of Louisiana appeared and filed an exception to the proceeding by mandamus, claiming that the petitioner could only have relief by a plenary suit, *via ordinaria;* and that it was, in fact, a suit against the State, which could not lie without its consent, and that the State declined to be made a party to the proceeding.

The recorder of mortgages appeared, and contended that he could not be required to cancel the inscription of the mortgages until it had been judicially declared that they were not valid and existing securities by proceedings *via ordinaria* by way of citation contradictorily had with the parties claiming the benefit of the mortgages.

The holders of the state bonds, Denis and others, appeared, and denied the allegations of the petition, and pleaded that the court had no jurisdiction of the demand of the relator, because receivers had been appointed to the Consolidated Association of Planters by the Circuit Court of the United States, and that court only could entertain jurisdiction of the matter.

The receivers of the association, appointed by the Circuit Court, did not appear, and offered no objection to the proceeding.

The cause was tried and the Civil District Court, for some reason not shown, dismissed the petition. The case was then appealed to the Supreme Court of Louisiana, which, on the first hearing, affirmed the judgment; but, on a rehearing, reversed it and granted a mandamus as prayed.

On the question of jurisdiction raised by the plea of the bondholders, the court said: "The point made that this court is without jurisdiction because receivers have been appointed for the Consolidated Association by the United States Circuit Court is untenable, when the object of the proceeding is to erase from the mortgage book of the State an incumbrance created by the law, and which the Circuit Court of the United States would have no authority to order."

As this presents the only federal question raised in the case,

we have no occasion to consider any other. If the state court had jurisdiction of the proceedings, its judgment cannot be impeached on the present writ of error, for that is the only objection made to it on federal grounds. The objection is that the court has no jurisdiction because the United States court had appointed receivers of the association. The simple fact that the said court had appointed such receivers is the only fact disclosed in the record, so far as the proceedings in the Circuit Court of the United States are concerned, until after final judgment had been rendered in the Supreme Court of Louisiana; and this fact only appeared by the statement of the defendants Forstall and Denis in their answer. After final judgment of the Supreme Court was rendered, John Calhoun, who had become sole receiver, together with Denis, one of the state bondholders, presented to the Supreme Court a petition for an order to call on the other defendants to join them in an application for a writ of error in this court, and if they refused, then that such writ be allowed to the petitioners alone. To this petition was annexed a copy of an order of the Circuit Court, made December 29th, 1883, in a cause in which William Cressey was complainant and The Consolidated Association of Planters were defendants, for an injunction and the appointment of receivers, enjoining the defendants from disposing of the association's assets or property; and appointing John Calhoun, T. J. Burke and George W. Nott as receivers in the cause, and directing them forthwith to take possession of all the property and assets of the said association and proceed to administer the same under the direction of the court, and collect all accounts due said association, and all parties having possession of assets, securities, books, papers, vouchers or effects of said association be ordered to deliver up the same to said receivers, and that said receivers be vested with all the rights and powers of receivers in equity in this cause.

A subsequent order, a copy of which was also annexed to the petition for writ of error, continued Calhoun and Burke as receivers, and specified more minutely their powers and duties, not materially differing from the above. By another order, made in June, 1884, a copy of which was also annexed to the

petition, Burke was relieved and Calhoun was continued as sole receiver.

The other defendants having declined to join in the writ of error, the court made the following order on the application for writ of error:

"*Order.*

"The exceptions filed by Forstall's Sons and Denis to the jurisdiction of the District Court were filed after the general issue had been pleaded. They do not appear to have been urged in the lower court, as no evidence was offered to show jurisdiction in the Fifth Circuit Court, Eastern District of Louisiana, and were not passed upon, as the judgment of the lower court dismissed the application on a question of proceeding. On appeal no allusion was made to them, and no action of the appellate court was asked on them.

"The exceptors have taken a chance for a decision in their favor on the merits. After getting one against them they cannot be allowed the relief now sought. *Mays* v. *Fritton*, 20 Wall. 414.

"The application for the writ is refused.

"New Orleans, March 26th, 1885.

"E. Bermudez, *Chief Justice.*"

We think that copies of the orders made by the Circuit Court, which were annexed to the petition for a writ of error, were produced in the case altogether too late to constitute any ground for importing a federal question into the cause, although we do not perceive that it would have made any difference in the result if they had been presented regularly in the court of first instance.

Taking the case, then, as it stood when the final decision of the Supreme Court of Louisiana was made, we have simply to decide whether the single fact that the Circuit Court had appointed receivers of the association deprived the state court of all jurisdiction of the petition for mandamus. We have seen that the Supreme Court of Louisiana decided that it did not, and we have seen the reason why they supposed it did

not, namely, that the Circuit Court had no authority to order an erasure of a mortgage on the records of the State.

We should hesitate to concur with the state court in the opinion that the Circuit Court of the United States would have no authority to order the erasure of an incumbrance from the mortgage book of the State. The courts of the United States, in cases over which they have jurisdiction, have just as much power to effectuate justice between the parties as the state courts have. But we do not suppose that the jurisdiction of the state court in the present case depends on the incapacity of the Circuit Court to afford relief; but on its own inherent powers, and the fact that such jurisdiction has not been taken away by the proceedings in the federal court. We held in a number of cases, that the jurisdiction of the state courts over controversies between parties, one of whom was proceeded against under the late national bankrupt law, was not taken away by the bankruptcy proceedings; although a suit against the bankrupt might be suspended by order of the bankruptcy court until he obtained or was refused a discharge. See *Eyster* v. *Gaff*, 91 U. S. 521; *Claflin* v. *Houseman*, 93 U. S. 130; *Mays* v. *Fritton*, 20 Wall. 414; *McHenry* v. *La Société Francaise &c.*, 95 U. S. 58. In the case of *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, we decided that suit might be brought in a state court against a national bank, although it had made default in paying its circulating notes, and a receiver of a bank had been appointed by the Comptroller of the Currency. *A fortiori*, a company may be sued whose assets have been placed in the hands of a receiver in an ordinary suit in chancery.

It is objected, however, that no action can be commenced against receivers without permission of the court which appointed them; and reference is made to *Barton* v. *Barbour*, 104 U. S. 126, 128, and *Davis* v. *Gray*, 16 Wall. 203. This is not an action against the receivers, but against the Consolidated Association and the recorder of mortgages. The receivers were notified of the proceeding by being served with a copy of the petition, so as to give them an opportunity of objecting if they saw fit to do so. They did not appear, and

made no objections. The state bondholders were made parties, and they did appear. We are not concerned, however, with the proceedings, or the merits of the case, but only with the question of the jurisdiction of the court. Of this we have no doubt. Perhaps the Circuit Court, on application of the receivers, might have interfered to prevent the petitioner from proceeding in the state court, had they thought proper to make such an application; but they did nothing of the kind.

This was not the case of a proceeding in the state court to deprive the receivers of property in their possession as such. That would have been a different thing, and the state court would not have had jurisdiction for such a purpose. This was only a case for enforcing the right of the petitioner to have cancelled on the books of the recorder a mortgage which had been satisfied and paid, — not interfering in any way with the possession of the receiver.

We are satisfied that the state court had jurisdiction of the case, and

The judgment of the Supreme Court is affirmed.

LELOUP *v.* PORT OF MOBILE.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 274. Submitted May 2, 1888. — Decided May 14, 1888.

Where a telegraph company is doing the business of transmitting messages between different States, and has accepted and is acting under the telegraph law passed by Congress July 24th, 1866, no State within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business.

Telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different States, they are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of state regulations, except such as are strictly of a police character; and any state regulations by way of tax on the occupation or business, or requiring a license to transact such business, are unconstitutional and void.

Opinion of the Court.

A general license tax on a telegraph company affects its entire business, interstate as well as domestic or internal, and is unconstitutional.

The property of a telegraph company, situated within a State, may be taxed by the State as all other property is taxed; but its business of an interstate character cannot be thus taxed.

The Western Union Telegraph Company established an office in the city of Mobile, Alabama, and was required to pay a license tax under a city ordinance, which imposed an annual license tax of $225 on all telegraph companies, and the agent of the company was fined for the non-payment of this tax: in an action to recover the fine, he pleaded the charter and nature of occupation of the company, and its acceptance of the act of Congress of July 24th, 1866, and the fact that its business consisted in transmitting messages to all parts of the United States, as well as in Alabama: *Held*, a good defence.

THE case is stated in the opinion.

Mr. Gaylord B. Clark for plaintiff in error submitted on his brief.

No appearance for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought in the Mobile Circuit Court, in the State of Alabama, by the Port of Mobile, a municipal corporation, against Edward Leloup, agent of the Western Union Telegraph Company, to recover a penalty imposed upon him for the violation of an ordinance of said corporation, adopted in pursuance of the powers given to it by the legislature of Alabama, and in force in August, 1883. The ordinance was as follows, to wit: "Be it ordained by the Mobile Police Board, that the license tax for the year, from the 15th of March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows: . . .

"On telegraph companies, $225. . . .

"Be it further ordained: For each and every violation of the aforesaid ordinance the person convicted thereof shall be fined by the recorder not less than one nor more than fifty dollars."

The complaint averred that the defendant, being the managing agent of the Western Union Telegraph Company, a cor-

poration having its place of business in the said port of Mobile, and then and there engaged in the business and occupation of transmitting telegrams from and to points within the State of Alabama and between the private individuals of the State of Alabama, as well as between citizens of said State and citizens of other States, committed a breach of said ordinance by neglecting and refusing to pay said license to the said municipal corporation. The complainant further averred that for this breach the recorder of the port of Mobile imposed on the defendant a fine of five dollars, for which sum the suit was brought.

The defendant pleaded that at the time of the alleged breach of said ordinance, he was the duly appointed manager, at the port of Mobile, of the Western Union Telegraph Company. That said company "was prior to the fifth day of June, 1867, a telegraph company duly incorporated and organized under the laws of the State of New York, and by its charter authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama. That on said fifth day of June, 1867, the said telegraph company duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of an act of Congress entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes,' approved July 24th, 1866. That in accordance with the authority of its said charter and the said act of Congress, and by agreement with the railroad companies, the said telegraph company constructed its lines and was at the time of the said alleged breach of said ordinance, maintaining and operating said lines of telegraph on the various public railroads leading into or through the said port of Mobile, to wit, the Mobile and Ohio Railroad, a railroad extending from the said port of Mobile, in Alabama, through the States of Mississippi, Tennessee, and Kentucky, to Cairo, in the State of Illinois; the Louisville and Nashville Railroad, extending from Cincinnati, in the State of Ohio, through said port of Mobile to New Orleans, in the State of

Louisiana, with a branch extending from said State of Alabama over the Pensacola and Louisville Railroad to Pensacola, in the State of Florida. That the said telegraph lines so running into or through said port of Mobile connected with and extended beyond the termini of the said railroads over other railroads, making continuous lines of telegraph from the office of said company, in said port of Mobile, to, through, and over all of the principal railroads, post roads, and military roads in and of the United States, and having offices for the transaction of telegraph business in the departments at Washington, in the District of Columbia, and in all of the principal cities, towns, and villages in each of the United States and in the Territories thereof. That all of said railroads so leading into and through the said port of Mobile and elsewhere in the United States are public highways, and that the daily mails of the United States are regularly carried thereon, under authority of law and the direction of the Postmaster General, and that said railroads and each of them are post roads of the United States. That said telegraph lines are also constructed under and across the navigable streams of the United States, in the State of Alabama and in the other States of the Union, but in all cases said lines are so constructed and maintained as not to obstruct the navigation of such streams and the ordinary travel on such military and post roads. That the said telegraph company was, before and during said year, commencing March 15th, 1883, and now is, engaged in the business of sending and receiving telegrams over said lines for the public between its said office in the port of Mobile and other places in other States and Territories of the United States, and to and from foreign countries; also in sending telegraphic communications between the several departments of the Government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business. And defendant avers that said official telegrams have been and are sent at rates which have been fixed by the Postmaster General annually since the said 5th of June, 1867. And defendant avers that as the manager of said company and in its name and under its direction and appoint-

ment and in no other manner or capacity was he engaged in said telegraph business at the time and the manner as alleged in said complaint."

To this plea a demurrer was filed and sustained by the court and judgment was given for the plaintiff; and, on appeal to the Supreme Court of Alabama, this judgment was affirmed. The present writ of error is brought to review the judgment of the Supreme Court. That court adopted its opinion given on a previous occasion between the same parties, in which the Circuit Court had decided in favor of the defendant, and its decision was reversed. In that opinion the Supreme Court said: "The defence was that the ordinance is an attempt to regulate commerce and violative of the clause of the Constitution of the United States which confers on Congress the 'power to regulate commerce with foreign nations and among the several States.' The Circuit Court held the defence good and gave judgment against the port of Mobile. Is the ordinance a violation of the Constitution of the United States? We will not gainsay that this license tax was imposed as a revenue measure — as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for state or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, how shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collate, explain, and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction between this case and the principle involved in *Osborne* v. *Mobile*, 16 Wall. 479. In that case the license levy was upheld, and we think it should be in this. *Joseph* v. *Randolph*, 71 Ala. 499."

In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was re-

quired, in addition, to pay taxes to the State, county, and port of Mobile, on its poles, wires, fixtures, and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per cent on their gross receipts within the State.

The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24th, 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.

Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of state regulations, except such as are strictly of a police character. In the case of *The Pensacola Telegraph Company* v. *The Western Union Telegraph Company*, 96 U. S. 1, we held that it was not only the right, but the duty of Congress to take care that intercourse among the States and the transmission of intelli-

gence between them be not obstructed or unnecessarily incumbered by state legislation; and that the act of Congress passed July 24th, 1866, above referred to, so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one State shall not, after accepting them, be excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the States, and is also appropriate legislation to execute the powers of Congress over the postal service. In *Western Union Telegraph Company* v. *Texas*, 105 U. S. 460, we decided that a State cannot lay a tax on the interstate business of a telegraph company, as it is interstate commerce, and that if the company accepts the provisions of the act of 1866, it becomes an agent of the United States, so far as the business of the government is concerned; and state laws are unconstitutional which impose a tax on messages sent in the service of the government, or sent by any persons from one State to another. In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages.

It comes plainly within the principle of the decisions lately made by this court in *Robbins* v. *The Taxing District of Shelby County*, 120 U. S. 489, and *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

It is parallel with the case of *Brown* v. *Maryland*, 12 Wheat. 419. That was a tax on an occupation, and this court held that it was equivalent to a tax on the business carried on, — (the importation of goods from foreign countries), — and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibits the States from laying any duty on imports. The Maryland act which was under consideration in that case declared that "all importers of foreign articles or commodities, etc., and all other persons selling the same by wholesale, etc., shall, before they are authorized to sell, take out a license, . . . for which they shall pay fifty dollars," etc., subject to a penalty for neglect or refusal. Chief Justice Taney, referring to the

case of *Brown* v. *Maryland* in *Almy* v. *State of California*, 24 How. 169, 173, in which it was decided that a state stamp tax on bills of lading was void, said: "We think this case cannot be distinguished from that of *Brown* v. *Maryland*. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question. . . . The opinion of the court, delivered by Chief Justice Marshall, shows that it [the case] was carefully and fully considered by the court. And the court decided that this state law [the Maryland law under consideration in *Brown* v. *Maryland*], was a tax on imports, and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance."

But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company.

The state court relies upon the case of *Osborne* v. *Mobile*, 16 Wall. 479, which brought up for consideration an ordinance of the city, requiring every express company, or railroad company doing business in that city, and having a business extending beyond the limits of the State, to pay an annual license of $500; if the business was confined within the limits of the State, the license fee was only $100; if confined within the city, it was $50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States.

A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to reëxamine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts.

In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list: *Case of State Freight Tax*, 15 Wall. 232; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Mobile* v. *Kimball*, 102 U. S. 691; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460; *Moran* v. *New Orleans*, 112 U. S. 69; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Walling* v. *Michigan*, 116 U. S. 446; *Picard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Western Union Telegraph Co.* v. *Pendleton*, 112 U. S. 347; *Ratterman* v. *Western Union Telegraph Co.*, *ante*, 411.

We may here repeat, what we have so often said before,

that this exemption of interstate and foreign commerce from state regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like. We have recently had before us the question of taxing the property of a telegraph company, in the case of *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530.

The result of the conclusion which we have reached is, that the judgment of the Supreme Court of Alabama must be

Reversed, and the cause remanded with instructions to reverse the judgment of the Mobile Circuit Court; and it is so ordered.

FARMERS' LOAN AND TRUST COMPANY *v.* NEWMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 253. Argued April 25, 26, 1888. — Decided May 14, 1888.

The receiver in a suit for the foreclosure of a railroad mortgage, being directed by the court to settle and adjust outstanding claims prior to the mortgage debt, and to purchase in outstanding adverse liens or titles, agreed with the holder of a debt, which constituted a paramount lien on a portion of the railroad, for the purchase of his lien and the payment of his debt out of any money coming into the receiver's hands from the part of the railroad covered by the lien, or from the sale of the receiver's certificates, or from the earnings of that portion of the road, or from the sale of it under the decree of the court; and this agreement was carried out on the part of the vendor. When it was made, a decree for a sale had already been made in the foreclosure suit; and afterwards the road was sold as an entirety, with nothing to show the price paid for the portion covered by the lien, and payment was made in mortgage bonds without any money passing. The vendor of the prior lien then intervened in the suit, asking the court to enforce his agreement with the receiver. Subsequently the court confirmed the sale, reserving to itself the power to make further orders respecting claims, rights, or interests in or liens on the property. At a subsequent term of court the

Statement of the Case.

court found that there was justly due the intervenor the sum claimed, and ordered the sale set aside unless the claim should be paid within ninety days. *Held*, that the intervenor was entitled to the protection of the court, but that the proper remedy was not the annulling of the sale, and confirmation, and master's deed, if the court had the power to do it, but an order for a resale of the entire property in satisfaction of the claim of the intervenor.

THE case as stated by the court was as follows:

This is an appeal from a final order setting aside a sale, made under a decree of foreclosure, of certain mortgaged railroad property, as well as the confirmation thereof, and requiring the receiver, appointed in the foreclosure proceedings, to regain possession of the property, unless the purchaser, before the expiration of a named period, paid a claim of the present appellee, for $17,750, with interest thereon at the rate of six per cent per annum from November 30, 1880.

The origin of that claim, and the circumstances under which it was asserted in this suit, are as follows:

The Lexington, Lake and Gulf Railroad Company was a Missouri corporation, with power to construct and operate a road from Lexington to the southern boundary line of that State. Having constructed the road-bed from Lexington to Butler, in Bates County, and procured ties sufficient for its line as far south as Pleasant Hill, and having also done some dredging, and being indebted to contractors for such work and materials — its liability therefor being evidenced by two notes, one held by Munroe & Co. for $10,682.74, and the other by Lawrence Dean for $2000, each dated October 12, 1871, and bearing interest at ten per cent per annum from date — the company, January 16, 1872, conveyed its road, together with all its rights, privileges, and franchises, including its depot-grounds and other property, acquired and to be acquired, to Moses Chapman, in trust to secure the payment of said notes, and with authority in the trustee, upon default in paying the notes, principal and interest, on or before March 1, 1872, to sell the mortgaged property, at public auction, upon thirty days' notice of sale, for cash, and convey the same to the purchaser.

Statement of the Case.

On the 7th of February, 1872, the company leased its road and property (with the right to mortgage the same) to the Burlington and Southwestern Railway Company — for and in behalf of its Linneus Branch — a corporation created under the laws of Missouri and Iowa, and whose road in Missouri was to extend from the Iowa line to Unionville, with a branch by way of Linneus to Lexington, thence to Kansas City and southwestern Missouri. The lease provided, among other things, that the property leased and said Linneus Branch should be represented by one common stock, and, to all intents and purposes, constitute one line of road, and one common property, to be known as the Linneus Branch of the Burlington and Southwestern Railway. The lessor company in the lease covenanted, among other things, that the leased premises were free from all liens, incumbrances, and debts, "except about the sum of $15,000 due contractors thereon."

On the 1st of April, 1872, the Burlington and Southwestern Railway Company placed a deed of trust upon its entire Linneus Branch and appurtenances, including the leased premises, extending from the main line of the mortgagor company at or near Unionville, by the way of Linneus and Lexington to Kansas City, and by the line of the leased premises from Lexington to Butler, to secure its bonds amounting to $1,600,000. Upon default in meeting the principal and interest of those bonds, the Farmers' Loan and Trust Company, trustee in the last-named deed, instituted in the court below a suit for foreclosure and sale. A final decree of foreclosure and sale was passed May 19, 1876, but, for some reason, it was not immediately executed.

On the 20th of February, 1877, Chapman, trustee in the deed of January 16, 1872, sold the mortgaged premises at public auction, after the required notice, to satisfy the debts secured by that deed, and Henry L. Newman, holding the note given to Munroe & Co., as trustee for the benefit of himself and one Waddell, became the purchaser. Chapman conveyed to Newman, as trustee, the deed being acknowledged August 22, 1877, and filed for record August 5, 1878.

On the 24th of December, 1879, Elijah Smith, receiver in

the foreclosure suit, and also a holder of a large amount of bonds secured by the $1,600,000 mortgage, filed his petition in the foreclosure suit, alleging that Newman and others claimed to own that part of the mortgaged premises consisting of the graded road-bed between Lexington and Butler, and asking that they be enjoined from attempting to interfere with said premises or any part thereof. An injunction was granted, and negotiations then pending between Newman and others for the sale of what he had purchased were thereby broken off.

On the 10th of January, 1880, the receiver, Smith, represented, by petition filed in the foreclosure suit, that a portion of the property in his custody is a line of railroad, partly constructed, "extending from Lexington, in La Fayette County, Missouri, to the town of Butler, in the county of Bates, being a portion of the property acquired by contract with the Lexington, Lake and Gulf Railroad Company;" that it was graded and bridged nearly that entire distance — 82 miles; that the work was done some years ago, and was depreciating in value; that said portion of road, if completed, would be of great value to the parties in interest, and it was important to complete it "at once, and before the sale and confirmation under the decree in this case can be had;" that "said railroad and bridges are rapidly going to decay, and the field is threatened to be occupied by a rival line, which would destroy the value of said property," and that said road should at once be ironed and equipped for traffic, in order to protect, preserve, and save said property to the parties in interest. He asked authority to borrow $300,000, upon receiver's certificates, and that the indebtedness so created "be a lien upon said portion of said road before described only," and "prior to all other liens thereon, but said indebtedness to constitute no claim against any other property in the receiver's hands nor any other fund except that pertaining thereto, to wit, said part of said railroad lying south of Lexington, and such additions thereto and property as may be made or acquired by said fund so borrowed." By a subsequent petition he informed the court that it would require $500,000 to do this work, and

stated other reasons why he should be permitted to build and equip the line south of Lexington for traffic. He also represented that $600,000 had been expended upon that part. The application was granted after notice to the bondholders under the $1,600,000 mortgage, and with their consent. The order authorizing the receiver to borrow $500,000 in certificates or debentures was made on March 3, 1880, and contained these provisions:

"And it is further ordered, adjudged and decreed that such certificates or debentures shall be and they are hereby adjudged to be a lien for the principal and interest thereof prior to all other liens or claims whatsoever upon that portion of said defendant's railroad before mentioned, with all of the property and appurtenances thereto belonging, to wit: . . . but upon no other property or funds in the possession of said receiver. . . .

"And the said receiver is further authorized and directed to settle and adjust, by payment or otherwise, any outstanding claims against the Lexington, Lake and Gulf Railroad Company which may seem to be prior in right to the claims of the Burlington and Southwestern Railway Company under the contract before mentioned, and to purchase in any outstanding or adverse lien or title to any portion or all of said property upon such terms as he may deem for the interest of the parties concerned, any right or title so acquired to be conveyed to him as receiver for the benefit of the parties in interest herein."

It is proper here to state that the certificates authorized by this order were not issued. But a few days after the order was made, namely, on March 12, 1880, Smith, "as receiver of the Burlington and Southwestern Railway Company, acting under authority of the Circuit Court of the United States," entered into a written agreement with Newman, representing himself and Waddell, in which it was stipulated, among other things: 1. That Newman should by quitclaim deed, properly acknowledged and executed within twenty days, and placed in the hands of J. W. Noble in escrow, convey all the right, title, and interest then held by or vested in him "in and to the

railroad and property, appurtenances and franchises of what was formerly known as the Lexington, Lake and Gulf Railroad Company, extending southwardly from the Missouri River, at Lexington, Missouri, by the way of Pleasant Hill, to a point south of Butler;" such conveyance to include all the rights and interest acquired by Newman and Waddell under the trust deed to Chapman, of January 16, 1872, and the sale made under it on the 20th of February, 1877. 2. That said receiver be substituted to all claims of every kind held by Newman and Waddell against the Lexington, Lake and Gulf Railroad Company. This agreement contained the following provisions:

"And in consideration of the premises, said party of the first part, as receiver, agrees to pay said Newman, out of the moneys coming into his hands from that part of said railroad hereinbefore mentioned, or from the sale of receiver's certificates lately authorized by said court to be issued by said receiver, or from any earnings from that portion of said road, or arising from the sale thereof under the decree of said court, and within nine months from the eighteenth day of December, 1879, the sum of seventeen thousand seven hundred and fifty dollars, it being recognized and admitted in this settlement that the claim of said Newman to the above amount is a first and prior lien upon said portion of said railroad, paramount to the mortgage to said Farmers' Loan and Trust Company; but this agreement is not to bind the receiver in reference to any other property or money coming into his hands, except from or pertaining to that part of the property aforesaid acquired from the Lexington, Lake and Gulf Railroad Company.

* * * * *

"And it is further mutually agreed by and between the parties hereto that time is of the essence of this contract, and that in case said second party shall fail to comply on his part with the stipulations hereof said first party may have the right to have the same enforced specifically by the court in which said cause is pending or, at his option, declare this agreement absolutely null and void; and if said first party shall fail within said nine months from December 18th, 1879, to pay said $17,750.00

said second party may apply to said court for the enforcement thereof, or, at his option, he may abrogate or abandon the same absolutely, and his rights in that event shall be the same as if this contract had not been made.

"And it is distinctly understood that this agreement is made by said receiver under an order of said court, and refers to no other than said property before mentioned, and is to be paid out of no funds except such as arise from said portion of said road, and is to constitute no personal or individual claim against said Elijah Smith.

"It is further understood and agreed that when said quitclaim deed shall be delivered in escrow to said Noble that the note mentioned and described in the said trust deed to Moses Chapman, under which said Newman's claim arises, shall be delivered to said Noble also in escrow, and said trust deed shall also be delivered to him if in possession of parties, if not, as soon as practicable; and on the compliance of the receiver with his part of this agreement said note and said trust deed shall be delivered to him, with the said quitclaim deed, as muniments of his title and as vouchers, said note to be cancelled upon payment of said $17,750.00."

So far as the record discloses, all the stipulations in this agreement, relating to Newman and Waddell, were complied with by them. The required quitclaim deed was executed, and the same, together with said notes and trust deed, were placed in the hands of Noble, in escrow, and are now held by him in that way.

On the 30th of November, 1880, the Linneus Branch road, including said property, franchises, rights, and premises of the Lexington, Lake and Gulf Railroad Company was sold, *in gross*, by a special master in the foreclosure suit, Elijah Smith, as trustee for the bondholders, becoming the purchaser at the price of one million dollars, paid *entirely in mortgage bonds held by those whom he represented.*

The present suit was commenced by petition of intervention filed in the foreclosure suit, March 7, 1881, by Newman, as trustee for himself and Waddell. After referring to the efforts of Smith to have his purchase confirmed, he prays that

said contract and agreement be enforced, and that before any order is made, confirming and approving the sale, the receiver be required to pay out of the proceeds of sale the sum of $17,750, with interest at the rate of six per cent per annum, since September 18, 1880, and for such other and further relief as may be just and proper. To this petition of intervention the complainants in the foreclosure suit filed an answer, and subsequently, July 5, 1881, obtained an order confirming the sales, approving the deed to Smith as trustee, which the master had previously submitted with his report of sale, and directing that the property be placed in his possession.

This order, however, contained the following provision: "But the said deed of conveyance and the delivery of said property to said grantee shall not be taken to affect any claim, right, interest in or lien upon or to said property sold and conveyed by said master's deed now pending in this court, or in any state court by leave of this court, but that said claim, right, interest, or lien are hereby reserved, subject to further order and decrees of this court, and the power to make further orders, decrees, and directions in reference to said property in this cause is hereby expressly reserved by the court."

On the 9th of December, 1881, an amended answer was filed by the Farmers' Loan and Trust Company, and Smith, as receiver. The cause having been heard, a final decree was rendered whereby it was ordered and adjudged that "there is justly due the intervenor named the sum of seventeen thousand seven hundred and fifty dollars, with interest thereon from the 30th day of November, A.D. 1880, at the rate of six per centum per annum until paid, and that said claim to the amount aforesaid was authorized by this court to be incurred by its receiver in this cause and was by him so incurred, and was to have been provided for and paid out of the proceeds of sale of that railroad and property described in the mortgage made to complainants by the defendant, The Burlington and Southwestern Railway Company, and which was sold on the 30th day of November, 1880, by order of this court, and the sale whereof was conditionally confirmed on July 5, 1881; that said claim not having been paid or provided for, said sale of said railroad

and property sold as aforesaid, as well as the confirmation thereof, is hereby set aside and for naught held, and said receiver of this court in this cause is hereby ordered to take exclusive possession of said railroad and property, with any additions or appurtenances thereto absolutely necessary to regain his original possession of all said property in all things the same and with all the powers in him as said receiver heretofore vested, at and upon the expiration of ninety (90) days from the date of this decree, unless within said last named period of ninety days the claim of said intervenor in the sum hereinbefore determined be paid with interest and the costs of this proceeding to said H. L. Newman, trustee as aforesaid, by said Elijah Smith, as trustee for bondholders, purchaser at said sale, and if said claim be paid as aforesaid, then said sale shall stand and said order of confirmation be final as to said demand."

From that decree the present appeal is prosecuted.

Mr. P. Henry Smyth for appellants.

Mr. Tilton Davis and *Mr. John W. Noble* for appellee. *Mr. John C. Orrick* was with them on the brief.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

From this history of the proceedings in the court below it satisfactorily appears:

1. That Newman, as trustee, had a lien upon the road south of Lexington — the same leased by the Lexington, Lake and Gulf Railway Company to the Burlington and Southwestern Railway Company for the benefit of the Linneus Branch of the latter corporation — prior and paramount to that created by the mortgage for $1,600,000.

2. That after the court passed the decree of foreclosure of May 19, 1876, the parties deemed it important to their interests that the road south of Lexington be completed for traffic before any sale took place under that decree, and to that end the receiver, with their knowledge and consent, obtained leave

to borrow money upon certificates, which should be a lien, prior to all others, upon that portion of the Burlington and Southwestern Railway acquired for its Linneus Branch under the contract of lease with the Lexington, Lake and Gulf Railroad Company of February, 1872, but upon no other property or funds in the possession of the receiver.

3. That by the same order, the receiver was directed to settle and adjust, by payment or otherwise, any outstanding claims against the lessor company which might seem to be prior in right to the claims of the lessee company under said contract of lease, and to purchase in any outstanding or adverse lien or title to any portion or all of the property, upon such terms as he deemed best for the interests of the parties concerned, "any rights or title so acquired to be conveyed to him *as receiver, for the benefit of the parties in interest herein;*" the parties here referred to being the holders of bonds under the mortgage for $1,600,000 and the trustees in that mortgage.

