UNITED STATES REPORTS

VOLUME 135

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1889

J. C. BANCROFT DAVIS

REPORTER

THE BANKS LAW PUBLISHING COMPANY
21 MURRAY STREET,
NEW YORK.
1899.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.

SAMUEL FREEMAN MILLER, Associate Justice.

STEPHEN JOHNSON FIELD, Associate Justice.

JOSEPH P. BRADLEY, Associate Justice.

JOHN MARSHALL HARLAN, Associate Justice.

HORACE GRAY, Associate Justice.

SAMUEL BLATCHFORD, Associate Justice.

LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

DAVID JOSIAH BREWER, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases.

Table of Cases.

Table of Cases.

Table of Cases.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1889.

IN RE NEAGLE, Petitioner.[1]

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

No. 1472. Argued March 4, 5, 1890. — Decided April 14, 1890.

An appeal from the decision of a Circuit Court of the United States in a *habeas corpus* case, under Rev. Stat. § 764, as amended by the act of March 3, 1885, 23 Stat. 437, c. 353, brings up the whole case, both law and facts, and imposes upon this court the duty of reëxamining it, upon the full record as it was heard in the inferior court.

A person who 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 a law or treaty of the United States, may, under the provisions of Rev. Stat. § 753, be brought before any court of the United States, or justice or judge thereof, by writ of *habeas corpus*, for the purpose of an inquiry into the cause of his detention; and the court or justice or judge is required by § 761 to proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

By virtue of Rev. Stat. §§ 606, 610, the justices of the Supreme Court of the United States are allotted among the nine circuits, to each one of which a judge is assigned; and the latter section makes it the duty of each judge to attend the Circuit Court in each district of the circuit to which he is allotted, and thereby imposes upon him the necessity of

[1] The docket title of this case is "*Thomas Cunningham, Sheriff of the County of San Joaquin, California, Appellant*, v. *David Neagle*."

Syllabus.

travelling from his residence to the Circuit Court which he is to attend, and from each place in that circuit where the court is held to the other places where it is held. *Held*, that, while a judge is thus travelling to or from those places, he is as much in discharge of his duty as when listening to and deciding cases in open court, and is as much entitled to protection in the one case as in the other.

While there is no express statute authorizing the appointment of a deputy marshal, or any other officer to attend a judge of the Supreme Court when travelling in his circuit, and to protect him against assaults or other injury, the general obligation imposed upon the President of the United States by the Constitution to see that the laws be faithfully executed, and the means placed in his hands, both by the Constitution and the laws of the United States, to enable him to do this, impose upon the Executive department the duty of protecting a justice or judge of any of the courts of the United States, when there is just reason to believe that he will be in personal danger while executing the duties of his office.

An assault upon a judge of a court of the United States, while in discharge of his official duties, is a breach of the peace of the United States, as distinguished from the peace of the State in which the assault takes place.

Under the provisions of Rev. Stat. § 788, it is the duty of marshals and their deputies in each State to exercise, in keeping the peace of the United States, the powers given to the sheriffs of the State for keeping the peace of the State; and a deputy marshal of the United States, specially charged with the duty of protecting and guarding a judge of a court of the United States, has imposed upon him the duty of doing whatever may be necessary for that purpose, even to the taking of human life.

United States officers and other persons, held in custody by state authorities for doing acts which they were authorized or required to do by the Constitution and laws of the United States, are entitled to be released from such imprisonment; and the writ of *habeas corpus* is the appropriate remedy for that purpose.

David Neagle, a deputy marshal of the United States for the District of California, was brought by writ of *habeas corpus* before the Circuit Court of that District, upon the allegation that he was held in imprisonment by the sheriff of San Joaquin County, California, on a charge of the murder of David S. Terry. He alleged that the killing of Terry by him was done in pursuance of his duty as such deputy marshal in defending the life of Mr. Justice Field, while in discharge of his duties as Circuit Judge of the ninth circuit. On the trial of this writ in the Circuit Court it entered an order discharging the prisoner, finding that he was in custody for an act done in pursuance of a law of the United States, and was imprisoned in violation of the Constitution and laws of the United States. The case being brought up to the Supreme Court by appeal, this court, on examining the voluminous testimony, arrived at

Statement of the Case.

the conviction that there was a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Mr. Justice Field, on his official visit to California in the summer of 1889; that this arose from animosity against him on account of judicial decisions made in the Circuit Court of the United States for the Northern District of California in a suit or suits to which they were parties; that the purpose which they had of doing Mr. Justice Field an injury became so well and so publicly known, that a correspondence ensued between the marshal and the District Attorney of that District and the Attorney General of the United States, the result of which was that Neagle was appointed a deputy marshal for the express purpose of guarding Mr. Justice Field against an attack by Terry and his wife which might result in his death; that such an attack did take place; that Neagle, being there for the said purpose of affording protection, had just reason to believe that the attack would result in the death of Mr. Justice Field unless he interfered; and that he did justifiably interfere by shooting Terry while in the act of assaulting Mr. Justice Field, whom he had already struck two or three times. *Held*,

(1) That Neagle was justified in defending Mr. Justice Field in this manner;

(2) That in so doing he acted in discharge of his duty as an officer of the United States;

(3) That having so acted, in that capacity, he could not be guilty of murder under the laws of California, nor held to answer to its courts for an act for which he had the authority of the laws of the United States;

(4) That the judgment of the Circuit Court, discharging him from the custody of the sheriff of San Joaquin County, must therefore be affirmed.

Mr. Justice Miller, on behalf of the court, stated the case as follows:

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farrish on his behalf. This petition represented that

the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:

"In the Justice's Court of Stockton Township.

"STATE OF CALIFORNIA,
County of San Joaquin, } ss:

"The People of the State of California to any sheriff, constable, marshal, or policeman of said State or of the county of San Joaquin:

"Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the 14th day of August, A.D. 1889, in this, that one David S. Terry, a human being then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought shot, killed and murdered, and accusing Stephen J. Field and David Neagle thereof: You are therefore commanded forthwith to arrest the above-named Stephen J. Field[1] and David Neagle and bring them before me, at my office, in the city of Stockton, or, in

[1] The Governor of California, on learning that a warrant had been issued for the arrest of Mr. Justice Field, promptly wrote to the Attorney General of the State, urging "the propriety of at once instructing the District Attorney of San Joaquin County to dismiss the unwarranted proceeding against him," as his arrest "would be a burning disgrace to the State unless disavowed." The Attorney General as promptly responded by advising the District Attorney that there was "no evidence to implicate Justice Field in said shooting," and that "public justice demands that the charge against him be dismissed;" which was accordingly done.

case of my absence or inability to act, before the nearest and most accessible magistrate in the county.

"Dated at Stockton this 14th day of August, A.D. 1889.

"H. V. J. SWAIN,

"*Justice of the Peace.*

"The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin County, California.

"Dated August 15, 1889. H. V. J. SWAIN,

"*Justice of the Peace.*"

The petition then recited the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defence of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general

terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and Constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farrish, and presented to Judge Sawyer, he made the following order:

"Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before the United States Circuit Court for the Northern District of California.

"SAWYER, *Circuit Judge.*"

The writ was accordingly issued and delivered to Cunningham, who made the following return:

"COUNTY OF SAN JOAQUIN, *State of California.*

"SHERIFF'S OFFICE.

"To the honorable Circuit Court of the United States for the Northern District of California:

"I hereby certify and return that before the coming to me of the annexed writ of *habeas corpus* the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice's court of Stockton township, State of California, county of San Joaquin, and by the endorsement made upon said warrant. Copy of said warrant and endorsement is annexed hereto and made a part of this return. Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded.

"August 17, 1889. THOS. CUNNINGHAM,

"*Sheriff San Joaquin County, California.*"

Various pleadings and amended pleadings were made which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of

habeas corpus and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered when the case comes to be examined upon its facts.

The hearing in the Circuit Court was had before Circuit Judge Sawyer and District Judge Sabin. The sheriff, Cunningham, was represented by G. A. Johnson, Attorney General of the State of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:

"In the Matter of David Neagle, on *habeas corpus.*

"In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody."

From that order an appeal was allowed which brought the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

Mr. Z. Montgomery, for appellant, argued mainly on the facts, maintaining that they showed that Terry had no purpose of seriously injuring Mr. Justice Field, and that therefore the killing was without excuse. He also presented in his brief the following questions of law:

Section 753 of the Revised Statutes provides "That the writ (of *habeas corpus*) shall not extend to a prisoner in jail . . . unless he is in custody for an act done or committed in pursuance of a law of the United States, or of an order, process, or

decree of a court thereof, or in custody in violation of the Constitution, or of a law or treaty of the United States." If, in killing Terry, Neagle was acting "in pursuance of a law of the United States," and if it appears that he was in custody in violation of the Constitution or a law of the United States, construing the word "law" as the law-making power intended it should be construed, then the writ of *habeas corpus* was properly issued; otherwise not. What, then, is the meaning of the word "law" as used in said section?

The Circuit Court, in rendering the decision now under review, by way of defining the word "law," used this language: "It will be observed that the language of the provision of section 753 is an act done . . . in pursuance of a law of the United States, not in pursuance of a statute of the United States."

The court seems to have assumed that there is such a thing as "a common law" of the United States. But this court has said there is no such thing. "It is clear that there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption." *Wheaton* v. *Peters*, 8 Pet. 591, 658.

In the case of *Tennessee* v. *Davis*, 100 U. S. 257, a case strongly relied upon by the Circuit Court as a sustaining authority for its decision in this case, the Supreme Court, in determining what is meant by the words "laws of the United States," as employed in the second section of the third article of the Federal Constitution, said: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection, or defence of the party, in whole or in part, by whom they are asserted." p. 264.

This, it will be observed, is a judicial construction by our highest court placed upon the words "laws of the United

States," as used in that very article of the Federal Constitution, which was intended to fix a limit beyond which Congress itself could not go in conferring jurisdiction upon a United States court. So that if we construe the words, "law of the United States," found in section 753 of the Revised Statutes, as including other laws than those enacted by Congress, we give to them a meaning which, in the light of the decision just quoted, would render them unconstitutional. In all the cases cited as authority by the Circuit Court, where an act of an officer of the United States was held to have been "done or committed in pursuance of a law of the United States," the "law" relied upon as authorizing such act was a statute.

In order to grasp the true spirit and intention of section 753, in authorizing federal courts to release, on *habeas corpus*, persons "in custody for acts done or omitted in pursuance of a law of the United States," etc., it may be well to recur to the evil intended to be remedied by the act as originally passed in 1833, and afterwards incorporated in section 753. In *Ex parte Jenkins*, 2 Wall. Jr. 521, a case cited by the Circuit Court in deciding this case, Mr. Justice Grier, referring to the act in question, said: "This act was passed when a certain State of this Union had threatened to nullify acts of Congress and to treat those as criminals who should attempt to execute them, and it was intended as a remedy against such state legislation." p. 529.

A careful examination of the cases cited wherein the federal courts have discharged on *habeas corpus* persons held in custody "for acts done or omitted in pursuance of a law of the United States," will show not only that the acts so done or omitted were in pursuance of a plain statutory law of the United States, but that such statutory law had been repudiated and sought to be nullified either by state legislation, or by state judicial tribunals without the aid of such state legislation. In other words, they were cases wherein persons had been arrested and imprisoned because of acts done or omitted in obedience to statutory laws of the United States, which statutory laws certain state tribunals had refused to recognize as laws. If it be contended that the slaying of Terry

by Neagle was, in fact, an act of justifiable homicide, done pursuant to a law of the United States, and Neagle's arrest and imprisonment even to await trial for said homicide constituted an illegal restraint of his liberty, which made it the duty of the federal court to release him on *habeas corpus*, as provided by § 753, I answer that such a contention is refuted, not only by the authorities cited, but by the express language of this court in *Ex parte Royall*, 117 U. S. 241, 247.

So, likewise, if the California statute which defines the crime of murder, the crime with which Neagle stands charged, was repugnant to the Constitution or laws of the United States, or if the facts which under the laws of California constitute murder, would under the laws of the United States be justifiable homicide, then it might be truthfully said that the State's "prosecution against Neagle had nothing upon which to rest, and the entire proceeding against him is a nullity."

But it is not pretended that there is any repugnance between the state law defining the crime with which Neagle is charged, and the Constitution or statutes of the United States. Hence I repeat there is no legal pretext for the interposition of a federal court in order to prevent his conviction and punishment for an act "done in pursuance of a law of the United States."

Thus it seems clear that, even if Neagle in the killing of Terry, had in fact been acting in pursuance of a law of the United States, still, unless there was something in the laws of California as construed by her courts that would make such a homicide punishable, he could not be lawfully released under § 753 merely because he was being held in custody to await his trial in a state court in order to have it determined judicially whether the homicide had, or had not, been committed in pursuance of a law of the United States.

While we concede that, under the laws of California, Neagle or anybody else would have had a right to protect Mr. Justice Field against a felonious assault, even by taking the life of the assailant, if necessary, we deny that the marshal had any authority under the statutes of the United States to send him on such a mission, or that the fact that he was a deputy mar-

shal conferred any special power upon him. Such a power, if it exists, must be found in § 787 or § 788 of the Revised Statutes. Section 787 makes it "the duty of the marshal of each district to attend the District and Circuit Courts when sitting therein, and to execute" precepts. This does not authorize the marshal to attend the judges of the court, wherever they may go: and such seems to have been the interpretation put upon the act by the District Attorney, when he wrote to the Attorney General on the 7th of May: "And while due caution has always been taken by the marshal, when either Judge or Mrs. Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge Sawyer or Justice Field against harm when away from the appraisers' building."

In this construction of the law it seems to me that the marshal was clearly right. But he now seeks, and his deputy, Neagle, seeks, and the decision under review seeks to justify the marshal, in sending a body guard to attend Mr. Justice Field when away from the court, and away from the appraisers' building, by reason and under authority of instructions from the United States Attorney General. My first answer to this plea is, that neither the Attorney General, nor the President acting through the Attorney General, was empowered by law to give to Marshal Franks any such authority as would justify him in sending Deputy Marshal Neagle for any such purpose. And my second answer is, that there is nothing in the record to show that either the Attorney General, or the President through the Attorney General, ever gave or attempted to give to Marshal Franks any order, direction or instruction, which even purports to authorize the sending of a deputy marshal on any such errand as that referred to.

If the President has any such power as he is claimed to have exercised in this instance, where does he get it? If the President has power, within the jurisdiction of the several States, to keep a body guard for every instrument of the federal government, he has power to place a marshal in the house of every American citizen in order to shield him from harm at the hands of his fellow-citizens. And, if it has come

to this, what use, would I ask, have we for state governments?

Mr. Attorney General for the appellee.

Neagle's right to a writ of *habeas corpus* is an inheritance from the common law, guaranteed by the Constitution, Art. 1, cl. 2, § 9.

Under section 751 of the Revised Statutes, authorizing the Circuit Court to issue writs of *habeas corpus*, the petitioner being restrained of his liberty, as he claims, in violation of the Constitution and laws of the United States, was entitled to demand, upon filing a proper petition, that a writ issue as a writ of right, and that the court determine whether he was thus unlawfully restrained of his liberty. Section 753 does not attempt to limit the right of the court to issue the writ in any case covered by the Constitution; that is, in any case arising under the Constitution or laws of the United States. It does, by a process of exclusion and definition, make more clear some of the cases to which the federal jurisdiction extends.

The question, then, is whether the imprisonment, from which the petitioner sought to be relieved by this writ, was an imprisonment arising under the Constitution of the United States, and the laws made in pursuance thereof; for any question arising under valid laws arises under the Constitution. A prisoner 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 the court or judge thereof, is in custody in violation of the Constitution of the United States.

But whether the right to the writ rests on the Constitution or statute, or both, the question is whether the petitioner, Neagle, arrested by the officer of the State of California for taking the life of David S. Terry, in defence of the life of Mr. Justice Field, was in custody in violation of the Constitution and laws of the United States. I shall not stop to argue the question whether Neagle acted in good faith and with sufficient reason for supposing the life of Justice

Field was in danger. I am content to leave that question upon the statement of facts, and the conclusion on the facts as set forth in the opinion of the Circuit Court.

I. It was the duty of the Executive Department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty: (1) Because such protection is essential to the existence of the government; (2) Because it is enjoined upon the President, as the executive, he being required "to take care that the laws be faithfully executed;" (3) The marshal was merely the hand of the executive, and unless protected by the marshal the courts and judges have no protection.

The reason why I say it is the duty of the Executive Department to protect the judicial, and why I say it has the authority so to do, is because the power of self-preservation is essential to the very existence of the government.

In the thirtieth number of the Federalist, written by Hamilton, I find this: "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts for which it is responsible, free from every control but a regard to the public good and the sense of the people."

In the fifty-eighth number of the same work, written by the same author, [these numbers are taken from Dawson's[1] edition,] I find this, speaking of the power given in the Constitution to the general government to regulate the election of senators and representatives: "Its propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation."

[1] In the editions of the Federalist prior to 1863, these two papers are respectively numbered 31 and 59. In that year Mr. Dawson's edition appeared, as the result of a collation of the first edition with the original articles in the newspapers. In his edition the title was changed from "Federalist" to "Fœderalist;" the name of one of the writers, (Mr. Jay,) was changed from "Jay" to "Jáy;" and the numbering of the papers after No. 28 was so altered that No. 31 of all previous editions became No. 30, and No. 59 became No. 58. The expediency of changing a numeration accepted by Hamilton, Jay and Madison, and adopted by the latter in the Hallowell editions, may be questioned.

Not less forcibly, by another distinguished gentleman, who honors us this morning by his presence, as a listener, is the same principle stated. Mr. Bayard, late Secretary of State, soon after this difficulty occurred, wrote as follows: "The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgments of its courts are equally and at all times and in all places sufficient to protect the individual judge who fearlessly and conscientiously in the discharge of his duty pronounces judgment."

This court has more than once announced the same doctrine. See *Cohens* v. *Virginia*, 6 Wheat. 264, 384, 387, 388; *Martin* v. *Hunter*, 1 Wheat. 304, 363; *Ex parte Siebold*, 100 U. S. 371; *Tennessee* v. *Davis*, 100 U. S. 257; *Ex parte Yarbrough*, 110 U. S. 651.

Argument certainly cannot be necessary to show the duty of the Executive Department of the government of the United States to protect the courts and judges in the discharge of their duties. Indeed, it is hardly supposed that this will be questioned. The President, as the head of the Executive Department, is under the constitutional obligation "to take care that the laws be faithfully executed." To the end that he may in every contingency discharge this duty, he is made Commander-in-Chief of the army and navy, and of the militia of the several States when called into active service.

No one questions the right or duty of the President to furnish guards for the mail or an escort for a paymaster carrying government treasure wherever danger is apprehended. Are the persons of the United States judges, travelling from place to place in the performance of their duties less sacred? less entitled to government protection than mail-bags or packages of money? Nor is the protection of the person more properly a matter of local concern than the protection of property. The person of a United States officer, in the discharge of his duty, is always clothed with the United States sovereignty, and in that sovereignty should be his protection.

The Constitution provides that before the President enters upon the execution of his office he shall take an oath: "I do

solemnly swear that I will faithfully execute the office of President of the United States and will to the best of my ability preserve, protect and defend the Constitution of the United States."

Standing, on the 4th of March, 1861, upon the steps of this Capitol, confronted by the mightiest rebellion the world ever saw, President Lincoln said to his dissatisfied countrymen: "You have no oath registered in heaven to destroy the government, while I shall have the most solemn one to preserve, protect and defend it."

He evidently supposed that this oath, embodied in the Constitution, was of some significance; and that being required to take this oath he was invested with some power adequate to the obligation. He understood that to preserve, protect and defend the Constitution meant to preserve, protect and defend the government; and that it was his right and his duty, independently or in the absence of acts of Congress, to use all the power placed at his disposal for the protection and preservation of the government. I observe that neither one of the arguments filed on behalf of the appellant refers to this clause of the Constitution at all. Has it, therefore, no significance? Does it not by necessary implication invest the President with self-executing powers; that is, powers independent of statute? Is it true that after the inauguration of President Washington and before Congress had passed any laws the President had no authority, so far as he had the means, to protect the property of the United States? It is certain that he was without any such authority if the arguments for the appellant, that he can act only in pursuance of specific acts of Congress, are sound.

We insist that, by the Constitution of the United States, a government was created possessed of all the powers necessary to existence as an independent nation; that these powers were distributed in three great constitutional departments, and that each of these departments is, by that Constitution, invested with all of those governmental powers, naturally belonging to such department, which have not been expressly withheld by the terms of the Constitution. In other words, that Congress

is invested not only with expressed but with implied legislative powers; that the judiciary is invested not only with expressed powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it; and that the President, in like manner, by the very fact that he is made the chief executive of the nation, and is charged to protect, preserve, and defend the Constitution, and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of the government can either take away or abridge; that many of these powers, pertaining to each branch of the government, are self-executing, and in no way dependent, except as to the ways and means, upon legislation.

If it be said that in the Constitution or statutes no specific direction to the President, the Attorney General, or the marshal can be found to protect the judges from assault or assassination, the answer is plain. This argument is an assumption that the doctrine of necessary and implied powers, which has been so often sustained in support of statutes, is confined to the legislative branch of the government, and that the executive has no powers except those expressly granted in the Constitution. On the contrary, when, by the Constitution, the President is invested with the executive power of the nation, and when that instrument enjoins upon him that he shall "take care that the laws be faithfully executed," it confers upon him all power reasonably incident to the exercise of the executive function, and necessary to the vindication and enforcement of the laws, which has not been withheld from him by the Constitution; and the power so granted in the Constitution Congress neither has nor has claimed to have, the right to abrogate. See *Ex parte Siebold*, *ubi sup.*, at pp. 395, 396; and *Ex parte Yarbrough*, *ubi sup.*

It must not be forgotten that, if the courts and judges cannot be protected by the executive through marshals, they cannot be protected at all. They are powerless to protect themselves. The executive is armed, not only with the power of the marshals and the civil posse, but with all the military and

naval forces of the government. Congress holds the purse, and is in condition not only to assert and defend its own rights, but to coerce the just consideration of its wishes at all times and on all subjects; while the judiciary is strong only in the respect and reverence of the people.

II. It was the duty of the judiciary, having been thus protected by the Executive Department, to sit in judgment upon, and to vindicate the officer of the Executive Department, if innocent, in the discharge of his duty: (1) because such authority in the federal judiciary is essential in principle to the existence of the nation; (2) such authority is amply sustained by decisions of this court.