4. That, under the authority of this order, the receiver made, with Newman as trustee, the agreement of March 12, 1880, whereby the latter agreed to convey to the former, as receiver, all his right, title and interest in the leased premises, including any rights acquired under Chapman's sale in virtue of the trust deed of January 16, 1872, and whereby, also, the receiver agreed to pay to Newman the sum of $17,750 within nine months from December 18, 1879, such payment to be made "out of any money coming into his hands from that part of said railroad hereinbefore mentioned or from the sale of receiver's certificates [then] lately authorized by said court to be issued by said receiver, or from earnings from that portion of said road, *or arising from the sale thereof under the decree of said court;*" such agreement "not to bind the receiver in reference to any other property or money coming into his hands except from or pertaining to that part of the property aforesaid acquired from the Lexington, Lake and Gulf Railroad Company."

It is not disputed that the order authorizing the receiver to acquire by purchase for the benefit of the parties interested in

the foreclosure suit, any adverse lien upon the property decreed to be sold, was one that the court had power to make; nor is it claimed that the agreement made with Newman was beyond the authority conferred upon the receiver by its order. And it is clear that the agreement gave Newman the right to be paid out of any proceeds arising from the sale of that part of the Linneus Branch covered by the deed of trust to Chapman and by the quitclaim to the receiver. But, manifestly, this agreement, fairly interpreted, imposed upon the receiver and the parties interested in the foreclosure suit the duty of obtaining from the court (as might readily have been done) such modification of the decree of sale, passed in 1876, as would enable the court and the parties to know how much was realized from a sale of that part of the road upon which Newman's prior lien rested. That result could have been reached only by selling that part separately, or by selling the mortgage property subject to that lien. Instead of having the sale made in one or the other of the forms suggested, Smith, as agent for the mortgage trustees and bondholders — having induced Newman to surrender his claim and title — bid in the property, *as an entirety*, including the leased premises upon which Newman had a paramount lien, for one million of dollars, *payable in mortgage bonds*. It is now said that there are no proceeds or moneys arising from the leased premises which can be awarded to Newman under his agreement with the receiver. In conformity with that agreement he deposited with Mr. Noble, not only his quitclaim deed to the receiver, but the Chapman trust deed and the note secured by it; and yet, according to the contention of the appellants, his only remedy is a separate, independent suit, asserting his prior lien upon the part of the road covered by the Chapman deed of trust. This result has come from the failure of Smith, as agent for the mortgage trustees and bondholders, to carry out in good faith the agreement which he, as receiver, made with Newman, under the authority of the court, for the benefit of the same parties.

We are of opinion that the sale of the mortgaged property, as an entirety, without having obtained such modification of

the decree of 1876 as would meet the requirements of the agreement with Newman, should, under the circumstances, be deemed an election upon the part of the appellants, and those whom they represent, not to have the mortgaged property sold in parts, or subject to Newman's prior lien, and, consequently, not to restrict his lien to that portion of the road embraced by the Chapman deed; and, therefore, he was entitled to be first paid out of the aggregate proceeds of the sale of the entire line covered by the $1,600,000 mortgage. His right thus to be paid is not to be defeated by the fact that the mortgage bondholders exercised the privilege given by the decree of sale to make payment, not in cash, but in mortgage bonds. If they do not discharge, in money, Newman's prior lien within a reasonable time fixed for that purpose, the property, covered by that mortgage, including the leased premises, should be again sold as an entirety, or so much thereof sold as may be necessary, to raise the amount, principal and interest, due him, together with his costs in the court below, from the time he filed the petition of intervention.

It may be that the same result practically would be accomplished for Newman by executing the decree from which the present appeal is prosecuted. But we are of opinion that the court below erred in setting aside — even if it had the power to do so — the confirmation of the sale by the special master, and the order approving the deed made to the purchaser. The sale was confirmed, the deed to the purchaser approved, and the latter authorized to take possession, by the order of July 5th, 1881. The reservations in that order did not authorize the court to set aside the confirmation of the sale and cancel the deed to the purchaser. The confirmation of the sale and the approval of the deed were, rather, subject to the power reserved, to protect and enforce, by subsequent orders, any claim or lien then pending either in that court, or, by its leave, in a state court. So far as Newman is concerned, such protection can be given, and should be given only, by an order directing the entire property, covered by the $1,600,000 mortgage, to be sold, in satisfaction of his claim or lien, without annulling the former sale or the confirmation thereof, and without withdraw-

ing or cancelling the deed made by the master to the purchaser.

To the extent indicated the decree is reversed and the cause is remanded for further proceedings consistent with this opinion.

TRAVELLERS' INSURANCE COMPANY *v.* McCONKEY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 273. Argued May 2, 1888. — Decided May 14, 1888.

In an action upon a policy of insurance by which the insurer agreed to pay the sum insured to the beneficiary within ninety days after sufficient proof that the insured within the continuance of the policy had sustained bodily injuries, effected through external, violent and accidental means, and that such injuries alone occasioned death within ninety days from their happening, but that no claim should be made when the death or injury was the result of suicide (felonious or otherwise, sane or insane) the burden of proof is on the plaintiff, (subject to the limitation that it is not to be presumed as matter of law that the deceased took his own life or was murdered,) to show that the death was caused by external violence, and by accidental means; and no valid claim can be made under the policy if the insured, either intentionally, or when insane, inflicted upon himself the injuries which caused his death, or if his death was caused by intentional injuries inflicted upon him by some other person.

THE case, as stated by the court, was as follows:

This is a suit upon what is commonly called an accident policy of insurance. There was a verdict and judgment against the insurance company for the sum of $5600 and costs. The case is here upon alleged errors of law committed at the trial to the prejudice of the defendant.

The policy, by its terms, insures the life of George P. McConkey, in the sum of five thousand dollars, for the term of twelve months, commencing at noon on the 7th of November, 1882; "the said sum insured to be paid to his wife, Sadie P.

McConkey, if surviving, (in event of her prior death, said sum shall be paid to the legal representatives of the insured,) within ninety days after sufficient proof that the insured, at any time within the continuance of this policy, shall have sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injuries, by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby, in a sum not exceeding twenty-five dollars per week, for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident."

The policy also contained these provisions:

"Provided always, that this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly, in part, or jointly, by bodily infirmities or disease existing prior or subsequent to the date of this contract, or by the taking of poison or contact with poisonous substances, or by any surgical operation or medical or mechanical treatment; nor to any case except where the injury is the proximate and sole cause of the disability or death; and no claim shall be made under this policy when the death or injury may have been caused by duelling, fighting, wrestling, lifting, or by over-exertion, or by suicide (felonious or otherwise, sane or insane), or by sunstroke, freezing, or intentional injuries inflicted by the insured or any other person, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of voluntary exposure to unnecessary danger, hazard,

or perilous adventure, or of violating the rules of any company or corporation, or when the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder or other explosive substances (unless insured to cover such occupation), or while engaged in or in consequence of any unlawful act; and this insurance shall not be held to extend to disappearances, nor to any case of death or personal injury, unless the claimant under this policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means."

The petition setting out the plaintiff's cause of action alleged that the insured, on or about January 2, 1882, "was accidentally shot through the heart by a pistol or gun, loaded with powder and ball, by a person or persons unknown to plaintiff, by reason of which accidental injury said George P. McConkey then and there instantly died, of which accident and death said defendant was duly and legally notified," etc.

The answer denies that the death of the insured was occasioned by bodily injuries effected through external, violent, and accidental means, (or effected through external violence and accidental means,) within the meaning of the contract of insurance. It alleges: 1. That his death was caused by suicide; 2. That it was caused by intentional injuries inflicted either by the insured or by some other person.

As the argument addressed to this court had special reference to the charge to the jury, the following extract from it is given, as showing the general grounds upon which the court below proceeded:

"The plaintiff exhibits the policy in evidence, and gives evidence of the fact that the insured was found dead within the life of the policy, from a pistol shot through the heart. This evidence satisfies the terms of the policy with respect to the fact that the assured came to his death by 'external and violent means,' and the only question is whether the means by which he came to his death were also 'accidental.'

Statement of the Case.

"It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence that suicide cannot be presumed. The plaintiff is therefore entitled to recover unless the defendant has by competent evidence overcome this presumption and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part.

"Neither is murder to be presumed by the jury; crime is never to be presumed; but if the jury find from the evidence that the insured was in fact murdered, the death was an accident as to him the same as if he had been killed by the falling of a house or the derailment of a railway car in which he was a passenger. If the jury find that the injuries of the insured resulting in his death were not intentional on his part the plaintiff has a right to recover.

"But if the jury find that the injuries inflicted upon the assured causing his death, whether by the assured himself or any other person, were intentional on the part of the assured, the plaintiff cannot recover in this action.

"The inquiry, therefore, before the jury is resolved into a question of suicide, because if the insured was murdered the destruction of his life was not intentional on his part.

"The defendant, in its answer, alleges that the death of the insured was caused by suicide.

"The burden of proving this allegation by a preponderance of evidence rests on the defendant. The presumption is that the death was not voluntary; and the defendant, in order to sustain the issue of suicide on his part, must overcome this presumption and satisfy the jury that the death was voluntary."

The court also said: "In order, therefore, to sustain the plea of suicide, the defendant must have given to the jury evidence sufficient to overcome the presumption to which I have referred, and to convince the jury that the injury from which the insured died was voluntary or intentional on his part."

As further illustrating the views of the learned judge who

Counsel for Parties.

presided at the trial, it may also be stated that the defendant asked the court to instruct the jury as follows: "The burden of proof is upon the plaintiff to establish, by a preponderance of credible testimony, that the deceased came to his death from injuries (or an injury) effected through external, violent, and accidental means within the intent and meaning of the contract and conditions expressed in the policy." That instruction was given with the following explanation or qualification: "That it does clearly appear from the evidence that the insured came to his death from injuries or an injury effected through violent and external means, and that the presumption is that the means were unintentional on the part of the insured, which the court holds satisfies the contract. This presumed fact is not conclusive, and may be overcome by evidence, if such there is in the case that the injuries were voluntary or intentional."

The defendant also asked the following instructions: "Plaintiff must establish by direct and positive proof that the death was caused by external violence and accidental means, and, failing in this, she will not be entitled to a verdict." "Plaintiff's case must not rest upon mere conjecture, but her proof must be such as to lead directly to the conclusion that the death was effected by accidental means within the meaning of the policy, and unless she have adduced proof of that character your verdict should be for the defendant." These instructions were given with the following qualifications: "The external violence appearing in the fact that the death ensued from a pistol shot through the heart, the presumption is that it was accidental — not intentional — on the part of the assured, which facts, proved and presumed, make out the plaintiff's case, unless the defendant has satisfied the jury by affirmative proof that the means of death were intentional on the part of the insured."

Mr. B. D. Lee for plaintiff in error. *Mr. John P. Ellis* was with him on the brief.

Mr. W. G. Thompson for defendant in error. *Mr. H. B. Fouke* was with him on the brief.

Opinion of the Court.

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

There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means. The policy provides that the insurance shall not extend to any case of death or personal injury, unless the claimant under the policy establishes, by direct and positive proof, that such death or personal injury was caused by external violence *and* accidental means. Such being the contract, the court must give effect to its provisions according to the fair meaning of the words used, leaning, however, — where the words do not clearly indicate the intention of the parties, — to that interpretation which is most favorable to the insured. *National Bank* v. *Ins. Co.*, 95 U. S. 673; *Western Ins. Co.* v. *Cropper*, 32 Penn. St. 351, 355; *Reynolds* v. *Commerce Fire Ins. Co.*, 47 N. Y. 597, 604; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 498, 507; *Fowkes* v. *Manchester &c. Life Assurance Ass'n*, 3 B. & S. 917, 925.

The requirement, however, of direct and positive proof, as to certain matters, did not make it necessary to establish the fact and attendant circumstances of death by persons who were actually present when the insured received the injuries which caused his death. The two principal facts to be established were external violence and accidental means, producing death. The first was established when it appeared that death ensued from a pistol shot through the heart of the insured. The evidence on that point was direct and positive; as much so, within the meaning of the policy, as if it had come from one who saw the pistol fired; and the proof, on this point, is none the less direct and positive, because supplemented or strengthened by evidence of a circumstantial character.

Were the means by which the insured came to his death also accidental? If he committed suicide, then the law was for the company, because the policy by its terms did not extend to or cover self-destruction, whether the insured was

at the time sane or insane. In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In *Mallory* v. *Travellers' Ins. Co.*, 47 N. Y. 52, 54, which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury or by the suicidal act of the deceased. "But," the court properly said, "the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person." Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts.

Upon like grounds, we sustain the ruling to the effect that the jury should not presume, from the mere fact of death, that the insured was murdered. The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified.

We are, however, of opinion that the instructions to the jury were radically wrong in one particular. The policy expressly provides that no claim shall be made under it where the death of the insured was caused by "*intentional* injuries, inflicted by the insured *or any other person.*" If he was murdered, then his death was caused by intentional injuries inflicted by another person. Nevertheless, the instructions to the jury were so worded as to convey the idea that if the insured was murdered, the plaintiff was entitled to recover; in other

words, even if death was caused wholly by intentional injuries inflicted upon the insured by another person, the means used were "accidental" as to him, and therefore the company was liable. This was error.

Upon the whole case, the court is of opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external violence and accidental means; also, that no valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death, or if his death was caused by intentional injuries inflicted upon him by some other person.

The judgment is accordingly reversed, and the cause remanded, with directions to grant a new trial and for further proceedings consistent with this opinion.

NICKERSON *v.* NICKERSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 881. Submitted January 6, 1888. — Decided May 14, 1888.

On the proof in this case the court holds that the plaintiff has failed to show such an agreement as can be made the basis of a decree in her behalf.

IN EQUITY. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. J. J. Johnson and *Mr. W. W. Wilshire* for appellant.

Mr. Enoch Totten for Azor H. Nickerson, appellee.

Mr. Henry Wise Garnett and *Mr. Conway Robinson, Jr.*, for appellants Carter and Matthews.

MR. JUSTICE HARLAN delivered the opinion of the court.

Opinion of the Court.

The substantial relief which the appellant, who was the plaintiff below, seeks in this suit is a decree (1) declaring void a conveyance executed May 31, 1883, by William B. Matthews, trustee, to the appellee, Lena D. Carter, by the name of Lena D. Nickerson, of lot two, in square one hundred and fourteen, in the city of Washington; (2) establishing, in behalf of the plaintiff, certain trusts in respect to said real estate; (3) and requiring Matthews and said Lena to convey the same to the plaintiff, or to trustees for the benefit of herself and the child of her marriage with the defendant, Azor H. Nickerson. Her bill asking such relief was dismissed with costs.

The case made by the bill is as follows:

The plaintiff, while on a visit to Portland, Oregon, in the year 1870, engaged herself to be married to the defendant Nickerson, then on duty in that city as an officer of the army of the United States. Prior to such engagement, he pointed out to her blocks 145 and 146 in Couch's Addition to Portland as his property, and "promised and agreed" that after marriage he would convey them to her as a marriage portion or settlement for the benefit of herself and any children of their marriage, and erect thereon a dwelling house for their use; or, if she so elected, they would sell the blocks and invest the proceeds in other property in Portland, to be held upon like trusts, and, after having advanced in value, sold and the proceeds applied exclusively to the purchase of a house for the plaintiff and her children.

The plaintiff's mother, who resided in San Francisco, having been informed of this engagement, objected to the marriage upon the gound that the defendant was an officer of the army, without settled place of abode, or other means of support than his pay as such officer. But her objections, the bill states, were overcome by the defendant's verbal assurance to her to the following effect: That the question of support had been considered by the plaintiff and himself; that he was the owner of certain blocks of ground in the city of Portland, and that he had promised and agreed with the plaintiff that if she would marry him, he would, immediately after marriage, convey them to the complainant as a marriage settlement, or would

hold them as trustee for her separate benefit, and if at any time sold, the proceeds should be invested in other property, to be held in like manner for the sole and separate benefit of the plaintiff and her children. Upon the strength of these promises and representations, and relying upon the good faith of the respondent Nickerson, and in consideration thereof, and for no other reason or consideration whatever, the plaintiff's mother, it is alleged, withdrew her objection, and consented to the marriage, which occurred on the 13th day of August, 1870. Without her mother's consent, the plaintiff avers, the marriage would not have taken place.

It is also alleged that the plaintiff, relying upon the love and affection of her husband; having confidence that he would, in good faith, keep and perform his agreement; and preferring that the property should be managed by him, without the complications necessarily arising from the interposition of third parties, did not require the lots to be conveyed to trustees for her benefit, but permitted the title to remain in the defendant, "subject to her equitable interests under said agreement."

About a month after the marriage the plaintiff and the defendant united in selling said blocks of ground, the proceeds being invested jointly with one John S. Walker in certain lots in Portland. Walker having died, a division of these lots was effected by judicial proceedings, which were concluded in 1878. In respect to the lots assigned in this division to the defendant, the bill alleges that they were held by him — although there were no writings between them on the subject — "for the sole and separate benefit of the complainant," and "as her trustee under the agreement, promise and consideration" hereinbefore stated.

While the plaintiff was temporarily residing in Europe, under circumstances to be presently stated, the defendant sold the lots last described and transmitted deeds therefor to be executed by her. The bill states that, not doubting the affection of her husband or his good faith in keeping his agreement, and perceiving from the consideration mentioned in the deeds ($12,000) that the lots had sufficiently increased in value

to enable him to carry out his promise to purchase a home for her and her child, the plaintiff executed the deeds — bearing the dates, respectively, of November 26, 1881, December 2, 1881, and January 10, 1882 — and returned them to the defendant, with a letter "imploring him to be extremely cautious as to handling said money and in making proper reinvestments."

Instead of investing the moneys received for the lots in a house for the plaintiff and her child, the defendant, the bill charges, in execution of a purpose to deprive her of all benefit of said ante-nuptial agreement, invested $8380 of the $12,000 in lot two in square one hundred and fourteen in Washington, which he caused to be conveyed to the defendant Matthews, as trustee, with power to make title to the premises as the defendant Nickerson might direct, and without the necessity of plaintiff's uniting in any conveyance that said trustee might make.

This purchase and arrangement, the bill alleges, was one step in a conspiracy formed by her husband with the defendant, Miss Carter, some time in the year 1880 — and to which conspiracy the defendant Matthews subsequently became a party — for the purpose of defrauding the plaintiff of her interest in the proceeds of the sale of the Portland property, for the benefit of said Carter, to whom he was to be married after being divorced from the plaintiff; that as the initial step in that conspiracy, her husband represented to her in July, 1880, that he was much in debt, and that it would be in the line of economy if she would reside for a time in Europe, where the cost of living was slight, and the facilities for educating their daughter abundant; that, although unwilling to be separated from her husband, she assented to his wishes, and, with her daughter, sailed for Europe on the 9th of July, 1880, her husband accompanying them to the steamer, and parting from her with every manifestation of love and affection; that, immediately after her departure for Europe, the defendant went to Philadelphia, and there rented rooms for the purpose of acquiring a pretended residence as a basis of proceedings for divorce in one of the courts of that city; that,

after the expiration of the statutory period, to wit, on the 2d of May, 1882, while the plaintiff was still in Europe, he filed a libel for divorce, and, by means of false and perjured testimony, and without her knowledge or consent, obtained, March 31, 1883, a decree of divorce from her; that of the institution of said suit and of said pretended decree the defendants Carter and Matthews had knowledge; and that, as soon as plaintiff was informed of those proceedings she returned to this country, and, in a suit brought for that purpose, she obtained, on the 9th of June, 1883, a judgment annulling the decree of divorce as having been procured by fraud and perjury.

The bill further charges that on the 2d of April, 1883, two days after said pretended divorce, her husband and Miss Carter went to the city of Baltimore, and were there married; that, on the 31st of May, 1883, he directed Matthews to convey and he did convey to said Carter, by the name of Nickerson, his title and interest in lot two in square one hundred and fourteen, said Matthews and Carter, as well as her husband, being aware, at the time, of the pendency of the suit in Philadelphia to set aside the fraudulent decree of divorce; and that on the day last named her husband executed to said Lena a bill of sale of all his personal property in the city of Washington, including the household furniture which the plaintiff and her husband used in common prior to her going to Europe.

All of these acts, the bill charges, were in execution of a conspiracy between her husband and the defendants Matthews and Carter for the following purposes: 1. To get the plaintiff out of the country, beyond the reach and knowledge of what was going on; 2. To have the plaintiff divorced from her husband, so that he could marry the defendant Carter; 3. To defeat the trusts upon which her husband held the Portland property and the proceeds of its sale, and to place the right and title to the same in the defendant Carter.

The defendants Nickerson, Matthews, and Carter, in separate answers, deny every material allegation in the bill relating to them respectively; except, that the marriage of the latter with Major Nickerson, at the time and place stated in

the bill, is admitted. They also severally plead, in bar of the relief sought, the statute of frauds of both the State of Oregon and the District of Columbia.

The statutes of Oregon provide:

"§ 771. No estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law or by a conveyance or other instrument in writing subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

"§ 775. In the following cases the agreement is void unless the same, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law:

"1. An agreement that, by its terms, is not to be performed within a year from the making thereof."

"4. An agreement made upon consideration of marriage, other than a mutual promise to marry."

"6. An agreement for the leasing for a longer period than one year, or for the sale, of real property or of an interest therein.

"7. An agreement concerning real property made by an agent of the party sought to be charged, unless the authority of the agent be in writing." Oregon Code of Procedure, 1862 (1863), pp. 190 and 191, Title VIII, §§ 771 and 775; General Laws of Oregon (1845–1864), pp. 341 and 342, Title VIII, §§ 771 and 775; General Laws of Oregon (1843–1872), pp. 264 and 265, Title VIII, §§ 771 and 775.

The statutes upon which the defendants rely as being in force in the District of Columbia, and as applicable to the case, 29 Charles II. c. 3, §§ 4, 7, [the English Statute of Frauds], provide as follows:

"§ 4. No action shall be brought whereby to charge . . .

any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

"§ 7. And . . . all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." Alexander's British Statutes in force in Maryland, 509.

We are not permitted by the evidence in this cause to doubt that the appellee Nickerson induced his wife to go to Europe, with her child, in order that he might, in her absence and without her knowledge, procure a decree of divorce from a court having no jurisdiction to grant it ; or that, without her knowledge, he obtained such decree from the court in Philadelphia — in which city he acquired a merely fictitious residence — by making it appear that his wife had deserted him, and taken up her residence in Europe against his wishes, when, in fact, he induced her to go abroad, substantially directed all of her movements while away, and, in frequent letters, covering the entire period from the date of her departure up to the institution of the suit for divorce, expressed warm affection for his absent wife. Indeed, a few weeks after he commenced his suit for divorce, he inclosed to his wife a draft for one thousand marks to cover her future expenses; his letter, transmitting the draft, being couched in such language as a faithful husband would use when communicating with his wife by letter. Nor can it be doubted that before the rendition of the decree for divorce, an understanding was reached between him and Miss Carter that they would intermarry as soon as he obtained a decree divorcing him from his wife. It is difficult to conceive of a clearer case of wrong and perjury than is disclosed

in the record upon the part of Major Nickerson towards his wife in reference to the proceedings instituted by him for divorce. If our decision depended upon the facts just stated, we should have no hesitation in granting the relief the appellant seeks. But the court would be unmindful of its duty to administer justice according to the settled rules of law, if it permitted the feelings naturally excited by the conduct of the husband in relation to that divorce, to control its investigation of the primary question, whether there was between him and his wife, prior to and at the time of their marriage, and as the consideration of the marriage, such an agreement as that set out in the bill; and if so, whether the agreement is of such nature, or has been so clearly established, as to authorize a court of equity to give the relief asked. It is entirely consistent with the perfidy practised by the husband towards the wife, in the matter of the fraudulent divorce, that no such agreement as that alleged was ever made, as the consideration of their marriage. If such an agreement was not made, or, supposing it to have been made, if it cannot, under the circumstances and the proof, be properly made the basis of a decree affecting the ownership of the lot conveyed by Matthews to the appellee Carter, the legal result cannot be changed by the fact that the husband, many years after the marriage, and by means of false evidence, obtained a divorce from his wife.

Even if the statutes of Oregon, where the agreement is alleged to have been made, or the statutes of Maryland, in force in this District, do not prevent relief being given in cases of fraud practised by a defendant pleading the statute of frauds, or when part performance is relied upon to take the case out of the statute, we are constrained to hold, upon a careful scrutiny of all the evidence, that the proof of the existence of the agreement is not of that satisfactory character required by the recognized principles of equity. Whether specific performance shall be decreed in any case depends upon the circumstances of that case, and rests in the discretion of the court. *King* v. *Hamilton*, 4 Pet. 311, 328; *Willard* v. *Taylor*, 8 Wall. 557, 564; *Waters* v. *Howard*, 1 Maryland Ch. 112; *Duvall* v. *Myers*, 2 Maryland Ch. 401. "Not, indeed," Mr. Justice

Story says, "of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles; but at the same time which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties." 1 Story Eq. Jur. § 742. One of these rules is, that in cases of this character relief should not be granted, after an unreasonable delay, or unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms.

In our judgment the proof fails to show such an agreement between Nickerson and wife as could be made the basis of a decree in her behalf. The allegations of the bill are expressly denied by the answer; and the statements of the wife in her deposition are flatly contradicted by the husband in his deposition. The only other witness in the cause in behalf of the plaintiff is her mother, and the deposition of the latter was not taken until nearly fifteen years after her daughter married the defendant. It contains a detailed account of an interview with him at the time she visited Portland, in the spring of 1870, for the purpose of personally expressing her opposition to the marriage of her daughter to Major Nickerson. In recalling what then passed between herself and him, she was not aided by any contemporaneous memorandum of what occurred. It is true that in her deposition, as well as in that of the appellant, are to be found such words and phrases as "agreement," "promised," "promised and agreed," "promise and agreement," "understood and agreed," "in consideration of marriage," and "marriage settlement and gift." But there is strong internal evidence in the depositions that these words and phrases — if not suggested by others familiar with their import — were not used or understood by the witnesses in their technical legal sense. Their evidence, in connection with all the circumstances of the case, especially the lapse of time, should be regarded as establishing, at most, only an honest belief and expectation upon the part of the appellant and her mother, before and at the time of the marriage, superinduced

by the general conduct or loose expressions of the defendant, that he intended, at some time after marriage, to provide his wife with a permanent home out of the proceeds of the sale of the Portland property. It is the case of a husband, who, prior to marriage, induced in the mind of his intended wife expectations in reference to real property which, after marriage, he failed to meet, but in respect to which property he did not enter — and, perhaps, intentionally refrained from entering — into any distinct and binding agreement.

She purposely forebore, as her bill shows, from having the Portland property conveyed to trustees for her benefit, and permitted the title to remain in the husband, in order that it might be easily handled, and in the belief that he would act in good faith toward her. She relied upon his honor, and has been deceived. But those facts, however strongly they appeal to our sympathy, cannot justify the court in finding, upon the meagre evidence in this cause, that there was an *agreement* upon his part, in consideration of marriage, to settle upon her either the property in Portland or the property purchased with the proceeds of its sale.

There is another serious obstacle in the way of granting to the appellant the relief she seeks. It is not proved, with sufficient certainty, that any part of the proceeds of the Portland property was, in fact, applied to the purchase of the lot in square one hundred and fourteen. If it did not, there is no ground, in any view of the case, upon which a trust could be fastened upon that lot for the benefit of the appellant.

In view of what has been said it is unnecessary to consider the question, so fully discussed by counsel, and so elaborately examined in the adjudged cases, as to whether marriage itself, standing alone, can be deemed part performance of an agreement as to lands, which otherwise could not be enforced with due regard to the letter and spirit of the statute of frauds.

Upon the whole case, we feel bound to hold that the appellant has not established sufficient grounds for the relief asked, and the decree must be

Affirmed.

Counsel for Parties.

POWELL *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

No. 914. Argued January 4, 1888. — Decided April 9, 1888.

The Fourteenth Amendment to the Constitution was not designed to interfere with the exercise of the police power by the State for the protection of health, the prevention of fraud, and the preservation of the public morals.

The prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk; or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the act of the legislature of Pennsylvania of May 21, 1885, (Laws of Penn. of 1885, p. 22, No. 25,) is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine.

The Statute of Pennsylvania of May 21, 1885, "for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof" neither denies to persons within the jurisdiction of the State the equal protection of the laws; nor deprives persons of their property without that compensation required by law; and is not repugnant in these respects to the Fourteenth Amendment to the Constitution of the United States.

THE case is stated in the opinion.

Mr. D. T. Watson and *Mr. Lyman D. Gilbert* for plaintiff in error. *Mr. W. B. Rodgers* was with them on the brief.

Mr. Wayne MacVeagh for defendant in error. *Mr. A. H. Wintersteen* was with him on the brief.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a judgment of the Supreme Court of Pennsylvania, sustaining the validity of a statute of that Commonwealth relating to the manufacture and sale of what is commonly called oleomargarine butter. That judgment, the plaintiff in error contends, denies to him certain rights and privileges specially claimed under the Fourteenth Amendment to the Constitution of the United States.

By acts of the General Assembly of Pennsylvania, one approved May 22, 1878, and entitled "An act to prevent deception in the sale of butter and cheese," and the other approved May 24, 1883, and entitled "An act for the protection of dairymen, and to prevent deception in sales of butter and cheese," provision was made for the stamping, branding, or marking, in a prescribed mode, manufactured articles or substances in semblance or imitation of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which oil, lard, or fat, not produced from milk or cream, entered as a component part, or into which melted butter or any oil thereof had been introduced to take the place of cream. Laws of Pennsylvania, 1878, p. 87; 1883, p. 43.

But this legislation, we presume, failed to accomplish the objects intended by the legislature. For, by a subsequent act, approved May 21, 1885, and which took effect July 1, 1885, entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," Laws of Pennsylvania, 1885, p. 22, No. 25, it was provided, among other things, as follows:

"SECTION 1. That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession, with intent to sell the same, as an article of food.

"SECTION 2. Every sale of such article or substance, which is prohibited by the first section of this act, made after this act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts in this State to recover upon any contract for the sale of any such article or substance.

"SECTION 3. Every person, company, firm, or corporate body who shall manufacture, sell, or offer or expose for sale or have in his, her, or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offence, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one-half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

"SECTION 4. Every person who violates the provisions of the first section of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offence, and imprisonment for one year for every subsequent offence."

The plaintiff in error was indicted, under the last statute, in the Court of Quarter Sessions of the Peace in Dauphin County, Pennsylvania. The charge in the first count of the indictment is, that he unlawfully sold, "as an article of food, two cases, containing five pounds each, of an article designed to take the place of butter produced from pure, unadulterated milk or cream from milk, the said article so sold, as aforesaid, being an article manufactured out of certain oleaginous substances and compounds of the same other than that produced from unadulterated milk or cream from milk, and said article so sold, as aforesaid, being an imitation butter." In the

second count the charge is that he unlawfully had in his possession, "with intent to sell the same, as an article of food, a quantity, viz., one hundred pounds, of imitation butter, designed to take the place of butter produced from pure, unadulterated milk or cream from the same, manufactured out of certain oleaginous substances, or compounds of the same other than that produced from milk or cream from the same."

It was agreed, for the purposes of the trial, that the defendant, on July 10, 1885, in the city of Harrisburg, sold to the prosecuting witness, as an article of food, two original packages of the kind described in the first count; that such packages were sold and bought as butterine, and not as butter produced from pure, unadulterated milk or cream from unadulterated milk; and that each of said packages was, at the time of sale, marked with the words, "Oleomargarine Butter," upon the lid and side in a straight line, in Roman letters half an inch long.

It was also agreed that the defendant had in his possession one hundred pounds of the same article, with intent to sell it as an article of food.

This was the case made by the Commonwealth.

The defendant then offered to prove by Prof. Hugo Blanck that he saw manufactured the article sold to the prosecuting witness; that it was made from pure animal fats; that the process of manufacture was clean and wholesome, the article containing the same elements as dairy butter, the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as butterine; that this butterine existed in dairy butter in the proportion of from three to seven per cent, and in the manufactured article in a smaller proportion, and was increased in the latter by the introduction of milk and cream; that this having been done, the article contained all the elements of butter produced from pure unadulterated milk or cream from the same except that the percentage of butterine was slightly smaller; that the only effect of butterine was to give flavor to the butter and that it had nothing to do with its wholesomeness; that the oleaginous substances in the manufactured arti-

cle were substantially identical with those produced from milk or cream; and that the article sold to the prosecuting witness was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk or cream from unadulterated milk.

The defendant also offered to prove that he was engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relating to the manufacture and sale of said article, and so sold by him; that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and, if prevented from continuing it, the value of his property employed therein would be entirely lost, and he be deprived of the means of livelihood.

To each offer the Commonwealth objected upon the ground that the evidence proposed to be introduced was immaterial and irrelevant.

The purpose of these offers of proof was avowed to be: (1) To show that the article sold was a new invention, not an adulteration of dairy products, nor injurious to the public health, but wholesome and nutritious as an article of food, and that its manufacture and sale were in conformity to the acts of May 22, 1878, and May 24, 1883. (2) To show that the statute upon which the prosecution was founded, was unconstitutional, as not a lawful exercise of police power, and, also, because it deprived the defendant of the lawful use "of his property, liberty, and faculties, and destroys his property without making compensation."

The court sustained the objection to each offer, and excluded the evidence. An exception to that ruling was duly taken by the defendant.

A verdict of guilty having been returned, and motions in arrest of judgment and for a new trial having been overruled,

the defendant was adjudged to pay a fine of one hundred dollars and costs of prosecution, or give bail to pay the same in ten days, and be in custody until the judgment was performed. That judgment was affirmed by the Supreme Court of the State. 114 Penn. St. 265.

This case, in its important aspects, is governed by the principles announced in *Mugler* v. *Kansas*, 123 U. S. 623.

It is immaterial to inquire whether the acts with which the defendant is charged were authorized by the statute of May 22, 1878, or by that of May 24, 1883. The present prosecution is founded upon the statute of May 21, 1885; and if that statute be not in conflict with the Constitution of the United States, the judgment of the Supreme Court of Pennsylvania must be affirmed.

It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the Fourteenth Amendment to the Constitution of the United States.

It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that Amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler* v. *Kansas*, 123 U. S. 663; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751; *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The question, therefore, is whether the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure un-

adulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health.

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. *Mugler* v. *Kansas*, 123 U. S. 623, 661. The court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court in Sinking Fund Cases, 99 U. S. 700, 718, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.

One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also, *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 625; *Livingston* v. *Darlington*, 101 U. S. 407.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;" yet, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judg-

ment, exercised either in the pressure of public opinion or by means of the suffrage." *Yick Wo.* v. *Hopkins*, 118 U. S. 370. The case before us belongs to the latter class. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued, in behalf of the defendant, that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between coördinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretence of guarding the public health, the public morals, or the

public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land.

The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business. *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 519.

It is also contended that the act of May 21, 1885, is in conflict with the Fourteenth Amendment in that it deprives the defendant of his property without that compensation required by law. This contention is without merit, as was held in *Mugler* v. *Kansas*.

Upon the whole case, we are of opinion that there is no error in the judgment, and it is, therefore,

Affirmed.

Mr. Justice Field dissenting.

The plaintiff in error was indicted in one of the courts of Pennsylvania for selling as an article of food two cases of oleomargarine butter, containing five pounds each, and was sentenced to pay a fine of one hundred dollars. The case being taken to the Supreme Court of the State, the judgment was affirmed, and to review it the case is brought to this court.

The statute, under which the conviction was had, was passed on the 21st of May, 1885, and went into effect on the first of July following. It declares in its first section: "That no person, firm, or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese,

nor shall sell or offer for sale, or have in his, her, or their possession with intent to sell the same as an article of food."

In another section the act made a violation of these provisions a misdemeanor punishable by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten or more than thirty days, or both such fine and imprisonment for the first offence, and imprisonment for one year for every subsequent offence.

The act, it is to be observed, is not designed to prevent any deception in the manufacture and sale of the article of oleomargarine butter, or any attempt to pass it off as butter made of milk or cream. The title would indicate that the act was intended for the protection of the public health, and to prevent the adulteration of dairy products, and fraud in the sale thereof. It is probable that the original draft of the act had such a purpose, and that the title was allowed to remain, after its body was changed. Be this as it may, the act is one prohibiting the manufacture or sale, or keeping for sale, of the article, though no concealment is attempted as to its character, nature, or ingredients. Its validity is rested simply upon the fact that it has pleased the legislature of the Commonwealth to declare that the article shall not be manufactured or sold or kept for sale within its limits. On the trial the defendant offered to prove by competent witnesses that the article manufactured was composed of ingredients perfectly healthy, and was as wholesome and nutritious as butter produced from pure milk or cream. But the court refused to allow the evidence, on the ground that it was immaterial and irrelevant. It was sufficient, in its judgment, that the legislature had passed the act, to render a disregard of its provisions a public offence.

The defendant also offered to prove that the article sold by him was a part of a large and valuable quantity manufactured prior to the passage of the act of May 21, 1885, in accordance with the laws of the Commonwealth relating to the manufacture and sale of the article; but this offer was also rejected on the same ground, as immaterial and irrelevant. The case is therefore to be considered as if the proof offered had been received. *Scotland County* v. *Hill*, 112 U. S. 183, 186.

Dissenting Opinion: Field, J.

Two questions are thus distinctly presented: first, whether a State can lawfully prohibit the manufacture of a healthy and nutritious article of food designed to take the place of butter, out of any oleaginous substance, or compound of the same, other than that produced from pure milk or cream, and its sale when manufactured? and, second, whether a State can, without compensation to the owner, prohibit the sale of an article of food, in itself healthy and nutritious, which has been manufactured in accordance with its laws?

These questions are not presented in the opinion of the court as nakedly and broadly as here stated, but they nevertheless truly indicate the precise points involved, and nothing else. Upon first impressions one would suppose that it would be a matter for congratulation on the part of the State, that in the progress of science a means had been discovered by which a new article of food could be produced, equally healthy and nutritious with, and less expensive than, one already existing, and for which it could be used as a substitute. Thanks and rewards would seem to be the natural return for such a discovery, and the increase of the article by the use of the means thereby encouraged. But not so thought the legislature of the Commonwealth of Pennsylvania. By the enactment in question it declared that no article of food to take the place of butter shall be manufactured out of any other oleaginous matter than that which is produced from pure milk or cream, or be sold within its limits or kept for sale, under penalty of fine and imprisonment.

If the first question presented can be answered, as it has been by the court, in the affirmative, I do not see why it is not equally within the competency of the legislature to forbid the production and sale of any new article of food, though composed of harmless ingredients, and perfectly healthy and nutritious in its character; or even to forbid the manufacture and sale of articles of prepared food now in general use, such as extracts of beef and condensed milk, and the like, whenever it may see fit to do so, its will in the matter constituting the only reason for the enactment. The doctrine asserted is nothing less than the competency of the legislature to prescribe out of

different articles of healthy and nutritious food, what shall be manufactured and sold within its limits, and what shall not be thus manufactured and sold. I have always supposed that the gift of life was accompanied with the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others. I have supposed that the right to take all measures for the support of life, which are innocent in themselves, is an element of that freedom which every American citizen claims as his birthright. I admit that previous to the adoption of the Fourteenth Amendment of the Federal Constitution, the validity of such legislation was to be determined by the constitution of the State, and that its tribunals were the authoritative interpreters of its meaning. This court could exercise no appellate jurisdiction over the judgments of the state courts in matters of purely local concern. Their judgments in such cases were final and conclusive. If the legislation of the State thus sustained was oppressive and unjust, the remedy could be found only in subsequent legislation, brought about through the influence of wiser views and a more enlightened policy on the part of the people. From the structure of our dual government, in which the United States exercise only such powers as are expressly delegated to them by the Constitution, or necessarily implied, all others not prohibited to the States being reserved to them respectively, or to the people, the great mass of matters of local interest were necessarily subject to state regulation, and whether that was wisely or unwisely enacted, it was not a question which could come under the consideration of this court. The government created by the Constitution was not designed for the regulation of matters purely local in their character. The States required no aid from any external authority to manage their domestic affairs. It was only for matters which affected all the States or which could not be managed by them in their individual capacity, or managed only with great difficulty and embarrassment, that a general and common government was desired. Only such powers of internal regulation were, therefore, conferred as were essential to the successful and efficient working of the

government established, to facilitate intercourse and commerce between the people of different States, and to secure to them equality of protection in the several States; and only such restraints were placed upon the action of the States as would prevent conflict with its authority, secure the fulfilment of contract obligations, and insure protection against punishment by legislative decree or by retrospective legislation. By the first section of the Fourteenth Amendment, which had its origin in the new conditions and necessities growing out of the late civil war, further restraints were placed upon the power of the States in some particulars, a disregard of which subjected their action to review by this court. That section is as follows:

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

It is the clause declaring that no State shall "deprive any person of life, liberty, or property without due process of law," which applies to the present case. This provision is found in the constitutions of nearly all the States, and was designed to prevent the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property. As I said on a former occasion, it means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. It has always been supposed to secure to every person the essential conditions for the pursuit of happiness, and is therefore not to be construed in a narrow or restricted sense. *Ex parte Virginia*, 100 U. S. 339, 366.

By "liberty," as thus used, is meant something more than freedom from physical restraint or imprisonment. It means freedom not merely to go wherever one may choose, but to do such acts as he may judge best for his interest not inconsistent

with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment. As said by the Court of Appeals of New York, in *People* v. *Marx*, "the term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare," 99 N. Y. 377, 386; and again, *In the matter of Jacobs:* "Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties, in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation." 98 N. Y. 98.

With the gift of life there necessarily goes to every one the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men. The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no State can give and no State can take away except in punishment for crime. It is involved in the right to pursue one's happiness. This doctrine is happily expressed and illustrated in *People* v. *Marx*, cited above, where the precise question here was presented. That case arose upon an indictment for a violation of a provision of an act of the legislature of New York, entitled "An act to prevent deception in the sale of dairy products," a section of which was almost identical in language with the first section

of the act of the legislature of Pennsylvania under consideration. The defendant was convicted by the Court of General Sessions of New York. The conviction was affirmed by the General Term of the Supreme Court, and from that decision an appeal was taken to the Court of Appeals, where the judgment was reversed. The court was of opinion that the object and effect of the act, notwithstanding its title, was, not to supplement existing provisions against fraud and deception by means of imitation of dairy butter, but to prohibit the manufacture and sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market and protect those engaged in the manufacture of dairy products against the competition of cheaper substances capable of being applied to the same uses as articles of food. At the trial, and on the argument of the appeal, the ground was taken that, if such were the case, the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it was designed to take the place of dairy butter, was by that act made a crime, and the court said: "The result of the argument is, that if, in the progress of science, a process is discovered of preparing beef tallow, lard, or any other oleaginous substance, and communicating to it a palatable flavor, so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter, the ban of this statute is upon it. Whoever engages in the business of manufacturing or selling the prohibited product is guilty of a crime; the industry must be suppressed; those who could make a livelihood by it are deprived of that privilege; the capital invested in the business must be sacrificed, and such of the people of the State as cannot afford to buy dairy butter must eat their bread unbuttered." And after referring to the state constitution, which provides that no member of the State shall be disfranchised, or be deprived of any of the rights and privileges secured to any citizen thereof, unless by

the law of the land, or the judgment of his peers; and to the clause which declares that no person shall be deprived of life, liberty, or property without due process of law; and to the first section of the article of the Fourteenth Amendment of the Federal Constitution, the court said: "These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these, no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." And, referring to various decisions as to the meaning of liberty, among which was one that the right to liberty embraces the right of man "to exercise his faculties and to follow a lawful vocation for the support of life," the court said: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race? Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another, with which it competes, can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

The answer made to all this reasoning, and this decision, is, that the act of Pennsylvania was passed in the exercise of its police power; meaning by that term its power to provide

for the health of the people of the State. Undoubtedly, this power of a State extends to all regulations affecting not only the health, but the good order, morals, and safety of society; but a law does not necessarily fall under the class of police regulations, because it is passed under the pretence of such regulation, as in this case, by a false title, purporting to protect the health and prevent the adulteration of dairy products, and fraud in the sale thereof. It must have in its provisions some relation to the end to be accomplished. If that which is forbidden is not injurious to the health or morals of the people, if it does not disturb their peace or menace their safety, it derives no validity by calling it a police or health law. Whatever name it may receive, it is nothing less than an unwarranted interference with the rights and the liberties of the citizen. *In the matter of Jacobs*, the law passed was entitled "An act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases, and regulating the use of tenement houses in certain cases." It prohibited the manufacture of cigars or preparation of tobacco in any form on any floor or in any part of any floor in any tenement house, if such floor or part of such floor was occupied by any person as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein; and declared that every person who was guilty of a violation of the act, or of having caused another person to commit such violation, should be deemed guilty of a misdemeanor, and punished by a fine of not less than ten dollars or more than one hundred dollars, or by imprisonment for not less than ten days or more than six months, or by both such fine and imprisonment. The tenement house used had four floors and seven rooms on each floor, and each floor was occupied by one family, living independently of the others, and doing its cooking in one of the rooms thus occupied. Jacobs was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house except in that room. For this violation of the act he was arrested. A writ of *habeas corpus* sued out in the court below for his discharge

was dismissed at the special term of the Supreme Court. On appeal to the General Term this order was reversed, and the case was taken to the Court of Appeals. There the claim was made that the legislature passed this act in the exercise of its police power; but the court said in answer: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final and conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen, and interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law." And the court concluded an extended consideration of the subject by declaring that, when a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the court must be able to see that it has in fact some relation to the public health, that the public health is the end aimed at, and that it is appropriate and adapted to that end; and as it could not see that the law in question forbidding the cigarmaker from plying his trade in his own room in the tenement house, when allowed to follow it elsewhere, was designed to promote the public health, it pronounced the law unconstitutional and void. If the courts could not in such cases examine into the real character of the act, but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject

to the arbitrary control of a temporary majority of such bodies, instead of being protected by the guarantees of the Constitution. In the recent prohibition cases from Kansas this court, after stating that it belonged to the legislative department to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, added: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. . . . The courts are not bound by mere form, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler* v. *Kansas*, 123 U. S. 623, 661.

In *Watertown* v. *Mayo*, the Supreme Court of Massachusetts, speaking of the police power of the State, said: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of the health, or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation the courts will interfere to protect the rights of citizens." 109 Mass. 315, 319. It would seem that under the constitutions of the States no legislature should be permitted, under the pretence of a police regulation, to encroach upon any of the just rights of the citizen intended to be secured thereby. Be this as it may, certain it is that no State can, under any pretence or guise whatever, impair any such rights of the citizen which the fundamental law of the United States has declared shall neither be destroyed nor abridged. Were this not so, the protection which the Constitution designed to

secure would be lost, and the rights of the citizen would be subject to the control of the state legislatures, which would in such matters be practically omnipotent. What greater invasion of the rights of the citizen can be conceived, than to prohibit him from producing an article of food, conceded to be healthy and nutritious, out of designated substances, in themselves free from any deleterious ingredients? The prohibition extends to the manufacture of an article of food out of any oleaginous substances, or compounds of the same, not produced from milk or cream, to take the place of butter or cheese. There are many oleaginous substances in the vegetable as well as the animal world, besides milk and cream, but out of none of them shall any citizen of the United States within the limits of Pennsylvania be permitted to produce such an article of food for public consumption. Only out of pure milk or cream shall that article be made, notwithstanding the vast means for its production furnished by the vegetable as well as by the animal kingdom. The full force of the doctrine asserted will be apparent if the extent is considered to which it may be applied. The prohibition may be extended to the manufacture and sale of other articles of food, of articles of raiment and fuel, and even of objects of convenience. Indeed, there is no fabric or product, the texture or ingredients of which the legislature may not prescribe by inhibiting the manufacture and sale of all similar articles not composed of the same materials.

The answer to the second question is equally conclusive against the decision of the court. In prohibiting the sale of the article which had been manufactured by the defendant pursuant to the laws of the State, the legislature necessarily destroyed its mercantile value. If the article could not be used without injury to the health of the community, as would be the case perhaps if it had become diseased, its sale might not only be prohibited but the article itself might be destroyed. But that is not this case. Here the article was healthy and nutritious, in no respect injuriously affecting the health of any one. It was manufactured pursuant to the laws of the State. I do not, therefore, think the State could forbid

its sale or use; clearly not without compensation to the owner. Regulations of its sale and restraints against its improper use undoubtedly could be made, as they may be made with respect to all kinds of property; but the prohibition of its use and sale is nothing less than confiscation. As I said in *Bartemeyer* v. *Iowa*, 18 Wall. 129, 137, with reference to intoxicating liquors, so I say with reference to this property, I have no doubt of the power of the State to regulate its sale, when such regulation does not amount to the destruction of the right of property in it. "The right of property in an article involves the right to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the Fourteenth Amendment affords protection. But the prohibition of sale in any way or for any use is quite a different thing from a regulation of the sale or use so as to protect the health and morals of the community." The fault which I find with the opinion of the court on this head is that it ignores the distinction between regulation and prohibition.

WALKER v. PENNSYLVANIA, No. 1303. Error to the Supreme Court of the State of Pennsylvania. Argued January 4, 1888. Decided April 9, 1888. MR. JUSTICE HARLAN delivered the opinion of the court. The questions presented in this case do not differ, in any material respect, from those determined in POWELL v. PENNSYLVANIA, just decided. The principles announced in that case necessarily require an affirmance of the judgment below.

Affirmed.

MR. JUSTICE FIELD dissented.

Mr. D. T. Watson and *Mr. W. B. Rodgers* for plaintiffs in error.

Mr. Wayne McVeagh for defendant in error.

MAHON *v.* JUSTICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 1411. Argued April 23, 24, 1888. — Decided May 14, 1888.

No mode is provided by the Constitution and laws of the United States by which a person, unlawfully abducted from one State to another, and held in the latter State upon process of law for an offence against the State, can be restored to the State from which he was abducted.

There is no comity between the States by which a person held upon an indictment for a criminal offence in one State can be turned over to the authorities of another State, although abducted from the latter.

A, being indicted in Kentucky for felony, escaped to West Virginia. While the governor of West Virginia was considering an application from the governor of Kentucky for his surrender as a fugitive from justice, he was forcibly abducted to Kentucky, and when there was seized by the Kentucky authorities under legal process, and put in jail and held to answer the indictment. *Held*, that he was not entitled to be discharged from custody under a writ of *habeas corpus* from the Circuit Court of the United States.

THE court stated the case as follows:

On the 9th of February, 1888, the governor of West Virginia, on behalf of that State, presented to the District Court of the United States for the District of Kentucky a petition, representing that during the month of September, 1887, a requisition was made upon him as governor aforesaid, by the governor of Kentucky, for Plyant Mahon, alleged to have committed murder in the latter State, and to have fled from its justice, and to be then at large in West Virginia; that pending correspondence between the two governors, and the consideration of legal questions growing out of the requisition, and during the month of December, 1887, or January, 1888, the said Plyant Mahon, while residing in West Virginia, was, in violation of her laws, and of the Constitution and laws of the United States, and without warrant or other legal process, arrested by a body of armed men from Kentucky, and by force and against his will, conveyed out of the State of

Statement of the Case.

West Virginia into the county of Pike, in the State of Kentucky, and there confined in the common jail of the county, where he has been ever since, and is deprived of his liberty by the keeper thereof.

The petitioner further represented that on the 1st of February, 1888, he as governor of West Virginia and on her behalf, made a requisition upon the governor of Kentucky, that Plyant Mahon be released from confinement, set at large, and returned in safety to the State of West Virginia; and that the demand was, on the 4th of that month, refused on the ground, among others, that the questions involved were judicial and not executive. The petitioner, therefore, in alleged vindication of the rights of the State of West Virginia, and of every citizen thereof, and especially of the said Plyant Mahon thus confined and deprived of his liberty, to the end that due process of law secured by both the Constitution of the United States and the constitution of the State of West Virginia, and the laws made in pursuance thereof, might be respected and enforced, prayed that the writ of *habeas corpus* be granted, directed to the keeper of the jail, commanding him to produce the body of said Plyant Mahon, together with the cause of his detention, before the judge of the court at such time and place as might be designated, and that judgment be rendered that said Plyant Mahon be discharged from said confinement and custody, and be safely returned within the jurisdiction of the State of West Virginia. At the same time another petition was presented to the court by one John A. Sheppard, representing that he was a citizen of West Virginia, and setting forth substantially the facts contained in the petition of the governor, and praying for a like writ of *habeas corpus*. Subsequently the name of Plyant Mahon was substituted for that of John A. Sheppard, and the proceedings on the petition were conducted in his name.

The court ordered the writ to issue, directed to the jailor of Pike County, requiring him to produce the body of Mahon before the District Court of the United States in the city of Louisville on the 20th of the month, and there to abide such order as might be made in the premises. The jailor of the

county, Abner Justice, made a return to the writ substantially as follows: That he held Plyant Mahon in custody and confined in the jail of Pike County by virtue of and in obedience to three writs issued by the clerk of the Criminal Court of the county under its order, each for the arrest of Mahon to answer an indictment pending against him and others for the crime of wilful murder, alleged to have been committed in that county, a crime for the trial of which that court had full jurisdiction, and commanding the officer arresting Mahon to deliver him to the jailor of the county; copies of which writs were annexed to the return; that under the writ of *habeas corpus* he was proceeding to the city of Louisville to produce the body of Mahon before the United States District Court there, when he was met on his way by the United States Marshal of the District of Kentucky, who, by virtue of the order of the District Court, took Plyant Mahon into his custody. He further returned that three indictments against Mahon and others for wilful murder were found by the grand jury of Pike County, Kentucky, and returned into the Circuit Court of said county at its September term, 1882, at which time that court had jurisdiction of the crime charged; that, by order of the court, made at each subsequent term, writs were issued by the clerk thereof for the arrest of Plyant Mahon to answer the indictments, until the Criminal Court of the county was established by act of the General Assembly of Kentucky in 1884, by which the jurisdiction previously vested in the Circuit Court was transferred to and vested in said Criminal Court; that, by orders of this latter court from term to term, writs were issued by the clerk thereof for the arrest of Mahon to answer the indictments; but none of them were executed upon him until January 12, 1888, when he was arrested in Pike County by the sheriff thereof, and delivered by him to the respondent, jailor of said county, in obedience to the writs which were issued, and under the command and authority of which he was held by the respondent as jailor in custody in the jail of said county, when the writ of *habeas corpus* was served upon him

The jailor subsequently, by leave of the court, made a fur-

ther return, in which he stated that a requisition was made by the governor of Kentucky upon the governor of West Virginia for the arrest and rendition to Kentucky of said Plyant Mahon as alleged in the governor's petition; that it was accompanied by a copy of the indictments referred to, certified by the governor of Kentucky to be authentic; that at the same time the governor appointed one Frank Phillips as the agent of the State to receive and bring to the State of Kentucky the said Mahon, as provided by law in such cases; that on the 30th of September, 1887, the governor of West Virginia returned said requisition to the governor of Kentucky, informing him that an affidavit, as required by the statute of West Virginia, should accompany the requisition before the same could be complied with; that thereafter the governor of Kentucky returned the requisition to the governor of West Virginia, accompanied by the affidavit required; that afterwards, about the 12th of January, 1888, Frank Phillips and others, with force and arms, violently seized the said Mahon in the State of West Virginia and brought him against his will into the county of Pike in the State of Kentucky, where the writs mentioned in the correspondent's original return were executed upon him by the sheriff of Pike County; that at that time no warrant for the arrest of Mahon had been issued or ordered to be issued by the governor of West Virginia in compliance with said requisition; and afterwards, on the 30th of January, 1888, he informed the governor of Kentucky that he declined to issue his warrant for the arrest of Plyant Mahon, in compliance with the requisition made upon him, because he had become satisfied, upon investigation of the facts, that Mahon was not guilty of the crime charged against him in the indictments; and that subsequently, on the 1st of February, 1888, the governor of West Virginia made upon the governor of Kentucky a demand for the release of Mahon from the jail of the county of Pike and his safe conduct back into West Virginia, with which demand the governor of Kentucky declined to comply, on the ground that Mahon was in the custody of the judicial department of the Commonwealth, and that the question of his release upon the grounds alleged in the demand

was one which the courts alone could determine, and that the adjudication thereof was not one within the purview of his powers and duties as governor. The facts thus detailed were established before the court on the hearing upon the writ and are contained in its findings.

On the 3d of March the court denied the motion for the discharge of Plyant Mahon, and ordered the marshal to return him to the jailor of Pike County. From this order an appeal was taken to the Circuit Court of the United States and there affirmed. To review the latter order the case is brought here

Mr. Eustace Gibson for appellant.

Mr. J. Proctor Knott for appellee.

Mr. Justice Field, after stating the case as above reported, delivered the opinion of the court.

The governor of West Virginia, in his application on behalf of the State for the writ of *habeas corpus* to obtain the discharge of Mahon and his return to that State, proceeded upon the theory that it was the duty of the United States to secure the inviolability of the territory of the State from the lawless invasion of persons from other States, and when parties had been forcibly taken from her territory and jurisdiction to afford the means of compelling their return; and that this obligation could be enforced by means of the writ of *habeas corpus*, as the court in discharging the party abducted could also direct his return to the State from which he was taken, or his delivery to persons who would see that its order in that respect was carried out.

If the States of the Union were possessed of an absolute sovereignty, instead of a limited one, they could demand of each other reparation for an unlawful invasion of their territory and the surrender of parties abducted, and of parties committing the offence, and in case of refusal to comply with the demand, could resort to reprisals, or take any other measures they might deem necessary as redress for the past and security

for the future. But the States of the Union are not absolutely sovereign. Their sovereignty is qualified and limited by the conditions of the Federal Constitution. They cannot declare war or authorize reprisals on other States. Their ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by citizens of other States.

If such violators have escaped from the jurisdiction of the State invaded, their surrender can be secured upon proper demand on the executive of the State to which they have fled. The surrender of the fugitives in such cases to the State whose laws have been violated, is the only aid provided by the laws of the United States for the punishment of depredations and violence committed in one State by intruders and lawless bands from another State. The offences committed by such parties are against the State; and the laws of the United States merely provide the means by which their presence can be secured in case they have fled from its justice. No mode is provided by which a person unlawfully abducted from one State to another can be restored to the State from which he was taken, if held upon any process of law for offences against the State to which he has been carried. If not thus held he can, like any other person wrongfully deprived of his liberty, obtain his release on *habeas corpus*. Whether Congress might not provide for the compulsory restoration to the State of parties wrongfully abducted from its territory upon application of the parties, or of the State, and whether such provision would not greatly tend to the public peace along the borders of the several States, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided.

The abduction of Mahon by Phillips and his aids was made, as appears from the return of the respondent to the writ, and from the findings of the court below, without any warrant or authority from the governor of West Virginia. It is true that Phillips was appointed by the governor of Kentucky as agent of the State to receive Mahon upon his surrender on the requi-

sition; but no surrender having been made, the arrest of Mahon and his abduction from the State were lawless and indefensible acts, for which Phillips and his aids may justly be punished under the laws of West Virginia. The process emanating from the governor of Kentucky furnished no ground for charging any complicity on the part of that State in the wrong done to the State of West Virginia.

It is true, also, that the accused had the right while in West Virginia of insisting that he should not be surrendered to the governor of Kentucky by the governor of West Virginia, except in pursuance of the acts of Congress, and that he was entitled to release from any arrest in that State not made in accordance with them; but having been subsequently arrested in Kentucky under the writs issued on the indictments against him, the question is not as to the validity of the proceeding in West Virginia, but as to the legality of his detention in Kentucky. There is no comity between the States by which a person held upon an indictment for a criminal offence in one State can be turned over to the authorities of another, though abducted from the latter. If there were any such comity, its enforcement would not be a matter within the jurisdiction of the courts of the United States. By comity nothing more is meant than that courtesy on the part of one State, by which within her territory the laws of another State are recognized and enforced, or another State is assisted in the execution of her laws. From its nature the courts of the United States cannot compel its exercise when it is refused; it is admissible only upon the consent of the State, and when consistent with her own interests and policy. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; Story's Conflict of Law, § 30.

The only question, therefore, presented for our determination is whether a person indicted for a felony in one State, forcibly abducted from another State and brought to the State where he was indicted by parties acting without warrant or authority of law, is entitled under the Constitution or laws of the United States to release from detention under the indictment by reason of such forcible and unlawful abduction. Section 753 of the Revised Statutes declares that "the writ

of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States."

To bring the present case within the terms of this section it is contended that the detention of the appellant is in violation of the provisions of the Fourteenth Amendment of the Constitution, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law;" and also in violation of the clause of the Constitution providing for the extradition of fugitives of justice from one State to another, and the laws made for its execution.

As to the Fourteenth Amendment, it is difficult to perceive in what way it bears upon the subject. Assuming, what is not conceded, that the fugitive has a right of asylum in West Virginia, the State of Kentucky has passed no law which infringes upon that right or upon any right or privilege or immunity which the accused can claim under the Constitution of the United States. The law of that State which is enforced is a law for the punishment of the crime of murder, and she has merely sought to enforce it by her officers under process executed within her territory. She did not authorize the unlawful abduction of the prisoner from West Virginia.

As to the removal from the State of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the Constitution, which declares that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime," and the laws passed by Congress to carry the same into effect — it is not

perceived how that fact can affect his detention upon a warrant for the commission of a crime within the State to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer.

The first of these is that of *Ex parte Susannah Scott*, 9 B. & C. 446. There it appeared that the prisoner, who had been indicted in the King's Bench for perjury, and for whose apprehension a warrant had been issued, was arrested by the officer, to whom the warrant was specially directed, at Brussels, in Belgium, and conveyed to England. A rule *nisi* was then obtained from the court for a writ of *habeas corpus*, and the question of her right to be released because of her illegal arrest in a foreign jurisdiction was argued before Lord Tenterden. He held that where a party charged with a crime was found in the country, it was the duty of the court to take care that he should be amenable to justice, and it could not consider the circumstances under which he was brought there, and that if the act complained of was done against the law of the foreign country, it was for that country to vindicate its own law, and the rule was discharged.