Such authority in the federal judiciary is essential in principle to the existence of the nation. It rests on the axiom already cited that every government must have within itself the resources for its own protection and preservation. It is argued that this homicide may be a crime against the State, and therefore the question should be adjudicated by a state tribunal. But this is a begging of the whole question. If Neagle simply did his duty as an officer of the United States he could not have done a wrong to the State of California; for an act cannot, at the same time, be a duty to the general government and a crime against the State. The fallacy of this argument lies in the assumption that here are two coördinate sovereignties, and that the citizen owes equal allegiance to both. On the contrary, as has been decided in this court, as often as the question has ever arisen, in all matters within the sphere of the general government, that government and the obligations it imposes are supreme, and where any supposed right or claim of a State contravenes such obligation, it must yield. *Cohens* v. *Virginia*, *ubi sup.*, at page 385; *Ableman* v. *Booth*, 21 How. 506, 517, 518.

The assumption of the right in the state court to try a federal officer for an act done in the discharge of his official duty implies the precedent right to arrest and the subsequent right to convict and punish such officer, and each involves consequences utterly inconsistent with the dignity and security of an independent government. The right to arrest the mar-

shal for this act after its performance implies the right to forbid and prevent its performance. Such a right is inconsistent with the dignity and supremacy of the general government. I do not claim that because a man is a federal officer he is not subject to arrest and trial in the state courts. I only claim that, for his official acts as such federal officer, he cannot be called in question in the state courts. In short, that the functions and agencies of the federal government cannot be interrupted or interfered with by state authority. *McCulloch* v. *Maryland*, 4 Wheat. 316, 431; *Weston* v. *Charleston*, 2 Pet. 449; *Collector* v. *Day*, 11 Wall. 113.

Section 643 of the Revised Statutes, providing for the issuance of writs of *habeas corpus cum causa*, and the removal from state to federal courts of prosecutions instituted against revenue officers and officers acting under registration laws, and providing for the trial of such cases in the federal courts, is a clear assertion of this power; and this law has been upheld in this court. *Tennessee* v. *Davis*, 100 U. S. 257. The same assertion of authority is found in the *Enrolment Act*, 13 Stat. 8, c. 13, § 12; *United States* v. *Gleason*, 1 Wool. C. C. 75; *United States* v. *Gleason*, 1 Wool. C. C. 128.

III. The right of a state court to hear and determine whether a federal officer has properly discharged his duty, according to the federal law, must stand or fall upon its own merit, and in no way depends upon the question whether the federal government has provided the formalities for a jury trial of that question. The jurisdiction of the state court in the premises, like the title of a plaintiff in ejectment, must stand or fall by itself.

Nor is there such force in the objection that the case is disposed of before a single judge, without a jury trial, as might at first be supposed. Nothing is more common than for cases of homicide to be disposed of simply by preliminary examination before a justice of the peace, or United States commissioner, or an examination before a coroner's jury, or upon an *ex parte* examination before a grand jury. The truth is, the guaranty of the right of trial by jury is for the benefit of the accused, not of the government. Moreover, the law makes no

distinction between trials for homicide and other felonies and misdemeanors, as to the right of a jury trial. If the jurisdiction of the federal court to hear and discharge a prisoner is to be denied in every case in which, according to the course of the common law, a jury trial would follow an indictment in a state court, then the authority of the federal courts to protect their officers against prosecution for fidelity to duty in a state court would be practically destroyed; for a jury trial is guaranteed in every criminal prosecution. But, however this may be, it is sufficient that it is the law that, either in the first or last instance, upon *habeas corpus*, or upon appeal or error, the federal courts have the right, and it is their bounden duty, to sit in judgment upon the official conduct of a federal officer.

IV. The only remaining question is whether the Circuit Court for the Northern District of California had the right to discharge the petitioner upon *habeas corpus* in the first instance, or whether the matter should have been allowed to proceed in the state court, subject to the right of this court to review the action of the state court upon a writ of error.

"When the petitioner is in custody by state authority for an act done or omitted to be done, in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, . . . in such and like cases of urgency involving the authority and operation of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority." *Ex parte Royall*, 117 U. S. 241, 251. See, also, *Wildenhus's Case*, 120 U. S. 1; *Botiller* v. *Dominguez*, 130 U. S. 238; *Ex parte Bridges*, 2 Woods, 428; *Ex parte McCardle*, 6 Wall. 318, 325; *Tennessee* v. *Davis*, 100 U. S. 257.

Numerous cases involving the right of the United States courts to discharge by *habeas corpus* persons from the custody of the officers of the state courts, on a charge of murder, have been decided at circuit, all supporting the jurisdiction of the United States courts in the premises. *Ex parte Jenkins*, 2 Wall. Jr. 521, decided by Mr. Justice Grier; *Ex parte Robin-*

son, 6 McLean, 355, decided by Mr. Justice McLean; *Roberts* v. *The Jailor of Fayette County*, 2 Abb. (U. S.) 265; *In re Ramsey*, 2 Flipp. 451; *In re Neill*, 8 Blatchford, 156, 167; *In re Farrand*, 1 Abb. (U. S.) 149; *Electoral College of South Carolina*, 1 Hughes, 571; *In re Hurst*, 2 Flipp. 510, are all cases involving the same principle and decided in the same way; but as these cases are all cited and discussed in the opinion of the Circuit Court in this case, I merely refer to them.

V. The writ of *habeas corpus* in this case was a writ of right. The petitioner being in custody, by reason of an act done in the discharge of his duty to the federal government, had the absolute right to its protection and to be heard and discharged at once. The case, within the decisions of this court, was a case of "urgency," and the Circuit Court had no discretion in the premises.

Mr. Joseph H. Choate (with whom was *Mr. James C. Carter* on the brief) for appellee.

I. There is no merit or force in any of the technical points raised by the Bill of Exceptions.

II. The true function and office of the writ of *habeas corpus* provided by the several statutes, amendatory of section 14 of the Judiciary Act of 1789, and now embodied in section 753 of the Revised Statutes, is not confined to what it was at common law, but necessarily devolves the power upon the federal court or judge, in inquiring into the cause of restraint of liberty, to hear and determine the facts and the law which constitute the petitioner's case of justification, by federal authority, of the act done, or of a violation, by his continued custody, of the federal Constitution, law or treaty, or of privilege, etc., by the law of nations, and to discharge the petitioner from custody, if such is made out, and to remand him if not.

The 14th section of the Judiciary Act, 1 Stat. 82, limited the power of federal judges to grant the writ, in the case of prisoners in jail, to cases where they were "in custody under or by color of the authority of the United States, or are com-

mitted to trial before some court of the same, or are necessary to be brought into court to testify."

How far, under that statute, the federal courts could go behind the return, considering that it gave them the power to grant the writ for the express "purpose of an inquiry into the cause of restraint of liberty," probably never was, and need not now be determined.

Certainly, as the English law then stood, that is, the common law and the Habeas Corpus Act of Charles II., the judges and courts in England confined themselves very closely to what appeared upon the face of the return, where it had been legal and regular, and the process had been issued by a court of competent jurisdiction. But the writ of *habeas corpus* seems always to have had a more extended use in the United States than in England, and inquiries under it have been more varied and far-reaching here than in that country. Church on Habeas Corpus, § 221, p. 272.

The act of March 2, 1833, 4 Stat. 632, c. 57, besides providing, by its third section, for the removal at any time before trial, from the state court into the Circuit Court, of any suit or prosecution for any act done under the *revenue* laws of the United States, or for any right, authority or title set up or claimed by such officer under any such law, by its seventh section conferred upon federal judges, in addition to the authority already conferred by law, power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, "where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof."

This act, like that of 1789, contained no provisions regulating the practice and procedure after the return; but, in view of the national crisis which led to the passage of the act, it can hardly be doubted that the intent of Congress, by this seventh section, was to enable the federal judge, if, upon the proofs, he found the fact to be that the petitioner was in custody for an act done in pursuance of a law of the United States, to discharge him; and, to ascertain that fact, he must

of necessity resort to any evidence that might be offered material to determine it.

The act of August 29, 1842, however, with the debates that preceded its passage, and the emergency out of which it arose, sheds the clearest light upon the function and the purpose of the *habeas corpus* provisions, as they were finally carried into the revision.

At the time of the passage of that act the executive and judiciary of the State of New York, in the case of McLeod, charged with murder in the state court, had successfully refused and resisted the intervention of the federal government, attempted upon the ground that, by the law of nations, the act of McLeod, which was charged to have resulted in the homicide, was an act done under the authority of the British nation, and therefore did not subject him individually to trial and punishment therefor by the municipal law of the State where the homicide was committed; and that, as the Constitution of the United States committed the whole subject of foreign intercourse to the federal government, the British subject, so charged with crime, ought, upon the demand of the federal government, to be released from the custody of the state court.

But, as the statutes stood, the federal judges had no power to issue a writ of *habeas corpus* in such a case; and it was to give them that power, and to provide in what cases they should exercise it, that the act of 1842, 5 Stat. 539, c. 257, entitled "*An Act to provide further remedial justice in the courts of the United States*," was passed.

Here clearly was an unmistakable assertion of the supremacy of the judicial power of the national government over the States and state courts, to the full extent of withdrawing from the state court the prisoner charged with alleged crime, and there awaiting trial by jury, and providing for the summary trial by the federal judge without a jury, on proofs to be taken before him, of the one federal question raised in the cause, with full power and discretion in the federal judge to discharge him, if he made out his claim of foreign sovereign authority, and prohibiting the States from ever again trying

or touching him for that alleged offence. It is to be noted, too, that the question must, in the nature of the case, be determined by the federal judge, not upon a mere inspection of any statute, order or commission, but necessarily upon a complete exploration of all the facts, just as they would in natural course have been laid before the jury in the state court, if the case had there proceeded. To this extent, and for the determination of this single question, it was the clear intent of Congress to override and supersede the jurisdiction of the state court.

An examination of the debates in the Senate which preceded this enactment will demonstrate this position.

The next piece of legislation was the act of February 5, 1867, 14 Stat. 385, c. 28, which again enlarged the power of the federal judges to issue writs of *habeas corpus*, so as to include all cases of restraint of liberty in violation of the Constitution or of a law or treaty of the United States; and here again the procedure is regulated so as to secure a full and final trial upon evidence, before the federal judge without a jury, of the one single federal question arising in the case as the ground for discharge from custody, and enabling and requiring the federal judge to explore all the facts bearing on that one question as fully as a jury would have done, if it had been left to proceed in the state court. Upon the return of the writ, a day is to be set for "the hearing of the cause." The petitioner may deny any material facts set forth in the return, and may allege any facts to show that the detention is in contravention of the Constitution or laws of the United States. The pleadings on either side may be amended so that the material facts may be ascertained — and it is provided that the "said court or judge shall proceed in a summary way to determine the facts of the case by hearing testimony and the arguments of the parties interested, and if it shall appear that the prisoner is deprived of his or her liberty in contravention of the Constitution or laws of the United States he or she shall forthwith be discharged and set at liberty." p. 386. The act concludes with the same provision, staying all proceedings on the same charge, pending proceedings on appeal,

and after final judgment of discharge, as was contained in the act of 1842.

Upon the face of this act, certainly, it is impossible to put any other construction than that the one federal question is withdrawn from the state court for final decision by the circuit judge without a jury, and that the prisoner must be discharged, if that question be decided in his favor, and that, too, whether there is any provision already made by Congress for trying him or not. It was clearly intended to preclude all further trial, if, and only if, the federal question was decided in his favor, except that the decision of the circuit judge was to be reviewed in this court.

Meantime came the case of *Ex parte Jenkins*, 2 Wall. Jr. 521, 526, and the Fugitive Slave Law Cases.

In this condition of the statutes and the decisions, the revision of the statute was made in 1874, Rev. Stat. c. 13, §§ 751–766, "Habeas Corpus."

It cannot be doubted that the effect of the revision is, and was intended to be, to make the procedure and the power and duty of the judge issuing the writ uniform and the same in all the cases covered by the several successive acts, and now embodied in § 753; to withdraw the federal question, on which the petitioner claims justification and exemption, away from the state court for full and final determination by the federal judge without a jury; and to discharge him from the custody of the state court, when he establishes, by proof to the satisfaction of the federal judge, that he is entitled to his discharge, but if he fails to make out such right, then to remand him to the state court's custody.

No other meaning than this can be imputed to the words in § 761: "and thereupon to dispose of the party as law and justice may require" in view of the explicit duty to discharge contained in the Acts of 1842 and 1867, which were being condensed and revised, and of the obvious intent to subject all cases alike to the same regulation.

Under this statutory scheme of *habeas corpus*, it is wholly immaterial whether there is any provision by federal criminal law conferring jurisdiction upon any court over the prisoner

when discharged. Congress has by this very act made what it deemed to be suitable provision for the case by substituting for a trial by jury, under federal authority, of the one question of justification, a trial by a judge without a jury, and by the Supreme Court on appeal. If he makes out such justification before that tribunal, the necessary theory of the act is that he is to be deemed innocent; that he has committed no crime; that he has only done what the supreme law of the country has required him to do. If, however, he fails to make out his alleged justification under federal authority, then he is remanded for trial on the charge made in the state court.

It is certainly too late at this day to question or discuss the power of Congress to provide, by means of this scheme of *habeas corpus* procedure for the removal from the state court into the federal court, for examination and determination, of this single question of federal authority, or of custody in violation of the federal Constitution and laws, when it arises in any case, civil or criminal, in a state court.

This exercise of power under the Constitution is far within that which was conceded to Congress by this court in *Tennessee* v. *Davis*, 100 U. S. 257.

In truth the alarm which is suggested at the idea of its being entrusted to a federal court, consisting of two judges, to try, subject to a review in this court, the question of federal authority and consequent immunity, as being a possible mode of escape for a party possibly guilty of murder, without any trial, is based upon no foundation.

The single question is to be fully tried, not upon affidavits, but upon testimony — not *ex parte*, but after a full hearing of both sides. And the power entrusted to the federal court over this one question is not so great as the same power over the whole case, which is entrusted to the ordinary committing magistrate, or to the judge on the trial, on the motion to quash, or on a motion in arrest of judgment after verdict. It is, in legal apprehension, the same power which is given to this court, upon the single federal question, on writ of error.

No case appears to have arisen under section 7 of this act for twenty years after its passage. When the execution of the

obnoxious Fugitive Slave law exposed the marshals to violent opposition and attack in the discharge of the duties imposed upon them by Congress, and to arrest, indictment and trial in the state courts on charges of assault or murder, for acts necessarily done by them in the performance of such duties, they immediately appealed to the federal courts for the protection afforded by this section seven, and the Circuit Courts have uniformly used it for the efficient protection and relief of all federal officers so charged and in custody, and this, as we submit, with the implied assent of Congress and the express approval of this court. The result of this line of decisions is so cogent, in support of the action of the court below in this case, as to command careful attention here. See *Ex parte Jenkins*, 2 Wall. Jr. 521 (1853); *Ex parte Robinson*, 6 McLean, 355; *Ex parte Robinson*, 4 Am. Law Reg. 617; *In re McDonald*, 9 Am. Law Reg. 661; *United States ex rel. Roberts* v. *Jailor of Fayette County*, 2 Abbott (U. S.) 265.

In this state of the adjudications under the seventh section of the Act of 1833, Congress revised the entire series of statutes in regard to *habeas corpus* in the manner already pointed out. It must be deemed to have known and approved the settled construction which the federal courts, for more than twenty years, had given to the Act of 1833; and when it incorporated in section 753 the cases covered by that act with the cases covered by the Judiciary Act and the Acts of 1842 and 1867, and enjoined upon the Circuit Courts, in all the cases alike, the duty to make a full and exhaustive inquiry into the facts, and to hear the cause and render final judgment of discharge, if law and justice so required, it must be deemed to have intended to sanction and confirm the exercise of the jurisdiction which the federal courts, under the more limited scope of the Act of 1833, had habitually asserted. *McDonald* v. *Hovey*, 110 U. S. 629; *Duramus* v. *Harrison*, 26 Alabama, 326; Sedgwick on Construction of Stat. (2d ed.) 229, note, and cases cited.

After the revision, other cases occurred, where the Circuit Courts released upon *habeas corpus* parties held in custody by the state courts for alleged crimes against the State. *Ex parte*

Bridges, 2 Woods, 428; *Ramsey* v. *The Jailor*, 2 Flipp. 457; *In re Brosnahan*, 18 Fed. Rep. 62. These must have been the cases to which this court referred in *Ex parte Royall*, 117 U. S. 241, 251, when it said that in "cases of urgency involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority."

III. The personal protection of Mr. Justice Field by Neagle was a duty imposed upon him by authority of the United States, and the homicide necessarily committed by him in rendering that protection effectual was "an act done by him in pursuance of a law of the United States," in the sense of the statute; and his detention therefor by the state court on a charge of murder was "in violation of the Constitution and laws of the United States" in the sense of the statute.

It is not pretended that there is any single specific statute making it his duty to furnish this protection. The authority arose directly and necessarily out of the Constitution and positive congressional enactments. Whatever is necessarily implied is as much a part of the Constitution and statutes as if it were actually expressed therein.

The corporate government established by the Constitution is a nation, absolutely sovereign over every foot of soil and over every person within the national territory and within the sphere of action assigned to it. Within that sphere, its Constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability by any other power whatsoever.

It has, necessarily, the inherent power of protecting itself and its agents in the exercise of all its constitutional powers, and of executing its own laws by its own tribunals, without any interruption from a State or any state authorities.

The government of the United States and the government of a State are distinct and independent of each other, within their respective spheres of action, although existing and exercising their powers within the same territorial limits.

Neither government can intrude within the jurisdiction of the other, or authorize any interference therein, by its judicial officers, with the action of the other. But whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy, until the validity of the different enactments and authorities is determined by the tribunals of the United States.

In such case, the surrender to a state court of the right to determine the existence of its sovereignty is the surrender of sovereignty itself. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Cohens* v. *Virginia*, 6 Wheat. 264 (1821); *Ableman* v. *Booth*, 21 How. 506 (1858); *Ex parte Siebold*, 100 U. S. 371 (1879); *Tennessee* v. *Davis*, 100 U. S. 257 (1879).

Such absolute and perfect protection being thus guaranteed to them by the Constitution, this at least must necessarily follow: that if, when attacked in the discharge of their duties, they protect themselves, or are protected by others, whose aid in the emergency they require, such protection is not merely self-defence authorized by the law of nature or the common law, but is an act clearly authorized by, and done in pursuance of, the Constitution, which enjoins them to proceed against all obstacles in the discharge of their duties.

But for the letter of the law, as it is so stoutly insisted that we must have "*a law*" to authorize the protection of the judge: Article III., Section 1, of the Constitution, declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish;" and the second section proceeds to define the cases to which this judicial power shall extend, and as Jay, C. J., says, in *Chisholm* v. *Georgia*, 2 Dall. 475, this shows the precise sense and latitude in which the words "to establish justice," as used in the preamble, are to be understood.

To carry into practical operation the provisions of the Constitution, "to establish justice," and bring it home to the people, Congress has divided the United States into judicial

districts, Rev. Stat. § 530; two of which are in the State of California, Rev. Stat. § 531; Act of August 5, 1886, 24 Stat. 308, c. 928. Circuit Courts are required by law to be held in these districts, Rev. Stat. § 609; and Mr. Justice Field was required by law to be present at them at least once in two years, Rev. Stat. § 610. In obedience to these laws, he was, at the time and place of the attack, travelling from one California circuit, where he had been holding court, to the other, where he was about to hold it. He was, therefore, at the time and place of the attack, *in the direct and immediate discharge of his official duties,—just as much so as if he had been sitting in court in San Francisco.*

Nothing can be clearer than that, if Mr. Justice Field himself had taken the life of Terry necessarily in the defence of his own, in the maintenance and protection of his right and duty to proceed upon his circuit and administer justice at San Francisco, the Constitution and the laws already cited imposing that duty upon him would have brought his case, beyond all question, within section 753 of the Revised Statutes. Neagle's act does so on the same principle and for the same reasons.

IV. But to Neagle's right and duty, as a bystander and citizen, to protect Mr. Justice Field, is to be added his official authority and duty conferred and imposed upon him by acts of Congress as a United States deputy marshal, attending the Justice on his circuit, within the district of which he was marshal. Thus, acting under federal authority and in pursuance of the statutes under which he was appointed, his act in protection of the Justice was clearly within the category of section 753 of the Revised Statutes, "done in pursuance of a law of the United States."

Conceding that marshals must look to the acts of Congress for their powers, these are ample to cover the above proposition. See Rev. Stat. §§ 787, 788. The latter section confers upon them the powers given to sheriffs and deputy sheriffs by state laws. The California code conferred upon sheriffs and their deputies the usual powers to preserve the peace, suppress riots, etc. The Supreme Court of the State has also held that

where the code is silent the common law governs. One of the common-law duties of a sheriff and his deputies was to accompany the judges on circuit and to protect them by an armed force. 1 Macaulay's History, 223; Dalton's Office of Sheriffs, London, 1698, c. 98.

These statutes certainly constituted Neagle a peace officer, to keep the peace of the United States when it was broken by the attack on Mr. Justice Field. That, under such circumstances or similar ones, there is such a thing as "the peace of the United States," and that the marshal and his deputies are the proper arm of the federal government to maintain it, seems to have been definitely settled by this court in *Siebold's Case*, *ut supra*.

V. But, if more be needed to demonstrate that Neagle, in protecting Mr. Justice Field, was discharging a duty imposed upon him by federal authority, or, in other words, was acting in pursuance of a law of the United States, it is to be found in the order of the Attorney General, which is conclusively presumed to have been the order of the President, commanding the performance of that duty.

We live under a government of laws and not of men, and can claim no authority or power for the President, or for any executive department, not conferred by law. What we assert is, that it is not only within the lawful power, but is the plain duty of the President, when informed that the due and regular administration of justice, on one of the federal circuits, is about to be interfered with by a threatened attack on the federal judge, assigned by law to administer it, and actually engaged in that service, to provide, by adequate means, for his protection. *Little* v. *Barreme*, 2 Cranch, 170; *McElrath* v. *United States*, 102 U. S. 426; *Runkle* v. *United States*, 122 U. S. 543, 557; *United States* v. *Macdaniel*, 7 Pet. 1, 14; *Decatur* v. *Paulding*, 14 Pet. 497; 6 Opinions Attys. Gen. 341, 342, 346; 1 Opinions Attys. Gen. 475; *Confiscation Cases*, 20 Wall. 92, 108; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279, 284; *Wells* v. *Nickles*, 104 U. S. 444.

VI. The court below did not err in holding that Neagle used no more force than was necessary in protecting Mr.

Justice Field, and that he was therefore entitled to his discharge from custody "for an act done under a law of the United States."