The next case is that of *The State* v. *Smith*, which was very fully and elaborately considered by the Chancellor and the Court of Appeals of South Carolina. 1 Bailey (S. C.), 283. Though this case did not arise upon the forcible arrest in another jurisdiction of the offender to answer an indictment, but to answer to a judgment, the conditional release from which he had disregarded, the principle involved was the same. Smith had been convicted of stealing a slave and sentenced to death. He was pardoned on condition that he would undergo confinement during a designated period, and within fifteen days afterwards leave the State and never return. The pardon was accepted, and the prisoner remained in confinement for the time prescribed, and within fifteen days afterwards removed to North Carolina, and remained there some years, when he returned to

South Carolina. The governor of the latter State then issued a proclamation stating that the prisoner was in the State in violation of the condition of his pardon, and offering a reward for his arrest. Smith afterwards returned to North Carolina, where he was forcibly seized by parties from South Carolina, without warrant or authority from any officer or tribunal of either State, except the proclamation of the governor of South Carolina, and was brought into the latter State and lodged in jail. He sued out a writ of *habeas corpus*, and was brought before the Chancellor of the State, and his discharge was moved on the ground that his arrest in North Carolina was illegal, and his detention equally so. The motion was refused and the prisoner remanded. The Chancellor gave great consideration to the case, and in the following extract from his opinion furnishes an answer to the principal objections urged in the case at bar to the detention of the appellant: "The prisoner," said the Chancellor, "is charged with a felonious violation of the laws of this State: it is answered, that other persons have been guilty, in relation to him, of an outrageous violation of the laws of another State, and therefore he ought to be discharged: I perceive no connection between the premises and the inference. The chief argument is drawn from supposed consequences, which are likely to follow, by bringing our government into collision with others. This is less to be apprehended among the States of the Union, where the Federal Constitution makes provision for a satisfaction of the violated jurisdiction. But suppose the case of a foreign State. There is no offence in trying, and, if he be guilty, convicting the subject of a foreign government, who has been guilty of a violation of our laws, within our jurisdiction. Or, if he had made his escape from our jurisdiction, and by any accident were thrown within it again; if he were shipwrecked on our coast, or fraudulently induced to land, by a representation that it was a different territory, with a view to his being given up to prosecution; there would seem to be no reason for exempting him from responsibility to our laws. In the case we are considering, the prisoner is found in our jurisdiction, in consequence of a lawless act of violence exercised upon him by individuals. The true

cause of offence to the foreign government is the lawless violation of its territory But a similar violation of a foreign jurisdiction might be made for other purposes; and it would not be in the power of our tribunals to afford satisfaction. An individual might be kidnapped and brought within our territory for the purpose of extorting money from him, or murdering him. It would not seem to be an appropriate satisfaction to the injured government to exempt a person justly liable to punishment under our laws, where we have no means of giving up to punishment those who have violated its laws. But there is no difficulty among the States of the Union. Upon demand by the State of North Carolina, those who have violated its laws will be given up to punishment." 1 Bailey (S. C.), 292.

Subsequently the prisoner was brought before the Presiding Judge of the Court of Appeals of the State to answer to a rule to show cause why his original sentence should not be executed and a date fixed for his execution. He showed for cause that he had received an executive pardon, and had performed all the conditions annexed to it, except the one which prohibited his return to the State, which, it was submitted, was illegal and void. And for further cause, he showed, that he had been illegally arrested in North Carolina and brought within the jurisdiction of this State against his own consent, and it was, therefore, insisted that he was not amenable to the courts of South Carolina, but was entitled to be sent back to North Carolina, or to be discharged, and sufficient time allowed him to return thither. The judge held the grounds to be insufficient, and the defendant then moved the court to reverse his decision on substantially the same grounds, and, among them, that he was entitled to be discharged in consequence of having been illegally arrested in North Carolina and brought into the State. Upon this the court said: "The pursuit of the prisoner into North Carolina and his arrest there was certainly a violation of the sovereignty of that State, and was an act which cannot be commended. But that was not the act of the State, but of a few of its citizens, for which the Constitution of the United States has provided a reparation. It gives the governor of that State the right to

demand them of the governor of this, and imposes on the latter the obligation to surrender them; but until it is refused there can be no cause of complaint." And the motion was refused.

In the case of *The State* v. *Brewster*, 7 Vt. 118, the same doctrine was announced by the Supreme Court of Vermont. There it appeared that the prisoner charged with crime had escaped to Canada, and was brought back against his will, and without the consent of the authorities of that Province, and he sought to plead his illegal capture and forcible return in bar of the indictment; but his application was refused, the court observing that the escape of the prisoner into Canada did not purge the offence, nor oust the jurisdiction of the court, and he being within its jurisdiction it was not for it to inquire by what means or in what manner he was brought within the reach of justice. Said the court: "If there were anything improper in the transaction it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain it is a matter which concerns the political relations of the two countries, and in that aspect is a subject not within the constitutional powers of this court." pp. 121, 122.

In *State* v. *Ross*, 21 Iowa, 467, the Supreme Court of Iowa declared the same doctrine, and stated the distinction between civil and criminal cases where the party is by fraud or violence brought within the jurisdiction of the court. The defendants were charged with larceny, and were arrested in Missouri and brought by force and against their will, by parties acting without authority, either of a requisition from the governor or otherwise, to Iowa, where an indictment against them had been found. In Iowa they were rearrested, and turned over to the civil authorities for detention and trial. It was contended that their arrest was in violation of law; that they were brought within the jurisdiction of the State by fraud and violence; that comity to a sister State and a just appreciation of the rights of the citizen, and a due regard to the integrity of the law, demanded that the court should under such cir-

cumstances refuse its aid; and that there could be no rightful exercise of jurisdiction over the parties thus arrested. But the court answered that "the liability of the parties arresting them [the defendants] without legal warrant, for false imprisonment or otherwise, and their violation of the penal statutes of Missouri, may be ever so clear, and yet the prisoners not be entitled to their discharge. The offence being committed in Iowa, it was punishable here, and an indictment could have been found without reference to the arrest. There is no fair analogy between civil and criminal cases in this respect. In the one, (civil,) the party invoking the aid of the court is guilty of fraud or violence in bringing the defendant or his property within the jurisdiction of the court. In the other, (criminal,) the people, the State, is guilty of no wrong. The officers of the law take the requisite process, find the prisoners charged within the jurisdiction, and this, too, without force, wrong, fraud, or violence on the part of any agent of the State or officer thereof. And it can make no difference whether the illegal arrest was made in another State or another government."

Other cases might be cited from the state courts holding similar views. There is indeed an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another State, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offence charged. They all proceed upon the obvious ground that the offender against the law of the State is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another State. It would indeed be a strange conclusion, if a party charged with a criminal offence could be excused from answering to the government whose laws he had violated because other parties had done violence to him, and also committed an offence against the laws of another State.

The case of *Ker* v. *Illinois*, decided by this court, 119 U. S. 437, has a direct bearing upon the question presented here, whether a forcible and illegal capture in another State is in

violation of any rights secured by the Constitution and laws of the United States. In that case it appeared that Ker was indicted in Cook County, Illinois, for embezzlement and larceny. He fled the country and went to Peru. Proceedings were instituted for his extradition under the treaty between that country and the United States, and application was made by our government for his surrender, and a warrant was issued by the President, directed to one Julian, as messenger, to receive him from the authorities of Peru, upon his surrender, and to bring him to the United States. Julian having the necessary papers went to Peru, but, without presenting them to any officer of the Peruvian Government, or making any demand on that government for the surrender of Ker, forcibly arrested him, placed him on board the United States vessel Essex, then lying in the harbor of Callao, kept him a close prisoner until the arrival of that vessel at Honolulu, in the Hawaiian Islands, where, after some detention, he was conveyed in the same forcible manner on board another vessel, in which he was carried a prisoner to San Francisco, California. Before his arrival in that State the governor of Illinois had made a requisition on the governor of California, under the laws of the United States, for his delivery as a fugitive from justice. The governor of California accordingly made an order for his surrender to a person appointed by the governor of Illinois to receive him and take him to the latter State. On his arrival at San Francisco he was immediately placed in the custody of this agent, who took him to Cook County, where the process of the Criminal Court was served upon him, and he was held to answer the indictment. He then sued out a writ of *habeas corpus* before the Circuit Court of the State, contending that his arrest and deportation from Peru was a violation of the treaty between that government and ours, and that consequently his subsequent detention under the process of the state court was unlawful. The Circuit Court remanded him to jail, holding that whatever illegality might have attended his arrest it could not affect the jurisdiction of the court, or release him from liability to the State whose laws he had violated. He then applied to the Circuit Court of the

United States for a writ of *habeas corpus*, asking his release upon the same ground; but the court refused it, holding that it was not competent to look into the circumstances under which the capture and the transfer of the prisoner from Peru to the United States were made, nor to free him from the consequences of the lawful process which had been served upon him for the offence which he was charged with having committed in the State of Illinois. When arraigned on the indictment in the trial court he raised similar questions on a plea in abatement, which was held bad on demurrer; and after conviction he carried the case on a writ of error to the Supreme Court of the State, where the same conclusion was reached, and the judgment against him was affirmed. He then brought the case to this court, where it was contended that under the treaty of extradition with Peru, he had acquired by his residence in that country a right of asylum — a right to be free from molestation for the crime committed in Illinois — a right that he should be forcibly removed from Peru to the State of Illinois only in accordance with the provisions of the treaty; and that this right was one which he could assert in the courts of the United States. But the court answered that there was no language in the treaty on the subject of extradition which said in terms that a party fleeing from the United States to escape punishment for a crime became thereby entitled to an asylum in the country to which he had fled; that it could not be doubted that the government of Peru might, of its own accord, without any demand from the United States, have surrendered Ker to an agent of Illinois, and that such surrender would have been valid within Peru; that it could not, therefore, be claimed, either by the terms of the treaty or by implication, that there was given to a fugitive from justice in one of those countries any right to remain and reside in the other; and that if the right of asylum meant anything it meant that.

So in this case, it is contended that, because under the Constitution and laws of the United States a fugitive from justice from one State to another can be surrendered to the State where the crime was committed, upon proper proceedings

taken, he has the right of asylum in the State to which he has fled, unless removed in conformity with such proceedings, and that this right can be enforced in the courts of the United States. But the plain answer to this contention is, that the laws of the United States do not recognize any such right of asylum, as is here claimed, on the part of a fugitive from justice in any State to which he has fled; nor have they, as already stated, made any provision for the return of parties who, by violence and without lawful authority, have been abducted from a State. There is, therefore, no authority in the courts of the United States to act upon any such alleged right. In *Ker* v. *Illinois*, the court said that the question of how far the forcible seizure of the defendant in another country, and his conveyance by violence, force, or fraud to this country could be made available to resist trial in the state court for the offence charged upon him, was one which it did not feel called upon to decide, for in that transaction it did not see that the Constitution, or laws, or treaties of the United States guaranteed to him any protection. So in this case we say that, whatever effect may be given by the state court to the illegal mode in which the defendant was brought from another State, no right, secured under the Constitution or laws of the United States, was violated by his arrest in Kentucky, and imprisonment there, upon the indictments found against him for murder in that State.

It follows that

The judgment of the court below must be affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Harlan, dissenting.

I dissent from the judgment of the court in this case. In my opinion the writ of *habeas corpus* was properly issued, and the prisoner, Mahon, should have been discharged and permitted to return to West Virginia. He was kidnapped and carried into Kentucky in plain violation of the Constitution of the United States, and is detained there in continued violation thereof. It is true, he is charged with having com-

mitted a crime in Kentucky. But the Constitution provides a peaceable remedy for procuring the surrender of persons charged with crime and fleeing into another State. This provision of the Constitution has two objects: the procuring possession of the offender, and the prevention of irritation between the States, which might arise from giving asylum to each other's criminals, and from violently invading each other's territory to capture them. It clearly implies that there shall be no resort to force for this purpose. The Constitution has abrogated, and the States have surrendered, all right to obtain redress from each other by force. The Constitution was made to "establish justice" and "insure domestic tranquillity;" and to attain this end as between the States themselves, the judicial power was extended "to controversies between two or more States," and they were enjoined to deliver up to each other fugitives from justice when demanded, and even fugitives from service. This manifest care to provide peaceable means of redress between them is utterly irreconcilable with any right to redress themselves by force and violence; and, of course, what is unconstitutional for the States is unconstitutional for their citizens. It is undoubtedly true that occasional instances of unlawful abduction of a criminal from one State to another for trial, have been winked at; and it has been held to be no defence for the prisoner on his trial. Such precedents are founded on those which have arisen where a criminal has been seized in one country and forcibly taken to another for trial, in the absence of any international treaty of extradition. It is obvious that such cases stand on a very different ground. It is there a question between independent nations bound by no ties of mutual obligation on the subject, and at liberty to adopt such means of redress and retaliation as they please. But where an extradition treaty does exist, and a criminal has been delivered up under it, he cannot, without violating the treaty, be tried for any other crime but that for which he was delivered up. *United States* v. *Rauscher*, 119 U. S. 407. This shows that, even when rightfully obtained for one offence, he cannot be prosecuted for another. It is true that in the same volume is found the case of *Ker* v. *Illi-*

nois, 119 U. S. 437, in which it was held not to be a good plea to an indictment, that the prisoner was kidnapped from Peru, with which country we had an extradition treaty. But this was because, as before said, the prisoner himself cannot set up the mode of his capture by way of defence, if the State from which he was abducted makes no complaint. Peru made none.

But this is not such a case. The State from which Mahon was abducted has interposed, not only by a formal demand for his restoration, but by suing out a *habeas corpus*. Perhaps the writ might have been sued out of this court, as the controversy had come to be a controversy between the States, Kentucky having availed herself of the fruits of the unlawful abduction by retaining the victim, and refusing to restore him on demand. The State of West Virginia, however, has elected, as she might do, to have the writ directed only to the person holding Mahon in custody. I take this to be a legal and apt remedy to settle the case by peaceable judicial means.

A requisition would not apply. That is provided for the extradition of fugitives from justice. It would apply for the delivery up of the kidnappers, but not for the restoration of their victim. It is a special constitutional remedy, addressed by the executive of one State to the executive of another, imposing a constitutional duty of extradition when properly made in a proper case. But the present case is a different one. It is not the surrender of a fugitive from justice which is sought, but the surrender of a citizen unconstitutionally abducted and held in custody. There must be some remedy for such a wrong. It cannot be that the States, in surrendering their right of obtaining redress by military force and reprisals, have no remedy whatever. It was suggested by counsel that the State of West Virginia might sue the State of Kentucky for damages. This suggestion could not have been seriously made. No; the remedy adopted was the proper one. *Habeas corpus* is not only the proper legal remedy, but a most salutary one. It is calculated to allay strife and irritation between the States by securing a judicial and peaceful decision of the controversy.

But it is contended that, although it may be within the

spirit of the Constitution, it is not within its letter, and special legislation is necessary to enable the courts or judges to issue a *habeas corpus*. I do not think that the conclusion follows. Congress, from the beginning, clothed the courts and judges of the United States with the general power to issue writs of *habeas corpus;* with the restriction, at first, not to extend to prisoners in jail, unless in custody under authority of the United States, etc. But in 1833, 1842, and 1867 this restriction was modified, and by the last act removed altogether "in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States." 14 Stat. 385. Rev. Stat. § 753. And see *Ex parte Parks*, 93 U. S. 18, 22, where the reference to 14 Stat. should be p. 385 instead of p. 44. This is legislation enough. A citizen of West Virginia is deprived of his liberty contrary to the Constitution and laws of the United States. The exigency has arisen in which the law applies; and if the party himself is precluded from setting up his wrongful abduction as a defence to an indictment, and perhaps precluded from demanding his discharge on *habeas corpus*, his State has intervened for his protection, and has sued out the writ. But I think that his own application for the writ is well grounded. He is not in the situation of a criminal who has been abducted from a State which takes no interest in his case. His restoration has been demanded by his State; and *habeas corpus* may be issued either at his own instance or that of the State.

This court does not hesitate, on the plea of insufficient legislation, to issue the writ of *habeas corpus* as an appellate remedy wherever a citizen is deprived of his liberty in violation of the Constitution or laws of the United States, and is refused a discharge by other tribunals, and has no other remedy. See *Ex parte Royall*, 112 U. S. 181; *Ex parte Royall*, 117 U. S. 241.

I think that the judgment of the Circuit Court should be reversed, and the prisoner restored to his liberty with permission to return to the State of West Virginia. I am authorized to say that Mr. Justice Harlan concurs in this opinion.

SEWALL *v.* HAYMAKER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 244. Argued April 20, 1888. — Decided May 14, 1888.

Under the statutes of Virginia, which were in force in September, 1837, and equally under the statutes of Ohio, which were in force at that time, a deed by husband and wife conveying land of the wife, was inoperative to pass her title, unless the husband, she having duly acknowledged the deed, signified his assent to the conveyance in her lifetime by an acknowledgment in the form prescribed by law.

EJECTMENT. Judgment for defendant. Plaintiffs sued out this writ of error. The case is stated in the opinion of the court.

Mr. C. B. Matthews for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action to recover forty-two undivided one-hundredth parts of a tract of land, in the county of Fayette, State of Ohio. The answer denied that the plaintiffs, or either of them, have any estate, title, or interest in or to this land, or to any part thereof. The defendants, also, pleaded that no cause of action accrued to the plaintiffs or to either of them against him within twenty years prior to the filing of the petition.

The bill of exceptions shows that the plaintiffs in error, after offering in evidence a patent of the United States covering the land in controversy, made proof tending to establish the following facts: The patentee, William Green Munford, died intestate, leaving as his only heirs, Robert Munford, John Munford, Stanhope Munford, William Green Munford, Elizabeth Munford, and Mary Munford. Three of these heirs — Stanhope, William Green, and Elizabeth — died early in the

present century, unmarried, childless, and intestate; the other three inherited the patented lands in equal shares. Margaret Ann Munford, the only heir of Robert Munford, who also died intestate, was born in the year 1800, and in 1819 intermarried with John Sinclair. She died intestate September 13, 1837, having inherited one-third of the property in controversy. Her husband died August 3, 1875. The original plaintiffs are her only heirs, and J. Hairiston Sewall is the grantee of some of the original plaintiffs for whom he was substituted as a party.

This was the case made by the plaintiffs in error who were plaintiffs below.

The defendant, to maintain the issues on his part, offered in evidence a certain deed, purporting to be a conveyance to one Cary S. Jones of the interest of John Sinclair and Margaret Ann Sinclair, his wife, in this land.

That deed is dated September 10, 1837 — three days before the death of Mrs. Sinclair — and purports to be signed by the grantors — Sinclair and wife, of Gloucester County, Virginia — and to have been "signed, sealed and delivered in presence of Wm. Robins, Richard S. Jones, and Pet. R. Nelson." Attached to it are the following certificates:

"Gloucester County, *to wit:*

"We, William Robins and Peyton R. Nelson, justices of the peace in the county aforesaid, in the State of Virginia, do hereby certify that Margaret Ann Sinclair, the wife of John Sinclair, parties to a certain deed bearing date on the 10th of September, 1837, and hereunto annexed, personally appeared before us, in our county aforesaid, and, being examined by us privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Margaret Ann Sinclair, acknowledged the same to be her voluntary act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

"Given under our hands and seals this 10th day of September, 1837.

"Wm. Robins. [seal.]

"Pet. R. Nelson. [seal.]

Opinion of the Court.

"STATE OF VIRGINIA, *Gloucester County, to wit:*

"We, Wm. Robins — Thomas Smith, justices of the peace in the county and State aforesaid, do hereby certify that John Sinclair, a party to a certain deed bearing date the 10th day of September, 1837, and hereunto annexed, personally appeared before us in our own county aforesaid, and acknowledged the same to be his act and deed, and desired us to certify the said acknowledgment to the clerk of the counties of ——, in the State of Ohio, in order that the said deed may be recorded.

"Given under our hands and seals this 14th of May, 1840.

"WM. ROBINS. [SEAL.]
"THOMAS SMITH. [SEAL.]

"STATE OF VIRGINIA, *Gloucester County, to wit:*

"I, John R. Cary, clerk of the court of the county aforesaid, in the State aforesaid, do hereby certify that Wm. Robins and Thomas Smith and Peyton R. Nelson, Esquires, whose names and seals are affixed to the within certificates of acknowledgments, were, at the time of subscribing the same, justices of the peace in and for the county aforesaid, duly commissioned and qualified, and that due faith and credit may and ought to be given to all their acts as such.

"In testimony whereof I have hereunto subscribed my name as clerk aforesaid and affixed the seal of the said county this 14th day of May, 1840, in the 64th year of the Commonwealth.

"[L. S.] JOHN R. CARY, *C. G. C.*

"STATE OF VIRGINIA, *Gloucester County, to wit:*

"I, Wm. Robins, presiding justice of the court of the county aforesaid, do hereby certify that John R. Cary, who has given the certificate below, is clerk of the said court, and that his attestation is in due form.

"Given under my hand this 14th day of May, 1840.

"WM. ROBINS, Sen'r. [SEAL]"

The plaintiffs objected to the admission of the conveyance in evidence, upon the ground that, as it was not acknowledged or

proven by John Sinclair until after the death of his wife, it was not sufficient and valid, as a conveyance of the latter's interest, either under the laws of Virginia, where it was executed, or under the laws of Ohio, where the land is situated. This objection was overruled and the deed admitted in evidence, to which the plaintiffs excepted. The defendant offered in evidence deeds conveying to him whatever title Cary S. Jones had, and admitted that he was in possession of the premises in controversy.

No further evidence being offered, the court charged the jury that the deed of September 10, 1837, was a valid conveyance and passed to the grantee Jones all the interest of Margaret Ann Sinclair in the premises; that the defendant, by subsequent conveyances, had become the grantee of that interest; and that he was entitled to a verdict. To this charge the plaintiffs excepted.

The act of the general assembly of Ohio, passed February 21, 1831, entitled "An act to provide for the proof, acknowledgment, and recording of deeds and other instruments of writing," was in force both when Mrs. Sinclair acknowledged the deed to Jones — September 10, 1837 — and when it was acknowledged, in 1840, by her husband. Its fifth section is in these words: "All deeds, mortgages, powers of attorney, and other instruments of writing, for the conveyance or incumbrance of any land, tenements or hereditaments, situate within this [that] State, executed and acknowledged, or proved in any other State, Territory or country, in conformity with the laws of such State, Territory or country, or in conformity with the laws of this State, shall be valid as if executed within this State in conformity with the foregoing provisions of this act." 29 Ohio Statutes, 346; 1 S. & C. 458, 465.

The statute of Virginia applicable to the case was the act of February 24, 1819 (Revised Code, Va., 1819, p. 361), entitled "An act to reduce into one the several acts for regulating conveyances and concerning wrongful alienations."

Its first section provides:

"That no estate of inheritance or freehold, or for a term of

more than five years, in lands or tenements, shall be conveyed from one to another unless the conveyance be declared by writing sealed and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her or their act, before the court of the county, city or corporation in which the land conveyed or some part thereof lieth, or in the manner hereinafter directed, and be lodged with the clerk of such court to be there recorded."

The fourth section provides:

"All bargains, sales and other conveyances whatsoever of any lands, tenements or hereditaments, whether they be made for passing any estate of freehold or inheritance, or for a term of years, and all deeds of settlement upon marriage wherein either lands, slaves, money or other personal things shall be settled or covenanted to be left or paid, at the death of the party or otherwise; and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void, as to all creditors and subsequent purchasers 'for valuable consideration without notice,' unless they shall be acknowledged or proved and 'lodged with the clerk to be' recorded, according to the directions of this act; but the same, as between the parties and their heirs, 'and as to all subsequent purchasers, with notice thereof, or without valuable consideration,' shall nevertheless be valid and binding."

The fifteenth section makes specific provision for the execution and acknowledgment of deeds by husband and wife. It is as follows:

"When a husband and his wife have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and, being examined privily, and apart from her husband, by one of the judges thereof, shall declare to him that she did freely and willingly seal and deliver the said writing, to be then shown and explained to her, and wishes not to retract it, and shall, before the said court, acknowledge the said writing, so again shown to her, to be

her act, such privy examination, acknowledgment and declaration shall thereupon be entered of record in such court; and if, before any two justices of the peace, for any county or corporation, in 'any State' or Territory of the United States 'or of the District of Columbia,' such married woman, being examined privily and apart from her husband, and having the writing aforesaid fully explained to her, shall acknowledge the same to be her act and deed, and shall declare that she had willingly signed, sealed and delivered the same, and that she wished not to retract it, and such privy examination, acknowledgment and declaration shall be certified by such justices, under their hands and seals, by a certificate annexed to said writing, and to the following effect, that is to say: *County or Corporation, sc: We, A. B. and C. D., justices of the peace in the county (or corporation) aforesaid, in the State (or Territory or District) of ———, do hereby certify that E. F., the wife of G. H., parties to a certain deed, bearing date on the — day of ———, and hereunto annexed, personally appeared before us in our county (or corporation) aforesaid; and being examined by us, privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said E. F., acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. Given under our hands and seals this — day of ———. A. B. [Seal.] C. D. [Seal.]*; and such certificate shall be offered for record to the clerk of the court in which such deed ought to be recorded; it shall be the duty of such clerk to record the said certificate accordingly, along with the deed to which it is annexed; and when the privy examination, acknowledgment and declaration of a married woman shall have been so taken in court and entered of record, or certified by two magistrates, and delivered to the clerk to be recorded, and the deed also shall have been duly acknowledged or proven, as to the husband, and delivered to the clerk to be recorded, pursuant to the directions of this act, such deed shall be as effectual in law, to pass all the right, title and interest of the wife, as if she had been an unmarried woman: *Provided, however*, that no cove-

nant or warranty, contained in such deed hereafter executed, shall in any manner operate upon any *feme covert* and her heirs, further than to convey effectually, from such *feme covert* and her heirs, her right of dower, or other interest in real estate, which she may have at the date of such deed."

The first section of the Ohio statute of 1831, (1 S. & C. 458,) as modified by the subsequent acts of January 29, 1833, (Id. 470,) and February 17, 1834, (Id. 694,) provides that when any man, or unmarried woman, above the age of eighteen years, "shall execute within this State, any deed, mortgage, or other instrument of writing, by which any land, tenement or hereditament shall be conveyed, or otherwise affected or incumbered in law, such deed, mortgage, or other instrument of writing, shall be signed and sealed by the grantor or grantors, maker or makers, or [and] such signing and sealing shall be acknowledged by such grantor or maker in the presence of two witnesses, who shall attest such signing and sealing, and subscribe their names to such attestation, and such signing and sealing shall also be acknowledged by such grantor or grantors, maker or makers, before a judge of the Supreme Court, or of the Court of Common Pleas, a justice of the peace, notary public, mayor, or other presiding officer of an incorporated town or city, who shall certify such acknowledgment on the same sheet on which such deed, mortgage, or other instrument of writing may be printed or written; and shall subscribe his name to such certificate."

The second section of the same act provides: "That when a husband and wife, she being eighteen years of age or upward, shall execute, within this State, any deed, mortgage, or other instrument of writing, for the conveyance or incumbrance of the estate of the wife, or her right of dower in any land, tenement or hereditament, situate within this State, such deed, mortgage, or other instrument of writing, shall be signed and sealed by the husband and wife; and such signing and sealing shall be attested and acknowledged in the manner prescribed in the first section of this act; and, in addition thereto, the officer before whom such acknowledgment shall be made shall examine the wife, separate and apart from her husband,

and shall read or otherwise make known to her the contents of such deed, mortgage, or other instrument of writing; and if upon such separate examination she shall declare that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith, such officer shall certify such examination and declaration of the wife, together with the acknowledgment as aforesaid, on such deed, mortgage, or other instrument of writing, and subscribe his name thereto."

Obviously, in view of the statutes of Ohio, the first inquiry must be whether the deed purporting to convey to Jones the interest of John Sinclair and wife in the lands in dispute was executed and acknowledged in conformity with the laws of Virginia, where that deed purports to have been made.

There has been no appearance in this court by the defendant; nor, in the examination of the questions presented, have we had the benefit of a brief in his behalf. But we are informed by the brief of the plaintiffs in error that it was claimed in the court below that neither the acknowledgment nor record of the Sinclair deed constituted parts of the deed itself, and that the effect of the want of acknowledgment was simply that defined by § 4 of the Virginia act of 1819, namely, that the deed was valid and binding as between the parties and their heirs.

We do not understand such to have been the law of Virginia in respect either to the acknowledgment or recording of deeds made by husband and wife. In *First National Bank of Harrisonburg* v. *Paul*, 75 Va. 594, 600, the question was as to the admissibility of parol evidence to show that the privy examination of a married woman was regularly taken in the form prescribed by the statute, or that the officer taking the same, by mistake or inadvertence, omitted material statements required to be set forth in the certificate of such examination. Referring to § 7 of c. 117 of the Virginia Code of 1873 — which, as we shall presently see, is substantially the same as § 15 of the act of 1819 — the court said: "It will thus be seen that the statute prescribes the necessary steps to be taken preparatory to a valid relinquishment of the claim for dower.

The certificate must set forth her declaration and acknowledgment as prescribed by the statute; it must be on or annexed to the deed; it must be admitted to record along with the deed, and when *all* these requirements shall have been complied with, and *not till then*, the writing operates to convey from the wife her right of dower." After observing that the object of the statute was to provide a substitute for the proceeding by fine in England, which was never in force in Virginia, whereby the rights of the wife on the one hand might be carefully guarded, and an indefeasible title secured on the other, the court proceeds: "As was said by Judge Tucker, (*Harkins* v. *Forsyth*, 9 Leigh, 301,) 'the validity of the deed is made to depend not upon the truth of the certificate, but upon its existence and its delivery to the clerk.' It is the authentic and sole medium of proving that the *feme covert* has acknowledged the deed with all the solemnities required by the statute." The Court of Appeals of Virginia, in the same case, quotes with approval the following language from *Elliott* v. *Peirsol*, 1 Pet. 328, 340: "What the law requires to be done and appear of record can only be done and made to appear of the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact or not — if there be no record of the privy examination; for by the express provisions of the law it is not the fact of privy examination merely, but the recording of the fact which makes the deed effectual to pass the estate of a *feme covert*."

In *Rorer* v. *Roanoke Nat. Bank*, decided in 1887, (not yet in the regular reports, but reported in 4 S. E. Rep. 820, 826, 831,) the court said that "all the requirements of the statute, including recordation, as to both *husband and wife*, must be complied with, or else the wife's title does not pass." After an extended review of the statutes of Virginia relating to conveyances, beginning with the act of 1674, and including those of 1705, 1710, 1748, 1785, 1792, 1814, and 1819, the court further said: "The part of § 15, c. 99, 1 Rev. Code, 1819, prescribing the effect of acknowledgments of married women when recorded, was condensed substantially into what is now

§ 7, c. 117, Code 1873, which was the statute in force and applicable to the case in hand. . . . The statute is absolute; there is no room for presumptions resulting from technical rules of construction; and all its requisites must be substantially complied with, or else nothing passes by the deed of a married woman. As colony and State, such has been not only the general policy, but the unmistakable spirit and letter of the law in Virginia for over 200 years."

In view of these adjudications, it is clear that by the law of Virginia the acknowledgment and the recording of conveyances by husband and wife of lands in that Commonwealth, in the mode prescribed by her laws, is essential to pass the estate of the wife in such lands.