VII. The clearly ascertained fact of the case, that the petitioner was in custody of a state court for an act done in pursuance of a law of the United States, and that he was still an officer of the United States, under obligation to proceed day by day with the discharge of his official duties, shows clearly that he was "in custody in violation of the Constitution of the United States," as provided by the other clause of section 753 of the Revised Statutes, and equally entitled to his immediate discharge on that ground, in the discretion of the Circuit Court, just as much as Mr. Justice Field himself was entitled to be.

Mr. G. A. Johnson, Attorney General of the State of California, for appellant.

Section 754 of the Revised Statutes says that application for the writ of *habeas corpus* shall be made by complaint in writing, signed by the person for whose relief it is intended, and that the facts set forth in the complaint shall be verified by the oath of the person making the application. The application for this writ was not signed by the relator, nor sworn to by him. The petitioner is A. L. Farrish, and not David Neagle, and the petition is sworn to by Farrish.

The amended traverse to the return was filed after the evidence was heard, and should have been stricken out. The testimony and proofs should have been stricken out, being introduced before the completion of the issues, but motions for these purposes were denied.

Respondent below then filed a demurrer to the amended traverse, but the court decided the whole case without first passing on the demurrer.

So much for the technical objections. As to the main question, we concede in the outset that in accordance with § 753, Rev. Stat. the writ of *habeas corpus* may extend to a prisoner in jail, if he is in custody for an act done or omitted in pursu-

ance 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. But what we maintain is that the word "law," as mentioned in Section 753, means statutory law and its necessary incidents.

We propose now to call the court's attention to the authorities cited by Judges Sawyer and Sabin, in their opinion in the court below, discharging the relator, and will endeavor to see whether they sustain their conclusion. The great question involved is as to the proper boundary lines between national and state jurisdiction. The judges say: "We simply determine whether it (the homicide) was an act performed in pursuance of a law of the United States. Nor do we act in this matter because we have the slightest doubt as to the authority of the state courts, and their ability and disposition to, ultimately, do exact justice to the prisoner. We have not the slightest doubt or apprehension on that particular, but there is a principle involved."

In the foregoing we agree with them entirely, and we are all desirous that the principle shall be definitely and permanently settled.

The first case cited is *Ex parte Royall*, 117 U. S. 241, 249. This case illustrates how careful federal courts are, in exercising a discretionary power, to interfere with process issued under state laws; that it is not only a matter of comity, but "it is a principle of right and of law, and, therefore, of necessity"; and it is a duty to conciliate rather than alienate and dissever the federal and state tribunals, "so that they may coöperate as harmonious members" of one judicial system.

This machinery of a federal government and of state governments is at once delicate and complex, and consists of balances and adjustments for all time to come, so that there may be no friction; like the harmony of our solar system, where each planet moves in its own orbit, without any impingement by the greater orbit which lightens all.

Ex parte Royall has no application to the case at bar, for in that case there was a constitutional question involved,

whether or not the constitutional provision against impairing the obligation of a contract was violated by the act of the General Assembly of Virginia; while the opinion of Judges Sawyer and Sabin does not claim that the statute of California against murder is unconstitutional, or that such a statute does not properly appertain to the police power of the State; so the case of *Ex parte Royall* and the case at bar are not parallel. Nor does the opinion claim, as we understand it, that any specific provision of the constitution of the United States has been infringed by the arrest and detention of the relator.

The next case cited is *Ex parte Siebold*, 100 U. S. 371, 392. This case, and the other cases where indictments had been found, involved the question of the constitutionality of certain sections of Title 26 of the Revised Statutes, entitled "The Elective Franchise," to wit: Sections 2011, 2012, 2016, 2017, 2021, 2022; and also §§ 5515, and 5522, under the title "Crimes." These sections relate to elections of members of the House of Representatives, and were an assertion on the part of Congress of a power to pass laws for regulating and superintending said elections. The question involved was the constitutional power of Congress to make such regulations, and this court sustained such power. In that case there was an act of Congress against obstructing the supervisors of elections and the marshals, and giving them power to keep the peace. In the case at bar there is no act of Congress, as we contend, nor, if we understand the opinion of the court below, is it contended that there is an act of Congress giving jurisdiction to the federal court of this case of alleged murder.

The next case cited by Judge Sawyer is that of *Tennessee* v. *Davis*, 100 U. S. 257. But that case and this are entirely different. That case was removed from the state court into the federal court because of an express act of Congress bearing on the subject (Section 643, Rev. Stat.). The case was transferred to the Circuit Court under the provisions of the foregoing act. A motion was made in the Circuit Court by the Attorney General to remand the case to the state court, on the ground that the federal court had no jurisdiction.

The case went up to the Supreme Court on a certificate of division of opinion between the judges, and yet even in such a case as that, where there was an express act of Congress, two of the judges dissented, Mr. Justice Clifford and Mr. Justice Field.

The majority in their opinion say: "A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted." p. 264. Here there is no statute of the United States which expressly or by necessary implication gave any authority for the relator to commit the homicide in question, so that his act could become a matter of federal cognizance.

The next case cited by the judges in their opinion is that of *Ex parte Jenkins et al.*, 2 Wall. Jr. 521. That case can have no significance here on this inquiry. That was a case, where, as is said, Jenkins and other deputy United States marshals were arrested on the warrant of a justice of the peace in Pennsylvania for shooting and wounding a negro, who resisted an arrest attempted by them under a warrant issued by the United States Court for a fugitive slave, in which case the justice of the United States Circuit Court took jurisdiction, and discharged them on a writ of *habeas corpus*. But in this case there was a law of the United States, to wit: the Fugitive Slave Law of 1850, and a writ had been issued to the marshal by a United States judge under that law; hence, Mr. Justice Grier well says: "In conclusion, as we find that the prisoners are officers of the United States, in confinement for acts done in pursuance of a law of the United States, and under a process from a judge of the same, . . . therefore, the order of the court is, that the prisoner be discharged."

The next case referred to in the opinion we are reviewing is *Ex parte Robinson*, 6 McLean, 355. A petition and affi-

davit of Hiram H. Robinson, marshal of the United States, stated that he was imprisoned under the order of the Honorable Judge Parker, one of the judges of the court of common pleas for the county of Hamilton, for the performance of his duty as marshal, under process signed by a commissioner of the United States, and prayed for a writ of *habeas corpus*. He was discharged by Judge McLean, because what he did was authorized by the Fugitive Slave Act of 1850.

The next case cited in the opinion of Judges Sawyer and Sabin is *United States ex rel. Roberts* v. *Jailor of Fayette County*, 2 Abb. (U. S.) 265, 279. This is a case where a deputy marshal was assisted by Roberts in endeavoring to serve process upon one Call, who was charged with crimes under the internal revenue laws, and who was killed by Roberts. Says the judge: "I disclaim all right and power to discharge the relator on any such ground as that the proof shows he acted in self-defence. A jury would probably acquit him on such ground, independent of the process under which he acted, but I have nothing to do with such an inquiry. It belongs only to the state court. I have only to inquire whether what he did was done in pursuance of a law and process of the United States, and so *justified*, *not excused*, by that law and process."

The next case cited in the opinion of the lower court is *In re Ramsey*, 2 Flippin, 451. The prisoner, while in the discharge of his duty as deputy United States marshal, killed one Joseph Lightfoot. For that he was arrested and held by the state officers. The officer had in his possession a warrant for the arrest of Lightfoot at the time of the homicide; Lightfoot had declared that he would not submit to an arrest; had reason to know that the officer came there to arrest him, and had a warrant; and his conduct was such as to imperil the life of the officer. Judge Ballard discharged the marshal.

The next case cited is *In re Neill*, 8 Blatchford, 167, which involved certain statutes, whereby the power of discharging from service in the army of the United States minors under the age of eighteen years is taken away from the courts, and is confided wholly to the Secretary of War. The petitioner, General Neill, refused to produce the body of an enlisted sol-

dier before a state judge, and was discharged by Mr. Justice Blatchford, on the basis of these statutes and the statutes in relation to the writ of *habeas corpus*.

The next case cited is *In re Farrand*, 1 Abb. (U. S.) 140, where a commander in the army of the United States made return to a writ of *habeas corpus* issued by a state court, showing that he held the petitioner as a recruit in the army, and pursuant to laws of the United States regulating enlistments. The state court directed the recruit to be discharged. The officer refused to discharge him, and was committed for contempt. Judge Ballard, on *habeas corpus*, discharged him.

The next case cited is *Electoral College of South Carolina*, 1 Hughes, 571. The conclusion of Judge Bond's opinion will sufficiently explain the case. He says: "That the state board of canvassers were clothed, under the law, with discretionary powers, which required them to discriminate the votes; to determine and certify the candidates elected after scrutiny, and that they were a part of the executive department of the government, and were in nowise subject to the control, as to what they should do after they had commenced to perform that duty, of the judicial department, and that as this was a general election, at which members of Congress were to be elected, and electors of President and Vice-President of the United States to be chosen, they were acting in official capacity; or in other words, *in pursuance of a law of the United States;* and, therefore, if any one disturbs them in the exercise of their functions, they are entitled to the protection of the courts of the United States."

Thus it will be seen that in all these cases cited by Judges Sawyer and Sabin some provision of the Constitution of the United States was violated, or some statute of the United States, or some order or process of a judge or court of the United States, and for this reason the petitioner was discharged from arrest.

In fact, that court is confronted with a formidable array of authorities and opinions in opposition to its view. *United States* v. *Guiteau*, 1 Mackey, 498, 538; *Ex parte Crouch*, 112 U. S. 179; the dissenting opinions of Mr. Justice Clifford and

Mr. Justice Field in *Tennessee* v. *Davis*, *ubi supra;* in *Ex parte Virginia*, 100 U. S. 349; and *Virginia* v. *Rives*, 100 U. S. 336; although we admit, as claimed, that the necessary incidents and implications of the statutes of Congress are as much a part of the law as their express provisions; for the Constitution itself confers on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted. (Art. 1, sec. 8, Clause 18.)

There is here no act of Congress, as in the act incorporating the United States Bank, *Osborn* v. *Bank of the United States*, 9 Wheat. 865; no act of Congress, as in the case of *Tennessee* v. *Davis*, to wit: Section 643, Revised Statutes; no process issued by a United States commissioner commanding the arrest of some one charged with certain crimes under the internal revenue laws, as in the case of *United States ex rel. Roberts* v. *Jailor of Fayette County*, and in the case of *Ableman* v. *Booth*, 21 How. 507; no showing that the party seeking his enlargement was duly mustered into the military service of the United States, and was detained by its officer as such soldier, as in *Tarble's Case*, 13 Wall. 397; and no process from a Circuit Court or judge, as in the case of *Ex parte Jenkins et al.*

We respectfully submit, therefore, whether or not the law as laid down by the lower court is not a new departure from established precedents and well adjudicated cases. Any other position would seem to be alarming in its character, and obliterative of the terminal bounds between federal and state jurisdiction. It would recognize a vast body of officers, and constantly increasing, as owing no allegiance except to the federal courts, and possessed of special privileges and immunities not conferred by any act of Congress.

We need not particularize, as such a holding would include the whole service of the United States, — Mint, Post Office, Customs, Land Department, Sub-Treasury, Internal Revenue.

Even if it be conceded that Congress has the right to legislate on this subject, and make such a case as the one at bar a case arising under the laws of the United States, it is sufficient to say that Congress has not done so, and there is no other

repository of federal legislative power than the Congress. The general government itself is but a government of limited powers, though supreme within those limits. The great residuum of our liberties exists in the States and the people thereof; they consist in inherent powers and are self-derived, not the outcome of a concession which they have made in the grant to the United States.

Our position is fully covered by the case of *Ex parte Yarbrough*, 110 U. S. 651, 659, where the court says: "It is very true that while Congress at an early day passed criminal laws to punish piracy with death, and for punishing all ordinary offences against person and property committed within the District of Columbia, and in forts, arsenals, and other places within the exclusive jurisdiction of the United States, *it was slow to pass laws protecting officers of the government from personal injuries inflicted while in discharge of their official duties within the States. This was not for want of power, but because no occasion had arisen which required such legislation, the remedies in the state courts for personal violence having proved sufficient.*

"Perhaps the earliest attempts of Congress to protect government officers, while in the exercise of their duty in a hostile community, grew out of the nullification ordinance of South Carolina, and is found in the act further to provide for the collection of duties on imports. . . . When, early in the late civil war, the enforcement of the acts of Congress for obtaining soldiers by draft brought the officers engaged in it into hostile neighborhoods, it was found necessary to pass laws for their protection. Accordingly, in 1863, an act was passed making it a criminal offence to assault or obstruct any officer while engaged in making the draft or in any service in relation thereto." 12 Stat. 731. See also *Ex parte Merryman*, Taney's Dec. 246; *Kendall* v. *United States*, 12 Pet. 527, 611; *Tracy* v. *Swartwout*, 10 Pet. 80, 94; *Gelston* v. *Hoyt*, 3 Wheat. 246, 331.

It is claimed also by the court below that there is a common law which may be appealed to in this case, which contention we have answered by saying that he is confronted with

statutes on the subject matter. But is there any common law for the United States as applicable to this case? Of course, common law terms are to receive a common law signification, such as murder or any other offence at common law, where it is not otherwise defined by act of Congress, or such as *habeas corpus*, or trial by jury.

In the case of *State of Pennsylvania* v. *The Wheeling, etc., Bridge Company et al.*, 13 How. 518, 563, the court says: "It is said that there is no common law of the Union on which the procedure can be founded; that the common law of Virginia is subject to its legislative action, and that the bridge, having been constructed under its authority, it can in no sense be considered a nuisance: that whatever shall be done within the limits of a State is subject to its laws, written or unwritten, unless it be a violation of the Constitution, or of some act of Congress. It is admitted that the federal courts have no jurisdiction of common law offences, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction." See also *Wheaton* v. *Peters*, 8 Pet. 591, 658; *Ex parte Bollman*, 4 Cranch, 75, 93.

We cannot close our argument in this case without bringing up the subject of the police power, which is an inherent power with the States, which they cannot surrender or abdicate, and which cannot be taken away, although Congress may establish police regulations also; but their operation must be confined to the subjects over which it is given control by the Constitution of the United States. The whole domain of the criminal law comes under this power; and the common law maxim, "*Sic utere tuo ut non alienum lædas*," seems to express in a few words its extensive application. Whatever concerns the public order, the public morals, the public health, the public security and safety, and the right of any and every person to enjoy these immunities, comes under the general police power of the State. The offences which Congress has the right to define and punish are only offences against the authority of the United States. It cannot assume any supervision of the police regulations of the States. All this is elementary learning.

There is a police regulation of the State of California defining the crime of murder and affixing the punishment, when committed within the territory of the State.

This is a matter of mere internal regulation, which can be best looked after and provided for in local districts, and to make it an exclusively national question or a concurrent one with the States would lead to constant attrition, inharmony, conflicts, and embroilments between the States and the national government, which it was the express design of the Constitution to prevent.

The Constitution was formed to make a more perfect union, establish justice, insure domestic tranquillity, and promote the general welfare. Hence, the judicial power of the United States is confined to cases arising under the Constitution of the United States, the laws of the United States, and treaties made, or which shall be made, under their authority, and to some special cases and controversies which have no bearing on the pending question.

As to the extent of the police powers, we cite *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Mugler* v. *Kansas*, 123 U. S. 623, 657; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Barbier* v. *Connolly*, 113 U. S. 27.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, for appellant, submitted on their brief.

Mr. Justice Miller, after stating the case as above, delivered the opinion of the court.

If it be true, as stated in the order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court.

Section 753 of the Revised Statutes reads as follows:

"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; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

And section 761 declares that when by the writ of *habeas corpus* the petitioner is brought up for a hearing the "court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." This of course means that if he is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.

By the law, as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the Circuit Court from any court of justice or judge inferior to the Circuit Court in a certain class of *habeas corpus* cases. But there was no appeal to the Supreme Court in any case except where the prisoner was the subject or citizen of a foreign State, and was committed or confined under the authority or law of the United States or of any State, on account of any act done or omitted to be done under the commission or authority of a foreign State, the validity of which depended upon the law of nations. But afterwards, by the act of Congress of March 3, 1885, 23 Stat. 437, this was extended by amendment as follows:

"That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: 'From the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described in the preceding section.'"

The preceding section here referred to is section 763, and is the one on which the prisoner relies for his discharge from custody in this case.

It will be observed that in both the provisions of the Revised Statutes and of this latter act of Congress the mode of review, whether by the Circuit Court of the judgment of an inferior court or justice or judge, or by this court of the judgment of a Circuit Court, the word "appeal," and not "writ of error," is used, and as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner Neagle had its origin in a suit brought by William Sharon of Nevada, in the Circuit Court of the United States for the District of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing, possessed and exhibited by her, purporting to be a declaration of marriage between them, under the code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge Sawyer, the Circuit Judge for that circuit, and Judge Deady, United States District Judge for Oregon, who had been duly appointed to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not

genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be endorsed 'cancelled,' and that the clerk write across it 'cancelled' and sign his name and affix his seal thereto."

The rendition of this decree was accompanied by two opinions, the principal one being written by Judge Deady and a concurring one by Judge Sawyer. They were very full in their statement of the fraud and forgery practised by Miss Hill, and stated that it was also accompanied by perjury. And inasmuch as Mr. Sharon had died between the hearing of the argument of the case on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, *nunc pro tunc*.

Nothing was done under this decree. The defendant, Sarah Althea Hill, did not deliver up the instrument to the clerk to be cancelled, but she continued to insist upon its use in the state court. Under these circumstances, Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the Circuit Court for the Northern District of California, on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging also the intermarriage of Miss Hill with David S. Terry, of the city of Stockton in California, and making the said Terry and wife parties to this bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief.

This case was argued in the Circuit Court before Field, Circuit Justice, Sawyer, Circuit Judge, and Sabin, District Judge. While the matter was held under advisement, Judge Sawyer, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to

have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge Sawyer, and had her husband change seats so as to sit directly in front of the Judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares," — the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "The best thing to do with him would be to take him out into the bay and drown him." These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us.

This was August 14, 1888. On the 3d of September, the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice Field, and during its delivery a scene of great violence occurred in the court-room. It appears that shortly before the court opened on that day, both the defendants in the case came into the court-room, and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice Field there were present on the bench Judge Sawyer, and Judge Sabin of the District Court of the United States for the District of Nevada. The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived, and the opinion of the court necessarily discussed this question without reaching the merits of the controversy. When allusion was made to this question Mrs. Terry rose from her seat, and addressing the justice who was delivering the opinion, asked in an excited manner whether he was going to order her to give up the marriage contract to be cancelled. Mr. Justice Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said,

in a very excited and violent manner, that Justice Field had been bought, and wanted to know the price he had sold himself for; that he had got Newland's money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice Field then directed the marshal to remove her from the court-room. She asserted that she would not go from the room, and that no one could take her from it.

Marshal Franks proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, rose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie-knife, when he was seized by persons present and forced down on his back. In the meantime Mrs. Terry was removed from the court-room by the marshal, and Terry was allowed to rise and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in court.

For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect. Both the judgment of the court on the petition for the revival of the decree in the case of Sharon against Hill and the judgment of the Circuit Court imprisoning Terry and wife for contempt have been brought to this court for review, and in both cases the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry*, 128 U. S. 289, and *Terry* v. *Sharon*, 131 U. S. 40.

Terry and Mrs. Terry were separately indicted by the grand jury of the Circuit Court of the United States during the same term for their part in these transactions, and the cases were

pending in said court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court-room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that *he* was not through with Judge Field yet; and, while in jail at Alameda, Terry said that after he got out of jail he would horsewhip Judge Field; and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge Field would resent it, he said: "If Judge Field resents it I will kill him." And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that "they were all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge Field some day.

Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Mr. Thomas T. Williams, editor of one of the daily newspapers of California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the court, he said that Justice Field had put a lie in the record about him, and when he met Field he would have to take that back, "and if he did not take it back and apologize for having lied about him, he would slap his face or pull his nose." "I said to him," said the witness, "'Judge Terry, would not that be a dangerous thing to do?

Justice Field is not a man who would permit any one to put a deadly insult upon him like that.' He said, 'Oh, Field won't fight.' I said, 'Well, Judge, I have found nearly all men will fight; nearly every man will fight when there is occasion for it, and Judge Field has had a character in this State of having the courage of his convictions, and being a brave man.' At the conclusion of that branch of the conversation, I said to him, 'Well, Judge Field is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.' He said, 'Well, that's as good a thing as I want to get.' The whole impression conveyed to me by this conversation was, that he felt he had some cause of grievance against Judge Field; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight." Mr. Williams says that after the return of Justice Field to California in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him.

It is useless to go over the testimony on this subject more particularly. It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge Field during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice Field, as soon as it became known that he was going to attend the Circuit Court in that year.

So much impressed were the friends of Judge Field, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney General of the United States suggesting the propriety of his furnishing some protection to the judge while in California. This resulted in a correspondence between the Attorney General of the United States, the District Attorney, and the marshal of the Northern District of California on that subject. This correspondence is here set out:

"DEPARTMENT OF JUSTICE,
"WASHINGTON, *April 27th*, 1889.

"JOHN C. FRANKS, United States Marshal, San Francisco, Cal.

"SIR: The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States Circuit Court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his Honor Justice Field or whoever may be called upon to hear and determine the matter. Of course, I do not know what may be the feelings or purpose of Mr. and Mrs. Terry in the premises, but many things which have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the court and the character of its judge that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties.

"You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the district attorney, if deemed best.

"Yours truly, W. H. H. MILLER.
"*Attorney General.*"

"UNITED STATES MARSHAL'S OFFICE,
"NORTHERN DISTRICT OF CALIFORNIA,
"SAN FRANCISCO, *May* 6, 1889.

"Hon. W. H. H. MILLER, Attorney General, Washington, D. C.

"SIR: Yours of the 27th ultimo, at hand.

"When the Hon. Judge Lorenzo Sawyer, our Circuit Judge, returned from Los Angeles (some time before the celebrated court scene) and informed me of the disgraceful action of Mrs. Terry towards him on the cars, while her husband sat in front smilingly approving it, I resolved to watch the Terrys (and so notified my deputies) whenever they should enter the court-room, and be ready to suppress the very first indignity offered by either of them to the judges. After this, at the time of their ejectment from the court-room, when I held Judge Terry

and his wife as prisoners in my private office and heard his threats against Justice Field, I was more fully determined than ever to throw around the Justice and Judge Sawyer every safeguard I could.

"I have given the matter careful consideration, with the determination to fully protect the federal judges at this time, trusting that the department will reimburse me for any reasonable expenditure.

"I have always, whenever there is any likelihood of either Judge or Mrs. Terry appearing in court, had a force of deputies with myself on hand to watch their every action. You can rest assured that when Justice Field arrives, he, as well as all the federal judges, will be protected from insults, and where an order is made it will be executed without fear as to consequences. I shall follow your instructions and act with more than usual caution. I have already consulted with the United States attorney, J. T. Carey, Esq., as to the advisability of making application to you, at the time the Terrys are tried upon criminal charges, for me to select two or more detectives to assist in the case, and also assist me in protecting Justice Field while in my district. I wish the judges to feel secure, and for this purpose will see to it that their every wish is promptly obeyed. I notice your remarks in regard to the publicity of your letter, and will obey your request. I shall only be too happy to receive any suggestions from you at any time.

"The opinion among the better class of citizens here is very bitter against the Terrys, though, of course, they have their friends, and, unfortunately, among that class it is necessary to watch.

"Your most obedient servant, J. C. Franks,
"*U. S. Marshal Northern Dist. of Cal.*"

"San Francisco, Cal., *May* 7, 1889.

"Hon. W. H. H. Miller,

"U. S. Attorney General, Washington, D. C.

"Dear Sir: Marshal Franks exhibited to me your letter bearing date the 27th ult., addressed to him upon the subject

of using due caution by way of protecting Justice Field and the federal judges here in the discharge of their duties in matters in which the Terrys are interested. I noted your suggestion with a great degree of pleasure, not because our marshal is at all disposed to leave anything undone within his authority or power to do, but because it encouraged him to know and feel that the Head of our Department was in full sympathy with the efforts being made to protect the judges and vindicate the dignity of our courts.

"I write merely to suggest that there is just reason, in the light of the past and the threats made by Judge and Mrs. Terry against Justice Field and Judge Sawyer, to apprehend personal violence at any moment and at any place, as well in court as out of court, and that while due caution has always been taken by the marshal when either Judge or Mrs. Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge Sawyer or Justice Field against harm when away from the appraisers' building.

"Discretion dictates, however, that a protection should be thrown about them at other times and places, when proceedings are being had before them in which the Terrys are interested, and I verily believe, in view of the direful threats made against Justice Field, that he will be in great danger at all times while here.

"Mr. Franks is a prudent, cool, and courageous officer, who will not abuse any authority granted him. I would therefore suggest that he be authorized in his discretion to retain one or more deputies, at such times as he may deem necessary, for the purposes suggested. That publicity may not be given to the matter, it is important that the deputies whom he may select be not known as such, and that efficient service may be assured for the purposes indicated, it seems to me that they should be strangers to the Terrys.

"The Terrys are unable to appreciate that an officer should perform his official duty when that duty in any way requires his efforts to be directed against them. The marshal, his deputies, and myself suffer daily indignities and insults from Mrs.

Terry, in court and out of court, committed in the presence of her husband and without interference upon his part. I do not purpose being deterred from any duty, nor do I purpose being intimidated in the least degree from doing my whole duty in the premises, but I shall feel doubly assured in being able to do so knowing that our marshal has your kind wishes and encouragement in doing everything needed to protect the officers of the court in the discharge of their duties.

"This, of course, is not intended for the public files of your office, nor will it be on file in my office. Prudence dictates great caution on the part of the officials who may be called upon to have anything to do in the premises, and I deem it to be of the greatest importance that the suggestions back and forth be confidential.

"I shall write you further upon the subject of these cases in a few days.

"I have the honor to be, your most obedient servant,

"JOHN T. CAREY,

"*U. S. Attorney.*"

"DEPARTMENT OF JUSTICE,

"WASHINGTON, D. C., *May* 27, 1889.

"J. C. FRANKS, Esq., United States Marshal, San Francisco, Cal.

"SIR: Referring to former correspondence of the department relating to a possible disorder in the session of the approaching term of court, owing to the small number of bailiffs under your control to preserve order, you are directed to employ certain special deputies at a *per diem* of five dollars, payable out of the appropriation for fees and expenses of marshals, to be submitted to the court as a separate account from your other accounts against the government for approval, under section 846, Revised Statutes, as an extraordinary expense, that the same may be forwarded to this Department in order to secure executive action and approval.

"Very respectfully, W. H. H. MILLER,

"*Attorney General.*"

The result of this correspondence was that Marshal Franks appointed Mr. Neagle a deputy marshal for the Northern District of California, and gave him special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco.

It appears from the uncontradicted evidence in the case that while the sleeping-car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the Judge refused to do, and he and Neagle got out of the car and went into the dining-room, and took seats beside each other in the place assigned them by the person in charge of the breakfast-room, and very shortly after this Terry and wife came into the room; and Mrs. Terry, recognizing Judge Field, turned and left in great haste, while Terry passed beyond where Judge Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she returned to the eating-room, Terry arose from his seat, and, passing around the table in such a way as brought him behind Judge Field, who did not see him or notice him, came

up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand, and in a very loud voice shouted out: "Stop! stop! I am an officer!" Upon this Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally, and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the Circuit Court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, travelling with him, and aware of all the previous relations of Terry to the Judge, — as he was, — of his bitter animosity, his declared purpose to have revenge even to the point

of killing him, he would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence, unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defence of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves.

Mr. Justice Field was a member of the Supreme Court of the United States, and had been a member of that court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that court. The business of the Supreme Court has become so exacting that for many years past the justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months.

But the justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the Circuit Courts of the United States.

Of these circuits there are nine, to each one of which a justice of the Supreme Court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows:

"The chief justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise."

Section 610 declares that it "shall be the duty of the chief justice, and of each justice of the Supreme Court, to attend at least one term of the Circuit Court, in each district of the circuit to which he is allotted during every period of two years."

Although this enactment does not require in terms that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year, and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit every year.

The justices of the Supreme Court have been members of the Circuit Courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important as necessary, as much a discharge of his official duty as that performed

in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court.

So it is impossible for a justice of the Supreme Court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of attendance on the Circuit Courts as prescribed by section 610, without travelling in the usual and most convenient modes of doing it to the place where the court is to be held. This duty is as much an obligation imposed by the law as if it had said in words "the justices of the Supreme Court shall go from Washington City to the place where their terms are held every year."

Justice Field had not only left Washington and travelled the three thousand miles or more which were necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject.

In the case of *United States* v. *The Schooner Little Charles*, 1 Brock. 380, 382, a question arose before Chief Justice Marshall, holding the Circuit Court of the United States for Virginia, as to the validity of an order made by the District Judge at his chambers, and not in court. The act of Congress authorized stated terms of the District Court, and gave the judge

power to hold special courts at his discretion, either at the place appointed by the law or such other place in the district as the nature of the business and his discretion should direct. He says: "It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;" and cites the practice of the courts in support of that view of the subject.

In the case of *United States* v. *Gleason*, 1 Wool. C. C. 128, 132, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed, and the court was asked to instruct the jury that under these circumstances they were not engaged in the duty of arresting the deserters named. "It is claimed by the counsel for the defendant," says the report, "that if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the purpose of making the arrests at that time, and were returning to headquarters at Grinnell, with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law." But the court held that this was not a sound construction of the statute, and "that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the proper prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still engaged in arresting the deserters, within the meaning of the statute. It is not necessary," said the court, "that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so

long as he is engaged in a service necessary and proper to that employment."

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be 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."

Opinion of the Court.

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected.

The views expressed by this court through Mr. Justice

Bradley, in *Ex parte Siebold*, 100 U. S. 371, 394, are very pertinent to this subject, and express our views with great force. That was a case of a writ of *habeas corpus*, where Siebold had been indicted in the Circuit Court of the United States for the District of Maryland, for an offence committed against the election laws, during an election at which members of Congress and officers of the State of Maryland were elected. He was convicted, and sentenced to fine and imprisonment, and filed his petition in this court for a writ of *habeas corpus*, to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the State of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and state courts on this subject, it is said:

"Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same

places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.' . . . Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and rerefining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. . . . It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

At the same term of the court, in the case of *Tennessee* v. *Davis*, 100 U. S. 257, 262, where the same questions in regard to the relative powers of the federal and state courts were concerned, in regard to criminal offences, the court expressed its views through Mr. Justice Strong, quoting from the case of *Martin* v. *Hunter*, 1 Wheat. 363, the following language: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its con-

stitutional powers;" and then proceeding: "It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection — if their protection must be left to the action of the state court — the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

To cite all the cases in which this principle of the supremacy of the government of the United States, in the exercise of all the powers conferred upon it by the Constitution, is maintained, would be an endless task. We have selected these as being the most forcible expressions of the views of the court, having a direct reference to the nature of the case before us.

Where, then, are we to look for the protection which we

have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the

great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles*, 104 U. S. 444. That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any

positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *United States* v. *San Jacinto Tin Company*, 125 U. S. 273, 279, 280. In that case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practised upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General or any other officer of the government to institute such a suit in the absence of any act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney General to institute that particular suit or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said:

"If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions, than the private individual, is hardly open to argument. . . . There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded, into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases?" The same question was raised in the earlier case of *United States* v. *Hughes*, 11 How. 552, and decided the same way.

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this

protection by the Attorney General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

"The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States.

Section 4176 of the Political Code of California reads as follows:

"The sheriff must:

"First. Preserve the peace.

"Second. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offence.

"Third. Prevent and suppress all affrays, breaches of the peace, riots and insurrections, which may come to his knowledge. . . ."

And the Penal Code of California declares (section 197) that homicide is justifiable when committed by any person "when resisting any attempt to murder any person or to commit a felony or to do some great bodily injury upon any person;" or "when committed in defence of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a felony."

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus*, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury accord-

ing to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. The original act of Congress on the subject of the writ of *habeas corpus*, by its 14th section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question, or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the States. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833, 4 Stat. 634, c. 57, § 7, among other remedies for such condition of affairs, provided, by its 7th section, that the federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act

done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of *habeas corpus* might issue by the federal judges arose out of the celebrated *McLeod Case*, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the federal judges under the writ of *habeas corpus*, by the act of August 29, 1842, 5 Stat. 539, c. 257, entitled "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed: "The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the

proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief." No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867, 14 Stat. 385, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of *habeas corpus* one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case.

We have already cited such decisions of this court as are most important and directly in point, and there is a series of cases decided by the Circuit and District Courts to the same purport. Several of these arose out of proceedings under the fugitive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another State, was arrested by the authorities of the State. In many of these cases they made application to the judges of the United States for relief

by the writ of *habeas corpus*, which give rise to several very interesting decisions on this subject.

In *Ex parte Jenkins*, 2 Wall. Jr. 521, 529, the marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a justice of the peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the Circuit Court of the United States for the Eastern District of Pennsylvania a petition for a writ of *habeas corpus*, which was heard before Mr. Justice Grier, who held that under the act of 1833, already referred to, the marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of Congress concerning the rendition of fugitive slaves. He said: "The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of *habeas corpus*, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned 'by any authority' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed." It "was passed when a certain State of this Union had threatened to nullify acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such state legislation."

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge Kane on another writ of *habeas corpus* and again released. 2 Wall. Jr. 531. A third time the marshal, being indicted, was arrested on a bench warrant issued by the state court, and again brought before the Circuit Court of the United States by a writ of *habeas corpus* and discharged. Some remarks of Judge Kane on this occasion are very pertinent to the objections raised in the present case. He said, 2 Wall. Jr. 543: "It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them [in the

state court], will in effect prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis*, while the case is at bar. It is made ineffectual at any time by the discharge on *habeas corpus*. . . . And there is no harm in this. No one imagines that because a man is accused he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating upon them."

Many other decisions by the Circuit and District Courts, to the same purport, are to be found, among them the following: *Ex parte Robinson*, 6 McLean, 355; 4 Amer. Law Register, 617; *Roberts* v. *Jailor of Fayette Co.*, 2 Abbott (U. S.) 265; *In re Ramsey*, 2 Flippin, 451; *In re Neill*, 8 Blatchford, 156; *Ex parte Bridges*, 2 Woods, 428; *Ex parte Royall*, 117 U. S. 241.

Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the act of 1842. He said: "If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another, is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the state court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either

way, they do not administer the criminal law of a State. In the one case as much as in the other, and no more, do they interfere with state judicial power."

The same answer is given in the present case. To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offence, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impanelled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offence to be submitted to a jury, and if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require.

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties,

Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

Mr. Justice Lamar (with whom concurred Mr. Chief Justice Fuller) dissenting.

The Chief Justice and myself are unable to assent to the conclusion reached by the majority of the court.

Our dissent is not based on any conviction as to the guilt or innocence of the appellee. The view which we take renders that question immaterial to the inquiry presented by this appeal. That inquiry is, whether the appellee, Neagle, shall in this *ex parte* proceeding be discharged and delivered from any trial or further inquiry in any court, state or federal, for what he has been accused of in the forms prescribed by the constitution and laws of the State in which the act in question was committed. Upon that issue we hold to the principle announced by this court in the case of *Ex parte Crouch*, 112 U. S., 178, 180, in which Mr. Chief Justice Waite, delivering the opinion of the court, said: "It is elementary learning that, if a prisoner is in the custody of a state court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on *habeas corpus* issued by a court of the United States, simply because he is not guilty of the offence for which he is held. All questions which may arise in the orderly course of the proceeding against him are to

be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defence to the information under which he is held. Whether his defence is sufficient or not is for the court which tries him to determine. If, in this determination, errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our own reports are numerous. *Ex parte Watkins*, 3 Pet. 202; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Parks*, 92 U. S. 18, 23; *Ex parte Siebold*, 100 U. S. 371, 374; *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Rowland*, 104 U. S. 604, 612; *Ex parte Curtis*, 106 U. S. 371, 375; *Ex parte Yarbrough*, 110 U. S. 651, 653."

Many of the propositions advanced in behalf of the appellee and urged with impressive force we do not challenge. We do not question, for instance, the soundness of the elaborate discussion of the history of the office and function of the writ of *habeas corpus*, its operation under and by virtue of section 753 of the Revised Statutes, or the propriety of its use in the manner and for the purposes for which it has been used, in any case where the prisoner is under arrest by a State for an act done "in pursuance of a law of the United States." Nor do we contend that any objection arises to such use of the writ, and based merely on that fact, in cases where no provision is made by the federal law for the trial and conviction of the accused. Nor do we question the general propositions, that the federal government established by the Constitution is absolutely sovereign over every foot of soil, and over every person, within the national territory, within the sphere of action assigned to it; and that within that sphere its constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability whatever. Nor, again, do we dispute the proposition that whatever is necessarily im-

plied in the Constitution and laws of the United States is as much a part of them as if it were actually expressed. All these questions we pretermit.

The recognition by this court, including ourselves, of their soundness does not in the least elucidate the case; for they lie outside of the true controversy. The ground on which we dissent, and which in and by itself seems to be fatal to the case of the appellee, is this: That in treating section 753 of the Revised Statutes as an act of authority for this particular use of the writ a wholly inadmissible construction is placed on the word "law," as used in that statute, and a wholly inadmissible application is made of the clause "in custody in violation of the Constitution . . . of the United States."

It will not be necessary to consider these two propositions separately, for they are called into this case as practically one.

The section referred to is as follows:

"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," etc.

It is not contended in behalf of the appellee that the writ of *habeas corpus* could be used, as here it is, in any case, without authority of a statute. In *Ex parte Bollman*, 4 Cranch, 75, 94, Chief Justice Marshall said: "The power to award the writ [of *habeas corpus*] by any of the courts of the United States must be given by written law."

It is not contended that there is any statute other than those now found in the Revised Statutes of the United States. Nor is it contended that in those statutes there is any authority for the use here made of the writ other than what is embraced in the clauses above quoted. The issue, as stated above, is thus narrowed to the proper force to be attributed to those clauses.

It is stated as the vital position in appellee's case, that it is not

supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits and act as a body guard to them to defend them against malicious assaults against their persons; that in the view taken of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase; and that it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there was to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments might operate unfavorably. In considering this position, it is indispensable to observe carefully the distinction between the individual man Neagle, and the same person in his official capacity as a deputy marshal of the United States; and also the individual man whose life he defended, and the same person in his official capacity of a Circuit Justice of the United States.

The practical importance of the distinction between the rights and liabilities of a person in his private character, and the authority and immunity of the same person in his official capacity, is clearly pointed out and illustrated in *United States* v. *Kirby*, 7 Wall. 482, 486, in which the court says: "No officer or employé of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws." And the court adds: "Indeed, it may be doubted whether it is competent for Congress to exempt the employés of the United States from arrest on criminal process from the state courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such

exemption should be attributed to Congress unless clearly manifested by its language."

Now, we agree, taking the facts of the case as they are shown by the record, that the personal protection of Mr. Justice Field, as a private citizen, even to the death of Terry, was not only the right, but was also the duty of Neagle and of any other bystander. And we maintain that for the exercise of that right or duty he is answerable to the courts of the State of California, and to them alone. But we deny that upon the facts of this record, he, as deputy marshal Neagle, or as private citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge Field as a Circuit Justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever in fact of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and, therefore, we think that the courts of the United States have in the present state of our legislation no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the sheriff.

The contention of the appellee, however, is that it was his official duty as United States marshal to protect the justice; and that for so doing in discharge of this duty, "which could only arise under the laws of the United States," his detention by the state courts brings the case within section 753 of the Revised Statutes, as aforesaid.

We shall therefore address ourselves as briefly as is consistent with the gravity of the question involved, to a consideration of the justice of that claim. We must, however, call attention again to the formal and deliberate admission that it is not pretended that there is any *single* specific statute making it, in so many words, Neagle's duty to protect the justice. The position assumed is, and is wholly, that the authority

and duty to protect the justice did arise directly and necessarily out of the Constitution and positive congressional enactments.

The Attorney General of the United States has appeared in this case for the appellee, in behalf of the government; and in order that the grounds upon which the government relies in support of its claim against the State of California that Neagle should be discharged on this writ may fully appear, it is proper to give some of his most important propositions in his own language. He maintains that "it was the duty of the judiciary, having been thus protected by the executive department, to sit in judgment upon and to vindicate the officer of the executive department, if innocent, in the discharge of his duty, because such authority in the federal judiciary is essential in principle to the existence of the nation." "We insist that, by the Constitution of the United States, a government was created possessed of all the powers necessary to existence as an independent nation; that these powers were distributed in three great constitutional departments, and that each of these departments is, by that Constitution, invested with all of those governmental powers naturally belonging to such department which have not been expressly withheld by the terms of the Constitution. In other words, that Congress is invested not only with expressed but with implied legislative powers; that the judiciary is invested not only with expressed powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it; and that the President, in like manner, by the very fact that he is made the chief executive of the nation, and is charged to protect, preserve, and defend the Constitution, and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of the government can either take away or abridge; that many of these powers pertaining to each branch of the government are self-executing, and in no way dependent, except as to the ways and means, upon legislation."

"The Constitution provides that before the President enters

upon the execution of his office he shall take an oath — I do solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability *preserve, protect and defend* the Constitution of the United States." And he asks: "Has this clause no significance? Does it not, by necessary implication, invest the President with self-executing powers; that is, powers independent of statute?"

In reply to these propositions, we have this to say: We recognize that the powers of the government, "within its sphere," as defined by the Constitution, and interpreted by the well-settled principles which have resulted from a century of wise and patriotic analysis, are supreme; that these supreme powers extend to the protection of itself and all of its agencies, as well as to the preservation and the perpetuation of its usefulness; and that these powers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications. But while that is all true, it is also true that the powers must be exercised, not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself. These great federal powers, whose existence in all their plenitude and energy is incontestable, are not autocratic and lawless; they are organized powers, committed by the people to the hands of their servants for their own government, and distributed among the legislative, executive, and judicial departments; they are not *extra* the Constitution, for, in and by that Constitution, and in and by it alone, the United States, as a great democratic federal republic, was called into existence, and finds its continued existence possible. In that instrument is found not only the answer to the general line of argument pursued in this case, but also to the specific question propounded by the Attorney General in respect to the President's oath, and its implications.

The President is sworn to "preserve, protect and defend the Constitution." That oath *has* great significance. The sections which follow that prescribing the oath (secs. 2 and 3 of Art. 2) prescribe the duties and fix the powers of the President. But one very prominent feature of the Constitution

which he is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of sec. 8, Art. 1, in which it is declared that "the Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

This clause is that which contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world; and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument. And that clause alone, conclusively refutes the assertion of the Attorney General, that it was "the duty of the executive department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty, because such protection is essential to the existence of the government." Waiving the question of the essentiality of any such protection to the existence of the government, the manifest answer is, that the protection needed and to be given must proceed not from the President, but primarily from Congress. Again, while it is the President's duty to take care that the laws be faithfully executed, it is not his duty to *make* laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution, and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. In fact, for the President to have undertaken to make any law of the United States pertinent to this matter would have been to invade the domain of power expressly committed by the Constitution exclusively to Congress. That body was perfectly able to pass such laws as it should deem expedient in reference to such matter; indeed, it has passed such laws in reference to

elections, expressly directing the United States marshals to attend places of election, to act as peace officers, to arrest with and without process, and to protect the supervisors of election in the discharge of their duties; and there was not the slightest legal necessity out of which to imply any such power in the President.

For these reasons the letters of the Attorney General to Marshal Franks, granting that they did import what is claimed, and granting that the Attorney General was to all intents and purposes, *pro hac vice*, the President, invested Neagle with no special powers whatever. They were, if so construed, without authority of law, and Neagle was then and there a simple deputy marshal, — no more and no less.

To illustrate the large sphere of powers self-executing and independent of statutes claimed to be vested in the executive, reference is made to the continually recurring cases of the President's interference for the protection of our foreign-born and naturalized citizens on a visit to their native country; and we are cited, as a striking instance of the exercise of such power, to the case of Martin Kozsta, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen, and who, whilst at Smyrna, was seized by order of an Austrian official and confined on board an Austrian vessel, and who, being afterwards delivered up to Captain Ingraham, commanding an American war vessel, in compliance with a demand, backed by a demonstration of force, on the part of that officer, was placed in the hands of a French consul subject to negotiations between the American and Austrian governments, resulting in the famous correspondence between the American Secretary of State, Mr. Marcy, and the Chevalier Hülsemann, representing the Austrian government, and the restoration of Kozsta to freedom. We are asked: — Upon what express statute of Congress then existing can this act of the government be justified?

We answer, that such action of the government was justified because it pertained to the foreign relations of the United States, in respect to which the federal government is the ex-

clusive representative and embodiment of the entire sovereignty of the nation, in its united character; for to foreign nations, and in our intercourse with them, states and state governments, and even the internal adjustment of federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit.