The question, however, remains as to the effect of the death of Mrs. Sinclair before her husband had acknowledged the deed. This question is by no means free from difficulty. It was suggested, in a somewhat different form, but not decided, in the case of *Rorer* v. *Roanoke Nat. Bank.* It was there argued that if a married woman's deed only became effectual when duly admitted to record, it would result that if the wife died between the date of her acknowledgment and the recording of the deed the instrument would be wholly void. But the court said: "Not so, however, for as between the husband and the grantee the deed would be valid and binding, though as to the wife it would be inoperative — ineffectual to pass her title — until duly recorded, for it is only then that a married woman's conveyance becomes a complete transaction. But it is useless to argue this proposition as the pretended recordation in 1875 of the deed of 1861 was prior to Mrs. Rorer's death. It is sufficient to say that, if the question were presented directly for decision, it would be an exceedingly interesting one, as the authority for recordation at a time subsequent to the execution and delivery of the deed seems to rest solely upon the presumption of the wife's continuing acquiescence; and in 2 Tuck. Bl. Com., Bk. 2, p. 268, the distinguished author significantly suggests the question whether recordation after the death of the wife would be effectual."

Although it was not essential, under the Ohio statute, that

the deed signed by Sinclair and wife be put upon record in Virginia, we are of opinion that upon her death it became — so far as the laws of the latter State are concerned — inoperative as a conveyance of her interest in the lands in controversy. Until the husband acknowledged it, and thereby, in the only way prescribed by statute, gave his assent to her conveying away her interest, the deed was ineffectual for any purpose. While it may not have been necessary that they should acknowledge the deed at the same time, or upon the same occasion, or before the same officer, the statute of Virginia, upon any fair interpretation of its words, and having regard to the policy which induced its enactment, must be held to have required that the acknowledgment of the husband should occur in the lifetime of the wife, while she was capable of asking his consent to the conveyance of her lands. But that assent was of no avail after the death of the wife before the husband had, by acknowledgment of the deed, signified his willingness to have her convey to Jones, under whom the defendant claims title. Upon her death the title passed to some one. It did not pass to Jones, for the reason that there was not then in existence any completed conveyance, sufficient, under the law, to transfer her estate to a grantee. It, therefore, must have passed to her heirs, and their title could not be divested by any subsequent act of the husband. The fourth section of the Virginia statute, declaring certain conveyances to be valid and binding as between the parties and their heirs, has no application to conveyances by a wife in which the husband does not join, during her lifetime, by an acknowledgment in the mode prescribed by law.

It results that, if the admissibility as evidence of the deed to Jones depends upon its validity, under the laws of Virginia, as a conveyance of Mrs. Sinclair's interest in these lands, the court erred in not excluding it from the jury.

Was the deed executed and acknowledged in conformity with the laws of Ohio, where the lands are situated? In other words, would the deed have conveyed the interest of Mrs. Sinclair if it had been executed and acknowledged in Ohio by the wife, in her lifetime, but not acknowledged by the

husband until after the death of the wife? If so, it may be that, under the Ohio statute of 1831, the deed would be good as between the heirs of Mrs. Sinclair and Jones; for that statute declares that a conveyance of lands in Ohio will be valid if acknowledged in conformity either with the laws of the State in which it is executed, or in conformity with the laws of Ohio.

Upon examining the statutes of Ohio — the controlling provisions of which have been referred to — and, also, the decisions of the Supreme Court of that State to which our attention has been called, we find nothing to justify us in holding that a deed for land, acknowledged by the wife, but not acknowledged by the husband in the lifetime of the wife, will pass her estate in the lands conveyed. In *Ludlow* v. *O'Neill*, 29 Ohio St. 181, it was held — using the language of the syllabus — that "under the statute of February 22, 1831, it is not indispensable to the validity of a deed executed by husband and wife that they should acknowledge it before the same officer or at the same time and place, or that their acknowledgments should be certified by a single certificate." Yet "the acknowledgment of the wife is not binding upon her until the deed is executed and acknowledged by the husband." "The husband," the court said, "can render the wife every needed protection by himself refusing to sign and acknowledge the deed. If she acknowledge it before the husband, it is presented to him with the wife's signature and acknowledgment, and he has only to refuse to acknowledge." We are of opinion that equally under the Ohio and Virginia statutes, a deed by the husband and wife conveying the latter's land is inoperative to pass her title unless the husband — she having duly acknowledged the deed — should, in her lifetime, and by an acknowledgment in the form prescribed by law, signify his assent to such conveyance. For the reasons stated the judgment is

Reversed, with directions to grant a new trial, and for further proceedings in conformity with law and the principles of this opinion.

Mr. Justice Matthews took no part in the decision of this case.

IN RE COY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 1395. Argued April 16, 17, 1888. — Decided May 14, 1888.

The acts of Congress and the statutes of Indiana make it a criminal offence for an inspector of elections, or other election officer, at which an election for a member of Congress is held, to whom is committed the safe keeping and delivery to the board of canvassers of the poll books, the tally sheets, and the certificates of the votes, to fail or omit to perform this duty of safe-keeping and delivery.

In an indictment in a court of the United States for a conspiracy to induce these officers to omit such duty, in order that the documents mentioned might come to the hands of improper persons who tampered with and falsified the returns, it is not necessary to allege or prove that it was the intention of these conspirators to affect the election of the member of Congress who was voted for at that place, the returns of which were in the same poll books, tally sheets, and certificates with those for state officers.

The authority of Congress to protect the poll books which contain the vote for a member of Congress, from the danger which might arise from the exposure of these papers to the chance of falsification or other tampering, is beyond question, and this danger is not removed because the purpose of the conspirators was to falsify the returns as to state officers found in the same poll books and certificates, and not those of the member of Congress.

The writ of *habeas corpus*, in case of a person held a prisoner by sentence of court, can only release the prisoner when it is shown that the court had no jurisdiction to try and punish him for the offence. The inquiry in such case is not whether there is in the indictment such specific allegation of the details of the charge as would make it good on demurrer, but whether the indictment describes a class of offences of which the court has jurisdiction, and alleges the defendant to be guilty. If the record of the case in which judgment of imprisonment is pronounced contains no charge of such offence, he should be discharged.

The prisoners in the present case are specifically charged with an offence against the election laws of Indiana and of the United States, by a conspiracy to violate those laws; and this court holds that the District Court of the United States for Indiana had jurisdiction to try and punish them for that offence, and the judgment of the Circuit Court refusing the writ of *habeas corpus* is accordingly affirmed.

THIS was a petition for a writ of *habeas corpus*. The District Attorney of the United States for the District of Indiana

demurred to the petition, and the demurrer was sustained and the writ refused. The petitioners appealed. The case is stated in the opinion.

Mr. Cyrus F. McNutt and *Mr. D. W. Voorhees* for appellants. *Mr. John G. McNutt* and *Mr. Finley A. McNutt* were on the appellants' brief.

Mr. E. B. Sellers and *Mr. Attorney General* for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the District of Indiana.

The case in that court arose upon an application for a writ of *habeas corpus* made on behalf of Simeon Coy and William F. A. Bernhamer, whose petition alleged that they were restrained of their liberty and detained in the custody of Edward Hawkins, the marshal of the United States for the District of Indiana, and Isaac King, sheriff of Marion County in that State, who claimed to hold the prisoners under the authority of a judgment of the United States District Court. The petition sets forth the nature of the proceedings by which they were indicted and tried in that court, wherein they were found guilty of the charges specified in the indictment. The sentence of the court was "that the said William F. A. Bernhamer make his fine to the United States in the sum of one thousand dollars, and that he be imprisoned in the State Prison North (of said State) for the period of one year; and that the said Simeon Coy make his fine to the United States in the sum of one hundred dollars, and that he be imprisoned in the said State prison for the period of eighteen months." The prisoners were thereupon committed to the charge of the marshal, in whose custody they were at the time when this petition was filed.

The petitioners also presented a copy of the indictment, attached to their petition, which they say charges no offence against the United States, and that the federal district court and the grand jury thereof had no jurisdiction in the premises.

They allege that the action of said grand jury in returning the indictment, and of the court and the marshal thereof in taking them into custody and restraining them of their liberty under and by virtue of the judgment, order and commitment of said court, are wholly void, and the imprisonment of the petitioners unlawful.

To this petition, praying for a writ of *habeas corpus*, a demurrer was filed by the attorney of the United States for said district on behalf of the marshal and the sheriff. Upon the hearing of that demurrer it was sustained by the Circuit Court,[1]

[1] By request of Mr. Justice Miller the following opinion of Mr. Justice Harlan, *In re Coy*, 31 Fed. Rep. 794, taken from the Government's brief, is repeated here. It relates to a different indictment for the same offence, and bears directly upon the questions discussed by the court.

HARLAN, J. The petitioner, Coy, is in custody under process based upon two indictments in the District Court of the United States for the District of Indiana.

He claims that that with which he is charged, if crimes at all, are crimes against the State, and not against the United States; consequently, that the District Court is without jurisdiction to proceed against him. If this contention be sound, the prisoner is entitled to be discharged. *Ex parte Lange*, 18 Wall. 163; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 113 U. S. 718, 724. Otherwise he must be remanded to the custody of the proper officer to be tried for the offences charged.

One of the indictments is under § 5440 Rev. Stat., which provides that "if two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court." § 5446 Rev. Stat., as amended by the act of May 17, 1879, c. 8, 21 Stat. 4. The first count of that indictment charges that Samuel E. Perkins, Simeon Coy, Henry Spaan, John H. Councilman, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer, and John L. Reardon did "conspire, confederate, and agree together, between and among themselves, to commit an offence against the United States, and did then and there, unlawfully, knowingly, and feloniously, then and there conspire, combine, confederate, and agree together, between and among themselves, to induce, aid, counsel, procure, and advise one Allen Hisey to unlawfully neglect and omit to perform a duty required and imposed by the laws of the State of Indiana relating to and affecting a certain election had and held at and in the county of Marion, in the State

which refused to issue the writ as prayed in the petition. From this judgment the prisoners took an appeal to the Supreme

and District of Indiana, and at the second precinct of the thirteenth ward of the city of Indianapolis, in the county of Marion aforesaid, on the 2d day of November, A.D. 1886, pursuant to law, at which election a Representative in Congress for the Seventh Congressional District of Indiana was voted for, to wit: To unlawfully neglect and omit to safely keep in his possession and custody the tally papers, poll lists, and certificates of said election at said precinct; he, the said Allen Hisey, being then and there an officer of said election, to wit, an inspector of said election at the second precinct of the thirteenth ward of the city of Indianapolis aforesaid, having been thereto duly appointed, and having duly qualified under the laws of the State of Indiana, and acting as such inspector; and that, to effect the object of said conspiracy, the said Samuel E. Perkins then and there, after one of the tally papers and one of the poll lists of said election at said precinct, and the certificate of the number of votes each person had received at said election at said precinct, designating the office, signed by the board of judges of said election at said precinct, had been deposited with him, the said Allen Hisey, as inspector as aforesaid, and that after he, the said Allen Hisey, had received the said tally paper, poll list, and certificate aforesaid, for the purpose of returning the same to the board of canvassers of said election for the county of Marion aforesaid, he, the said Samuel E. Perkins, did then and there, by unlawfully and feloniously counselling and advising him, the said Allen Hisey, so to do, and by other unlawful means, to the grand jurors aforesaid unknown, unlawfully used to effect the same unlawful purpose, unlawfully induced and procured him, the said Allen Hisey, to unlawfully omit and neglect to safely keep said tally paper, poll list, and certificate in the possession and custody of him, the said Allen Hisey, as inspector as aforesaid, and by said unlawful means induced and procured said Allen Hisey, as inspector as aforesaid, to surrender and deliver to and into the possession of the said Samuel E. Perkins, and permit him, the said Samuel E. Perkins, to take and have the possession and custody of said tally paper, poll list, and certificate, and the said tally paper to then and there unlawfully mutilate, alter, forge, and change, before the said tally paper, poll list, and certificate had been returned to and canvassed and estimated by the board of canvassers of the said election of the county of Marion aforesaid, he, the said Samuel E. Perkins, not being then and there an officer of said election, and not then and there being a person authorized by the laws of the State of Indiana to have possession and custody of said tally paper, poll list, and certificate aforesaid, contrary to the form of the statute of the United States, and against the peace and dignity of the United States of America." The second count charges the defendants with having committed a like offence in respect to the same election in the second precinct of the twenty-third ward of Indianapolis; and the third count charges them with having committed a like offence in respect to the election in the second precinct of the tenth ward.

Court, which was allowed, and the same has been very fully argued in this court, both on their behalf and on the part of the government.

The other indictment is against Coy alone. It charges him with having unlawfully and feloniously advised, induced, and procured the inspector at said election in the third precinct of the thirteenth ward — with whom was deposited the poll list, tally paper, and certificate of the election — to neglect and omit the performance of the duty, imposed by law, of safely keeping said documents in his possession until delivered to the board of canvassers, and to surrender them to Perkins, by whom they were altered and mutilated.

Under what circumstances is the failure, neglect, or refusal of an officer of an election, at which a Representative in Congress is voted for, to perform a duty imposed upon him, as such officer, by the law of the State, an offence against the United States?

By § 5511 Rev. Stat., it is provided that "if, at any election for Representative or Delegate in Congress, any person . . . interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means, induces any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; . . . or aids, counsels, procures, or advises any such . . . officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished," etc.

That the persons mentioned in the various counts of the indictment for conspiracy as inspectors of election were lawfully in the discharge of the functions appertaining to that position is conceded in argument, and is aptly alleged in the indictment. It is also conceded, and, if it were not, it is clear, from the statutes of the State, to be hereafter examined, that they were under a duty to give or make a certificate, document, or evidence in relation to the election in their respective precincts. Each inspector, at such election, who violated or refused to comply with his duty, or any law regulating the same, as well as every one who aided, counselled, procured, or advised him to violate, refuse, or omit to perform his duty, were, according to the express words of this section, guilty of a crime. It is equally clear, in the other case, that the petitioner, Coy, committed a crime if he aided, counselled, procured, or advised an inspector at such election to violate or to refuse or omit to comply with his duty or any law regulating the same.

By § 5515 it is provided: "Every officer of an election at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or munici-

The record presented to us is very simple, there being no other statement of the proceedings had upon the indictment

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pal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election or the result thereof; . . . shall be punished as prescribed in section fifty-five hundred and eleven."

Observe, "intent" is not made an element in determining the existence of the offences specified in that section, except in those cases where the offender knowingly does an act "unauthorized" by the law of the United States, or by the law of the State or Territory under whose sanction he exercises the functions of an officer of election. His neglect or refusal to perform a *duty* required by law in regard to an election, *at which a Representative of Congress is voted for*, is made by this section an offence against the United States, although such non-performance of duty is without an evil intent; while the doing of an act simply "unauthorized" by law is not punishable unless done with an intent to affect the election or the result thereof. Whether that distinction is justified by sound public policy was for the law-making department of the government to determine. It was well said by the court, commenting on § 5515, in *United States* v. *Jackson*, 25 Fed. Rep. 548, 549, 550:

"Congress seeks by this statute to guard the election of members of Congress against any possible unfairness, by compelling, under its pains and penalties, every one concerned in holding the election to a strict and scrupulous observance of every duty devolved upon him while so engaged. . . . The evil intent consists in disobedience to the law. The legislature has the power to adjudge, and does adjudge, that the doing of the thing is not for the public good; and whether its judgment be wise or unwise, it is always binding on the citizen, and the doing of it is a crime. This is particularly so with reference to that class of statutes imposing duties on public officials in the exercise of their public functions. The command of the legislative will must be obeyed, and disobedience is a crime, and may be punished as such."

I proceed to inquire whether the alleged surrender of the certificate, tally paper, and poll list was a violation of any *duty* imposed upon the inspector as an officer of the election at which a Representative in Congress was voted for. If it was, it follows, in view of the plain words of the statute, that he committed an offence against the United States; consequently, those who conspired to induce or procure, and any one who advised, counselled, induced, or procured him to neglect or violate his duty by surrendering the election papers to Perkins also committed an offence against the United States.

The duties imposed by the laws of the State upon inspectors at an election at which a Representative in Congress is voted for are set forth in c. 56 of the Revised Statutes of the State of 1881.

than is contained in that instrument itself, and the judgment of the court upon the trial. As the Circuit Court refused to

Township trustees, by virtue of their office, are inspectors of election in the precincts in which they reside. Prior to the opening of the polls they appoint two judges of different political parties, who, with the inspector, constitute a board of election. Rev. Stat. Indiana, § 4688. The judges and the inspector, before the election is opened, are required to take an oath to support the Constitution of the United States and of the State, and to faithfully and impartially discharge the duties assigned by law. Id. § 4692. The inspector is the chairman of the board of election. Id. § 4695. When the polls are closed it is made the duty of himself and the election judges to open the ballot-box and count the votes, the ballots to be taken out one by one by the inspector, "who shall open them as he takes them out, and read aloud the name of each person printed or written thereon, and the office for which every such person is voted. He shall then hand the ballot to one of the judges, who shall examine the same and hand it to the other judge, who shall string it on a thread of twine." Id. § 4710. No person can be admitted to the room where the counting is done, except the members of the board of election, the sworn clerks, and two voters from each political party having candidates to be voted for. Id. § 4711.

Other sections of the statutes of Indiana are as follows:

"SEC. 4712. When the votes shall be counted the board of judges shall make out a certificate under their hands, stating the number of votes each person has received, and designating the office, which number shall be written in words; and such certificate, together with one of the lists of voters and one of the tally papers, shall be deposited with the inspector, or with one of the judges selected by the board of judges.

"SEC. 4713. As soon as the votes are counted, and before e certificate of the judges as prescribed in the foregoing section is made out, the ballots, with one of the lists of voters and one of the tally papers, shall, in the presence of the judges and clerks, be carefully and securely placed by the inspector, in the presence of the judges, in a strong and stout paper envelope or bag, which shall then be tightly closed and well sealed with wax by the inspector, and shall be delivered by such inspector to the county clerk at the very earliest possible period before or on the Thursday next succeeding said election; and the inspector shall securely keep said envelope containing the ballots and papers therein, and permit no one to open said envelope, or touch or tamper with said ballots or papers therein. And upon the delivery of such envelope to the clerk, said inspector shall take and subscribe an oath before said clerk, that he has securely kept said envelope, and the ballots and papers therein, and that, after said envelope had been closed and sealed by him in the presence of the judges and clerks, he had not suffered or permitted any person to break the seal or open said envelope, or touch or tamper with said ballot or papers, and that no person has broken such seal or opened said envelope to his knowledge; which oath shall be filed in said clerk's office with the other election papers.

grant the writ of *habeas corpus* there is no return by the marshal and the sheriff, so that we have none of the facts or evi-

"SEC. 4714. The clerk shall securely keep said envelope so sealed, with the ballots and papers therein, in the same condition as it was received by him from the inspector in his office (unless opened by said inspector, in the presence of the board of canvassers, as herein provided), for the period of six months. But, when such election is contested he shall preserve them so long as such contest is undetermined, subject to the order of the court trying such contest. . . .

"SEC. 4715. The inspectors of each township or precinct, or the judges of election to whom the certificates, poll-books, and tally papers shall have been delivered as provided for in this act, shall constitute a board of canvassers, who shall canvass and estimate the certificates, poll lists, and tally papers returned by each member of said board: for which purpose they shall assemble at the court-house, on the Thursday next succeeding such election, between the hours of ten A.M. and six o'clock P.M.

"SEC. 4716. The members of such board who shall assemble at such time and place shall select one of their number as chairman, and the clerk of the Circuit Court shall act as their clerk.

"SEC. 4717. Such board, when organized, shall carefully compare and examine the papers intrusted to it, and aggregate and tabulate from them the vote of the county; a statement of which shall be drawn up by the clerk, and shall contain the names of the persons voted for, the office, the number of votes given in each township and precinct to each person, the number of votes given to each in the county, and also the aggregate number of votes given; which statement shall be signed by each member of said board; which canvass sheet, together with such certificates, poll-books, and tally papers, shall be delivered to the clerk, and by him filed in his office. The same shall be preserved by him, open to the inspection of any legal voter of the county or district or State."

These statutes have been referred to at large in order to show the great care taken by the State to guard the ballot against fraud, to secure a correct canvass of the votes cast and an honest declaration of the result. It appears that the laws of Indiana contain special provisions for the custody of two sets of papers relating to general elections: (1) The ballots, one of the lists of voters, and one of the tally papers, sealed up in a paper envelope or bag, must be delivered by the inspector into the custody of the county clerk. (2) The certificate prepared by the board of judges, showing the number of votes each candidate received, and designating the office, together with one of the lists of voters and one of the tally papers, must be "deposited with the inspector," and be returned by him to the board of canvassers, who meet on the Thursday succeeding the election for the purpose of canvassing and estimating "the certificates, poll lists, and tally papers." To the latter papers the present indictments refer. They are the papers which, it is charged, were "deposited" with the inspector by the

dence in the case except as they are detailed in the indictment. The only question raised by the petitioners, supported by sev-

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board of election, and, after being surrendered to Perkins, were forged, altered, and mutilated.

It will be observed that the local statute does not, in express terms, require the inspector to keep those papers in his actual manual custody, during the whole period intervening after they are "deposited" with him, and before he returns them to the board of canvassers. It is therefore contended that the surrender of them to Perkins was not a violation of any *duty* imposed upon the inspector, and could not be deemed a crime unless done with the intent to affect in some way the result of the election for Representative in Congress; and that, as it is not charged in the indictment that the alleged surrender of the election papers was with such intent, or that the alleged forgeries and alterations in fact affected the result of the election for Representative in Congress, it does not appear that any offence against the United States was committed.

In support of these positions, counsel for the prisoner invoke the familiar rule that penal statutes are to be construed strictly; that is, for the benefit of him against whom the penalty is inflicted. Dwar. St. 634. It is doubtful whether that rule has any application in the present case; for the statutes of Indiana, to which we have referred, merely regulate the conduct of general elections in that State, and define the duties of the officers of such elections. Let it, however, be conceded, for the purposes of this case, that, in determining whether the prisoner has committed a crime, the statutes of Indiana and the statutes of the United States relating to the election of Representatives in Congress, taken as a whole, should be interpreted as penal statutes strictly, and not as remedial enactments to be liberally construed in order to suppress the frauds and public wrongs against which they are directed. *Taylor* v. *United States*, 3 How. 197, 210; *United States* v. *Hartwell*, 6 Wall. 385. Still the inquiry remains as to the intent with which the legislative department enacted these laws. In giving effect to the rule that penal statutes must be strictly construed, the court must not disregard the kindred rule, that the intention of the law-maker, to be gathered from the words employed, governs in the construction of all statutes. It was said by the Supreme Court of the United States, speaking by Chief Justice Marshall in *United States* v. *Wiltberger*, 5 Wheat. 76, 95, that "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation or in that sense in which the legislature had obviously used them, would comprehend." So, in *United States* v. *Morris*, 14 Pet. 464, 475, Chief Justice Taney, speaking for the court, said: "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the

eral points in regard to the statutes applicable thereto, is that the District Court which tried the indictment had no jurisdic-

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evident intention of the legislature ought not to be defeated by a forced and overstrict construction." See also *American Fur Company* v. *United States*, 2 Pet. 358, 367.

Giving to the prisoner the full benefit of the rule of interpretation invoked in his behalf, — leaning to the side of mercy where the liberty of the citizen is involved, — I entertain no doubt that the statutes of Indiana, fairly construed, impose upon an inspector who receives the certificate, tally sheet, and poll list of a general election the duty of safely keeping them in his own custody until they are delivered or returned to the board of canvassers. The requirement that they shall be "deposited" with him, and that the board of canvassers, of which he is *ex officio* a member, shall "canvass and estimate the certificates, poll lists, and tally papers *returned by each member of said board*," is inconsistent with the idea that he may, prior to the assembling of the board of canvassers, voluntarily surrender these important papers into the hands of others. I say important papers, because, upon examining the statutes and the decisions of the supreme court of Indiana, it will be found that, although in contested election-cases the ballots, lists of voters, and tally papers, sealed up and delivered to the county clerk, are primary and conclusive evidence of the result of the election, *Reynolds* v. *State*, 61 Ind. 392, 422 *et seq.*, the papers "deposited" with the inspector constitute the basis upon which rests the official declaration in the first instance of the result of all elections in the State. *Moore* v. *Kessler*, 59 Ind. 152. The election of members of the state legislature, Governor, Representatives in Congress, and electors for President and Vice-President all rest upon the papers so deposited with inspectors. Rev. Stat. Ind., §§ 4717, 4718, 4721, 4723, 4724, 4726–4729. It is inconceivable that any inspector could suppose it to be consistent with his duty to part with these papers in advance of his meeting his colleagues of the board of canvassers. They are deposited with him as an officer of the law, acting under the sanction of an oath. The word "deposited" implies that the depositary must safely keep these papers in his own custody until he surrenders them to the board whose duty it is to canvass the returns and certify the result of the election. While he may not be responsible for their absolute safety in every case, he is under a solemn duty to guard them with diligence, proportioned to their value, and to the danger that might come to the public from their loss or mutilation. He holds them in trust for the public, and his duty to retain them in his own exclusive custody is quite as clearly defined as if the statute had so declared in express words. If he voluntarily parts with them before they are returned to the board of canvassers they are no longer "deposited" with him. Any other construction would defeat the obvious intention of the legislature and shock the common sense of every one interpreting these statutory provisions in the light of the ordinary meaning of the words used.

tion. This proposition is founded, not upon any want of jurisdiction of the person, but upon the broad statement that the

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It is said that the inspector would not violate his duty by depositing these papers after they were received by him in some bank for safe-keeping; consequently it is contended he need not always have them in his actual manual custody. This might depend upon the mode of the deposit. If they were placed in a box in the bank vault, and he alone had access to that box, they might in such a case be regarded as in his actual custody. Other cases might be supposed in which his duty to hold the papers might not be violated by the particular mode adopted for their preservation. But no case of doubtful character is now before us. The specific charge in the indictment is that the inspector unlawfully surrendered the papers to Perkins, who had no right under the law to their custody, and that he was induced to do so by Coy in one case, and in the other case by Coy and his confederates.

It was also said in argument that the indictments do not state that the crimes charged were committed in relation to or at an election for Representative in Congress. Counsel overlook the fact that in one case the accused are charged with a conspiracy to procure and induce, and in the other case that Coy procured and induced, the inspector to unlawfully neglect and omit to perform a duty required by the laws of the State "relating to and affecting a certain election *had and held* . . . on the 2d day of November, 1886, *pursuant to law, at which election* a Representative in Congress for the Seventh Congressional district of Indiana was voted for," etc. I know judicially that such an election was authorized by law to be held, and I must take judicial knowledge of what every one knows, that such an election was in fact held at the time and place specified in the indictment. The general averment that the election was held on the day fixed by statute and "pursuant to law" is sufficient to show that it was one at which a Representative in Congress could be legally voted for.

But it is earnestly insisted that the certificate made by the board of election showing the number of votes received by each person and "designating the office" is to be deemed a separate document in respect to each candidate voted for, or at least that it was one document so far as it related to candidates for state offices and a different document or paper so far as it related to the election held for Representative in Congress; and that, in the absence of a specific averment in the indictment showing the surrender of the documents in question to Perkins to have been procured in one case by the prisoner and in the other case by him and his co-defendants, with direct reference to the vote for Representative in Congress, the district court must be held to be without jurisdiction to proceed; in other words, that the mere surrender by the inspector to Perkins of the certificate and other documents deposited with him, nothing else appearing, is not, and could not legally be made, an offence against the United States.

In these views I do not concur. It was conceded in argument, and it

indictment presents no crime or offence under the laws of the United States.

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may be inferred from the statutes, that the certificate in question was in fact one paper, in that it stated the result of the election as to each candidate. So, also, as to the copy of the tally paper and poll list placed in the hands of the inspector. They were none the less documents in regard to an election for Representative in Congress, because they also showed the number of votes cast at the same polls for state officers. And we have seen that the inspector was under a duty imposed by law to keep them in his custody until returned to the board of canvassers, and that, by Revised Statutes of the United States, the inspector at an election at which a Representative in Congress is voted for is guilty of a crime against the United States if he neglects or refuses to perform, or violates *any duty* imposed upon or required of him "in regard to such election" by any law of the United States or of the State in which such election is held. It is not difficult to understand the reasons which induced the State to require the certificate and one copy each of the poll list and tally paper to be deposited with and safely kept by the inspector until returned by him to the board of canvassers. If mutilated or changed before they reach that board, their value as legal evidence in regard to the election both for state and national officers, might be impaired or destroyed. If skilfully altered by bad men, the will of the people as expressed at the polls might be defeated. Common prudence, therefore, suggested the necessity of guarding against every possibility of such mutilation or alteration. To that end these papers were required to be "deposited" with the inspector as soon as the vote was counted by the judges of the election. In holding them prior to their being returned to the board of canvassers, that officer represented both the State and the United States. The national and state governments were alike interested in the faithful discharge of his duty as a public depositary. The documents intrusted to him in that capacity, may be said to have been the joint property of the two governments. To part with them was a violation of his duty to the State, and therefore a crime against the United States, because they related to an election for Representative in Congress, and because his neglect or refusal to perform, or his violation of, a duty imposed upon him by law "in regard to such election" is made by the express words of the act of Congress an offence against the United States, punishable by fine or imprisonment, or both. In order to obtain an honest canvass of the votes cast at an election for Representative in Congress, that which the State makes the inspector's duty to her, in respect to documents relating to the election, is made by the act of Congress a duty to the United States. It is consequently not necessary to set out in the indictment the precise nature of the alternations made by Perkins, nor aver that they were designed to affect, or in fact affected, the result of the election for Representatve in Congress. As the papers in question related to the election for Representative in Congress — although containing evidence as to the election

The indictment itself is of considerable length, although consisting of but one count. It reads as follows:

"The grand jurors of the United States, within and for the District of Indiana, impanelled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States within and for the District of Indiana aforesaid, upon their oath present that Simeon Coy, Henry Spaan, John H. Councilman, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer,

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for state officers — the mere surrender of them to Perkins by the inspector, in violation of the duty imposed upon him by law, constituted an offence against the United States, without reference to the nature of the alleged alterations or forgeries. The offence of the inspector was complete the moment he surrendered the papers to Perkins; and when the latter received them, the offence of the prisoner in the one case, and the offence of the prisoner and his co-conspirators in the other case, were also complete.

The authority of Congress to enact the statutes to which reference has been made is no longer an open question in the courts of the Union. Such legislation is authorized by that provision of the Constitution which invests Congress with power to make regulations as to the time and manner of holding elections for Representatives in Congress, or to alter such regulations as the State prescribes. Article 1, Section 4. The requirement that officers of elections at which such Representatives are voted for shall perform the duties imposed by the State in regard to such elections is the same, in legal effect, as if Congress had in the first instance and by direct legislation imposed those duties upon those officers. It would be extraordinary indeed if the nation could not prescribe penalties for the nonperformance of duties in regard to elections for Representatives in Congress by those exercising the functions of officers at such elections. It is immaterial that such officers were appointed by the State. When supervising elections for Representatives in Congress, they can be reached by the power of the United States, and punished for neglect of the duties they assume to discharge. These views are sustained by the elaborate judgments of the Supreme Court of the United States in *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; and *Ex parte Yarbrough*, 110 U. S. 651; in which the power of Congress, either by direct legislation or by adopting the regulations established by the State to secure the integrity and freedom of elections at which Representatives in Congress are chosen, is placed upon grounds that cannot be shaken. Those cases cover the whole field of argument.