That authority the Constitution vests expressly and conclusively in the treaty-making power — the President and Senate — by one simple and comprehensive grant: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." This broad grant makes enumeration of particular powers unnecessary. All other delegations of powers in reference to the international relations of this country are carefully and specifically enumerated and assigned, one by one, to their designated departments. In reply, therefore, to the question, what law expressly justifies such action, we answer, the organic law, the Constitution, which expressly commits all matters pertaining to our diplomatic negotiations to the treaty-making power.

Other cases are referred to in illustration of the same point; but the one which it is alleged presents that principle in the most imposing form is that of *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273. In that case a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of land, on the ground that it had been obtained from the government by fraud and deceit practised upon its officers. There are, it is true, some expressions in the opinion delivered in that case which seem to admit that there is no specific act of Congress expressly authorizing the Attorney General to bring suit for the annulment of a patent procured by fraud from the government; but a close examination of the doctrine of the court shows that it goes no farther than the assertion that the authority of the Attorney General arises by implication, directly and immediately, out of the express law of Congress. The opinion quotes the clause of the Constitution

which declares that the judicial power shall extend to all cases to which the United States shall be a party, and says that this means, mainly, where it is a party plaintiff. It then refers to the statute of Congress which expressly directs the United States District Attorneys to bring suits in behalf of the government; and that the suits thus brought by them are to be under the immediate superintendence and control of the Attorney General. The utmost extent to which the court goes is, that whilst admitting there is no express authority in the Attorney General to institute the suit, yet such authority is directly and necessarily involved in the express provisions of the statute vesting him with the entire control and superintendence of such suits, and the provision and control of the District Attorneys in their conduct of them.

Equally conclusive is the answer which the Constitution makes to the assertion that by the Constitution the judiciary is invested, not only with the express powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it. It may be found in the clause which declares that "The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court;" and in that which declares it shall make all laws necessary and proper for carrying into execution the powers of those tribunals. The correlation between those clauses is manifest and unmistakable. If Congress can and must, by the very terms of the Constitution, make all laws proper for carrying into execution all the powers of any department of the government, and if it can create the Circuit Court, expand its powers, abridge them, and abolish the court at will, how can it be that that court, at the least, shall have any implied powers derived from the Constitution and independent of the statutes? And yet, in this transaction, it must be remembered that Mr. Justice Field is only claimed to be the representative of that court.

Not only do the foregoing views seem to us to be the logical and unavoidable results of original and independent studies of the Constitution, but they are also sustained and enforced by a long series of judicial recognitions and assertions.

Dissenting Opinion: Lamar, J., Fuller, C. J.

In *United States* v. *Fisher*, 2 Cranch, 358, 396, Chief Justice Marshall, in delivering the opinion of the court, said of the clause above relied on: "In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

In *McCulloch* v. *Maryland*, 4 Wheat. 316, 420, 421, Chief Justice Marshall, for the court, delivered one of those opinions which are among the chief ornaments of American jurisprudence. It is largely devoted to an exhaustive analysis of the constitutional clause in question. Among other things, he says: "The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

In *United States* v. *Reese*, 92 U. S. 214, 217, Chief Justice Waite, delivering the opinion of the court, said: "Rights and immunities created by or dependent upon the Constitution of

the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected."

In *Strauder* v. *West Virginia*, 100 U. S. 303, 310, the court say: "A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

Cooley, in his work on "Constitutional Limitations," collates from the numerous adjudications of this court, cited by him, the following principles: "So far as that instrument [the Constitution] apportions powers to the national judiciary, it must be understood, for the most part, as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not, of its own force, give to national courts jurisdiction of the several cases which it enumerates, but an act of Congress is essential, first, to create courts, and afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name. And although the courts of the United States administer the common law in many cases, they do not derive authority from the common law to take cognizance of and punish offences against the government. Offences against the nation are defined and their punishment prescribed by acts of Congress." In a note to this paragraph he says: "Demurrer to an indictment for a libel upon the President and Congress. By the court: 'The only question which this case presents is, whether the Circuit Courts can exercise a common law jurisdiction in criminal cases. . . . The general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States; whatever is not expressly given to

the former the latter expressly reserve. . . . It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.' *United States* v. *Hudson*, 7 Cranch, 32; see *United States* v. *Coolidge*, 1 Wheat. 415. 'It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption.' Per McLean, J., *Wheaton* v. *Peters*, 8 Pet. 591. 658;" and citing many other authorities.

In *Tennessee* v. *Davis*, 100 U. S. 257, 267, referring to the judiciary act of 1789, the court said: "It [the Constitution] did not attempt to confer upon the federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required," etc.

It would seem plain, therefore, that if the Constitution means anything, and if these judicial utterances, extending as they do over a period of eighty years, and embracing a variety of interests, mean anything, they mean that the power to provide and prescribe the laws necessary to effectuate the governmental and official powers of the United States and its officers is vested in Congress.

The gravamen of this case is in the assertion that Neagle slew Terry in pursuance *of a law* of the United States. He who claims to have committed a homicide by authority must show the authority. If he claims the authority of law, then *what* law? And if a law, how came it to be a law? Somehow and somewhere it must have had an origin. Is it a law because of the existence of a special and private authority issued from one of the executive departments? So in almost these words

it is claimed in this case. Is it a law because of some constitutional investiture of sovereignty in the persons of judges who carry that sovereignty with them wherever they may go? Because of some power inherent in the judiciary to create for others a rule or law of conduct outside of legislation, which shall extend to the death penalty? So, also, in this case, *in totidem verbis*, it is claimed. We dissent from both these claims. There can be no such law from either of those sources. The right claimed must be traced to legislation of Congress; else it cannot exist.

If it be said that Congress has the power to make such laws, yet in the absence of statutes from that source other departments may act in the premises; or if it be said that the possession of that power by the government does not negative the existence of similar powers in other departments of the government; the response that these powers are plainly not concurrent, but are exclusive, can be made in the language of Mr. Justice Story, in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617. Speaking of the fugitive slave law of 1793, he says: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, . . . in such a case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it."

If it be said that that case had reference to the interference of a State with congressional powers, whilst in the case at bar no such question is involved, the answer is that the difference is favorable and not adverse to the theory of this opinion. The principle is the same; and if that principle can be applied, as applied it was, to the denial to a state legislature of the powers previously enjoyed over matters originally appertaining to it, *a multo fortiori* will it apply to the exclusion of two cöordinate departments of the same government from powers which they never possessed.

As before stated, if the killing of Terry was done "in pursu-

ance of a law of the United States," that law had somewhere an origin. There are under the general government only two possible sources of law. The common law never existed in our federal system. The legislative power possessed by the United States must be found, either exercised in the Constitution as fundamental law, or by some body or person to whom it was delegated by the Constitution. It has already been pointed out that the Constitution does not itself create any such law as that contended for; and that it could not have been created by any executive or judicial action or status is made manifest, not only by the clause in sec. 8, Art. I, already cited and commented on, but also by sec. 1, Art. I, and the two paragraphs of Art. VI.

Sec. 1, Art. I, provides that "*All* legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The second paragraph of Art. VI provides that "the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." Now, what is it that constitutes the supreme laws, of which so much is said in this case? How distinctly, how plainly and how fully the Constitution answers! The Constitution itself, the treaties, and the laws made in pursuance of the Constitution. Made by whom? By Congress, manifestly. The two clauses already quoted give the power of legislation in the most sweeping terms. It alone has power to make any law. Anything purporting to be a law not enacted by Congress would not be "in pursuance of" any provision of the Constitution.

Thus we are driven to look for the source of this asserted law to some legislation of Congress — legislation made under either its express constitutional authority, or under its properly implied authority, it is immaterial which; and there is none of either class.

The authority is sought to be traced here through the self-preservative power of the federal judiciary implied from the Constitution; and then through the obligation of the execu-

tive to protect the judges, implied from the Constitution, whereas there is no such implication in either case, for the simple but all-sufficient reason that by the Constitution itself the whole of those functions is committed to Congress.

Since then the Constitution did not, by its own direct provisions, regulate this matter, but committed it to the hands of Congress with full powers in the premises; it is only by the enactment of some law of Congress that the appellee can show that he is in custody "in violation of the Constitution." As previously remarked, the two propositions are, as to this case, essentially one. Turning again to the statute under which the writ is sued out, we find that the clause relied on is that which makes the writ applicable where the person "is in custody for an act done or omitted in pursuance of a law of the United States." The question then arises, What sort of law? What does the expression import? Is it not plain that it means just what the same expression all through the Constitution imports?

If that instrument, which is the fountain of the federal power, be consulted, it will be found that in it and the amendments thereto the word law, in either its singular form or its plural, laws, is used forty-two times. Of these instances of that use sixteen are where the word is used in reference to the jurisprudence of the States, and of the law of nations, or where they are merely terms of description — such as "courts of law," "cases in law and equity," etc. Of the other instances of its use, and which all have reference to that body of rules which constitute the jurisprudence distinctly of the United States, there are only three cases in which it is not manifest that the word is used as equivalent to "statutes," "enactments of the Congress;" and it is clear in those three instances the word is used also as equivalent to "statutes." The following are examples:

"The Congress may, at any time, *by law*, make or alter such regulations, [in regard to the election of Senators and Representatives]." Art. I, sec. 4.

"Every bill . . . shall, before it become *a law*, be presented," etc. Art. I, sec. 7.

Dissenting Opinion: Lamar, J., Fuller, C. J.

"Congress shall have power . . . to establish . . . uniform *laws* on the subject of bankruptcies," etc. Art. I, sec. 8.

"Congress shall have power . . . to make *all laws* which shall be necessary and proper," etc. Art. I, sec. 8.

"No bill of attainder or *ex post facto law* shall be passed." Art. I, sec. 9.

"Congress shall make no *law* respecting an establishment of religion." 1st Amendment.

It would be tedious, and it is unnecessary, to set them all forth. They all have the same *manifest* meaning of "statutes," except three, and in those three instances the words do not mean anything other than statutes. We think it plain that the expression, "a law of the United States," as used in section 753 of the Revised Statutes, mean just what the similar expression means all through the Constitution, — and that is a *statute* of the United States. *Tennessee* v. *Davis*, 100 U. S. 257, 264.

Of the decisions of this court cited as authority to sustain the order discharging the appellee, *Ex parte Siebold*, 100 U. S. 371, and *Tennessee* v. *Davis*, *supra*, are relied on as having the most direct bearing on the case. We do not consider *Ex parte Siebold* as being adverse to the proposition which we maintain. In that case the existence of express statutes upon which the controversy arose was undisputed. The sole question was as to the constitutional competency of Congress to pass certain laws which, in the most express, explicit, and imperative words, required marshals and deputy marshals of the United States to attend places for the election of members of Congress, to keep the peace at the polls, make arrests, and protect the supervising officers in the discharge of their duties at those elections. The court decided that the enactments of Congress in question were constitutional. The power of Congress to pass these laws being thus settled, no assertion as to the powers of the marshals and deputy marshals to execute them in the States can be found in that able opinion which do not follow as a logical consequence. We fail to see anywhere in the decision any intimation that, independently of such legislation,

the officers therein named could, by virtue of their office, have exercised the same powers in obedience to the instructions of an executive department, in the exercise of its authority implied from the Constitution.

In *Tennessee* v. *Davis*, the case was removed from a state court to the Circuit Court of the United States, under the express provisions of section 643 of the Revised Statutes. The homicide, for which the petitioner was prosecuted, was committed by him while executing his duties, as a revenue officer, in pursuance of the express requirements of the revenue laws, and in defence of his own life, upon a party offering unlawful resistance. So far from running counter to the position we are seeking to maintain, we think the principle there laid down, on the point we are now discussing, is in accord with that position. The language of the court, through Mr. Justice Strong, who delivered its opinion, is as follows: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sec. 1647; 6 Wheat. 379."

Whilst it is true that the opinions in both of those cases assert in the strongest and most impressive language the supremacy of the government of the United States in the exercise of the powers conferred upon it by the Constitution, we regard them also as a vindication of Congress as the law-making department of the government, as the depository of the implied and constructed powers of the government; or, as Mr. Chief Justice Marshall expresses it, of the power to legislate upon that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

As the *Siebold Case* and *Tennessee* v. *Davis* have been referred to as the most important and directly in point in support of the opposite view, we do not deem it necessary to give an extended examination of the series of cases decided by the Circuit and District Courts cited to the same purport. *Ex parte Jenkins*, 2 Wall. Jr. 521, to which attention is more especially called, combined in itself the main features of most

of the others, which were proceedings under the fugitive slave law, in which United States marshals were arrested while executing process under that law by state officers acting under the authority of the statutes of the State, the inevitable effect, if not the avowed object, of which was to nullify the operation of the aforesaid act of Congress.

This was so in *Ex parte Jenkins*. The United States marshal was arrested on a warrant issued by a state magistrate while he was executing a warrant issued under said law of Congress. He was brought before the Circuit Court of the United States for the Eastern District of Pennsylvania, on a writ of *habeas corpus*, and was discharged upon the ground that the fugitive slave law, having been enacted in pursuance of the Constitution of the United States, was paramount to the law of Pennsylvania in conflict with it, and that the marshal, being in custody for an act done in pursuance of that law of Congress, and in execution of process under it, was entitled to his discharge. It is so manifest that that case was within the provision of section 753 of the Revised Statutes that further comment is unnecessary; and the same may be said of all of the other decisions of the circuit and district courts. In every one of them the party discharged was in custody either for an act done in pursuance of an express statute of Congress, or in the execution of a decree, order, or process of a court, or the custody was in violation of the Constitution of the United States.

We stated at the outset of these remarks that we raised no question upon the discussion of the history of the legislation of Congress upon the subject of the writ of *habeas corpus*. We think, however, it is pertinent in this connection to inquire what was the necessity for any such legislation at all if the theory contended for as to the sufficiency of the self-executing powers of the executive and judicial departments of the government to protect all the agencies and instrumentalities of the federal government is correct. Why could not President Jackson, in 1833, as the head of the executive department, invested with the power and charged with the duty to take care that the laws be faithfully executed and to defend the Consti-

tution, have enforced the collection of the federal revenues in the port of Charleston, and have protected the revenue officers of the government against any arrest made under the pretensions of state authority, without the aid of the act of 1833? Why, in 1842, when the third *habeas corpus* act was passed, could not the President of the United States, by virtue of the same self-executing powers of the executive, together with those of the judicial department, have enforced the international obligations of the government, without any such act of Congress? It is a noteworthy fact in our history, that whenever the exigencies of the country, from time to time, have required the exercise of executive and judicial power for the enforcement of the supreme authority of the United States government for the protection of its agencies, etc., it was found, in every instance, necessary to invoke the interposition of the power of the national legislature. As early as 1807, in *Ex parte Bollman and Swartwout*, 4 Cranch, 75, 94, Chief Justice Marshall said: "The power to award the writ [of *habeas corpus*] by any of the courts of the United States, must be given by written law. . . . The inquiry, therefore, on this motion will be, whether by any statute compatible with the Constitution of the United States, the power to award a writ of *habeas corpus*, in such case as that of Erick Bollman and Samuel Swartwout, has been given to this court."

It is claimed that such a law is found in section 787 of the Revised Statutes, which is as follows:

"It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

It is contended that the duty imposed upon the marshal of each district by this section is not satisfied by a mere formal attendance upon the judges while on the bench; but that it extends to the whole term of the courts while in session, and can fairly be construed as requiring him to attend the judge while on his way from one court to another, to perform his

duty. It is manifest that the statute will bear no such construction. In the first place, the judge is not the court; the person does not embody the tribunal, nor does the tribunal follow him in his journeys. In the second place, the direction that he shall attend the court confers no authority or power on him of any character; it is merely a requirement that he shall be present, in person, at the court when sitting, in order to receive the lawful commands of the tribunal, and to discharge the duties elsewhere imposed upon him.

Great as the crime of Terry was in his assault upon Mr. Justice Field, so far from its being a crime against the court, it was not even a contempt of court, and could not have received adequate punishment as such. Section 725 of the Revised Statutes limits contempt to cases of misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

It is claimed that the law needed for appellee's case can be found in section 788 of the Revised Statutes. That section is as follows: "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

It is then argued that by the Code of California the sheriff has extensive powers as a conservator of the peace, the statutes to that effect being quoted *in extenso;* that he also has certain additional common law powers and obligations to protect the judges and to personally attend them on their visits to that State; that, therefore, no statutory authority of the United States for the attendance on Mr. Justice Field by Neagle, and for Neagle's personal presence on the scene was necessary; and that that statute constituted Neagle a peace officer to keep the peace of the United States. This line of argument seems to us wholly untenable.

By way of preliminary remark it may be well to say, that so far as the simple fact of Neagle's attendance on Mr. Justice Field, and the fact of his personal presence, are concerned, no authority, statutory or otherwise, was needed. He had a right to be there; and being there, no matter how or why, if it be-

came necessary to discharge an official duty, he would be just as much entitled to the protection of section 753 of the Revised Statutes as if he had been discharging an official duty in going there. The fallacy in the use made of section 788, in the argument just outlined, is this: That section gives to the officers named the same measure of powers when in the discharge of their duties as those possessed by the sheriffs, it is true; but it does not alter the duties themselves. It does not empower them to enlarge the scope of their labors and responsibilities, but only adds to their efficiency within that scope. They are still, by the very terms of the statute itself, limited to the execution of "the laws of the United States;" and are not in any way by adoption, mediate or immediate, from the code or the common law, authorized to execute the laws of California. The statute, therefore, leaves the matter just where it found it. If the act of Terry had resulted in the death of Mr. Justice Field, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent, in the present condition of its statutes, to prosecute in its own tribunals the murder of its own Supreme Court justice, or even to inquire into the heinous offence through its own tribunals? If yes, then the slaying of Terry by the appellee, in the necessary prevention of such act, was authorized by the law of the United States, and he should be discharged; and that, independently of any official character, the situation being the same in the case of any citizen. But if no, how stands the matter then? The killing of Terry was not by authority of the United States, no matter by whom done; and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the state courts to be tried. The question then recurs, Would it have been a crime against the United States? There can be but one answer. Murder is not an offence against the United States, except when committed on the high seas or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the

national government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial and give immunity from any liability to trial where he is accused of murder, unless an express statute of Congress is produced permitting such discharge.

We are not unmindful of the fact that in the foregoing remarks we have not discussed the bearings of this decision upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws, and in enabling a federal judge or court, by an order in a *habeas corpus* proceeding, to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens, whenever the amenability to its courts of a federal officer or employé or agent is sought to be enforced. We have not entered upon that question, because, as arising here, its suggestion is sufficient, and its consideration might involve the extent to which legislation in that direction may constitutionally go, which could only be properly determined when directly presented, by the record in a case before the court of adjudication.

For these reasons, as briefly stated as possible, we think the judgment of the court below should be reversed and the prisoner remanded to the custody of the sheriff of San Joaquin County, California; and we are the less reluctant to express this conclusion, because we cannot permit ourselves to doubt that the authorities of the State of California are competent and willing to do justice; and that even if the appellee had been indicted, and had gone to trial upon this record, God and his country would have given him a good deliverance.

Mr. Justice Field did not sit at the hearing of this case, and took no part in its decision.

LEISY *v.* HARDIN.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 1459. Submitted January 6, 1890.—Decided April 28, 1890.

A statute of a State, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the State, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

Peirce v. *New Hampshire*, 5 How. 504, overruled.

Mr. Chief Justice Fuller, on behalf of the court, stated the case as follows:

Christine Leisy, Edward Leisy, Lena and Albert Leisy, composing the firm of Gus. Leisy & Co., citizens of Illinois, brought their action of replevin against A. J. Hardin, the duly elected and qualified marshal of the city of Keokuk, Iowa, and *ex officio* constable of Jackson township, Lee County, Iowa, in the Superior Court of Keokuk, in said county, to recover 122 one-quarter barrels of beer, 171 one-eighth barrels of beer, and 11 sealed cases of beer, which had been seized by him in a proceeding on behalf of the State of Iowa against said defendants, under certain provisions of the code of the State of Iowa; and upon issue joined, a jury having been duly waived by the parties, the case was submitted to the court for trial, and, having been tried, the court, after having taken the case under advisement, finally "rendered and filed in said cause its findings of fact and conclusions of law in words and figures following, to wit:

"1st. That plaintiffs, Gus. Leisy & Co., are a firm of that name and style, residing in the State of Illinois, with principal place of business at Peoria, Illinois; that said firm is composed wholly of citizens of Illinois; that said firm is engaged as

brewers in the manufacture of beer in the said city of Peoria, Illinois, selling same in the States of Illinois and Iowa.

"2d. That the property in question, to wit, 122 one-quarter barrels of beer, of the value of $300, 171 one-eighth barrels of beer, value $215, and 11 sealed cases of beer, value of $25, was all manufactured by said Leisy & Co. in the city of Peoria, Illinois, and put up in said kegs and cases by the manufacturers, viz., Gus. Leisy & Co., at Peoria, Illinois; that each of said kegs was sealed and had placed upon it, over the plug in the opening of each keg, a United States internal revenue stamp of the district in which Peoria is situated; that said cases were substantially made of wood, each one of them containing 24 quart bottles of beer, each bottle of beer corked and the cork fastened in with a metallic cap, sealed and covered with tin-foil, and each case was sealed with a metallic seal; that said beer in all of said kegs and cases was manufactured and put up into said kegs and cases as aforesaid by the manufacturers, to wit, Gus. Leisy & Co., plaintiffs in this suit, and to open said cases the metallic seals had to be broken.

"3d. That the property herein described was transported by said Gus. Leisy & Co. from Peoria, Illinois, by means of railways to Keokuk, Iowa, in said sealed kegs and cases, as same was manufactured and put up by them in the city of Peoria, Illinois.

"4th. That said property was sold and offered for sale in Keokuk, Iowa, by John Leisy, a resident of Keokuk, Iowa, who is agent for said Gus. Leisy & Co.; that the only sales and offers to sell of said beer was in the original keg and sealed case as manufactured and put up by said Gus. Leisy & Co. and imported by them into the State of Iowa; that no kegs or cases sold or offered for sale were broken or opened on the premises; that as soon as same was purchased it was removed from the premises occupied by Gus. Leisy & Co., which said premises are owned by Christiana Leisy, a member of the firm of Gus. Leisy & Co., residing in and being a citizen of Peoria, Illinois; that none of such sales or offers to sell were made to minors or persons in the habit of becoming intoxicated.

"5th. That on the 30th day of June, 1888, the defendant, as

constable of Jackson township, Lee County, Iowa, by virtue of a search warrant issued by J. G. Garrettson, an acting justice of the peace of said Jackson township, upon an information filed charging that in premises occupied by said John Leisy there were certain intoxicating liquors, etc., seized the property therein described and took same into his custody.