I am of opinion that the District Court of the United States has jurisdiction to proceed under these indictments.

The application for the discharge of the prisoner must therefore be denied. It is so ordered.

and John L. Reardon, late of said district, at the district aforesaid, on the third of November, in the year of our Lord one thousand eight hundred and eighty-six, unlawfully, knowingly and feloniously did then and there conspire, confederate, and combine and agree together, and with one Samuel E. Perkins, to commit an offence against the United States in this, to wit: The grand jurors aforesaid, impanelled and sworn as aforesaid, do charge and present that on the 2d day of November, in the year of our Lord one thousand eight hundred and eighty-six, an election for a Representative in the Congress of the United States from the Seventh Congressional District of the State of Indiana, was lawfully had and held in and for said Seventh Congressional District of Indiana; that the county of Marion in said State, and the city of Indianapolis, situated in said county, are, and on said 2d day of November, in the year of our Lord one thousand eight hundred and eighty-six, were in and constituted parts of said congressional district, and that at said election for Representative in Congress, so held in said district and in said county and city, a Representative in Congress was lawfully voted for at each and every voting precinct of said district and of said county and city, including the precincts hereafter particularly named; that at said election one Allen Hisey served [as] and was the lawful inspector of the election at and for the second precinct of the thirteenth ward of said city of Indianapolis, and at said election said John H. Councilman served [as] and was the lawful inspector of election at and for the second precinct of the fourth ward of said city of Indianapolis, and that at said election said Stephen Mattler served as and was the lawful inspector of election at and for the third precinct of the thirteenth ward of said city of Indianapolis, and that at said election one Lorenz Schmidt served as and was the lawful inspector of election at and for the first precinct of the twenty-third ward of said city of Indianapolis, and one Joel H. Baker served as and was the lawful inspector of election at and for the sixth precinct of Center township in said county of Marion, and one Joseph Becker served as and was the lawful inspector of election at and for the second precinct of the eleventh ward of the city of In-

dianapolis aforesaid, and one Andrew Oehler served as and was the lawful inspector of election at and for the first precinct of the seventeenth ward of said city of Indianapolis, and one John Edwards served as and was the lawful inspector of election at and for the second precinct of the eighteenth ward of said city of Indianapolis.

"That at and after the close of the election aforesaid, and until delivery was made to the clerk of said county and to the board of canvassers of said county, each of said inspectors had in his lawful possession the ballots, tally papers, poll lists, and certificates of the board of judges of election of and for the precinct of which he was and had been inspector as aforesaid; said ballots, poll lists, tally papers, and certificates each contained evidence in respect to said election of Representative in Congress, and said grand jurors aforesaid do charge and present that at said district, on said third day of November, in the year of our Lord one thousand eight hundred and eighty-six, said defendants Simeon Coy, Henry Spaan, John H. Councilman, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer, and John L. Reardon, intending to obtain unlawful possession of said papers and election returns so in the custody of said inspectors, and feloniously to mutilate, alter, forge, and change the said poll lists, tally papers, and certificates of the judges of election, did unlawfully and feloniously conspire, confederate, combine, and agree together, and with said Samuel E. Perkins, unlawfully and by false and deceitful speeches, statements, assertions, and promises, and by other unlawful means to the grand jurors unknown, to counsel, assist, aid, procure, and induce said Allen Hisey, Lorenz Schmidt, John H. Councilman, Stephen Mattler, Joel H. Baker, Joseph Becker, Andrew Oehler, and John Edwards, inspectors as aforesaid, and each of them, unlawfully to omit, neglect, fail, and refuse to perform the duties imposed by the laws of the State of Indiana upon them and each of them safely to guard, keep, and preserve from harm and danger the papers, poll lists, tally papers, and certificates of the judges of election so deposited with them, the said inspectors, and each

of them respectively, until lawfully delivered to the board of canvassers of said county of Marion, and to the clerk of said county, and that to effect the object of said conspiracy the said Samuel E. Perkins unlawfully advised, persuaded, and procured the said Allen Hisey, inspector as aforesaid, unlawfully, and negligently to deliver to him, the said Samuel E. Perkins, the poll lists, tally papers, and certificates of the judges of election deposited with him, the said Allen Hisey, for return to the board of canvassers of said county, before the same had been returned to the said board of canvassers; and said Samuel E. Perkins and Simeon Coy unlawfully persuaded, advised, and procured the said Stephen Mattler unlawfully and negligently to deliver, and he, the said Stephen Mattler, consented to and did then and there unlawfully and negligently deliver to said Perkins and Coy the poll lists, tally papers, and certificate of the board of judges of election deposited with him, the said Stephen Mattler, for return to the board of canvassers of said county, before the same had been returned to and canvassed by said board of canvassers; and the said John E. Sullivan and George W. Budd unlawfully received and took from Lorenz Schmidt the poll list, tally paper and certificate of the board of judges of election deposited with said Lorenz Schmidt as aforesaid for return to the board of canvassers aforesaid; and the said John H. Councilman, negligently and in disregard of his duty, parted with and surrendered to a person or persons, to the grand jurors unknown, the poll list, tally paper and certificate of the judges of election deposited with him, the said John H. Councilman, for return to the board of canvassers; and said Simeon Coy unlawfully received, procured and took from Andrew Oehler, inspector as aforesaid, the poll list, tally paper and certificate of the judges of election deposited with him, the said Andrew Oehler, as aforesaid, to be returned to the board of canvassers of said county; and the said defendants, Simeon Coy, Henry Spaan, John E. Sullivan, and others of the defendants, to the grand jurors unknown, advised, persuaded and procured the said Joel H. Baker unlawfully and negligently to surrender and deliver to some person

or persons, to the grand jurors unknown, the poll list, tally paper and certificate of the judges of election deposited with him for return to the said board of canvassers; and said defendants, Simeon Coy, Henry Spaan, John E. Sullivan, and other defendants, to the grand jurors unknown, advised, procured and persuaded said John Edwards, inspector as aforesaid, to unlawfully and negligently deliver and to surrender to some person or persons, to the grand jurors as aforesaid unknown, the poll list, tally paper and certificate of the judges of election deposited with him, the said John Edwards, as aforesaid to be returned to the said board of canvassers; and said Simeon Coy, John H. Councilman, Henry Spaan, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Mattler, William F. A. Bernhamer and John L. Reardon procured the election of said William A. Bernhamer as chairman of the board of canvassers of said election in and for said county of Marion, in said State and district, and said William F. A. Bernhamer, as such chairman, refused to accept the poll list, tally paper and certificate of the judges of election deposited with said John H. Councilman as inspector as aforesaid, when first presented by said John H. Councilman to said board of canvassers and until the said tally paper and certificate of the judges of election had been unlawfully altered and forged; and further to effect the object of said conspiracy, said Simeon Coy sent one William H. Eden to said Joseph Becker, inspector as aforesaid, and to other inspectors, to the grand jurors unknown, with direction, instruction and request to said Joseph Becker and other inspectors, respectively, not forthwith to return and deliver the returns of said election contained in sealed bags to the clerk of the Circuit Court of the county of Marion aforesaid, but to unlawfully bring the same to him, the said Simeon Coy; the said Simeon Coy, Samuel E. Perkins, Henry Spaan, Charles N. Metcalf, John E. Sullivan, George W. Budd, Albert T. Beck, John L. Reardon and said persons to the grand jurors unknown, to whom said tally papers, poll lists and certificates of judges of election were so unlawfully surrendered and delivered by said John H. Councilman, John Edwards, Allen

Hisey, Lorenz Schmidt, Andrew Oehler, Stephen Mattler, Joseph Becker and Joel H. Baker, respectively, as aforesaid, not being then and there officers of said election, and not being then and there persons authorized by law to have the possession and custody of said poll lists, tally papers and certificates of the judges of election aforesaid, contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

"EMORY B. SELLERS,
"*Attorney for the U. S. for the District of Indiana.*"

The essence of this indictment is, that whereas by the law of the State of Indiana it was the duty of these inspectors to take the certified lists of the voters, with the returns of the judges, and safely keep them until they delivered them to the county clerk or to the board of canvassers who were to examine and count the votes of all the precincts in the county, they were persuaded by the defendants, who influenced them in various ways, to deliver up the certificates, poll lists, and tally papers to other persons who had no authority to take charge of them, and who thus had an opportunity of opening, examining, and falsifying those documents. It is the omission of this duty, which was imposed upon these inspectors by the law of Indiana, of safely keeping these papers confided to their care, that constitutes the foundation of this proceeding.

The provisions of the statutes of Indiana upon this subject may be found in the following sections of the Revised Statutes of that State:

"SEC. 4712. CERTIFICATE OF JUDGES. 34. When the votes shall be counted, the board of judges shall make out a certificate, under their hands, stating the number of votes each person has received, and designating the office; which number shall be written in words; and such certificate, together with one of the lists of voters and one of the tally papers, shall be deposited with the inspector, or with one of the judges selected by the board of judges."

"SEC. 4715. BOARD OF CANVASSERS. 37. The inspectors

of each township or precinct, or the judges of election to whom the certificates, poll books, and tally papers shall have been delivered, as provided for in this act, shall constitute a board of canvassers, who shall canvass and estimate the certificates, poll lists, and tally papers returned by each member of said board; for which purpose they shall assemble at the court-house on the Thursday next succeeding such election, between the hours of ten A.M. and six o'clock P.M."

The acts of Congress which are supposed to make the conduct of persons interfering with these election returns a criminal offence are to be found in the following sections of the Revised Statutes of the United States:

"SEC. 5440. If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." [1]

"SEC. 5511. If, at any election for Representative or Delegate in Congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living or dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; or does any unlawful act to secure an opportunity to vote for himself, or any other person; or by force, threat, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter of

[1] By the act of May 17, 1879, 21 Stat. 4, c. 8, this section of the Revised Statutes was amended so as to read as follows:

"If two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

any State, or of any Territory, from freely exercising the right of suffrage, or by any such means induces any voter to refuse to exercise such right, or compels or induces by any such means any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interferes in any manner with any officer of such election in the discharge of his duties; or by any such means or other unlawful means, induces any officer of an election or officer whose duty it is to ascertain, announce or declare the result of any such election, or give or make any certificate, document or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures or advises any such voter, person or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

The charge in the indictment, which is supposed to be justified by this section, is that the defendants conspired to interfere with the officers of the election in the discharge of their duties; that they did by unlawful means induce them to violate and refuse to comply with their duty in regard to the custody and safekeeping of the election returns, and that they persuaded and induced these officers, or attempted so to do, to omit their duty in regard thereto.

Section 5512, although mainly relating to the registration of voters, makes it an offence for any "officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing or declaring the result thereof, or in giving or making any certificate, document or evidence in relation thereto," who "knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election or the

result thereof, or any certificate, document or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be punishable as prescribed in the preceding section."

Section 5515 makes it an offence for any officer of an election, at which any Representative or Delegate in Congress is voted for, "who withholds, conceals or destroys any certificate of record so required by law respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so."

These statutes of the United States, first prescribing a punishment for a conspiracy to commit an offence against its laws, supplemented or preceded by federal laws made for the security and protection of the elections held for Representatives and Delegates to Congress, confer authority to punish a conspiracy to prevent or interfere with that security, by proceedings in the federal courts. The difficulty and delicacy of the position arises from the circumstance that Congress, instead of passing laws for the election of such members and delegates from the States and Territories under the supervision of its own officers and at times when no other elections are held, has remitted to the States the duty of providing for such elections. It follows that in all cases where a member of Congress is elected from a State, that he is voted for at an election held under the laws of the State, which provide for holding other elections at the same time and place, under the direction of the same officers, at which ballots are cast for a great number of state and local officers. The same judges, inspectors, and clerks preside and conduct the election for all these different offices. The votes for members of Congress are generally put into the same box with those cast for the various state and

municipal officers. They are generally printed upon ballots, composed of one piece of paper, containing a long list of names, including those of the candidate for Representative in Congress, state, county and municipal officers.

While the Federal Government has not thought it advisable to provide for separate elections for Congressmen, nor to interfere with the general laws for the conduct of those elections passed by the States, it has enacted the sections above referred to, and among others those for the punishment of persons who violate the election laws at an election where votes are cast for a member of Congress. In doing this they have adopted the laws of the State, and they have provided that persons who violate them at such an election, that is, where a member is voted for, shall be punished by the provisions of the statutes of the United States and by proceedings in the federal courts.

This anomalous condition makes the question of the applicability of the laws of Congress on this subject to offences under the state statutes for the regulation of the casting, returning, and counting of votes somewhat complex; but the power, under the Constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned. The right of Congress to do this, by adopting the statutes of the States, and enforcing them by its own sanctions, is conceded by counsel to be established. In regard to this they say in their brief:

"It is, perhaps, since the decision in *Ex parte Clarke*, 100 U. S. 399, past debate that Congress has the power under the Constitution to adopt the laws of the several States, respecting the mode of electing members of Congress, and, as resulting from that power, the right to prescribe punishment for infractions of the laws so adopted. This court has held more than once that Congress has exercised this power, and has adopted these laws, and, with them, the officers created under them,

making them for the purposes of the election of representatives in Congress its officers, and has added new sanctions to such laws, and subjected such officers to the penalties of these sanctions. All this is conceded."

The main objection to the indictment, however, which is urged with great earnestness by counsel for appellants, is, that it contains no averment that the intent and purpose of the defendants' conduct was to affect in any manner the election of a member of Congress, or to influence the returns relating to that office. The proposition is put in various forms, that since there were many state and local officers also voted for at the election in question and in those precincts, and as it is consistent with the indictment that the actions of the conspirators were directed only to the election of those persons, and not to that for the federal office of a congressional representative, the indictment is for that reason insufficient.

The charge is that the conspirators *unlawfully and feloniously* induced the election officers to omit to perform their duty in this respect, which is in general conceded to be expressive of an evil intent. But counsel demand something more than this general evil intent in tampering with the poll lists, tally papers and certificates, although it is not denied that the object of the parties accused, in inducing the election officers to violate their duty, proceeded from a criminal intent, or that it was done for the purpose of affecting the returns contained in the papers that were withheld, or exposing them to the danger of mutilation and alteration. It is said, however, that since the evil intent is not shown to have been specifically aimed at the returns of the vote for congressmen, the statutes of the United States can have no force so far as the infliction of any penalty is concerned; and it is asserted that Congress had no power to provide for any punishment where no intent affecting the congressional election is averred.

It would be a very singular principle to establish, that, where a man was charged with a homicide, caused by maliciously shooting into a crowd with the purpose of killing some person against whom he bore malice, but with no intent to injure or kill the individual who was actually struck by the shot, he

should be held excused because he did not intend to kill that particular person, and had no malice against him.

The analogy of this example to the present case is close. The persons accused did desire and intend to interfere with the election returns, and they did purpose to falsify those returns, as to some of the persons, at least, who were then voted for as candidates. It is argued on their behalf that because it is not averred in the indictment that they intended to falsify the election returns with regard to the congressional vote, or to affect those particular returns, it is to be held bad. It is also insisted that the felonious intent had relation to the action of inducing the officers to omit the duty of keeping carefully the poll books and tally sheets, and although the records of the votes for congressman might possibly also suffer along with a number of other persons who might be affected by that omission, yet because there was not in the minds of the conspirators the specific intent or design to influence the congressional election, they are not to be held liable under this statute.

The object to be attained by these acts of Congress is to guard against the danger, and the opportunity, of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result.

There are many instances when an act may be criminal in its character without there being a criminal intent. Gross carelessness, by which a person may be injured or killed, while it may reduce the offence from murder to manslaughter, or modify the penalty, does not wholly relieve the person guilty of it from criminal responsibility. Governments, both national and state, and even municipal, make laws for protection against articles, such as powder or glycerine, from acci-

dents resulting from negligence, where no intention exists to cause an injury. If persons violate these laws they become liable to the penalty prescribed, because the necessity for strict care and caution in regard to such dangerous substances requires that carelessness in regard thereto, from which damage might result, should be punished, notwithstanding there may be an absence of any criminal or felonious intent.

The case before us is eminently one of this character. Crimes against the ballot have become so numerous and so serious that the attention of all legislative bodies has been turned with anxious solicitude to the means of preventing them, and to the object of securing purity in elections and accuracy in the returns by which their result is ascertained. The acts of Congress and of the State of Indiana now under consideration are of this class. The manifest purpose of both systems of legislation is to remove the ballot-box as well as the certificates of the votes cast from all possible opportunity of falsification, forgery, or destruction; and to say that the mere careless omission, or the want of an intention on the part of persons who are alleged to have acted feloniously in the violation of those laws, excuses them because they did not intend to violate their provisions as to all the persons voted for at such an election, although they might have intended to affect the result as regards some of them, is manifestly contrary to common sense and is not supported by any sound authority. It may be added that the language of the act of Congress in describing these offences, clearly does not require, in regard to some of these acts of omission and failure to perform the duties imposed upon election officers, that there should be alleged or proved an intention to give an opportunity for improper tampering with the records of the votes cast.

It is also strenuously insisted by counsel for the appellants in their argument that no offence under the act of Congress is recited in the indictment. We have already stated, however, what the indictment charges, and given extracts from those acts and the statutes of Indiana on that subject. While we do not think it necessary to elaborate the argument, which has been fully considered in the court below, and in several opin-

ions on writs of error and applications for *habeas corpus* in various inferior tribunals, we do not doubt that the indictment sets forth a conspiracy by the parties to this appeal to induce the inspectors of election in Indianapolis to omit the discharge of their duty and to fail to safely keep and guard the poll lists, tally papers and certificates committed to their care for the precincts at which they each presided. Nor do we doubt that the statute of Indiana imposed such a duty upon those inspectors, which they were induced to violate by the persuasion and influence of the parties to this conspiracy.

We are the less inclined to enter into these controversies, as to a narrow construction of the statutes of Indiana and the acts of Congress, because we think they were questions properly before the District Court on the trial of the prisoners. They were questions of which that court had jurisdiction and which it was its duty to decide. When decided by that court they were not subject to review here by a writ of error, nor were they in a proper or just sense questions affecting its jurisdiction. It would be as well to say that every question concerning the sufficiency and validity of an indictment and the evidence necessary to support it, was a matter of jurisdiction, and authorized an interference, if error took place, by a writ of *habeas corpus* for its correction. That this cannot be done has been repeatedly held in this court.

The leading case on the subject is that of *Ex parte Tobias Watkins*, 3 Pet. 193, in which the opinion was delivered by Chief Justice Marshall. Watkins was committed to jail in the District of Columbia by virtue of a judgment of the Circuit Court of the United States for that District. An application for a writ of *habeas corpus* was made on his behalf upon the ground that the indictment on which he was convicted did not show any jurisdiction in that court, and that it charged no offence for which he could be punished therein. The eminent Chief Justice, after remarking upon the general proposition that a commitment by the judgment of a court of competent jurisdiction is a sufficient answer to a writ of *habeas corpus* intended to effect his discharge, said: "The judgment of a court of record whose jurisdiction is final is as conclusive

on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it. The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced, but they deny their application to a case in which the indictment charges an offence not punishable criminally according to the law of the land. But with what propriety can this court look into the indictment? We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offence cognizable in any court is cognizable in that court. If the offence be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other, and must remain in full force unless reversed regularly by a superior court capable of reversing it." pp. 202, 203.

It may be said that this language is too broad in asserting that, because every court must pass upon its own jurisdiction, such decision is itself the exercise of a jurisdiction which belongs to it, and cannot, therefore, be questioned in any other court. But we do not so understand the meaning of the court. It certainly was not intended to say that because a federal court tries a prisoner for an ordinary common law

offence, as burglary, assault and battery, or larceny, with no averment or proof of any offence against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by *habeas corpus* because the court which tried him had assumed jurisdiction.

In all such cases, when the question of jurisdiction is raised, the point to be decided is, whether the court has jurisdiction of that class of offences. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well defined class of offences, as forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of *habeas corpus*.

And, as the laws of Congress are only valid when they are within the constitutional power of that body, the validity of the statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment. And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him. *Ex parte Siebold*, 100 U. S. 371.

So, while we have attempted to answer the main argument of prisoners' counsel, that Congress had no power to punish an act not specifically intended to affect the election of a member of Congress, though the act was done with a felonious intent, and that if it had such power it has not exercised it, we thought it not necessary, under the principle laid down in *Ex parte Watkins*, to inquire into the sufficiency of the allegation of the more minute details of the offence as charged in the indictment. We are not here to consider it as on a demurrer before trial; but, finding that the District Court had a general jurisdiction of this class of offences, we proceed no further in the inquiries on that subject.

In *Ex parte Parks*, 93 U. S. 18, 23, this question was very ably reviewed upon all the authorities. The case of Watkins was reaffirmed, and the general proposition announced that it

was apparent from a review of the cases that "where the prisoner is in execution upon a conviction the writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the court below had jurisdiction of the offence, and did no act beyond the powers conferred upon it. . . . The District Court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of a writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court."

In *Ex parte Yarbrough*, 110 U. S. 651, the subject was again examined very fully. The court reiterated the doctrine that the writ of *habeas corpus* cannot be converted into a writ of error by which the judgment of the court passing the sentence can be reviewed. The court there said: "If that court had jurisdiction of the party and of the offence for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further. This principle disposes of the argument made before us on the insufficiency of the indictments under which the prisoners in this case were tried. Whether the indictment sets forth in comprehensive terms the offence which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law, which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction. Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into on a writ of *habeas corpus* limited to an inquiry into the existence of jurisdiction on the part of that court." pp. 653, 654. Citing *Ex parte Tobias Watkins* and *Ex parte Parks*, *supra*.

We cannot better close this opinion than by a further extract from that of the court in *Ex parte Yarbrough*, p. 666: "In a republican government, like ours, where political power

is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources."

The judgment of the Circuit Court, denying the writ of habeas corpus, is affirmed.

Mr. Justice Field dissenting.

The petitioners and appellants were indicted in the District Court of the United States for the District of Indiana for an alleged conspiracy to commit an offence against the United States, and were convicted and sentenced to pay a fine and be imprisoned. The fine of Bernhamer was one thousand dollars, and his imprisonment was for one year; the fine of Coy was one hundred dollars, and his imprisonment was for eighteen months. The offence charged was that the accused conspired with one Perkins to induce the inspectors of an election held in Indiana, in November, 1886, at which a Representative in Congress was voted for, to omit a duty imposed upon them by the laws of that State, to safely keep the poll lists of the voters, the tally papers, and the certificates of the judges of election, until they were delivered to the clerk of the county, or to its board of canvassers, by whom the votes were to be examined and counted; and, to effect the object of the conspiracy, persuaded the inspectors to deliver those papers to persons who had no authority to take charge of them.

On this appeal we can only inquire whether the Circuit Court erred in refusing to issue the writ; and I admit, in determining upon the propriety of issuing it, the sole question that court could consider was whether the District Court of Indiana, in which the appellants were indicted, tried, and convicted, had jurisdiction of the offence and of the parties accused, and to render the judgment pronounced. As was said in *Ex parte Siebold*, 100 U. S. 371, 375: "The only ground

on which this court, or any court, without some special statute authorizing it, will give release on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void." But that this court and the Circuit Court can exercise jurisdiction by *habeas corpus*, in cases where it is alleged that by the action of an inferior tribunal a citizen of the United States has been unlawfully deprived of his personal liberty, is well established; and they can look into the record of the inferior court, under whose judgment the parties are restrained of their liberty, to ascertain whether it had jurisdiction to hold and try them, and render the judgment. If it appear upon such examination that the inferior court had jurisdiction, the further consideration of the case is ended. The writ of *habeas corpus* cannot be made to take the place of a writ of error, so as to authorize an examination into any alleged errors of the inferior court in reaching its conclusion. But if it had no jurisdiction over the parties or of the offence with which they are charged, or to render the judgment, the Circuit Court and this court can interfere and discharge them. The broad doctrine laid down in *Ex parte Watkins*, 3 Pet. 193, that where no revision by a higher court of the judgment of a court in a criminal case is authorized, another court will not inquire into its jurisdiction upon *habeas corpus*, has been modified by subsequent decisions.

As in the present case no objection was made before the Circuit Court, or is made here, to the jurisdiction of the District Court of Indiana over the persons of the accused, or to render the judgment pronounced, if the offence charged was one of which that court could take cognizance, the sole question before us is whether the indictment charges an offence thus cognizable.

In *Ex parte Siebold* and *Ex parte Clarke*, reported in 100 U. S. 371, 399, it was held that Congress had the power under the Constitution to adopt the laws of the States respecting the election of officers of the States, where at such election a member of Congress is to be voted for, and that it could impose a punishment for a violation of such laws. This was

held in the face of the objection that it was not competent for Congress to punish a state officer for the manner in which he discharged the duties imposed upon him by the laws of the State; nor to make the exercise of its punitive power depend upon the legislation of the States. But the court at the same time held that the adoption by Congress of the laws of the State only extended so far as the election concerned Representatives in Congress. Its language was: "If, for its own convenience, a State sees fit to elect state and county officers at the same time, and in conjunction with the election of representatives, Congress will not thereby be deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of officers of election, having exclusive reference to the election of state or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts." 100 U. S. 393.

It would seem, therefore, essential in an indictment presented in a United States court, for an offence cognizable by that court under these state laws, that it should aver that the violation of them was intended to affect the election of a member of Congress. How inspectors of election or other officers of a State may conduct the elections, so far as those elections relate to state officers, and what liability they may incur in such cases for the omission of duties imposed upon them by state laws, are matters entirely within the cognizance of the state tribunals. A violation of the state laws as to the election of persons to fill state offices cannot be made the subject of punishment by a federal court, nor, of course, a conspiracy to induce state officers to violate those laws. The judicial power of the United States does not extend to a case of that kind. The Constitution defines and limits that power. It declares that the power shall extend to cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority; to cases affecting ambassadors, other public ministers, and consuls; to cases of admiralty and maritime jurisdiction, and to various contro-

versies to which the United States or a State may be a party, or between citizens of different States, or citizens of the same State claiming lands under grants of different States, or between citizens of a State and any foreign State, citizens or subjects. Whilst the judicial power thus defined and limited may be applied to new cases as they arise under the Constitution and laws of the United States, it cannot be extended by Congress so as to include cases not enumerated in that instrument, as has been often held by this court.

The indictment in this case charges a conspiracy to induce certain election officers appointed under the laws of Indiana to commit a crime against the United States, the crime being the alleged omission by them to perform certain duties imposed by the laws of that State respecting elections. But it contains no allegation that the alleged conspiracy was to affect the election of a member of Congress; which, as said above, appears to me to be essential to bring the offence within the jurisdiction of the court. If the conspiracy was to affect the election of a state officer, no offence was committed cognizable in the District Court of the United States. If it had any other object than to affect the election of a member of Congress, it was a matter exclusively for the cognizance of the state courts.

In several States, and probably in a majority of them, numerous officers, state, county, city, and village, are elected at the same time with representatives in Congress; and according to the present decision a conspiracy to persuade the officers of election to omit any duty imposed upon them under the laws of the State, though designed merely to affect the election of an inferior magistrate of a village, is an offence against the United States, punishable in the Federal courts. Thus, obedience to the laws of the State in matters of even local offices, if a member of Congress is voted for at the same election, may be enforced by the courts of the United States, instead of by the proper tribunals of the State whose laws have been violated. I am not able to assent to a doctrine which leads to this result, and gives the Federal courts power to intermeddle with the action of state officials in an election

for local offices whenever a member of Congress may have been voted for at the same time. I agree to what is said by the court as to the temptations existing in a republican government, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, to control those elections by violence and corruption. But I do not perceive in that fact any reason why the punishment of fraud committed or designed at state elections for state officers should be transferred to the Federal courts. The States are as much interested in guarding against frauds at such elections, and in maintaining their purity, as it is possible for the general government to be. They do not require for their protection in such matters the aid of the general government, any more than in other domestic affairs. As observed on a former occasion, "they are invested with the sole power to regulate domestic affairs of the highest moment to the prosperity and happiness of their people, affecting the acquisition, enjoyment, transfer, and descent of property; the marriage relation and the education of children; and if such momentous and vital concerns may be wisely and safely intrusted to them, I do not think that any apprehension need be felt if the supervision of elections in their respective States should also be left to them," where, I may add, it properly belongs.

I am of opinion that the writ of *habeas corpus* should have been issued in this case by the Circuit Court, and that its order denying the petition of the appellants should, therefore, be reversed.

CRAIG *v.* LEITENSDORFER.

ORIGINAL MOTION IN A CAUSE ADJUDGED IN THIS COURT AT THE PRESENT TERM.

No. 1. Submitted April 23, 1888. — Decided May 14, 1888.

This court has power, and it is its duty, to issue writs of attachment, for costs here against persons who intervene in this court by leave of court,

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and also against their sureties, in bonds for costs furnished by them by order of court on intervening.

THIS cause was tried at the present term, and is reported 123 U. S. 189. A question in regard to the enforcement of the payment of costs in this court, arises under the following circumstances:

On the 4th day of May, 1885, this cause having then been docketed and entered here, the attorney of record signed the following stipulation:

"WILLIAM CRAIG, *Appellant*,
vs.
"THOMAS LEITENSDORFER. } In Equity, No. 310.

"And now come the parties above named, and stipulate and agree together, that by their mutual consent the decree of the Circuit Court, from which this appeal is taken, be reversed and the cause remanded to the court with directions that a decree be entered 'bill dismissed without costs.'

"BENJ. F. BUTLER,
For Appellant.
"JOHN HALLUM,
For Appellee.
"*And Attorney in Fact for parties in interest.*"

On the same day the court adjourned for the term.

On the 6th day of the same May the late Chief Justice received the following letter, and caused it to be filed in the office of the clerk of the court, as shown by the indorsement:

"WASHINGTON, D. C., *6th May*, 1885.

"*To Chief Justice Morrison R. Waite, present:*

"In *Craig* v. *Leitensdorfer*, a stipulation of counsel was filed on the 4th inst., the last day of the late term of the Supreme Court, signed by 'John Hallum for appellee, and attorney in fact for parties in interest.' Many months ago the appellee, impoverished by long litigation, transferred his interest in the land involved to Thomas J. Allen, who retained me to defend

the case. He has never employed Mr. Hallum, to my knowledge. Will not the court protect Allen's interests against the sacrifice — the gratuitous sacrifice, contemplated by Mr. Hallum?

"See *Pratt* v. *Jerome*, 19 Howard, 384.

"Respectfully,

"ROBERT H. BRADFORD.

"[Indorsed.]

"SUPREME COURT OF THE UNITED STATES.

"1884. October Term.

"LETTER OF BRADFORD IN REGARD TO STIPULATION TO REVERSE

"[Filed May 6th, 1885. — James H. McKenney, Clerk.]"

On the 20th October, 1885, *Mr. Butler* on behalf of Craig, made the following motion, supporting it by a further statement which is not material in this connection:

"And now comes the appellant, defendant in this cause, here in court, by Benj. F. Butler, his counsel, and moves that an order be issued to Leann King, as executrix, who has filed a motion to be substituted in said cause as appellee, or to intervene therein, and also to R. H. Bradford, who has heretofore appeared for Thomas Leitensdorfer, plaintiff, appellee, and has written a letter to the Chief Justice that he now appears for Thomas J. Allen, who, he claims, now owns the *locus in quo* by purchase since this litigation began, each to show cause, if any either has, why an order and decree shall not be entered upon the stipulation filed herein on the 4th day of May last, a copy of which is as follows, to wit:" [being the above stipulation.]