"6th. And the court finds that said intoxicating liquors thus seized by the defendant in his official capacity as constable were kept for sale in the premises described in the search warrant in Keokuk, Lee County, Iowa, and occupied by Gus. Leisy & Co. for the purpose of being sold, in violation of the provisions of the laws of Iowa, but which laws, the court holds, are unconstitutional and void, as herein stated.

"7th. That on the 2d day of July, 1888, plaintiffs filed in this court their petition, alleging, among other things, that they were the owners and entitled to the possession of said property, and that the law under which said warrant was issued was unconstitutional and void, being in violation of section 8 of article I of the Constitution of the United States, and having filed a proper bond, a writ of replevin issued and the possession of said property was given to plaintiffs.

"From the foregoing facts the court finds the following conclusions:

"That plaintiffs are the sole and unqualified owners of said property and entitled to the possession of same and judgment for one dollar damages for their detention and costs of suit; that so much of chapter 6, title XI, of the Code of 1873, and the amendments thereto, as prohibits such sales by plaintiffs as were made by plaintiffs, is unconstitutional, being in contravention of section 8 of article I of the Constitution of the United States; that said law has been held unconstitutional in a like case heretofore tried and determined by this court, involving the same question, in the case of *Collins* v. *Hills*, decided prior to the commencement of this suit and prior to the seizure of said property by defendant; to all of which the defendant at the time excepted."

Judgment was thereupon rendered as follows:

"This cause coming on for hearing, plaintiffs appearing by

Statement of the Case.

Anderson & Davis, their attorneys, and the defendant by H. Scott Howell & Son and Wm. B. Collins, his attorneys, and the cause coming on for final hearing on the pleadings on file and the evidence introduced, the court makes the special finding of facts and law herewith ordered to be made of record and finds that plaintiffs are the sole and unqualified owners and entitled to possession of the following-described personal property, to wit: 122 one-quarter ($\frac{1}{4}$) barrels of beer of the value of $300; 171 one-eighth ($\frac{1}{8}$) barrels of beer of the value of $215, and 11 sealed cases of beer of the value of $25.

"That, plaintiffs being in possession of said property by virtue of a bond heretofore given, said possession in plaintiffs is confirmed. The court further finds that the writ issued by J. G. Garrettson, a justice of the peace, under which defendant held possession of said property and seized same, is void, same having been issued under sections of the law of Iowa that are unconstitutional and void.

"That plaintiff is entitled to one dollar damages for the wrongful detention of said property.

"It is therefore ordered and considered by the court that the plaintiffs have and recover of defendant the sum of one dollar damages, and costs of this action, taxed at $—.

"To which findings, order and judgment of court the defendant at the time excepts and asks until the 31st day of October, 1888, to prepare and file his bill of exceptions, which request is granted and order hereby made."

A motion for new trial was made and overruled, and the cause taken to the Supreme Court of Iowa by appeal, and errors therein assigned as follows:

"I. The court erred in finding that the plaintiffs were the sole and unqualified owners and were entitled to the possession of the intoxicating liquors seized and held by appellant.

"II. In finding that the plaintiffs were entitled to one dollar damages for their detention, and for costs of suit.

"III. The court erred in holding that the sales of beer in 'original packages,' by the keg and case, as made by John Leisy, agent of plaintiffs, were lawful.

"IV. The court erred in its conclusions and finding that so

much of the law of the State of Iowa embraced in chapter 6, title XI, Code of 1873, and the amendments thereto, as prohibits such sales of beer in the State of Iowa was unconstitutional, being in contravention of section 8, article I, of the Constitution of the United States.

"V. The court erred in rendering a judgment for plaintiffs and awarding them the intoxicating liquors in question and damages and costs against defendant.

"VI. The court erred in overruling the defendant's motion for a new trial."

The Supreme Court reversed the judgment of the Superior Court, and entered judgment against the plaintiffs and their sureties on the replevin bond in the amount of the value of the property, with costs. The judgment thus concluded: "And it is further certified by this court, and hereby made a part of the record, that in the decision of this suit there is drawn in question the validity of certain statutes of the State of Iowa, namely, chap. 6 of title XI of the Code of Iowa of 1873 and the amendments thereto, on the ground of their being repugnant to and in contravention of section 8 of article I of the Constitution of the United States, said appellees, Gus. Leisy & Co., claiming such statutes of the State of Iowa are invalid, and the decision in this cause is in favor of the validity of said statutes of the State of Iowa."

To review this judgment, a writ of error was sued out from this court.

The opinion of the Supreme Court, not yet reported in the official series, will be found in 43 N. W. Rep. 188.

The seizure of the beer in question by the constable was made under the provisions of chapter 6, title XI, of the Code of 1873 and amendments thereto. (Code 1873, p. 279; Laws 1884, c. 8, p. 8, c. 143, p. 146; Laws 1888, c. 71, p. 91; 1 McClain's Ann. Code, §§ 2359 to 2431, p. 603.)

Section 1523 of the Code is as follows:

"No person shall manufacture or sell, by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof,

or any person acting under his authority, or by his permission, to sell the same within this state contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided."

Chapter 71 of the Laws of the 22d General Assembly is an act approved April 12, 1888 (Laws Iowa, 1888, p. 91), of which the first section is as follows:

"That after this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquor, for any purpose whatever, otherwise than as provided in this act. Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever; and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for one year from date of its issue unless revoked according to law or until application for renewal is disposed of, if such application is made before the year expires. Provided, that renewals of permits may be annually granted upon written application by permit holders who show to the satisfaction of the court or judge that they have during the preceding year complied with the provisions of this act and execute a new bond as in this act required to be originally given, but parties may appear and resist renewals the same as in applications for permits."

Section 2 provides for notice of application for permit, and section 3 reads thus:

"Applications for permits shall be made by petition signed and sworn to by the applicant and filed in the office of the clerk of the district court of the proper county at least ten days before the first day of the term, which petition shall state the applicant's name; place of residence; in what business he is then engaged, and in what business he has been engaged for

two years previous to filing petition; the place, particularly describing it, where the business of buying and selling liquor is to be conducted; that he is a citizen of the United States and of the State of Iowa; that he is a registered pharmacist and now is, and for the last six months has been lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application; and is not the keeper of a hotel, eating-house, saloon, restaurant or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage, and has not within the last two years next preceding his application been directly or indirectly engaged, employed or interested in the unlawful manufacture, sale or keeping for sale of intoxicating liquors; and that he desires a permit to purchase, keep and sell such liquors for lawful purposes only."

Various sections follow, relating to giving bond; petition as to the good moral character of applicant; hearing on the application; oath upon the issuing of permit; keeping of record; punishment by fine, imprisonment, etc.

By section 20, sections 1524, 1526, and other sections of the Code were, in terms, repealed.

The Code provided for the seizure of intoxicating liquors unlawfully offered for sale, and no question in reference to that arises here, if the law in controversy be valid.

By section 1 of chapter 8 of the Laws of 1884, p. 8, ale, beer, wine, spirituous, vinous and malt liquors are defined to be intoxicating liquors.

Section 1524 of the Code of 1873, p. 279, was as follows:

"Nothing in this chapter shall be construed to forbid the sale, by the importer thereof, of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws: *Provided*, That the said liquor, at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantities

not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary or sacramental purposes."

This section is substantially identical with section 2 of chapter 45 of the acts of the fifth general assembly of Iowa, approved January 22, 1855 (Laws Iowa, 1854–1855, p. 58); and it was carried into the revision of 1860 as section 1560 (Revision 1860, Chap. 64, p. 259). It was repealed by section 20 of the act of April 12, 1888, as before stated.

Section 1553 of the Code, as amended by the act of April 5, 1886 (Laws Iowa, 1886, p. 83, c. 66, § 10), forbade any common carrier to bring within the State of Iowa, for any person or persons, or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor was to be transported, or was consigned for transportation, certifying that the consignee, or person to whom such liquor was to be transported, conveyed or delivered, was authorized to sell intoxicating liquors in such county. This was held to be in contravention of the federal constitution, in *Bowman* v. *Chicago & North Western Railway Co.*, 125 U. S. 465.

Mr. James C. Davis for plaintiffs in error.

Mr. H. Scott Howell and *Mr. W. B. Collins* for defendant in error.

Mr. John Y. Stone, Attorney General for the State of Iowa, for that State.

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

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419.

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Walling* v. *Michigan*, 116 U. S. 466; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government. Where the sub-

ject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. *Cooley* v. *Port Wardens of Philadelphia*, 12 How. 299.

It was stated in the 32d number of the Federalist that the States might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the federal constitution; second, where it was given to the United States and prohibited to the States; third, where, from the nature and subjects of the power, it must be necessarily exercised by the national government exclusively. But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed.

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will

that such commerce shall be free and untrammelled. *County of Mobile* v. *Kimball*, 102 U. S. 691; *Brown* v. *Houston*, 114 U. S. 622, 631; *Wabash, St. Louis &c. Railway* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493.

That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?

In *Brown* v. *Maryland* (*supra*) the act of the state legislature drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the federal government contributed more to the great revolution which introduced the present system, than

the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States; that that power was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was co-extensive with the subject on which it acts and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. Story, Constitution, § 1066. And although the precise question before us was not ruled in *Gibbons* v. *Ogden* and *Brown* v. *Maryland*, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in *Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U. S. 465. In the latter case, section 1553 of the Code of the State of Iowa as amended by c. 143 of the acts of the twentieth General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice Matthews, the concurring opinion of Mr. Justice Field, and the dissenting opinion by Mr. Justice Harlan, on behalf of Mr. Chief Justice Waite, Mr. Justice Gray, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority

conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the federal government.

"If in the present case," said Mr. Justice Matthews, "the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States," and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of interstate commerce by means of railroads, designed to remove trammels

upon transportation between different States, and upon the subject of the transportation of passengers and merchandise, (Revised Statutes, sections 4252 to 4289, inclusive,) including the transportation of nitro-glycerine and other similar explosive substances, with the proviso that, as to them, "any State, territory, district, city or town within the United States" should not be prevented by the language used "from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein," is referred to as indicative of the intention of Congress that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by States in particular cases by the express permission of Congress. It is said that the law in question was not an inspection law, the object of which "is to improve the quality of articles produced by the labor of a country, to fit them for exportation; or, it may be, for domestic use;" *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; *Turner* v. *Maryland*, 107 U. S. 38, 55; nor could it be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community; nor a law to prevent the introduction into the State of diseases, contagious, infectious, or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the Constitution; and the observations of Mr. Justice Catron, in *The License Cases*, 5 How. 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power "any article

of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." And Mr. Justice Matthews thus proceeds, p. 493: "For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. . . . Can it be supposed that by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any

description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

Many of the cases bearing upon the subject are cited and considered in these opinions, and among others *The License Cases*, 5 How. 504, wherein laws passed by Massachusetts, New Hampshire and Rhode Island, in reference to the sale of spirituous liquors, came under review and were sustained, although the members of the court who participated in the decisions did not concur in any common ground upon which to rest them. That of *Peirce et al.* v. *New Hampshire* is perhaps the most important to be referred to here. In that case the defendants had been fined for selling a barrel of gin in New Hampshire which they had bought in Boston and brought coastwise to Portsmouth, and there sold in the same barrel and in the same condition in which it was purchased in Massachusetts, but contrary to the law of New Hampshire in that behalf. The conclusion of the opinion of Mr. Chief Justice Taney is in these words, p. 586: "Upon the whole, therefore, the law of New Hampshire is in my judgment a valid one. For, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."

Referring to the cases of Massachusetts and Rhode Island,

the Chief Justice, after saying that if the laws of those States came in collision with the laws of Congress authorizing the importation of spirits and distilled liquors, it would be the duty of the court to declare them void, thus continues, p. 576: "It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence or pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction. . . . These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or

diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

The New Hampshire case, the chief justice observed, differs from *Brown* v. *Maryland*, in that the latter was a case arising out of commerce with foreign nations, which Congress had regulated by law; whereas the case in hand was one of commerce between two States, in relation to which Congress had not exercised its power. "But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation. The question, therefore, brought up for decision is, whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all state laws upon the subject null and void." p. 578. He declares it to appear to him very clear, p. 579, "that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law

of Congress." He comments on the omission of any prohibition in terms, and concludes that if, as he thinks, "the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with state laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate." And he considers that the legislation of Congress and the States has conformed to this construction from the foundation of the government, as exemplified in state laws in relation to pilots and pilotage and health and quarantine laws.

But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the States and the exercise of power over purely local commerce and local concerns.

The authority of *Peirce* v. *New Hampshire*, in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.

The doctrine now firmly established is, as stated by Mr. Justice Field, in *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 507, "that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: A tax upon freight transported from State to State, *Case of the State Freight Tax*, 15 Wall. 232; a statute imposing a burdensome condi-

tion on ship-masters as a prerequisite to the landing of passengers, *Henderson* v. *Mayor of New York*, 92 U. S. 259; a statute prohibiting the driving or conveying of any Texas, Mexican or Indian cattle, whether sound or diseased, into the State between the first day of March and the first day of November in each year, *Railroad Co.* v. *Husen*, 95 U. S. 465; a statute requiring every auctioneer to collect and pay into the state treasury a tax on his sales, when applied to imported goods in the original packages by him sold for the importer, *Cook* v. *Pennsylvania*, 97 U. S. 566; a statute intended to regulate or tax, or to impose any other restriction upon, the transmission of persons or property, or telegraphic messages, from one State to another, *Wabash, St. Louis &c. Railway* v. *Illinois*, 118 U. S. 557; a statute levying a tax upon non-resident drummers offering for sale or selling goods, wares or merchandise by sample, manufactured or belonging to citizens of other States, *Robbins* v. *Shelby Taxing District*, 120 U. S. 489.

On the other hand, we have decided, in *County of Mobile* v. *Kimball*, 102 U. S. 691, that a state statute providing for the improvement of the river, bay and harbor of Mobile, since what was authorized to be done was only as a mere aid to commerce, was, in the absence of action by Congress, not in conflict with the Constitution; in *Escanaba Co.* v. *Chicago*, 107 U. S. 678, that the State of Illinois could lawfully authorize the city of Chicago to deepen, widen and change the channel of, and construct bridges over, the Chicago River; in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, that the jurisdiction and control of wharves properly belong to the States in which they are situated unless otherwise provided; in *Brown* v. *Houston*, 114 U. S. 622, that a general state tax laid alike upon all property is not unconstitutional, because it happens to fall upon goods which, though not then intended for exportation, are subsequently exported; in *Morgan Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455, that a state law, requiring each vessel passing a quarantine station to pay a fee for examination as to her sanitary condition and the ports from which she came, was a rightful exer-

cise of police power; in *Smith* v. *Alabama*, 124 U. S. 465, and in *Nashville &c. Railway Co.* v. *Alabama*, 128 U. S. 96, that a state statute requiring locomotive engineers to be examined and obtain a license was not in its nature a regulation of commerce; and in *Kimmish* v. *Ball*, 129 U. S. 217, that a statute providing that a person having in his possession Texas cattle, which had not been wintered north of the southern boundary of Missouri at least one winter, shall be liable for any damages which may accrue from allowing them to run at large, and thereby spread the disease known as the Texas fever, was constitutional.

We held also in *Welton* v. *The State of Missouri*, 91 U. S. 275, that a state statute requiring the payment of a license tax from persons dealing in goods, wares and merchandise, which are not the growth, produce or manufacture of the State, by going from place to place to sell the same in the State, and requiring no such license tax from persons selling in a similar way goods which are the growth, produce or manufacture of the State, is an unconstitutional regulation; and to the same effect in *Walling* v. *Michigan*, 116 U. S. 446, in relation to a tax upon non-resident sellers of intoxicating liquors to be shipped into a State from places without it. But it was held in *Patterson* v. *Kentucky*, 97 U. S. 501, and in *Webber* v. *Virginia*, 103 U. S. 344, that the right conferred by the patent laws of the United States did not remove the tangible property in which an invention might take form from the operation of the laws of the State, nor restrict the power of the latter to protect the community from direct danger inherent in particular articles.

In *Mugler* v. *Kansas*, 123 U. S. 623, it was adjudged that "state legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, or by the amendments thereto." And this was in accordance with our decisions in *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Company* v. *Massachusetts*, 97 U. S.

25; and *Foster* v. *Kansas*, 112 U. S. 201. So in *Kidd* v. *Pearson*, 128 U. S. 1, it was held that a state statute which provided (1) that foreign intoxicating liquors may be imported into the State, and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the State; and (2) that intoxicating liquors may be manufactured and sold within the State for mechanical, medicinal, culinary and sacramental purposes, but for no other, not even for the purpose of transportation beyond the limits of the State, was not an undertaking to regulate commerce among the States. And in *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31, 40, we affirmed the judgment of the Supreme Court of Iowa, sustaining the sentence of the district court of Plymouth in that State, imposing a fine of $500 and costs, and imprisonment in jail for three months, if the fine was not paid within thirty days, as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining the defendant from selling or keeping for sale any intoxicating liquors, including ale, wine and beer, in Plymouth County. Mr. Justice Miller there remarked: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly, it seems to us to be quite as wise to use the processes of the law and the powers of a court to prevent the evil, as to punish the offence as a crime after it has been committed."

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national

government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

In *Mugler* v. *Kansas*, *supra*, the court said (p. 662) that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil." And that "if in the judgment of the legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. . . . Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." Undoubtedly, it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the

regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the Supreme Court of Iowa, in *Pearson* v. *International Distillery*, 72 Iowa, 348, 354, to be "intended to conform the statute to the doctrine of the United States Supreme Court, announced in *Brown* v. *Maryland*, 12 Wheat. 419, and *License Cases*, 5 How. 504, so that the statute should not conflict with the laws and authority of the United States." But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the State of Iowa, who are registered pharmacists and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago &c. Railway Co.*, *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the for-

eign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 238, in "a frank and candid coöperation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. 1 of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Gray, with whom concurred Mr. Justice Harlan and Mr. Justice Brewer, dissenting.

Mr. Justice Harlan, Mr. Justice Brewer and myself are unable to concur in this judgment. As our dissent is based on

the previous decisions of this court, the respect due to our associates, as well as to our predecessors, induces us to state our position, as far as possible, in the words in which the law has been heretofore declared from this bench.

The facts of the case, and the substance of the statutes whose validity is drawn in question, may be briefly stated.

It was an action of replevin of sundry kegs and cases of beer, begun in an inferior court of the State of Iowa against a constable of Lee County in Iowa, who had seized them at Keokuk in that county under a search-warrant issued by a justice of the peace pursuant to the statutes of Iowa, which prohibit the sale, the keeping for sale, or the manufacture for sale, of any intoxicating liquor (including malt liquor) for any purpose whatever, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under an annual license granted by the district court of the proper county, upon being satisfied that the applicant is a citizen of the United States and of the State of Iowa, and a resident of the county, and otherwise qualified.

The plaintiffs were citizens and residents of the State of Illinois, engaged as brewers in manufacturing beer at Peoria in that State, and in selling it in the States of Illinois and Iowa. The beer in question was manufactured by them at Peoria, and there put up by them in said kegs and cases; each keg being sealed, and having upon it, over the plug at the opening, a United States internal revenue stamp; and each case being substantially made of wood, containing two dozen quart bottles of beer, and sealed with a metallic seal which had to be broken in order to open the case. The kegs and cases owned by the plaintiffs, and so sealed, were transported by them from Peoria by railway to Keokuk, and there sold and offered for sale by their agent, in a building owned by one of them, and without breaking or opening the kegs or cases.

The Supreme Court of Iowa having given judgment for the defendant, the question presented by this writ of error is whether the statutes of Iowa, as applied to these facts, contravene section 8 of article 1, or section 2 of article 4 of the Constitution of the United States, or section 1 of article 14 of the Amendments to the Constitution.

Dissenting Opinion: Gray, Harlan, Brewer, JJ.

By section 8 of article 1 of the Constitution, "the Congress shall have power," among other things, "to regulate commerce with foreign nations, and among the several States," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

By section 2 of article 4, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

By section 1 of the Fourteenth Amendment, "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."

By the Tenth Amendment, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Among the powers thus reserved to the several States is what is commonly called the police power — that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime.

"The police power belonging to the States in virtue of their general sovereignty," said Mr. Justice Story, delivering the judgment of this court, "extends over all subjects within the territorial limits of the States; and has never been conceded to the United States." *Prigg* v. *Pennsylvania*, 16 Pet. 539, 625. This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain fire-test is beyond the constitutional power of Congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute, even as to oils manufactured under letters patent from the United States. *United States* v. *Dewitt*, 9 Wall. 41; *Patterson* v. *Kentucky*, 97 U. S. 501.

The police power includes all measures for the protection of the life, the health, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling houses and lottery tickets. *Slaughterhouse Cases*, 16 Wall. 36, 62, 87; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Phalan* v. *Virginia*, 8 How. 163, 168; *Stone* v. *Mississippi*, 101 U. S. 814.

This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by Chief Justice Waite, referring to earlier decisions to the same effect, "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." *Stone* v. *Mississippi*, 101 U. S. 814, 819. See also *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 753; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672; *New Orleans* v. *Houston*, 119 U. S. 265, 275.

The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health or the morals of the people. Gunpowder, for instance, is a subject of commerce and of lawful use, yet, because of its explosive and dangerous quality, all admit that the State may regulate its keeping and sale. And there is no article, the right of the State to control or to prohibit the sale or manufacture of which within its limits is better established, than

intoxicating liquors. *License Cases*, 5 How. 504; *Downham* v. *Alexandria Council*, 10 Wall. 173; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Tiernan* v. *Rinker*, 102 U. S. 123; *Foster* v. *Kansas*, 112 U. S. 201; *Mugler* v. *Kansas* and *Kansas* v. *Ziebold*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1; *Eilenbecker* v. *Plymouth County Court*, 134 U. S. 31.

In *Beer Co.* v. *Massachusetts*, above cited, this court, affirming the judgment of the Supreme Judicial Court of Massachusetts, reported in 115 Mass. 153, held that a statute of the State, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, except as therein provided, applied to a corporation which the State had long before chartered, and authorized to hold real and personal property, for the purpose of manufacturing malt liquors. Among the reasons assigned by this court for its judgment, were the following:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

"Since we have already held, in the case of *Bartemeyer* v. *Iowa*, that as a measure of police regulation, looking to the

preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts." 97 U. S. 32, 33.

In *Mugler* v. *Kansas* and *Kansas* v. *Ziebold*, above cited, a statute of Kansas, prohibiting the manufacture or sale of intoxicating liquors as a beverage, and declaring all places, where such liquors were manufactured or sold in violation of the statute, to be common nuisances, and prohibiting their future use for the purpose, was held to be a valid exercise of the police power of the State, even as applied to persons who, long before the passage of the statute, had constructed buildings specially adapted to such manufacture.