An order was granted, and on its return *Mr. Charles W. Hornor* and *Mr. R. H. Bradford* appeared on behalf of Leitensdorfer, Thomas J. Allen, and Leann King.

On the 2d November, 1885, the following motion was made on behalf of Craig, entitled in the cause:

"And now comes the appellant here, by his counsel, Benjamin F. Butler and O. D. Barrett, and gives the court to be

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informed that in reply to the motion to show cause filed herein on the 20th of October last, R. H. Bradford, Esq., and Charles W. Hornor representing Thomas Leitensdorfer and Thomas J. Allen, come here into court, and set up the title to the *locus de quo*, set forth in the bill of complaint, to be in other and different persons than said Leitensdorfer, to wit: in Thomas J. Allen and Leann King, and that John Hallum is not and never has been counsel in this cause, as he, in his affidavit avers, filed in support of said motion. And the appellant says, before said motion can be determined, evidence needs to be taken and conveyances shown to establish all the facts as respects the title to said *locus de quo* at the date of filing said motion.

"WHEREFORE, the appellant prays that a Special Master be appointed by this court to take testimony on the state of said title and the rights of the parties, and report the state of said title to this court with his findings of fact thereon.

"BENJ. F. BUTLER,
"O. D. BARRETT,
"*Of Counsel.*"

The court on the 4th November granted leave to file affidavits, and on the 14th December, 1885, *Mr. Barrett* and *Mr. Butler* filed affidavits in support of their motion to have a decree entered upon the stipulation.

On the 18th January, 1886, the following order was entered by the court:

"In this case it is ordered that the decree be reversed in accordance with an agreement to that effect entered into between Mr. Butler, of counsel for appellant, and Mr. Hallum, of counsel for the appellee, now on file, and that the cause be remanded with instructions to dismiss the bill without prejudice, unless the appellee, or some or all the persons who claim to have acquired title to the premises in dispute, or some part thereof, from or through him since the suit was begun, within thirty days from the entry hereof, file a stipulation in the cause, with security to the satisfaction of the clerk, to pay all costs and expenses accruing on this appeal since the last term

that may be finally adjudged against the appellee, including the cost of printing the record and the clerk's fee for supervising."

In accordance with this order, on the 15th February, 1886, sufficient bonds with sureties were filed in the clerk's office by Leann S. King and by Thomas J. Allen, conditioned for the payment of costs accruing after October term, 1884, including cost of printing the record and clerk's fee for supervising.

After the cause was heard at the present term, the costs not being paid, *Mr. Butler* and *Mr. Barrett*, on the 16th of April, 1888, moved the court as follows:

"And now comes the appellant, by his solicitors Benj. F. Butler and O. D. Barrett, and gives this court to be informed, that this cause having been heard and determined by said court and a mandate to the Circuit Court being about to be sent down, the matter of certain costs still remains to be adjusted and settled in this cause. That is to say:

"Leann S. King and Thomas J. Allen, who, by interlocutory order of said court passed the 18th day of January, 1886, were permitted to be heard in court, or by brief, in said cause, as 'persons who claimed to have acquired title to the premises in dispute, or to some part thereof, from or through the appellee, since said suit was begun,' on condition each should file a stipulation in the cause with security to the satisfaction of the clerk to pay all costs and expenses, accruing on said appeal since the last term of the court, that may be finally adjudged against the appellee, including the cost of printing the record, and clerk's fees for supervising. And said King and said Allen each filed such stipulation with instruments of security duly executed by each, the instrument filed by said King having the signature and seal of John N. Smith and Charles R. Lockridge of Kansas City, Mo., as sureties, thereto affixed in the full and just sum of three thousand dollars, which said security in the matter of said King, was satisfactory to the clerk of this court. Said Allen did file like security having executed under his hand and seal, and under the

hands and seals of Charles R. Haywood and A. D. Wilson of Arapahoe Court, Colorado, in the full and just sum of three thousand dollars, which security in the matter of said Allen was satisfactory to the clerk of this court. All which now fully appears in the copies of said securities hereto annexed marked A. D.

"And the court here is further informed that judgment having been rendered by this court in this case in favor of the appellant, with costs against the appellee, that the costs, since the October term of 1884, including the costs of printing the record and the clerk's fees for supervising, which costs amounting to the full and just sum of eleven hundred fifteen dollars and two cents, ($1115.02,) as taxed by said clerk, and for the payment of which said Allen and said King and their sureties were jointly and legally bound, are long since due and unpaid, although duly taxed; of all of which said King and said Allen have had due and reasonable notice through their attorneys of record in this cause, but neither of them has paid said costs, or any part thereof or filed with said clerk any reason why they should not so do.

"Wherefore the appellant moves the court here to estreat said instruments of security for said costs, and order judgment to be entered thereon as taxed by said clerk and proper process of attachment to issue against all said persons, jointly and severally, so that the judgment of this court may be rendered effectual, and said costs may be paid to the Clerk of this Court.

"BENJ. F. BUTLER,
"O. D. BARRETT.
"*Solicitors for the Counsel.*"

Leave was thereupon granted to *Mr. Charles W. Hornor* as attorney for Thomas J. Allen, and to *Mr. John Paul Jones* as attorney for Leann S. King to file answers and briefs in reply to this motion, and on the 23d April, *Mr. Hornor* on behalf of Allen filed the following answer, (with a brief and argument in support of it,) both of which were adopted by *Mr. Jones* in open court on behalf of Mrs. King:

"Now into this honorable Court, by his attorney, comes *Thomas J. Allen*, and in answer to the motion served on him Monday, April 10, 1888, excepts and says:

"*First.* That he is no proper party to this suit and cannot be called on to defend this motion, because the Court is without jurisdiction; because the motion is premature, no *personal* demand having been made for the costs claimed upon any person liable for them; no judgment or decree entered against respondent; no detailed itemized bill of costs either exhibited or filed, and because motioner has mistaken his remedy and the amount claimed is not due and is misstated.

"*Second.* That no costs are due to the clerk; they have all been paid by Mr. Butler, who is the sole person having any real interest in this rule or in this case as appellant; and he has a full and perfect remedy at law.

"Wherefore he prays that these exceptions be sustained and this motion dismissed with costs, and for all further general and equitable relief.

"CHARLES W. HORNOR,

"*Attorney for Thomas J. Allen.*"

Mr. Justice Miller: An application was made in this case last Monday, for a compulsory process against Mrs. Leann S. King and Thomas J. Allen, and sureties, who signed two bonds for costs in this case.

The circumstances of the case are about these. Craig and Leitensdorfer had been litigating for an immense tract of land in Colorado, and the case had come here by appeal in behalf of Craig against the judgment of the Circuit Court. Shortly after it got here, Craig made an arrangement with Leitensdorfer, or with his executor (for he died during the progress of this long litigation), by which the case was to be closed up by a consent decree in favor of Craig, or his representatives. He presented that agreement to this court, and asked to have it enforced. At that time Mrs. King and Mr. Allen interposed by their counsel, and protested against this dismissal, saying that they had bought Leitensdorfer's claim, or parts of it,

before he had made this arrangement, and to enforce it would prejudice them. That motion was heard in this court long enough to have settled a common case. The court said to these parties, if each of you will enter into bonds to pay all costs from this time forward to be adjudged against you, or the appellee, you shall be permitted to intervene and be heard. They were heard and they made all the defence that was made against Craig's claim. In October last, this court decided the case in favor of Craig, and against Leitensdorfer's representatives. The costs were taxed by the clerk, and these parties have neglected to pay them. We are of opinion that they must pay them, and we are of opinion that this court has power, and it is its duty, to enforce the payment without remitting the payees in these bonds to another suit in some other court. We, therefore, make an order that an attachment issue against Mrs. King and her sureties, and Mr. Allen and his sureties, to compel payment of the amount of the taxed costs, unless they do pay it before the last day of this term.

This is a new question, and a more elaborate opinion may be submitted before the end of the term, but this order is made now because the parties ought to have an opportunity to pay, and we make the order now that they pay the costs, and that a writ of attachment issue if they do not pay before the end of this term.

It is proper to observe that if the money is not paid the writ of attachment will be returnable to the next term of the court.

IN RE BURDETT.

ORIGINAL.

Submitted April 9, 1888. — Decided April 16, 1888.

When the amount in controversy in a case decided in the Circuit Court is too small to come here by writ of error, this court is without power by writ of mandamus to compel the judge of the Circuit Court to reverse his own judgment.

Statement of the Case.

THIS was a motion for leave to file a petition for a writ of mandamus, and for a rule to show cause why it should not issue. The petition set forth that the petitioner on the 20th March, 1887, in ignorance of the act of March 3d, 1887, increasing the limit of jurisdiction of Circuit Courts to $2000, commenced an action in replevin to the Circuit Court of the United States for the Eastern District of Michigan for the recovery of goods and property of the value of $653.38; that the defendants appeared and pleaded the general issue; that the cause was placed upon the trial docket and was dismissed for want of jurisdiction; "that afterwards, and on or about the 9th day of January, A.D. 1888, the said defendants caused to be brought on to be heard before said court a motion for an order for a return of the property seized under the writ of replevin in said cause, and that the said court thereupon, against the objection of the said plaintiffs, that said court had already dismissed said cause for want of jurisdiction, and consequently had no authority to make and enter such an order, made and entered in said court and cause, an order requiring the said plaintiffs to return to the said defendants the property seized under the writ of replevin in said cause, and the defendants having thereupon waived a return of said property, said court thereupon ordered that the damages for the value of said property, irrespective of the plaintiffs' right, title, interest or ownership therein, be assessed by a jury of said court; that afterwards, and on or about the 17th day of January, A.D. 1888, the said plaintiffs moved the said court to set aside and vacate the order entered in said cause on said 9th day of January," "and that the said court thereupon entered an order denying said motion."

The prayer of the petition which the petitioner asked leave to file was, "that the people's writ of mandamus may be issued out of said court, directed to the judges of the Circuit Court of the United States, for the Eastern District of Michigan, directing and requiring them to set aside and vacate the said order of January 9th, 1888, ordering a return of said property, and an assessment of the value thereof in case of default, and that the people's writ of prohibition may be

Argument for the Motion.

issued out of said court, directed to the said Circuit Court of the United States for the Eastern District of Michigan, restraining and prohibiting the said court from further proceeding in said cause."

Mr. Levi T. Griffin for petitioner.

Mr. Justice Miller: A petition on the part of H. S. Burdett and others, asking for a mandamus against the Judge of the Circuit Court of the United States for the Eastern District of Michigan, has been presented to us. The case arises out of an action of replevin in which the Circuit Court decided that it had no jurisdiction. A proceeding was then had to get damages for the taking of the goods in replevin, which the court entertained and rendered judgment for the damages. The amount in controversy is too small to come to this court by writ of error, and we are asked by the writ of mandamus to direct the judge of that court to set aside the judgment which he rendered. Whether there was error in that matter or not, we do not think that we have any power by writ of mandamus to compel the judge of that court to reverse his own judgment.

SEAGRIST *v.* CRABTREE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 386. Submitted April 9, 1888. — Decided April 16, 1888.

It is not sufficient cause for dismissing a writ of error that the citation was served and made returnable less than thirty days after the writ was granted.

Motion to dismiss "because the citation was not served in time."

Mr. J. G. Zachry for the motion: The citation in this case was made returnable on the second Monday in October, 1885.

Service was had on the attorneys for Crabtree on September 16, 1885. The time intervening between the date of service and the return of the citation was less than thirty days, and the notice to the defendant in error, Crabtree, was not sufficient. Rev. Stat. § 999.

Mr. O. D. Barrett opposing: The facts stated in the motion show that plaintiffs in error have fully complied with the fifth section of the eighth rule of this court, which simply provides that the citation be served *before* the return day of the writ. It was so served.

Mr. Justice Miller: This is a motion to dismiss, the ground for which is that the citation was served and made returnable less than thirty days after the writ was granted. We do not think that is a sufficient ground to dismiss the writ of error, whatever may be the ground for relief.

HUNT *v.* BLACKBURN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 199. Submitted April 2, 1888. — Decided April 9, 1888. — Motion to reinstate submitted April 26, 1888. — Ordered continued April 30, 1888.

A cause under submission having been dismissed by the court of its own motion for want of jurisdictional amount, the appellant moves to reinstate and submits affidavits. The court orders the motion continued, with leave to each party to file further affidavits.

The case is stated in the opinion.

Mr. J. B. Haskell for appellant.

No appearance for appellee.

Mr. Justice Miller: After an examination of the record in this case, which was submitted on printed arguments, we

have not been able to find any evidence of the value of the land in controversy, which is the subject of this suit. It is therefore

Dismissed for want of jurisdiction.

Mr. Haskell, on the 26th April, 1888, submitted a motion to reinstate the cause, accompanied by affidavits of the value of the property in dispute.

No appearance for opposition.

Mr. Justice Miller: This case was dismissed by the court on April 9, 1888, because there was no evidence of there being a sufficient amount in controversy to give this court jurisdiction. A motion is now made to reinstate it, and affidavits submitted on the part of the appellant intended to show that the value of the land in controversy is over $5000. Although notice was given to the opposite party by telegraph, there has been no sufficient opportunity or time for them to produce counter affidavits, nor are we entirely satisfied with the sufficiency of those produced by the appellant. This motion to reinstate the case is, therefore, continued until the next term of the court, with leave for either party to file additional affidavits on this subject.

MARCHAND *v.* LIVANDAIS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 1077. Submitted January 4, 1888. — Decided April 16, 1888.

A *feme covert* was sued in Louisiana to recover upon notes said to have been executed by her with the authority and consent of her husband. The husband was made a party to the suit under the Code, although without interest in the suit. Judgment being given for defendant, the plaintiff sued out a writ of error against the wife only, but serving it on the husband also. On motion by defendant in error to dismiss the writ: *Held*, that the motion should be denied.

Statement of the Case.

MOTION TO DISMISS. The case is stated in the opinion.

Mr. Edgar H. Farrar and *Mr. Ernest B. Kruttschnitt* for the motion.

Mr. C. W. Hornor and *Mr. W. S. Benedict* opposing.

MR. JUSTICE MILLER: A motion is made to dismiss this cause because Charles Lafitte, the husband of the defendant in error, is not named in the writ of error as a party to the proceedings. The judgment was in favor of his wife Josephine, and he was a party authorizing her in the suit below, according to the forms of the Louisiana law, which require that the husband must be joined with the wife when she sues, whether he has any interest or not; and the plaintiff in error has served a citation on Lafitte, although he was not named in the writ of error. It may be doubtful whether Lafitte is a necessary party in this court, seeing he was not a party to the judgment. If for conformity's sake he ought to have been brought here to aid his wife in the writ of error, the citation to him is sufficient for that purpose. The motion to dismiss the case is overruled.

WESTERN AIR LINE CONSTRUCTION COMPANY *v.* McGILLIS.

ORIGINAL MOTION IN A CAUSE BROUGHT HERE BY WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1283. Submitted April 9, 1888. — Decided April 16, 1888.

The court, for reasons stated in its opinion, denies a motion to vacate a supersedeas or to make an order that the appeal bond filed in the case does not operate as a supersedeas.

THE defendants in error made the following motion:

"And now come the defendants in error in the above cause, by John S. Cooper, their attorney and counsel, and move the

court to vacate the supersedeas in the above cause, or for an order declaring that the appeal bond filed by appellant in said cause does not operate as a supersedeas; because the writ of error was not sued out or served within sixty days after the rendering of the judgment entered and complained of in said cause.

"JOHN S. COOPER,

"*Attorney and Counsel for Defendants in Error.*"

Mr. John S. Cooper for the motion.

Mr. E. Walker opposing.

MR. JUSTICE MILLER: This is a motion to vacate what is called a supersedeas. The papers show that the writ was neither sued out or served within sixty days after the rendition of the judgment which is the subject of the writ of error: It follows as a matter of course that the writ cannot operate as a supersedeas, and we know of no motion that is necessary or proper in this court on that subject. Writs of supersedeas do not issue, unless it may become necessary from some peculiar circumstances. The statute declares that, when within sixty days, the plaintiff sues out his writ of error, files it with the clerk of the proper court, and then gives a bond within a certain time mentioned by the statute, that the bond, if approved for that purpose by the judge who grants the citation and the writ of error, shall operate as a supersedeas. It is a matter of law whether it operates as a supersedeas.

There is no evidence here of any proceeding to collect a debt which has been disregarded. At all events there is no occasion for a supersedeas.

The motion is denied.

APPENDIX.

I.

JUDGMENTS AND DECREES,

INTERLOCUTORY AND FINAL, AT OCTOBER TERM, 1887, NOT OTHERWISE REPORTED.

No. 374. ALLIS *v.* FREEMAN. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. April 2, 1888: Dismissed, with costs, on the authority of the appellant and on motion of *Mr. R. D. Mussey* in behalf of counsel for appellant, *Mr. F. W. Cotzhausen* and *Mr. R. Mason*. No counsel appearing for the appellees.

No. 227. ANDERSON TWINE CO. *v.* TOD. Error to the Circuit Court of the United States for the Northern District of Ohio. April 13, 1888: Dismissed, with costs, as per stipulation. *Mr. John C. Lee*, *Mr. Aaron Blackford*, and *Mr. James A. Bope* for plaintiff in error. *Mr. Jacob F. Burket* for defendant in error.

No. 1152. BAINS *v.* DODGE. Error to the Circuit Court of the United States for the Northern District of Texas. February 13, 1888: Dismissed, with costs, on motion of *Mr. A. H. Garland* in behalf of counsel for the plaintiffs in error. *Mr. Roger Q. Mills* for plaintiffs in error. No counsel appearing for the defendants in error.

No. 1300. BAIRD *v.* BALDWIN. Appeal from the Circuit Court of the United States for the Northern District of Illinois. November 15, 1887: Docketed and dismissed, with costs, on motion of *Mr. Eppa Hunton* for the appellees. No one opposing.

No. 35. BALTIMORE AND POTOMAC RAILROAD COMPANY *v.* DISTRICT OF COLUMBIA. Error to the Supreme Court of the District of Columbia. October 26, 1887: Dismissed, with costs, for failure to file the transcript of the record during the term to which the writ of error was returnable. *Mr. Enoch Totten* for the plaintiff in error. *Mr. Henry E. Davis* for the defendant in error.

No. 91. BALTZER *v.* BISCHOFFSHEIM. Appeal from the Circuit Court of the United States for the Southern District of New York. October 20, 1887: Dismissed as per stipulation. *Mr. C. A. Seward* and *Mr. Charles M. Da Costa* for appellants. *Mr. Joseph H. Choate* for appellee.

No. 852. BARKER *v.* KANSAS AND GULF SHORT LINE RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Texas. May 3, 1888: Dismissed, with costs, as per stipulation, on motion of *Mr. Stephen G. Clarke* in behalf of counsel. *Mr. E. Ellery Anderson* for appellants. *Mr. H. Chilton* for appellees.

No. 1405. BATCHELOR *v.* KIRKBRIDE. Error to the Circuit Court of the United States for the District of New Jersey. April 2, 1888: Docketed and dismissed, with costs, on motion of *Mr. J. Hubley Ashton* for defendant in error. No one opposing.

No. 939. BAXTER MOUNTAIN GOLD MINING COMPANY *v.* PATTERSON. Error to the Supreme Court of the Territory of New Mexico. May 3, 1888: Dismissed, with costs, on motion of *Mr. J. H. Hoffecker, Jr.*, for the plaintiff in error. No counsel appearing for the defendants in error.

No. 232. BELL TELEPHONE COMPANY OF MISSOURI *v.* MISSOURI, *ex rel.* BALTIMORE AND OHIO TELEGRAPH COMPANY. Error to the Circuit Court of the United States for the Eastern District of Missouri. April 18, 1888: Dismissed, with costs, on the authority of the plaintiff in error. *Mr. Henry Hitchcock* and *Mr. G. A. Finckelnburg* for plaintiff in error. No counsel appearing for the defendant in error.

No. 393. BIRDSEYE *v.* HEILNER. Appeal from the Circuit Court of the United States for the Southern District of New York. May 4, 1888: Dismissed, as per stipulation, on motion of *Mr. J. M. Wilson* in behalf of counsel, *Mr. G. M. Plympton*, for appellants. *Mr. Livingston Gifford* for appellees.

No. 292. BRANSCOM *v.* WOOD. Appeal from the Circuit Court of the United States for the District of Kansas. May 4, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. Simon Wolf* and *Mr. Wm. F. Mattingly* for appellants. *Mr. A. Bergen* for appellee.

No. 63. CALLENDER *v.* BATES. Error to the Supreme Court of the Territory of Dakota. November 10, 1887: Dismissed, with costs, because the transcript of the record failed to show any service of the citation, but leave granted to the plaintiff in error to move within sixty days from the date of this judgment for the restoration of this cause to the docket. *Mr. W. K. Mendenhall* and *Mr. R. J. Wells* for plaintiff in error. No appearance for defendant in error.

No. 260. CENTRAL PACIFIC RAILROAD COMPANY *v.* SANTA CLARA COUNTY. Error to the Supreme Court of the State of California. March 20, 1888: Dismissed, with costs, on motion of *Mr. Creed Haymond* of counsel for plaintiff in error. *Mr. Henry Beard* for plaintiff in error. *Mr. Barclay Henley* for defendant in error.

No. 951. CENTRAL PACIFIC RAILROAD COMPANY *v.* UNITED NICKEL COMPANY. Error to the Circuit Court of the United States for the Northern District of California. March 20, 1888: Dismissed, with costs, on motion of *Mr. Creed Haymond* of counsel for the plaintiff in error. *Mr. M. A. Wheaton* for plaintiff in error. No counsel appearing for defendant in error.

No. 1362. CHICAGO, BURLINGTON AND KANSAS CITY RAILWAY COMPANY *v.* SULLIVAN COUNTY. Appeal from the Circuit Court of the United States for the Western District of Missouri. February 20, 1888: Docketed and dismissed, with costs, on motion of *Mr. John P. Butler* for appellee. No one opposing.

No. 136. CLEVELAND *v.* LOCKWOOD. Appeal from the Circuit Court of the United States for the District of New Jersey. January 19, 1888: Dismissed, with costs, as per stipulation. *Mr. J. D. Bedle* for appellants. *Mr. Causten Browne* for appellee.

No. 858. COPPER QUEEN MINING COMPANY *v.* ARIZONA PRINCE COPPER COMPANY. Error to the Supreme Court of the Territory of Arizona. February 2, 1888: Dismissed, with costs, on motion of *Mr. J. K. McCammon* in behalf of counsel for plaintiff in error *Mr. Thomas Mitchell.* No counsel appearing for defendant in error.

No. 287. CROSBY *v.* HARDING. Appeal from the Circuit Court of the United States for the Southern District of New York. May 4, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. Charles P. Crosby* for appellant. *Mr. W. S. Carter* and *Mr. W. B. Hornblower* for appellee.

No. 280. DALE *v.* MARMELSTEIN. Error to the Supreme Court of the State of Georgia. November 29, 1887: Dismissed, with costs, on motion of *Mr. George A. Mercer* for plaintiffs in error. No counsel appearing for defendant in error.

No. 281. DALE *v.* WELLS. Error to the Supreme Court of the State of Georgia. November 29, 1887: Dismissed, with costs, on motion of *Mr. George A. Mercer* for plaintiffs in error. No counsel appearing for defendant in error.

Nos. 1378 and 1379. DISTRICT OF COLUMBIA *v.* MURDOCK. MURDOCK *v.* DISTRICT OF COLUMBIA. Appeals from the Court of Claims. April 23, 1888: Judgment affirmed by a divided court. *Mr. Attorney General* and *Mr. Assistant Attorney General Howard* for the District of Columbia. *Mr. C. C. Cole* and *Mr. John C. Fay* for Murdock.

No. 245. DUFF *v.* ST. LOUIS WOODEN WARE WORKS. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. April 20, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. George A. Christy* for appellants. No counsel appearing for appellees.

No. 128. GRAHAM *v.* SPENCER. Error to the Circuit Court of the United States for the District of Massachusetts. October 11, 1887: Judgment affirmed, as per stipulation, on motion of *Mr. J. Hubley Ashton* in behalf of *Mr. J. B. Richardson*, counsel for the plaintiff in error. *Mr. E. B. Hoar* for the defendant in error.

No. 88. GRAND RAPIDS AND INDIANA RAILROAD COMPANY *v.* LILES. Error to the Circuit Court of the United States for the District of Indiana. December 1, 1887: Dismissed, with costs, by authority of the plaintiff in error. *Mr. Thomas J. O'Brien* for plaintiff in error. No counsel appearing for defendant in error.

No. 2, Original. In the matter of ALBERT GRANT. Petition for a Writ of Mandamus. December 19, 1887: Dismissed for the want of prosecution. *Mr. B. F. Butler*, *Mr. S. S. Henkle*, *Mr. William Lawrence* and *Mr. H. W. Blair* for petitioner. No one opposing.

No. 1364. GREENE *v.* MCARTHUR. Appeal from the Circuit Court of the United States for the Southern District of Ohio. February 20, 1888: Docketed and dismissed, with costs, on motion of *Mr. Lawrence Maxwell, Jr.*, for appellees. No one opposing.

No. 1365. GLENN *v.* MCARTHUR. Appeal from the Circuit Court of the United States for the Southern District of Ohio. February 20, 1888: Docketed and dismissed, with costs, on motion of *Mr. Lawrence Maxwell, Jr.*, for appellees. No one opposing.

No. 81. GOULD *v.* SPICER. Appeal from the Circuit Court of the United States for the District of Rhode Island. November 29, 1887: Dismissed, with costs, pursuant to the 10th Rule. *Mr. Thomas Wm. Clarke* for appellant. *Mr. Benjamin F. Thurston* for appellees.

No. 270. HARTRANFT *v.* ZEH. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. May 2, 1888: Dismissed, with costs, on motion of *Mr. Solicitor General Jenks* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. F. P. Prichard* for defendants in error.

No. 1333. HELBING *v.* CALIFORNIA. Error to the Supreme Court of the State of California. January 13, 1888: Docketed and dismissed, with costs, on motion of *Mr. E. B. Stonehill* for defendants in error. No one opposing.

No. 325. HOLT *v.* KENDALL. Appeal from the Circuit Court of the United States for the Northern District of Illinois. May 4, 1888: Dismissed, with costs, on motion of *Mr. J. M. Wilson* in behalf of *Mr. Benjamin F. Thurston* and *Mr. John W. Merriam*, counsel for appellant. No counsel appearing on behalf of appellees.

No. 1391. JONES *v.* NICHOLS. Appeal from the Circuit Court of the United States for the Northern District of Alabama. March 20, 1888: Docketed and dismissed, with costs, on motion of *Mr. James L. Pugh, Jr.*, for appellee. No one opposing.

No. 211. KAIN *v.* NELSON. Error to the Circuit Court of the United States for the Eastern District of Tennessee. April 6, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. Enoch Totten* and *Mr. A. H. Pettibone* for plaintiff in error. *Mr. W. M. Baxter* for defendants in error.

No. 14. KANSAS PACIFIC RAILWAY COMPANY *v.* LEWIS. Appeal from the Circuit Court of the United States for the District of Kansas. November 3, 1887: Submission of this cause set aside, and appeal dismissed, with costs, on motion of *Mr. Samuel Shellabarger* for appellant. *Mr. J. P. Usher*, *Mr. John F. Dillon*, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* for appellant. No counsel for appellee.

No. 37. KENNEDY *v.* LAMB. Appeal from the Circuit Court of the United States for the District of Nebraska. October 26, 1887: Dismissed, with costs, on motion of the appellants. *Mr. A. J. Poppleton*, *Mr. J. M. Thurston* and *Mr. John F. Dillon* for appellants. No counsel for appellee.

No. 236. KENNEY *v.* EDDY. Error to the Supreme Court of the Territory of Montana. April 18, 1888: Dismissed, with costs, pur-

suant to the 10th Rule. *Mr. John C. Robinson* and *Mr. M. F. Morris* for plaintiffs in error. No counsel appearing for defendants in error.

No. 138. KIRK *v.* ELKINS MANUFACTURING AND GAS COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. January 9, 1888: Dismissed, with costs, on motion of *Mr. William A. McKenney* in behalf of *Mr. Hector F. Fenton*, counsel for the appellants. *Mr. John G. Johnson* for appellee.

No. 467. DE LA MOTHE *v.* ANGUS. Appeal from the Circuit Court of the United States for the Southern District of Illinois. March 20, 1888: Dismissed, with costs, on motion of *Mr. James H. Graham* of counsel for appellant. *Mr. A. L. Merriman* for appellant, *Mr. David Fales* and *Mr. Frank W. Hackett* for appellee. April 16, 1888: Decree of March 20, 1888, set aside and case restored to the docket.

No. 276. LE CLAIRE *v.* MAY. Appeal from the Circuit Court of the United States for the Southern District of Illinois. May 3, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. J. N. Rogers* for appellant. No counsel appearing for appellee.

No. 1292. LEONARD *v.* LOVELL. Appeal from the Circuit Court of the United States for the Western District of Michigan. October 31, 1887: Docketed and dismissed, with costs, on motion of *Mr. E. M. Marble* for appellee. No one opposing.

No. 241. LOEBER *v.* WYKOFF. Error to the Supreme Court of the Territory of Montana. April 19, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. Thomas L. Napton* for plaintiff in error. *Mr. Walter H. Smith*, *Mr. E. C. Ford* and *Mr. M. F. Morris* for defendant in error.

No. 806. LORILLARD *v.* PRIDE. Appeal from the Circuit Court of the United States for the Northern District of Illinois. May 4, 1888: Dismissed, as per stipulation, on motion of *Mr. J. M. Wilson* in behalf of *Mr. Rowland Cox*, counsel for appellants. *Mr. Samuel A. Duncan* and *Mr. Benjamin F. Thurston* for appellee.

No. 231. LYNCH *v.* ANDREWS. Error to the Supreme Court of Appeals of the State of West Virginia. April 18, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. N. Goff, Jr.*, for plaintiffs in error. *Mr. Caleb Bogges* and *Mr. Charles Marshall* for defendant in error.

No. 146. MACK *v.* SLATEMAN. Error to the Circuit Court of the United States for the Eastern District of Wisconsin. November 15, 1887: Dismissed, with costs, as per stipulation, on motion of *Mr. Eppa Hunton* in behalf of *Mr. B. K. Miller*, counsel for plaintiffs in error. *Mr. F. W. Cotzhausen* for defendants in error.

No. 9. MCKAY *v.* STOWE. Appeal from the Circuit Court of the United States for the District of Massachusetts. October 18, 1887: Dismissed as per stipulation. *Mr. Elias Merwin* for appellants. *Mr. J. E. Maynadier* for appellees.

No. 318. MARSHALL *v.* UNITED STATES. Appeal from the Court of Claims. April 30, 1888. MR. JUSTICE MILLER:

The petition for rehearing in this case is granted, and the argument will be heard at the time of the regular call of the case on the docket at the next term. See 124 U. S. 391.

No. 247. MELLON *v.* SMITH-DAVIS MANUFACTURING CO. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. April 24, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. Clinton Rowell* for appellant. No counsel appearing for appellees.