It has also been adjudged that neither the grant of a license to sell intoxicating liquors, nor the payment of a tax on such liquors, under the internal revenue laws of the United States, affords any defence to an indictment by a State for selling the same liquors contrary to its statutes. *License Tax Cases*, 5 Wall. 462; *Pervear* v. *Commonwealth*, 5 Wall. 475.

The clause of the Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," has no bearing upon this case. The privileges and immunities thus secured are those fundamental rights and privileges which appertain to citizenship. *Conner* v. *Elliott*, 18 How. 591, 593; Curtis, J., in *Scott* v. *Sandford*, 19 How. 393, 580; *Paul* v. *Virginia*, 8 Wall. 168, 180; *McCready* v. *Virginia*, 94 U. S. 391, 395. As observed by the court in *Bartemeyer* v. *Iowa*, "The right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States." 18 Wall. 133.

Nor is the case affected by the Fourteenth Amendment of the Constitution. As was said in the unanimous opinion of this court in *Barbier* v. *Connolly*, after stating the true scope of that amendment, "But neither the amendment — broad and comprehensive as it is — nor any other amendment, was

designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." 113 U. S. 27, 31. Upon that ground, the amendment has been adjudged not to apply to a state statute prohibiting the sale or manufacture of intoxicating liquors in buildings long before constructed for the purpose, or the sale of oleomargarine lawfully manufactured before the passage of the statute. *Mugler* v. *Kansas*, 123 U. S. 623, 663; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683, 687.

The remaining and the principal question is, whether the statute of Iowa, as applied to the sale within that State of intoxicating liquors in the same cases or kegs, unbroken and unopened, in which they were brought by the seller from another State, is repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

In the great and leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1, the point decided was that acts of the legislature of New York, granting to certain persons for a term of years the exclusive navigation by steamboats of all waters within the jurisdiction of the State, were, so far as they affected such navigation by vessels of other persons licensed under the laws of the United States, repugnant to the clause of the Constitution empowering Congress to regulate foreign and interstate commerce.

Chief Justice Marshall, in delivering judgment, after speaking of the inspection laws of the States, and observing that they had a remote and considerable influence on commerce, but that the power to pass them was not derived from a power to regulate commerce, said: "They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating

the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." pp. 203, 204. Again; he said that quarantine and health laws "are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens," and that the constitutionality of such laws had never been denied. p. 205.

Mr. Justice Johnson, in his concurring opinion, said: "It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce, than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision." p. 235.

That Chief Justice Marshall and his associates did not consider the constitutional grant of power to Congress to regulate foreign and interstate commerce as, of its own force, and without national legislation, impairing the police power of each State within its own borders to protect the health and welfare of its inhabitants, is clearly indicated in the passages above quoted from the opinions in *Gibbons* v. *Ogden*, and is conclusively proved by the unanimous judgment of the court delivered by the Chief Justice five years later in *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245.

In that case, the legislature of Delaware had authorized a dam to be erected across a navigable tide-water creek which opened into Delaware Bay, thereby obstructing the navigation of the creek by a vessel enrolled and licensed under the navi-

gation laws of the United States. The decision in *Gibbons* v. *Ogden* was cited by counsel, as conclusive against the validity of the statute of the State. But its validity was upheld by the court, for the following reasons:

"The act of assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

"The counsel for the plaintiffs in error insists that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.'

"If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as

repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." 2 Pet. 251, 252.

In *Brown* v. *Maryland*, 12 Wheat. 419, the point decided was that an act of the legislature of Maryland, requiring all importers of foreign goods by the bale or package, or of spirituous liquors, and "other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce," to first take out a license and pay fifty dollars for it, and imposing a penalty for failure to do so, was, as applied to sales by an importer of foreign liquors in the original packages, unconstitutional, both as laying an impost, and as repugnant to the power of Congress to regulate foreign commerce.

The statute there in question was evidently enacted to raise revenue from importers of foreign goods of every description, and not as an exercise of the police power of the State. And Chief Justice Marshall, in answering an argument of counsel, expressly admitted that the power to direct the removal of gunpowder, or the removal or destruction of infectious or unsound articles which endanger the public health, "is a branch of the police power, which unquestionably remains, and ought to remain, with the States." pp. 443, 444.

Moreover, the question there presented and decided concerned foreign commerce only, and not commerce among the States. Chief Justice Marshall, at the outset of his opinion, so defined it, saying: "The cause depends entirely on the question, whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported." p. 436.

It is true, that, after discussing and deciding that question, he threw out this brief remark: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State." p. 449. But this remark was *obiter dictum*, wholly aside from the question before the court and having no bearing on its decision, and therefore extrajudicial, as has since been noted by Chief Justice Taney and Mr. Justice McLean in the *License Cases*,

5 How. 504, 575, 578, 594, and by Mr. Justice Miller in *Woodruff* v. *Parham*, 8 Wall. 123, 139.

To a remark made under such circumstances are peculiarly applicable the warning words of Chief Justice Marshall himself in an earlier case, where, having occasion to explain away some dicta of his own in delivering judgment in *Marbury* v. *Madison*, 1 Cranch, 137, he said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 Wheat. 264, 399, 400. Another striking instance in which that maxim has been applied and acted on is to be found in the opinion of the court at the present term in *Hans* v. *Louisiana*, 134 U. S. 1, 20.

But the unanimous judgment of this court in 1847 in *Peirce* v. *New Hampshire*, reported together with *Thurlow* v. *Massachusetts* and *Fletcher* v. *Rhode Island* as the *License Cases*, 5 How. 504, is directly in point, and appears to us conclusively to govern the case at bar. Those cases were elaborately argued by eminent counsel, and deliberately considered by the court, and Chief Justice Taney, as well as each of six associate justices, stated his reasons for concurring in the judgment.

The cases from Massachusetts and Rhode Island arose under statutes of either State, prohibiting sales of spirituous liquors by any person, in less than certain quantities, without first having obtained an annual license from municipal officers; in the one case, from county commissioners, who, by the express terms of the statute, were not required to grant any licenses when in their opinion the public good did not require them to be granted; and in the other case, from a town council, who

were forbidden to grant licenses whenever the voters of the town in town meeting decided that none should be granted. Mass. Rev. Stat. 1836, c. 47, §§ 3, 17, 23–25; Stat. 1837, c. 42, § 2; R. I. Pub. Laws of 1844, p. 496, § 4; Laws of 1845, p. 72; 5 How. 506–510, 540. Those statutes were held to be constitutional, as applied to foreign liquors which had passed out of the hands of the importer; while it was assumed that, under the decision in *Brown* v. *Maryland*, those statutes could be allowed no effect as to such liquors while they remained in the hands of the importer in the original packages upon which duties had been paid to the United States. 5 How. 576, 590, 610, 618.

The case of *Peirce* v. *New Hampshire* directly involved the validity, as applied to liquors brought in from another State, of a statute of New Hampshire, which imposed a penalty on any person selling any wine, rum, gin, brandy or other spirits, in any quantity, "without license from the selectmen of the town or place where such person resides." N. H. Laws of 1838, c. 369; 5 How. 555. The plaintiffs in error, having been indicted under that statute for selling to one Aaron Sias in the town of Dover in the State of New Hampshire one barrel of gin, without license from the selectmen of the town, at the trial admitted that they so sold to him a barrel of American gin; and introduced evidence that "the barrel of gin was purchased by the defendants in Boston in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua Bridge, and from thence to the defendant's store in Dover, and afterwards sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts." The defendants contended that the statute was unconstitutional, because it was "in violation of certain public treaties of the United States with Holland, France and other countries, containing stipulations for the admission of spirits into the United States;" and because it was repugnant to the clauses of the Constitution of the United States restricting the power of the States to lay duties on imports or exports, and granting the power to Congress to regulate commerce with foreign nations and among the several States. Chief Justice Parker

instructed the jury "that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose; but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other States; that she might tax them the same as other property, and might regulate the sale to some extent; that a State might pass health and police laws, which would, to a certain extent, affect foreign commerce and commerce between the States; and that this statute was a regulation of that character, and constitutional." After a verdict of guilty, exceptions to this instruction were overruled by the highest court of the State. 5 How. 554–557; 13 N. H. 536.

In that case, as in the case at bar, the statute of the State prohibited sales of intoxicating liquors by any person without a license from municipal authorities, and authorized licenses to be granted only to persons residing within the State; and the liquors were sold within the State by the importer, and in the same barrel, keg or case, unbroken and in the same condition, in which he had brought them from another State. Yet the judgment of the highest court of New Hampshire was unanimously affirmed by this court.

Chief Justice Taney, Mr. Justice Catron and Mr. Justice Nelson were of opinion that the statute of New Hampshire was a regulation of interstate commerce, but yet valid so long as it was not in conflict with any act of Congress.

Chief Justice Taney, after recognizing that "spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists; and Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded, and may therefore admit, or not, as it shall deem best, the importation of ardent spirits; and inasmuch as the laws of Congress authorize their importation, no State has a

right to prohibit their introduction;" and yet upholding the validity of the statutes of Massachusetts and Rhode Island, as not interfering with the trade in ardent spirits while they remained a part of foreign commerce, and were in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorized them to be imported; p. 577; proceeded to state the case from New Hampshire as follows:

"The present case, however, differs from *Brown* v. *Maryland* in this: that the former was one arising out of commerce with foreign nations, which Congress has regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power. Some acts of Congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation." p. 578. And he concluded his opinion thus: "Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and Congress has clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue." p. 586.

Mr. Justice Catron expressed similar views. While he was

of opinion that the ultimate right of determining what commodities might be lawful subjects of interstate commerce belonged to Congress in the exercise of its power to regulate commerce, and not to the States in the exercise of the police power, he was equally clear that the statute of New Hampshire was a valid regulation, in the absence of any legislation upon the subject by Congress. After pointing out the difficulties standing in the way of any attempt by Congress to make the special and various regulations required at different places at the maritime or inland borders of the States, he said: "I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that Congress cannot do what the States have done, are doing and must continue to do, from a controlling necessity, even should the exclusive power in Congress be maintained by our decision." p. 606. "Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection; and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of state legislation on the particular subject. We would by our decision expunge more state laws and city corporate regulations than Congress is likely to make in a century on the same subject; and on no better assumption than that Congress and the state legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts." p. 607. And finally, in summing up his conclusions, he said: "That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and convicted; but that the state law was constitutionally passed, because of the power of the State thus to regulate; there being no regulation of Congress, special or general, in existence, to which the state law was repugnant." pp. 608, 609.

Mr. Justice Nelson expressed his concurrence in the opinions delivered by the Chief Justice and Mr. Justice Catron. p. 618.

Justices McLean, Daniel, Woodbury and Grier, on the other hand, were of opinion that the license laws of New Hampshire, as well as those of Massachusetts and Rhode Island, were merely police regulations and not regulations of commerce, although they might incidentally affect commerce.

Mr. Justice McLean, in the course of his opinion in *Thurlow* v. *Massachusetts*, said: "The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the States. Since the adoption of its constitution they have existed in Massachusetts." p. 588. [Mass. Stats. 1786, c. 68; 1792, c. 25; 7 Dane Ab. 43, 44.] "It is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals, or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce, and is not known to carry infectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And though they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State." pp. 589, 590. "A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the state authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every

aspect a local regulation, and relates exclusively to the internal police of the State." p. 591. "The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments." p. 592.

In his opinion in *Peirce* v. *New Hampshire*, he declared that the same views were equally applicable to that case; and added: "The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the State. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgence, and to advance the moral and physical welfare of society." "If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress." "But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license. The right of an importer of ardent spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account of their having transported this property from Massachusetts to New Hampshire." pp. 595, 596.

Mr. Justice Daniel said: "The license laws of Massachusetts, Rhode Island and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or reality;

they do not prohibit sales, either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority. These laws are, therefore, in violation neither of the Constitution of the United States, nor of any law nor treaty made in pursuance or under authority of the Constitution." p. 617.

Mr. Justice Woodbury repeated and enforced the same views, saying, among other things: "It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the State after the foreign importation is completed and on shore." p. 619. "The subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power." "The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also, if a merchant extensively engaged in commerce, often does import articles, with no view of selling them here, but of storing them for a higher and more suitable market in another State, or abroad." p. 620. "But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of its property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce." p. 625. "Whether such laws of the States as to

licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign States. Call them by whatever name, if they are necessary to the well being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper, or apparently embraced in the Constitution. So, whether they conflict or not, indirectly and slightly, with some regulations of foreign commerce, after the subject matter of that commerce touches the soil or waters within the limits of a State, is not perhaps very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government." p. 627.

Mr. Justice Grier did not consider the question of the exclusiveness of the power of Congress to regulate foreign and interstate commerce as involved in the decision, but maintained the validity of the statutes in question under "the police power, which is exclusively in the States." pp. 631, 632.

The other members of the court at that time were Mr. Justice Wayne and Mr. Justice McKinley, who do not appear by the report to have taken part in the decision of those cases, although the former appears at page 545 to have been present at the argument, and by the clerk's minutes to have been upon the bench when the judgments were delivered. It is certain that neither of them dissented from the decision of the court.

The consequences of an opposite conclusion in the case from New Hampshire, regarding liquors brought from one State into another, were forcibly stated by several of the judges.

Mr. Justice McLean said: "If the mere conveyance of property from one State to another shall exempt it from taxation, and from general state regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary." p. 595.

Mr. Justice Catron said: "To hold that the state license

law was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire." p. 608.

Mr. Justice Woodbury said: "If the proposition was maintainable, that, without any legislation by Congress as to the trade between the States, (except that in coasting, as before explained, to prevent smuggling,) anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad, or from a neighboring State. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity." pp. 625, 626.

Mr. Justice Grier, in an opinion marked by his characteristic vigor and directness of thought and expression, (after saying that he mainly concurred with Mr. Justice McLean,) summed up the whole matter as follows:

"The true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

"It has been frequently decided by this court, 'that the powers which relate to merely municipal regulations, or what

may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category.

"As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede, when they come in conflict or collision, '*salus populi suprema lex.*'

"If the right to control these subjects be 'complete, unqualified and exclusive' in the state legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers; they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned and punished for their offences against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime and protection of the public welfare, must of necessity have full and free operation, according to the exigency which requires their interference.

"It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good; and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people." pp. 631, 632.

This abstract of the *License Cases* shows (what is made yet clearer by an attentive reading of the opinions as a whole) that the difference of opinion among the judges was upon the question whether the state statutes, which all agreed had some influence upon commerce, and all agreed were valid exercises of the police power, could properly be called regulations of commerce.

While many of the judges said or assumed that a State could not restrict the sale by the importer and in the original packages of intoxicating liquors imported from a foreign country, which Congress had authorized the importation of, and had caused duties to be levied upon; all of them undoubtingly held that, where Congress had not legislated, a State might, for the protection of the health, the morals and the safety of its inhabitants, restrict or prohibit, at its discretion and according to its own views of policy, the sale by the importer of intoxicating liquors brought into it from another State, and remaining in the barrels or packages in which they were brought in.

The ability and thoroughness with which those cases were argued at the bar and on the bench, the care and thought bestowed upon their consideration, as manifested in the opinions delivered by the several judges, and the confidence with which each judge expressed his concurrence in the result, make

the decision of the highest possible authority. It has been accepted and acted on as such by the legislatures, the courts and the people, of the nation and of the States, for forty years. It has not been touched by any act of Congress; it has guided the legislation of many of the States; and it has been treated as beyond question by this court in a long series of cases. *Veazie* v. *Moor* (1852), 14 How. 568, 575; *Sinnot* v. *Davenport* (1859), 22 How. 227, 243; *Gilman* v. *Philadelphia* (1865), 3 Wall. 713, 730; *Pervear* v. *Commonwealth* (1866), 5 Wall. 475, 479; *Woodruff* v. *Parham* (1868), 8 Wall. 123, 139; *United States* v. *Dewitt* (1869), 9 Wall. 41, 45; *Henderson* v. *Mayor of New York* (1875), 92 U. S. 259, 274; *Beer Co.* v. *Massachusetts* (1877), 97 U. S. 25, 33; *Patterson* v. *Kentucky* (1878), 97 U. S. 501, 503; *Mobile County* v. *Kimball* (1880), 102 U. S. 691, 701; *Brown* v. *Houston* (1885), 114 U. S. 622, 631; *Walling* v. *Michigan* (1886), 116 U. S. 446, 461; *Mugler* v. *Kansas* (1887), 123 U. S. 623, 657, 658.

In the *Passenger Cases*, 7 How. 283, decided in 1849, two years after the *License Cases*, statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving from abroad, were adjudged to be repugnant to the Constitution and laws of the United States, and therefore void, by the opinions of Justices McLean, Wayne, Catron, McKinley and Grier, against the dissent of Chief Justice Taney and Justices Daniel, Nelson and Woodbury, each of the judges delivering a separate opinion. The decision in the *License Cases* was relied on by each of the dissenting judges; pp. 470, 483, 497, 518, 524, 559; and no doubt of the soundness of that decision was suggested in the opinions of the majority of the court, or in any of the cases in which the judgment of that majority was afterwards approved and followed. *Henderson* v. *Mayor of New York*, and *Commissioners of Immigration* v. *North German Lloyd*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Compagnie Générale Transatlantique*, 107 U. S. 59; *Head Money Cases*, 112 U. S. 580.

When Mr. Justice Grier, in the *Passenger Cases*, 7 How. 462, said, "And to what weight is that argument entitled, which assumes, that, because it is the policy of Congress to

leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?" the context shows that he had in mind cases in which the policy to leave commerce free had been manifested by statute or treaty; and he had already, on page 457, made it manifest that he did not intend to retract or to qualify his opinion in the *License Cases*.

An intention on the part of Congress that commerce shall be free from the operation of laws passed by a State in the exercise of its police power cannot be inferred from the mere fact of there being no national legislation upon the subject, unless in matters as to which the power of Congress is exclusive. Where the power of Congress is exclusive, the States have, of course, no power to legislate; and it may be said that Congress, by not legislating, manifests an intention that there should be no legislation on the subject. But in matters over which the power of Congress is paramount only, and not exclusive, the power of the States is not excluded until Congress has legislated; and no intention that the States should not exercise, or continue to exercise, their power over the subject can be inferred from the want of congressional legislation. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 702–704.

The true test for determining when the power of Congress to regulate commerce is, and when it is not, exclusive, was formulated and established in *Cooley* v. *Board of Wardens*, 12 How. 299, concerning the validity of a state law for the regulation of pilots and pilotage, in which Mr. Justice Curtis, in delivering judgment, said: "When the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively

demanding that diversity, which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." He then stated that the act of Congress of August 7, 1789, c. 9, § 4, (1 Stat. 54) in regard to pilotage, manifested the understanding of Congress, at the outset of the government, that the nature of the subject was not such as to require its exclusive legislation, but was such that, until Congress should find it necessary to exercise its power, it should be left to the legislation of the States, because it was local and not national, and was likely to be best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits; and he added, in words which appear to us equally appropriate to the case now before the court: "The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants." "We are of opinion that this state law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action." 12 How. 319–321.

In *Gilman* v. *Philadelphia*, 3 Wall. 713, 730, this court, speaking by Mr. Justice Swayne, applying the same test, and relying on *Willson* v. *Blackbird Creek Marsh Co.* and *Cooley* v. *Board of Wardens*, above cited, upheld the validity of a stat-

ute of Pennsylvania authorizing the construction of a bridge across the Schuylkill River, so as to prevent the passage of vessels with masts; and, after stating the points adjudged in *Brown* v. *Maryland* and in the *Passenger Cases*, said: "But a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail, or to be sold at all, without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. *License Cases*, 5 How. 504."

By the same test, and upon the authority of *Willson* v. *Blackbird Creek Marsh Co.*, a statute of Wisconsin, authorizing the erection of a dam across a navigable river, was held to be constitutional in *Pound* v. *Turck*, 95 U. S. 459, 463. To the like effect are *Willamette Bridge* v. *Hatch*, 125 U. S. 1, 8–12, and other cases there cited.

Upon like grounds, it was held, in *Mobile County* v. *Kimball*, 102 U. S. 691, that a statute of Alabama, authorizing the improvement of the harbor of Mobile, did not trench upon the commercial power of Congress; and the court, after pointing out that some expressions of Chief Justice Marshall in *Gibbons* v. *Ogden* as to the exclusiveness of the power of Congress to regulate commerce were restricted by the facts of that case, and by the subsequent judgment in *Willson* v. *Blackbird Creek Marsh Co.*, said: "In the *License Cases*, which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of Congress in the absence of Congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the judges; but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subjects there considered." 102 U. S. 700, 701.

In *Woodruff* v. *Parham*, 8 Wall. 123, a state statute, imposing a uniform tax on all sales by auction within it, was held constitutional, as applied to sales of goods the product of other States and sold in the original and unbroken packages.

In *Hinson* v. *Lott*, 8 Wall. 148, decided at the same time, it was adjudged that a state statute which prohibited any dealers, introducing any intoxicating liquors into the State, from offering them for sale, without first paying a tax of fifty cents a gallon, and imposed a like tax on liquors manufactured within the State, was valid, as applied to liquors brought from another State, and held and offered for sale in the same barrels or packages in which they were brought in; because, in the words of Mr. Justice Miller, who delivered the opinion of the court in both cases, it was not "an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State." 8 Wall. 153. These two cases were cited by the court in *Low* v. *Austin*, 13 Wall. 29, 34, and in *Cook* v. *Pennsylvania*, 97 U. S. 566, 573, in which, in accord with the opinions in the *License Cases*, state taxation upon original cases of wines imported from a foreign country, and upon which duties had been paid under acts of Congress, was held to be invalid.

In *Welton* v. *Missouri*, 91 U. S. 275, the point decided was that a state statute, requiring the payment of a license tax from persons selling, by going from place to place within the State for the purpose, goods not the growth or manufacture of the State, and not from persons so selling goods which were the growth or manufacture of the State, was unconstitutional and void, by reason of the discrimination; and in *Machine Co.* v. *Gage*, 100 U. S. 676, a state statute imposing a like tax, without discriminating as to the place of growth or produce of material or manufacture, was adjudged to be constitutional and valid, as applied to machines made in and brought from another State.

In *Brown* v. *Houston*, 114 U. S. 622, it was decided that coal, mined in Pennsylvania and brought in boats by river from Pittsburg to New Orleans, to be there sold by the boat-load on account of the Pennsylvania owner, and remaining afloat in its original condition and original packages, was subject, in common with all other property in the city, to taxation under the general tax laws of Louisiana; and the court referred to *Woodruff* v. *Parham*, above cited, as upholding the validity

of a "tax laid on auction sales of all property indiscriminately," and "which had no relation to the movement of goods from one State to another." 114 U. S. 634.