No. 125. MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, (as reorganized,) *v.* DOW. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. January 9, 1888: Dismissed, with costs, on motion of *Mr. Wager Swayne* for appellant. *Mr. U. M. Rose* for appellees.

Nos. 115 and 164. MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, (as reorganized,) *v.* DOW, and DOW *v.* MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, (as reorganized.) Appeals from the Circuit Court of the United States for the Eastern District of

Arkansas. December 15, 1887: Dismissed as per stipulation. *Mr. John F. Dillon* and *Mr. Wager Swayne* for the Railroad Company. *Mr. U. M. Rose* for the trustees.

No. 452. MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, (as reorganized,) *v.* DOW. Appeal from the Circuit Court of the United States for the Southern District of New York. May 3, 1888: Dismissed, as per stipulation, on motion of *Mr. Stephen G. Clarke* in behalf of *Mr. John F. Dillon* and *Mr. Wager Swayne*, counsel for appellant. *Mr. John M. Bowers* for appellees.

No. 324. MEXICAN NATIONAL CONSTRUCTION COMPANY *v.* FRY. Error to the Circuit Court of the United States for the Eastern District of Texas. February 13, 1888: Dismissed, as per stipulation, on motion of *Mr. Samuel Shellabarger* in behalf of *Mr. Theodore F. H. Meyer*, counsel for plaintiff in error. *Mr. Wm. W. Boyce* and *Mr. Wm. E. Earle* for defendant in error.

No. 312. MEXICAN NATIONAL CONSTRUCTION COMPANY *v.* REUSENS. Error to the Circuit Court of the United States for the Southern District of New York. February 13, 1888: Dismissed, as per stipulation, on motion of *Mr. Samuel Shellabarger* in behalf of *Mr. Theodore F. H. Meyer*, counsel for plaintiff in error. *Mr. Michael H. Cardozo* for defendant in error.

No. 13. MURRAY *v.* PARDEE. Error to the Supreme Court of the Territory of Montana. October 18, 1887: Dismissed, with costs, pursuant to the 19th Rule. *Mr. E. W. Toole* for plaintiff in error. No counsel for defendant in error.

No. 862. NAILOR *v.* NAILOR. Appeal from the Supreme Court of the District of Columbia. May 14, 1888: Dismissed for the want of jurisdiction. *Mr. Henry Wise Garnett* and *Mr. Walter D. Davidge* for appellants. *Mr. C. C. Cole* and *Mr. William A. Cook* for appellees.

No. 184. PARK *v.* UNITED STATES. Error to the Circuit Court of the United States for the District of Massachusetts. February 13, 1888: Dismissed on motion of *Mr. A. B. Wentworth* of counsel for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 152. PATTERSON *v.* GERARDI. Error to the Circuit Court of the United States for the Eastern District of Missouri. January 31, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. W. H. Bliss* for plaintiff in error. *Mr. Jeff. Chandler* for defendants in error.

No. 587. PEOPLE'S BANK OF THE CITY OF NEW YORK *v.* MECHANICS' NATIONAL BANK OF NEWARK. Appeal from the Circuit Court of the United States for the District of New Jersey. February 7, 1888: Dismissed, as per stipulation, on motion of *Mr. Thomas N. McCarter* in behalf of *Mr. Cortlandt Parker* and *Mr. R. Wayne Parker*, counsel for appellant. *Mr. A. Q. Keasbey* for appellees.

No. 716. PEOPLE'S BANK OF THE CITY OF NEW YORK *v.* MECHANICS' NATIONAL BANK OF NEWARK. Appeal from the Circuit Court of the United States for the District of New Jersey. February 7, 1888: Dismissed on authority of counsel for the appellant, on motion of *Mr. Thomas N. McCarter* in behalf of *Mr. Cortlandt Parker* and *Mr. R. Wayne Parker*, counsel for appellant. No counsel appearing for appellees.

No. 882. PENNSYLVANIA RAILROAD COMPANY *v.* JANEWAY. Error to the Circuit Court of the United States for the District of New Jersey. October 26, 1887: Dismissed, as per stipulation, on motion of *Mr. Enoch Totten* in behalf of *Mr. Edward T. Green*, counsel for plaintiff in error. *Mr. John R. Emery* for defendants in error.

No. 220. PERRY *v.* EQUITABLE COÖPERATIVE FOUNDRY COMPANY. Appeal from the Circuit Court of the United States for the Northern District of New York. April 12, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. Samuel A. Duncan* for appellants. *Mr. Theodore Bacon* for appellees.

No. 157. POWER *v.* BAKER. No. 307. BAKER *v.* POWER. Appeals from the Circuit Court of the United States for the District of Minnesota, February 2, 1888: Decree affirmed from the Bench, the appellants to pay the costs of their respective appeals in this Court. Cost of printing testimony improperly embodied in the transcript of the record, and clerk's fees for supervising the same, to be paid by the appellants in No. 157. *Mr. Edward G. Rogers*, *Mr. C. D. O'Brien* and *Mr. W. H. Bliss* for Power. *Mr. J. H. Davidson* and *Mr. H. L. Williams* for Baker.

No. 124. PRICE *v.* MEYER. Appeal from the Supreme Court of the Territory of Utah. October 31, 1887: Dismissed, as per stipulation, on motion of *Mr. B. H. Bristow* in behalf of *Mr. John F. Dillon* and *Mr. Wager Swayne*, counsel for appellant. *Mr. Lyman K. Bass*, *Mr. C. W. Bennett* and *Mr. Robert Harkness* for appellees.

No. 1335. QUARLES *v.* SIMRALL. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. January 19, 1888: Docketed and dismissed, with costs, on motion of *Mr. William A. McKenney* for appellees. No one opposing.

No. 226. RICHARDSON *v.* DAY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. May 14, 1888: Decree affirmed, with costs, by a divided court. *Mr. J. M. Flower* and *Mr. D. K. Tenney* for appellants. *Mr. S. D. Puterbaugh* for appellees.

No. 785. ROBINSON *v.* WALL. Appeal from the Supreme Court of the District of Columbia. January 9, 1888: Dismissed, with costs, as per stipulation, on motion of *Mr. J. J. Johnson* for appellants. *Mr. Randall Hagner* for appellee.

No. 131. SARGENT *v.* MASSACHUSETTS HOSPITAL LIFE INSURANCE COMPANY. Appeal from the Circuit Court of the United States for the District of Massachusetts. January 11, 1888: Decree affirmed, without costs, as per stipulation. *Mr. R. M. Morse, Jr.*, for appellants. *Mr. W. G. Russell* and *Mr. George Putnam* for appellees.

No. 101. SLINEY *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Pennsylvania. December 7, 1887: Dismissed, pursuant to the 10th Rule. *Mr. John M. Thompson* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 75. SIMMONS HARDWARE COMPANY *v.* NATIONAL PUMP CYLINDER COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. November 17, 1887: Dismissed, with costs, as per stipulation. *Mr. Frederic N. Judson* for appellant. *Mr. H. M. Pollard* and *Mr. S. N. Taylor* for appellee.

No. 259. SOUTHERN PACIFIC RAILROAD COMPANY *v.* SANTA CLARA COUNTY. Error to the Supreme Court of the State of California. March 20, 1888: Dismissed, with costs, on motion of *Mr. Creed Haymond* of counsel for the plaintiff in error. *Mr. Henry Beard* for plaintiff in error. *Mr. Barclay Henley* for defendant in error.

No. 261. SOUTHERN PACIFIC RAILROAD COMPANY *v.* MCCUSKER. Error to the Supreme Court of the State of California. March 20, 1888: Dismissed, with costs, on motion of *Mr. Creed Haymond* of counsel for plaintiff in error. *Mr. Henry Beard* for plaintiff in error. *Mr. J. W. Cooksey* for defendants in error.

No. 262. SOUTHERN PACIFIC RAILROAD COMPANY *v.* MCCUSKER. Error to the Supreme Court of the State of California. March 20, 1888: Dismissed, with costs, on motion of *Mr. Creed Haymond* of counsel for plaintiff in error. *Mr. Henry Beard* for plaintiff in error. *Mr. J. W. Cooksey* for defendants in error.

No. 489. SOUTHERN PACIFIC RAILROAD COMPANY *v.* LOS ANGELES. Error to the Supreme Court of the State of California. March 20, 1888: Dismissed, with costs, on motion of *Mr. Creed Haymond* of counsel for plaintiff in error. *Mr. George H. Smith* for plaintiff in error. No counsel appearing for defendant in error.

No. 142. SPENCER *v.* MCMASTER. Appeal from the Supreme Court of the Territory of Wyoming. January 23, 1888: Dismissed, with costs, on motion of *Mr. Walter H. Smith* of counsel for appellants. *Mr. Walter H. Smith* and *Mr. C. W. Halcombe* for appellants. No counsel appearing for appellee. Decree of dismissal of January 23, 1888, set aside, on *Mr. Smith's* motion, and case restored to the docket on February 13, 1888. May 14, dismissed, with costs, on motion of *Mr. Smith*. No counsel appearing for appellee.

No. 196. STITZEL *v.* ATHERTON. Appeal from the Circuit Court of the United States for the District of Kentucky. December 12, 1887: Dismissed, with costs, as per stipulation, on motion of *Mr. B. F. Buckner* in behalf of *Mr. James A. Beattie*, counsel for appellants. *Mr. John Mason Brown*, *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* for appellees.

No. 1051. THE SUFFOLK *v.* GOLDSMITH. Appeal from the Circuit Court of the United States for the District of Maryland. January 18, 1888: Dismissed, with costs, as per stipulation, on motion of *Mr. M. F. Morris* in behalf of *Mr. John H. Thomas*, counsel for appellants. *Mr. Sebastian Brown* for appellee.

No. 736. SWETTING *v.* AMERICAN EMIGRANT COMPANY. Appeal from the Circuit Court of the United States for the Southern District of Iowa. May 14, 1888: Dismissed, with costs, on motion of *Mr. W. Hallett Phillips* in behalf of *Mr. J. H. Call*, counsel for appellants. No counsel appearing for appellee.

No. 1327. TELFNER *v.* RUSS. Error to the Circuit Court of the United States for the Western District of Texas. December 19, 1887: Docketed and dismissed, with costs, on motion of *Mr. John J. Weed* for defendant in error. No one opposing.

No. 487. TEXAS AND PACIFIC RAILWAY COMPANY *v.* TOOTHMAN. Error to the Circuit Court of the United States for the Eastern District of Texas. May 14, 1888: Judgment reversed, with costs, as per stipulation, on motion of *Mr. A. B. Browne* for plaintiff in

error. *Mr. John C. Brown*, *Mr. A. T. Britton*, *Mr. A. B. Browne* and *Mr. John F. Dillon* for plaintiff in error. *Mr. C. C. Cole* and *Mr. W. L. Cole* for defendants in error.

No. 93. TEXAS AND ST. LOUIS RAILWAY COMPANY IN MISSOURI AND ARKANSAS *v.* CLEVELAND ROLLING MILL COMPANY. Error to the Circuit Court of the United States for the Eastern District of Missouri. December 2, 1887: Dismissed, with costs, pursuant to the 10th Rule. *Mr. John P. Ellis* and *Mr. B. D. Lee* for plaintiff in error. *Mr. Henry Hichcock* for defendant in error.

No. 59. UNION PACIFIC RAILWAY COMPANY *v.* DYCHE. Error to the Supreme Court of the State of Kansas. November 8, 1887: Judgment reversed, with costs, and cause remanded with instructions to reverse the judgment of the District Court of Riley County, Kansas, as per stipulation, on motion of *Mr. J. M. Wilson* in behalf of *Mr. John F. Dillon*, counsel for plaintiff in error. *Mr. C. M. Dyche* in person.

No. 198. UNITED STATES *v.* COLGATE. Appeal from the Circuit Court of the United States for the Southern District of New York. April 2, 1888: Dismissed on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. No counsel appearing for the appellee.

No. 1386. UNITED STATES *v.* BAILEE. Appeal from the Court of Claims. April 23, 1888: Judgment affirmed by a divided court. *Mr. Attorney General*, *Mr. Assistant Attorney General Howard* and *Mr. F. P. Dewees* for appellant. *Mr. George A. King* and *Mr. I. G. Kimball* for appellee.

No. 188. WALKER *v.* DUN. Appeal from the Circuit Court of the United States for the District of Maryland. November 10, 1887: Dismissed, with costs, so far as it relates to the following named appellants, viz.: H. Crawford Black, John Sheridan and John Wilson, Jr., trading as Black, Sheridan & Wilson; M. J. Blake, Edward H. Lee, Melvin C. Gould, John W. Crowell, Thomas Martin, John Hurley, Nicholas Sandberg and Charles Melvin, on

motion of *Mr. Sebastian Brown* for appellants. *Mr. John H. Thomas*, *Mr. R. H. Smith* and *Mr. W. W. McFarland* for appellees.

No. 335. WEIR PLOW COMPANY *v.* TURNBULL. Appeal from the Circuit Court of the United States for the Northern District of Illinois. May 4, 1888: Dismissed, as per stipulation, on motion of *Mr. J. M. Wilson*, in behalf of counsel. *Mr. E. A. West* and *Mr. L. L. Bond* for appellant. *Mr. J. L. High* for appellees.

No. 1363. WILSON *v.* MCARTHUR. Appeal from the Circuit Court of the United States for the Southern District of Ohio. February 20, 1888: Docketed and dismissed, with costs, on motion of *Mr. Lawrence Maxwell, Jr.*, for appellees. No one opposing.

No. 282. WOODS *v.* ROSENBAUM. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. May 3, 1888: Dismissed, with costs, pursuant to the 10th Rule. *Mr. David Hall Rice* and *Mr. Leonard Myers* for appellants. *Mr. W. J. Budd* for appellees.

II.

CASES DISMISSED IN VACATION,

PURSUANT TO RULE 28,

BETWEEN THE FINAL ADJOURNMENT AT OCTOBER TERM, 1886, AND THE COMMENCEMENT OF OCTOBER TERM, 1887.

No. 367. WOODMAN *v.* MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH. Error to the Supreme Court of the State of Michigan. June 8, 1887: Dismissed pursuant to the 28th Rule. *Mr. Frank T. Lodge* and *Mr. De Forest Paine* for plaintiff in error. *Mr. E. L. Fancher* for defendant in error. See 124 U. S. 161, for subsequent proceedings in this case.

No. 58. BISSELL *v.* NATIONAL LAFAYETTE AND BANK OF COMMERCE. Error to the Circuit Court of the United States for the Eastern District of Missouri. June 27, 1887: Dismissed pursuant to the 28th Rule. *Mr. Upton M. Young* for plaintiff in error. *Mr. J. E. McKeighan* for defendant in error.

No. 87. HENLINE *v.* PERRINE. Appeal from the Circuit Court of the United States for the Southern District of Illinois. August 22, 1887: Dismissed pursuant to the 28th Rule. *Mr. Robert E. Williams* for appellants. *Mr. Mitchell J. Smiley* for appellee.

No. 123. JENKINS *v.* ANN ARBOR AGRICULTURAL COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. August 22, 1887: Dismissed pursuant to the 28th Rule. *Mr. Charles F. Burton* for appellants. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for appellee.

No. 177. LEWIS *v.* IMBODEN. Appeal from the District Court of the United States for the District of West Virginia. June 20, 1887: Dismissed pursuant to the 28th Rule. *Mr. S. A. Miller* for appellants. *Mr. W. Mollohan* for appellee.

No. 712. NEW MEXICO AND ARIZONA RAILROAD COMPANY *v.* HOBSON. Error to the Supreme Court of the Territory of Arizona. August 23, 1887: Dismissed pursuant to the 28th Rule. *Mr. A. T. Britton* and *Mr. A. B. Browne* for plaintiff in error. *Mr. Barclay Henley* for defendant in error.

No. 183. PLIMPTON *v.* WINSLOW. Appeal from the Circuit Court of the United States for the District of Massachusetts. June 30, 1887: Dismissed pursuant to the 28th Rule. *Mr. Thomas Wm. Clarke* for appellant. *Mr. John L. S. Roberts* for appellee.

No. 110. RUMSEY *v.* BUCK. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. July 11, 1887: Dismissed pursuant to the 28th Rule. *Mr. Robert H. Parkinson* for the appellants. *Mr. G. M. Stewart* for the appellees.

No. 332. UNDERWOOD *v.* WARREN. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. July 11, 1887: Dismissed pursuant to the 28th Rule. *Mr. G. M. Stewart* for appellant. *Mr. Robert H. Parkinson* for appellees.

No. 535. SILL *v.* SOLBERG. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. August 1, 1887: Dismissed pursuant to the 28th Rule. *Mr. Angus Cameron* for appellant. *Mr. S. U. Pinney* for appellee.

III.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

ORDER.

There having been an Associate Justice of this Court appointed since the commencement of this term, It is ordered that the following allotment be made of the Chief Justice and Associate Justices of said Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.

For the Third Circuit, JOSEPH P. BRADLEY, Associate Justice.

For the Fourth Circuit, MORRISON R. WAITE, Chief Justice.

For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.

For the Sixth Circuit, STANLEY MATTHEWS, Associate Justice.

For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.

For the Eighth Circuit, SAMUEL F. MILLER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

January 23, 1888.

IV.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

ORDER.

It is ordered that the following allotment be made of the Associate Justices of this Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.

For the Third Circuit, JOSEPH P. BRADLEY, Associate Justice.

For the Fourth Circuit, JOHN M. HARLAN, Associate Justice.

For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.

For the Sixth Circuit, STANLEY MATTHEWS, Associate Justice.

For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.

For the Eighth Circuit, SAMUEL F. MILLER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

April 2, 1888.

INDEX.

CONFLICT OF LAW.

See JURISDICTION, A, 6; B, 9; E.

CONSTITUTIONAL LAW.

A. CONSTITUTIONAL LAW OF THE UNITED STATES.

B. CONSTITUTIONAL LAW OF A STATE.

By the constitution of California two modes of assessment for taxation are prescribed: one, by a state board of equalization; the other, by county boards and local assessors. All property is directed to be assessed in the county, city, etc., in which it is situated, except that the franchise, roadway, road-bed, rails, and rolling-stock of any railroad operated in more than one county, are to be assessed by the state board, and apportioned to the several counties, etc. By an act of the legislature the state board is required to include in their assessment steamers engaged in transporting passengers and freights across waters which divide a railroad. This act was held by the Supreme Court of California, in *San Francisco* v. *Central Pacific Railroad Co.*, 63 Cal. 469, to be contrary to the constitution, and steamboats were held to be assessable by the county board, and not by the state board. This court, following that decision, and that of *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394, *holds* that the assessment of the steamers of a railroad company by the state board is in violation of the constitution of California, and void; and, being inseparably blended with the other property assessed, it makes the whole assessment void. *California* v. *Central Pacific Railroad Co.*, 1.

CONTRACT.

See ATTORNEY'S LIEN;
DISTRICT OF COLUMBIA;
RAILROAD, 1, 2.

CORPORATION.

1. A bill in equity filed in the Circuit Court of the United States in 1882 by a stockholder in a New York corporation, whose corporate term expired in 1878, to correct a deed of land in North Carolina made to the corporation in 1853, is barred by the statute of limitations in North Carolina, and by the general principles of courts of equity with regard to laches, unless a better reason for not instituting the suit earlier is given than the one given in this suit. *Taylor* v. *Holmes*, 489.
2. A stockholder in a corporation which has passed the term of its corporate existence, and has long ceased to exercise its corporate franchises, who desires to obtain equitable relief for it, must, in order to maintain an action therefor in his own name, show that he has endeavored in vain to secure action on the part of the directors, if there are any, or to have the stockholders elect a new board of directors, and must disclose when he acquired his interest in the corporation. *Ib.*
3. If a corporation by negligence cancels a person's stock, and issues certificates therefor to a third party, the true owner may proceed against the corporation to obtain the replacement of his stock, or its value, without pursuing the purchaser or those who hold under him. *St. Romes* v. *Levee Steam Cotton Press Co.*, 614.

See CONSTITUTIONAL LAW, A, 2.

COSTS.

This court has power, and it is its duty, to issue writs of attachment, for costs here against persons who intervene in this court by leave of court, and also against their sureties, in bonds for costs furnished by them by order of court on intervening. *Craig* v. *Leitensdorfer*, 764.

See JURISDICTION, B, 4.

COURT AND JURY.

1. In this case, which was an action for damages for a death caused, in a collision, by the alleged negligence of the owner of a vessel on which it was claimed the deceased was a passenger, the judgment below is reversed for error in refusing to direct a verdict for the defendant on the ground that there was no evidence that the deceased lost his life by reason of the collision, or by the negligence of the defendant, and in refusing to grant the request of the defendant to go to the jury on the question whether the deceased lost his life by reason of the collision. *Providence and Stonington Steamship Co.* v. *Clare*, 45.
2. In the courts of the United States the presiding judge may, in submitting a case to the jury, express his opinion on the facts; and when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the jury, such expression is not reviewable on writ of error. *Rucker* v. *Wheeler*, 85.
3. In this case there was no error in the charge of the court to the jury. *Ib.*

COURT OF CLAIMS.

See CLAIMS AGAINST THE UNITED STATES, 1, 2; JURISDICTION, D.

CUSTOMS DUTIES.

ESTOPPEL.

EVIDENCE.

1. The statutes of Michigan require the attestation of two witnesses to the grantor's signature. A deed of husband and wife was offered in evidence, the attestation to which was: "Signed, sealed, and delivered in presence of S. W. for" the husband; "W. H. R., G. H. for" the wife; and there was a certificate that "the word 'half' in the twelfth line was interlined before signing. S. W., E. W." E. W. signing this certificate with S. W. was the justice of the peace who took the acknowledgment, and his certificate of acknowledgment stated that he knew the person who made the acknowledgment to be the person who executed the instrument. *Held*, that the execution of the deed was proved, and it was properly admitted in evidence. *Culbertson* v. *The H. Witbeck Co.*, 326.
2. A certificate by a master in chancery and notary public in New Jersey, taking an acknowledgment there of a deed of land in Michigan that he is "satisfied that the parties making the acknowledgment are the grantors in the within deed of conveyance," is a sufficient certificate that they were the same persons as those named as grantors in the deed; but if defective in this respect, the defect is cured under the laws of Michigan by a certificate from the proper official that the person taking the acknowledgment was "a master in chancery and notary public," and that "the annexed instrument is executed and the proof of acknowledgment thereto taken in accordance with the laws of the State of New Jersey." *Ib.*
3. An objection as to the sufficiency of a certificate of a register of deeds to an instrument offered in evidence which was not made at the trial cannot be taken here. *Ib.*
4. Letters from the Secretary of the Treasury to a collector of customs, affirming an assessment of duty, and to an importer acknowledging the receipt of his appeal from the collector's assessment, are admissible in evidence to show that an appeal was taken. *Robertson* v. *Downing*, 607.

EXECUTIVE.

See CLAIMS AGAINST THE UNITED STATES, 7;
SECRETARY OF STATE.

EXECUTOR AND ADMINISTRATOR.

See CONSTITUTIONAL LAW, A, 4.

EXTRADITION.

1. On the hearing of an appeal from a judgment of a Circuit Court, discharging a writ of *habeas corpus* which had been issued on the petition of a person arrested for a crime committed in a foreign country, and held for extradition under treaty provisions, the jurisdiction of the commissioner and the sufficiency of the legal ground for his action are the main questions to be decided; and this court declines to consider questions respecting the introduction of evidence, or the sufficiency of the authentication of documentary proof. *Benson* v. *McMahon*, 457.
2. When a person is held for examination before a commissioner, to determine whether he shall be surrendered to the Mexican authorities, to be extradited for a crime committed in Mexico, the question to be determined is, whether the commission of the crime alleged is so established as to justify the prisoner's apprehension and commitment for trial if the offence had been committed in the United States; and the proceeding resembles in its character preliminary examinations before a magistrate for the purpose of determining whether a case is made out to justify the holding of a person accused, to answer to an indictment. *Ib.*
3. The crime of "forgery," as enumerated in article 3 of the Treaty of Extradition with Mexico of June 20, 1862, is not confined to the English common law offence of forgery; but it includes the making, forging, uttering, and selling to the public, fraudulent printed tickets of admission to an operatic performance, bearing on their face in print the name of the manager of the operatic company, and also stamped with his name and seal. *It seems* that such an offence is also included in the crime of forgery as defined by the English common law. *Ib.*

FORGERY.

See EXTRADITION, 3.

GENEVA AWARD.

See CLAIMS AGAINST THE UNITED STATES, 2, 3.

HABEAS CORPUS.

The writ of *habeas corpus*, in case of a person held a prisoner by sentence of court, can only release the prisoner when it is shown that the court

had no jurisdiction to try and punish him for the offence. The inquiry in such case is not whether there is in the indictment such specific allegation of the details of the charge as would make it good on demurrer, but whether the indictment describes a class of offences of which the court has jurisdiction, and alleges the defendant to be guilty. If the record of the case in which judgment of imprisonment is pronounced contains no charge of such offence, he should be discharged. *In re Coy*, 731.

See EXTRADITION, 1.

HUSBAND AND WIFE.

See DEED;
WRIT OF ERROR, 2.

INDIAN-TRUST BONDS.

See SET-OFF.

INDICTMENT.

In an indictment in a court of the United States for a conspiracy to induce officers named in the opinion to omit their duty, in order that documents therein mentioned might come to the hands of improper persons who tampered with and falsified the returns, it is not necessary to allege or prove that it was the intention of these conspirators to affect the election of the member of Congress who was voted for at that place, the returns of which were in the same poll books, tally sheets, and certificates with those for state officers. *In re Coy*, 731.

See CONSTITUTIONAL LAW A. 25;
JURISDICTION C

INSURANCE.

1. A provision in a policy of fire insurance, that if the interest of the assured in the property is "any other than the entire, unconditional and sole ownership for the use and benefit of the assured," or is "incumbered by any lien, whether by deed of trust, mortgage or otherwise," it must be so represented in the policy, does not, if it is stated that the property is incumbered, require a statement of the nature or amount of the incumbrances. *Hosford* v. *Germania Fire Ins. Co.*, 399.
2. An application for fire insurance, expressly made a part of the policy and a warranty by the assured, contained these questions and answers: "Is there any incumbrance on the property? Yes. If mortgaged, state the amount. $3000." *Held*, that an omission to state that the property was incumbered otherwise than by mortgage was no breach of the warranty. *Ib.*

INTEREST.

INTERVENOR.

See RAILROAD, 3.

JUDGMENT.

1. Plaintiffs' complaint in ejectment sought to recover "all the north part of lot 2, in section 36, township 38 N. of range 10 W. of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot 2, and 753 feet south therefrom." Defendant denied every allegation. The record showed that after the parties had submitted the cause to the court, "the court, having heard the evidence, and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of the defendant the possession of so much of said lot 2 as lies south of the south line of lot number 1, as indicated by a fence constructed and maintained by the defendant as and on said south line . . . which the plaintiffs shall recover of the defendant." *Held*, (1) That though the order embraced both a finding and a judgment, it was not for that reason a nullity; (2) That it was not a general finding for the plaintiffs, but a finding for them as to the part of the land described in the order, and that the judgment for the possession of this part of the premises was in accordance with the local law of the district in which the cause was tried, Rev. Stat. Indiana, 1881, § 1060; (3) That this court is bound to assume from the record that the tract described in the order was a part of the premises described in the complaint. *Morgan* v. *Eggers*, 63.
2. If, after transfer by the plaintiff of the subject of controversy in a litigation in Louisiana, the court, on being informed of the transfer, refuses to permit the suit to be discontinued by the plaintiff, a judgment does not make it *res judicata* as to the assignee. *St. Romes* v. *Levee Steam Cotton Press Co.*, 614.
3. Dismissal of a suit for want of parties does not make the subject of it *res judicata*. *Ib.*

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. A brought ejectment against B. B thereupon filed a bill in equity, (which was subsequently amended,) to remove a cloud from the title, setting up that the deed under which A claimed was a mortgage, with a written contract of defeasance. A demurred. Upon hearing on the demurrer it was ordered that if B should, within fifteen days, bring into court the amount due on the mortgage, and interest, and all taxes paid by A., etc., A should be restrained from further persecution of the ejectment suit; but if he should fail to do so within that time, the bill should be dismissed and the defendant allowed to proceed with the suit. *Held*, (1) That this order, made upon hearing of a de-

LEASE.

LIEN.

LIMITATION, STATUTES OF.

LOCAL LAW.

MAILS.

MANDAMUS.

When the amount in controversy in a case decided in the Circuit Court is too small to come here by writ of error, this court is without power by writ of mandamus to compel the judge of the Circuit Court to reverse his own judgment. *In re Burdett*, 771.

MARRIED WOMAN.

MEXICAN GRANT.

See PUBLIC LAND, 1, 2, 3, 8–13.

MINERAL LAND.

See EJECTMENT;
PUBLIC LAND, 6, 7, 14.

MORTGAGE.

1. When a mortgage contains no provision for the payment of rents and profits to the mortgagee while the mortgagor remains in possession, the mortgagee is not entitled, — as against the owner of the equity of redemption, — to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf; even though the income may be expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon failure by the mortgagor to perform the conditions of the mortgage. *Freedman's Saving and Trust Co.* v. *Shepherd*, 494.
2. When a decree of foreclosure and sale of mortgaged property grants to the purchaser a credit for part of the purchase money, reserving a lien upon the property to enforce its payment, the court may, if the purchaser make default, and no rights of innocent third parties have intervened, order a resale of the property upon a rule to the purchaser to show cause why it should not be done. *Stuart* v. *Gay*, 518.
3. The decree of foreclosure in this case conferred upon the purchaser at the foreclosure sale no such right of acquiring the securities of the lower classes to be paid from the fund realized from the sale, as would authorize him, as such purchaser, to dispute in a proceeding in the original suit for foreclosure to compel payment of the amount remaining due of the purchase money, the computations by the master, confirmed by the decree of the court, of the amounts which the creditors of the higher classes were to receive from the fund. *Ib.*
4. In marshalling the classes of debts entitled to be paid out of a fund arising from a sale of mortgaged property under a decree of foreclosure, it is immaterial whether the master calculates the interest to a day prior to the date of the decree of sale, or up to that day, for the purpose of determining the principal sum that is to bear interest thereafter. *Ib.*

See RAILROAD, 3;
TRUST, 1.

MUNICIPAL BOND.

See MUNICIPAL CORPORATION.

MUNICIPAL CORPORATION.

1. In this case certain negotiable bonds, issued by the town of Milan, Tennessee, were held to have been issued without lawful authority. *Kelley* v. *Milan*, 139.

NATIONAL BANK.

POLICE COURT.

PRACTICE.

PRECATORY TRUST.

PRINCIPAL AND AGENT.

PROMISSORY NOTE.

PUBLIC LAND.

PUBLIC LAW.

See PUBLIC LAND, 4.

RAILROAD.

B. Statutes of the United States.

C. Statutes of the States and Territories.

SUPERSEDEAS.

TAX AND TAXATION.

TELEGRAPH COMPANIES.

TREATY WITH MEXICO.

TRIAL BY JURY.

TRUST.

1. A creditor whose debt is secured by a deed of trust of real estate to a third party as trustee, may purchase the property at a sale by the trustee under the terms of the trust; and if he credits the debtor on the mortgage debt with the amount of the purchase money, it is in fact and in law a money payment to the use and benefit of the debtor. *Easton* v. *German-American Bank*, 532.

WRIT OF ERROR.