In *Walling* v. *Michigan*, 116 U. S. 446, the statute of Michigan, which was held to be an unconstitutional restraint of interstate commerce, imposed a different tax upon persons engaged within the State in the business of selling or soliciting the sale of intoxicating liquors to be sent into the State, from that imposed upon persons selling or soliciting the sale of such liquors manufactured within the State; and the court declared that the statute would be perfectly justified as "an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people," "if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature." 116 U. S. 460.

In *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557, the only point decided was that a State had no power to regulate the rates of freight of any part of continuous transportation upon railroads partly within the State and partly in other States. In *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, a state law requiring the payment of a license tax by drummers and persons not having a regularly licensed house of business within the taxing district, offering for sale or selling any goods by sample, was decided to be unconstitutional as applied to persons offering to sell goods on behalf of merchants residing in other States, because, as the majority of the court held, its effect was "to tax the sale of such goods, or the offer to sell them, before they are brought into the State." 120 U. S. 497. Neither of those cases appears to us to tend to limit the police power of the State to protect the public health, the public morals and the public peace within its own borders.

As was said by this court in *Sherlock* v. *Alling*, 93 U. S. 99, 103, "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of

their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution." It was accordingly held in that case that an action against a carrier engaged in interstate commerce might be maintained under a state statute giving a civil remedy, unknown to the common law, for negligence causing death; and in subsequent cases that what a State might punish or afford redress for, it might seek by proper precautions to prevent; and consequently, that a state statute requiring, under a penalty, engineers of all railroad trains within the State to be examined and licensed by a state board, either as to their qualifications generally, or as to their capacity to distinguish between color signals, was not in its nature a regulation of commerce, but was a constitutional exercise of the power reserved to the States, and intended to secure the safety of persons and property within their territorial limits, and, so far as it affected interstate commerce, not in conflict with any express enactment of Congress upon the subject, nor contrary to any intention of Congress to be presumed from its silence. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, Chattanooga & St. Louis Railway* v. *Alabama*, 128 U. S. 96.

In *Railroad Co.* v. *Husen*, 95 U. S. 465, it was expressly conceded, in the opinion of the court delivered by Mr. Justice Strong, that a State, in the exercise of its police power, could "legislate to prevent the spread of crime, or pauperism, or disturbance of the peace," as well as "justify the exclusion of property, dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases." 95 U. S. 471. And the decision, by which the statute of Missouri, forbidding the introduction of any Texas, Mexican or Indian cattle into the State, was held to be an unconstitutional interference with interstate commerce, rested, as clearly appears in the opinion in that case, and has since been distinctly recognized by the court, upon the ground that the statute made no distinction, in the transportation forbidden, between cattle which might be diseased and those which were not. *Kimmish* v. *Ball*, 129 U. S. 217, 221.

The authority of the States, in the exercise of their police power, and for the protection of life and health, to pass laws affecting things which are lawful subjects or instruments of commerce, and even while they are actually employed in commerce, has been expressly recognized by Congress in the acts regulating the transportation of nitro-glycerine, as well as in the acts for the observation and execution of the quarantine and health laws of the States. Rev. Stat. §§ 4278–4280; 4792–4796.

In *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455, 465, the system of quarantine laws established by the State of Louisiana was held, in accordance with earlier opinions, to be a constitutional exercise of the police power; and it was said by the court: "Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." It was added that in this respect the case fell within the principle of *Willson* v. *Blackbird Creek Marsh Co.*, *Cooley* v. *Board of Wardens*, *Gilman* v. *Philadelphia*, *Pound* v. *Turck*, and other cases.

In *Mugler* v. *Kansas*, 123 U. S. 623, the court said: "In the *License Cases*, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did

not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress." 123 U. S. 657, 658.

In *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, the point, and the only point decided, was that a statute of Iowa, which forbade common carriers to bring intoxicating liquors into the State from any other State, without first obtaining a certificate from a county officer of Iowa, that the consignee was authorized by the laws of Iowa to sell such liquors, was an unconstitutional regulation of interstate commerce. While Mr. Justice Field in his separate opinion (p. 507) intimated, and three dissenting justices (pp. 514, 515) feared, that the decision was in effect inconsistent with the decision in the *License Cases*, Mr. Justice Matthews, who delivered the judgment of the majority of the court, not only cautiously avoided committing the court to any such conclusion, but took great pains to mark the essential difference between the two decisions. On the one hand, after making a careful analysis of the opinions in the *License Cases*, he said: "From this analysis it is apparent that the question presented in this case was not decided in the *License Cases*. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned." On the other hand, in stating the reasons for holding the statute of Iowa, prohibiting the transportation of liquors from another State, not to be a legitimate exertion of the police power of the State of Iowa, he said: "It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border." "But the right to prohibit sales, so far as conceded

to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it." 125 U. S. 479, 498, 499.

In the opinion of the majority of the court in that case, it was noted that the omission of Congress to legislate might not so readily justify an inference of its intention to exclude state legislation in matters affecting interstate commerce, as in those affecting foreign commerce; Mr. Justice Matthews saying: "The organization of our state and federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. The same necessity perhaps does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the States, and paramount over all the powers of the States; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet, in respect to commerce among the States, it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively

interferes, such commerce may be left to be freely dealt with by the respective States." 125 U. S. 482, 483.

In *Kidd* v. *Pearson*, 128 U. S. 1, a statute of Iowa, prohibiting the manufacture or sale of intoxicating liquors, except for mechanical, medicinal, culinary and sacramental purposes only, and authorizing any building used for their unlawful manufacture to be abated as a nuisance, was unanimously held to be constitutional, as applied to a case in which the liquors were manufactured for exportation and were sold outside the State; and the court, in showing how impracticable it would be for Congress to regulate the manufacture of goods in one State to be sold in another, said: "The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent." "A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." 128 U. S. 21, 22.

The language thus applied to congressional supervision of the manufacture within one State of intoxicating liquors intended to be sold in other States appears to us to apply with hardly less force to the regulation by Congress of the sale within one State of intoxicating liquors brought from another State. How far the protection of the public order, health and morals demands the restriction or prohibition of the sale of intoxicating liquors is a question peculiarly appertaining to the legislatures of the several States, and to be determined by them upon their own views of public policy, taking into consideration the needs, the education, the habits and the usages, of people of various races and origin, and living in regions far apart and widely differing in climate and in physical characteristics. The local option laws prevailing in many of the States indicate the judgment of as many legislatures, that the sale of intoxicating liquors does not admit of regulation by a uniform rule over so large an area as a single State, much less over the area of a continent. It is manifest that the regulation

of the sale, as of the manufacture, of such liquors manufactured in one State to be sold in another, is a subject which, far from requiring, hardly admits of a uniform system or plan throughout the United States. It is, in its very nature, not national, but local; and must, in order to be either reasonable or effective, conform to the local policy and legislation concerning the sale, or the manufacture, of intoxicating liquors generally. Congress cannot regulate this subject under the police power, because that power has not been conceded to Congress, but remains in the several States; nor under the commercial power, without either prescribing a general rule unsuited to the nature and requirements of the subject, or else departing from that uniformity of regulation which, as declared by this court in *Kidd* v. *Pearson*, above cited, it was the object of the commercial clause of the Constitution to secure.

The above review of the judgments of this court since the decision in the *License Cases* appears to us to demonstrate that that decision, while often referred to, has never been overruled or its authority impugned.

It only remains to sum up the reasons which have satisfied us that the judgment of the Supreme Court of Iowa in the case at bar should be affirmed.

The protection of the safety, the health, the morals, the good order and the general welfare of the people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States and the laws made in pursuance thereof being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the national Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce.

The police power extends to the control and regulation of things which, when used in a lawful and proper manner, are

subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the public safety, the public health or the public morals. Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime.

The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the legislatures of the several States, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.

The statutes in question were enacted by the State of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce; they have no relation to the movement of goods from one State to another, but operate only on intoxicating liquors within the territorial limits of the State; they include all such liquors without discrimination, and do not even mention where they are made or whence they come. They affect commerce much more remotely and indirectly than laws of a State, (the validity of which is unquestioned,) authorizing the erection of bridges and dams across navigable waters within its limits, which wholly obstruct the course of commerce and navigation; or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the State.

If the statutes of a State, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another State and sold by the importer in what are called original packages, the consequence must be that an inhabitant of any State may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other States of the Union intoxicating liquors of whatever descrip-

tion, in cases or kegs, or even in single bottles or flasks, despite any legislation of those States on the subject, and although his own State should be the only one which had not enacted similar laws. It would require positive and explicit legislation on the part of Congress, to convince us that it contemplated or intended such a result.

The decision in the *License Cases*, 5 How. 504, by which the court, maintaining these views, unanimously adjudged that a general statute of a State, prohibiting the sale of intoxicating liquors without license from municipal authorities, included liquors brought from another State and sold by the importer in the original barrel or package, should be upheld and followed; because it was made upon full argument and great consideration; because it established a wise and just rule, regarding a most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to Congress and the inherent police power reserved to the States; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the Constitution; because it has been accepted and acted on for forty years by Congress, by the state legislatures, by the courts and by the people; and because to hold otherwise would add nothing to the dignity and supremacy of the powers of Congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders.

The silence and inaction of Congress upon the subject, during the long period since the decision in the *License Cases*, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this court; rather than to warrant the presumption that Congress intended that commerce among the States should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the States.

For these reasons, we are compelled to dissent from the opinion and judgment of the majority of the court.

LYNG *v.* MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 1219. Submitted March 19, 1890. — Decided April 28, 1890.

Following *Leisy* v. *Hardin*, *ante*, 100, the judgment of the court below in this case is reversed.

Plaintiff in error was prosecuted and convicted in the Circuit Court for Iron County, Michigan, under an information alleging "that on the 19th day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at the village of Iron River, in said Iron County, Henry Lyng, then and there being, was a person whose business consisted in part of selling at wholesale brewed and malt liquors, (not proprietary patent medicine,) as agent for Franz Hagemeister and Henry Hagemeister, copartners doing business in the city of Green Bay, Wisconsin, under the firm name of Hagemeister & Son, without he or they having paid in full or in part the tax required by law to be paid upon the business, neither he nor they being druggists selling liquors for chemical, medicinal or sacramental purposes only and in strict compliance with the law."

The case went to the Supreme Court of Michigan on exceptions, and the conviction was affirmed, and the case remanded to the Circuit Court with instructions to proceed to judgment. This was done accordingly, and the Supreme Court having affirmed the judgment, the cause was thereupon brought to this court by writ of error.

The opinion of the Supreme Court is to be found in 42 Northwestern Reporter, 139.

The trial in the Circuit Court was had upon the following facts agreed:

"1. Franz Hagemeister and Henry Hagemeister are citizens of the United States of America, and reside at the city of Green Bay, in the State of Wisconsin, and are engaged in the manufacture of lager beer, under the name of 'Hagemeister

& Son,' at Green Bay aforesaid, where they have a brewery for the manufacture thereof.

"2. Such lager beer is brewed liquor within the meaning of act No. 313 of the laws of Michigan for 1887.

"3. Said Hagemeister & Son own a warehouse in the village of Iron River in the township of Iron River, in the county of Iron and State of Michigan, where they store quantities of their lager beer so made by them at Green Bay aforesaid, and from there shipped to their said warehouse in said village of Iron River, to be there stored and disposed of.

"4. The defendant, Henry Lyng, is employed by said Hagemeister & Son as their agent, on a regular salary, to look after their said warehouse, to take orders for and deliver said beer, so manufactured and stored, in quantities exceeding three gallons, and to collect and remit the proceeds of the sales thereof to said Hagemeister & Son, and was so employed on the 19th day of July, 1888.

"5. On the 19th day of July, 1888, at the village of Iron River, in the county of Iron and State of Michigan, said defendant, in the course of his said employment by Hagemeister & Son, did deliver from said warehouse to Martin Lally, and to divers other persons, all of whom paid him therefor, certain of said lager beer, so made and shipped by Hagemeister & Son from Green Bay aforesaid, in quantities exceeding three gallons. All of said lager beer was so delivered in the original packages in which it had been shipped. The defendant sold no other liquors.

"6. Neither the said defendant nor the said Hagemeister & Son, or either of them, have paid any tax in the village of Iron River aforesaid on the business of selling or keeping for sale malt liquors at wholesale or at wholesale and retail, nor given any bond such as is mentioned in act No. 313 of the Public Acts of Michigan for 1887."

Sections 1, 2, 4, 7, and 24, of act No. 313 of Public Acts of Michigan, 1887, p. 445, *et seq.*, are as follows:

"SECTION 1. *The People of the State of Michigan enact*, That in all townships, cities and villages of this State there shall be paid annually the following tax upon the business of

manufacturing, selling or keeping for sale, by all persons whose business, in whole or in part, consists in selling or keeping for sale, or manufacturing, distilled, or brewed or malt liquors or mixed liquors, as follows: Upon the business of selling or offering for sale spirituous or intoxicating liquors, or mixed liquors by retail, or any mixture or compound, excepting proprietary patent medicines, which in whole or in part consist of spirituous or intoxicating liquors, and any malt, brewed or fermented liquors, five hundred dollars per annum; upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail, three hundred dollars per annum; upon the business of selling spirituous or intoxicating liquors at wholesale, five hundred dollars; or at wholesale and retail, eight hundred dollars per annum; upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum; upon the business of manufacturing for sale spirituous or intoxicating liquors, eight hundred dollars per annum. No person paying a tax on spirituous or intoxicating liquors under this act shall be liable to pay any tax on the sale of malt, brewed or fermented liquors. No person paying a manufacturer's tax on brewed or malt liquors under this act shall be liable to pay a wholesale dealer's tax on the same.

"SEC. 2. Retail dealers of spirituous or intoxicating liquors, and brewed, malt and fermented liquors shall be held and deemed to include all persons who sell any of such liquors by the drink, and in quantities of three gallons or less, or one dozen quart bottles or less, at any one time, to any person or persons. Wholesale dealers shall be held and deemed to mean and include all persons who sell or offer for sale such liquors and beverages in quantities of more than three gallons, or more than one dozen quart bottles, at any one time, to any person or persons. No tax imposed under this act shall be required from any person for selling any wine or cider made from fruits grown or gathered in this State, unless such wine or cider be sold by the drink as other beverages are."

"SEC. 4. Every person engaged in, or intending to engage in, any business named in section one of this act, and requiring

the payment of any tax mentioned in said section one, shall, on or before the first day of May in each year, make and file with the county treasurer in the county where it is proposed to carry on such business, a statement in writing and on oath, showing the name and residence of such person, the ward, village or township in which it is proposed to carry on such sale or manufacture, and the nature of the business which such person is engaged in, or is intending to engage in; and shall, on or before the first day of May in each year, pay to the said county treasurer, in advance, the taxes required by said section one for such business for the year commencing on said first day of May and ending on the thirtieth day of April next thereafter."

"SEC. 7. If any person or persons shall engage or be engaged in any business requiring the payment of a tax under section one of this act without having paid in full the tax required by this act, and without having the receipt and notice for such tax posted up as required by this act, or without having made, executed and delivered the bond required by this act, or shall in any manner violate any of the provisions of this act, such person or persons shall be deemed guilty of a misdemeanor, and, upon conviction thereof, if there is no specific penalty provided therefor by this act, shall be punished by a fine of not more than two hundred dollars and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than ninety days, or both such fine and imprisonment, in the discretion of the court. And in case such fine and costs shall not have been paid at the time such imprisonment expires, the person serving out such sentence shall be further detained in jail until such fine and costs shall have been fully paid: *Provided*, That in no case shall the whole term of imprisonment exceed six months. And any person or persons engaged in any business requiring the payment of a tax under section one of this act, who, after paying the tax so required, shall be convicted of the violation of any of the provisions of this act, shall thereby, in addition to all other penalties prescribed by this act, forfeit the tax so paid by him or them, and be precluded from con-

tinuing such business for the remainder of the year or time for which said tax was paid, and be debarred from again engaging in any business requiring the payment of a tax under section one of this act, or from becoming a surety or sureties upon any bond required under section seven of this act, for the period of one year from the time of such conviction. Each violation of any of the provisions of this act shall be construed to constitute a separate and complete offence, and for each violation on the same day, or on different days, the person or persons offending shall be liable to the penalties and forfeitures herein provided, and be precluded and debarred from continuing or engaging in any business requiring the payment of a tax under this act as aforesaid. And it shall be the duty of sheriffs, marshals, constables and police officers to forthwith close all saloons and other places where the business of manufacturing, selling or keeping for sale any of the liquors mentioned in section one of this act is being conducted, upon which business the tax required by said section one has not been paid in full, and in which the receipt mentioned in section five of this act shall not be posted up and displayed."

"SEC. 24. All persons engaged in the business of selling or keeping for sale any of the liquors mentioned in this act, whether as owner or as clerk, agent, or servant or employé, shall be equally liable as principals for any violation of any of the provisions of this act, and any person or principal shall be liable for the acts of his clerk, servant, agent or employé for any violation of the provisions of this act."

Mr. Howard E. Thompson for plaintiff in error.

Mr. Edward Cahill for defendant in error.

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

Under the statute in question, which is entitled "An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous or intoxicating liquors and malt, brewed

or fermented liquors or vinous liquors in this State, and to repeal all acts or parts of acts inconsistent with the provisions of this act," an annual tax is levied "upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail" of three hundred dollars, and "upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum." The manufacturer of malt or brewed liquors made outside of the State of Michigan cannot introduce them into the hands of consumers or retail dealers in that State, without becoming subject to this wholesale dealer's tax of three hundred dollars per annum in every township, village or city where he attempts to do this. The manufacturer in the State need only pay the manufacturer's tax of sixty-five dollars, and is then exempt from paying the tax imposed on the wholesale dealer.

We have repeatedly held 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, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. *Leloup* v. *Mobile*, 127 U. S. 640, 648, and cases cited. In *Bowman* v. *Chicago and Northwestern Railway*, 125 U. S. 465, it was decided that a section of the Code of the State of Iowa, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was essentially a regulation of commerce among the States, and not being sanctioned by the authority, express or implied, of Congress, was invalid because repugnant to the Constitution of the United States; and in *Leisy* v. *Hardin*, *ante*, 100, the judgment in which has just been announced, that the right of importation of ardent spirits, distilled liquors, ale and beer from one State into another, includes, by necessary implication, the right of sale in the original packages at the place where the importation terminates; and that the power cannot be conceded to a State to exclude, directly or indirectly, the subjects of inter-

state commerce, or, by the imposition of burdens thereon, to regulate such commerce, without congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any State, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts and the usages of the commercial world. It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances. Lyng was merely the representative of the importers, and his conviction cannot be sustained, in view of the conclusions at which we have arrived.

The judgment of the Supreme Court of the State of Michigan is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Justices Harlan, Gray and Brewer dissented upon the grounds stated in their opinion in *Leisy* v. *Hardin*, *ante*, 100.

MACKALL *v.* MACKALL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 159. Argued April 1, 2, 1890. — Decided April 21, 1890.

A bill in equity was filed to set aside a deed made to one of his sons by the grantor as made under undue influence, and to affirm the validity of a will executed by that grantor a short time before the making of the deed. A decree was entered, affirming the deed as to a part of the property conveyed by it as a confirmation of a previously acquired equitable title, and setting it aside as to the remainder. The plaintiffs appealed; the defendant took no appeal; *Held*, that, although the decree was apparently incongruous in supporting the deed as to a part and setting it aside as to the remainder on a bill charging undue influence, yet as no appeal had been taken by the defendant, the court would look into the merits, and that, whatever criticism might be made upon its form, the decree was substantially right.

When a husband and wife separate, and one son remains with the father, taking his part, sharing his confidence and affection, and assisting him in his affairs, and the other children go with the mother, taking her part in the family differences, and this state of things continues for years, until terminated by the death of the father, it is natural and reasonable that the father, in disposing of his estate, should desire to specially provide for the son who remained with him and took his part; and a deed made by him with this object, and under the natural influences springing from such relationship will be sustained, unless it be made further to appear that the son practised upon the father imposition, fraud, importunity, duress, or something of that nature, in order to secure its execution.

The fact that a party who has received a parol gift of real estate has entered into possession and has expended money in improvements thereon, presents equitable considerations to uphold a decree establishing a subsequent conveyance as a confirmation of the equitable title.

In equity. The case is stated in the opinion.

Mr. S. S. Henkle (with whom was *Mr. R. M. Newton* on the brief) for appellants.

Mr. Jeremiah M. Wilson and *Mr. J. S. C. Blackburn* for Brooke Mackall, appellee. *Mr. W. Willoughby* filed a brief for same.

Mr. Robert Christy and his wife, *Mrs. Catharine Christy*, appellees in person.

Mr. Justice Brewer delivered the opinion of the court.

This is an appeal from a decree of the Supreme Court of the District of Columbia. The facts are these:

On December 9, 1879, Brooke Mackall, Sr., made a will, whereby he gave to his children, other than Brooke Mackall, Jr., all his property, declaring as to said Brooke Mackall, Jr., that "by this my last will and testament I do not give, devise, or bequeath to my son, Brooke Mackall, Jr., any part, parcel or portion of my property whatever, as the said Brooke Mackall, Jr., heretofore received from me many and large advances, and as it would be unjust to my other children hereinbefore named, but I direct Leonard to pay him one

dollar." This will was duly probated. On February 27, 1880, he executed and delivered to Brooke Mackall, Jr., a deed conveying many lots in Washington and Georgetown. A few days thereafter, and on March 7, 1880, he died, being at the time about eighty years of age. On February 14, 1882, complainants, devisees under the will, filed their bill, setting forth the will and the deed, and praying a decree, "declaring null and void and of no effect the deed of conveyance executed on the 27th day of February, 1880, by the decedent to the defendant, Brooke Mackall, Jr., and ordering the same to be delivered up to the complainants, and affirming the validity of the will made by the decedent on the 9th day of December, 1879." The gravamen of the bill was undue influence on the part of Brooke Mackall, Jr., in securing the execution of the deed. Upon final hearing, a decree was entered as follows by the general term, in which the case was heard in the first instance: "That the deed of Brooke Mackall, Sr., to the defendant, Brooke Mackall, Jr., of February 27, 1880, described in the bill of complaint, shall, as to lot No. 7, in square 223, at the southwest corner of Fourteenth Street and New York Avenue, in the city of Washington, D. C., and the interest therein described and growing out of the same, operate as a confirmation of the title, legal and equitable, in the said grantee, the defendant, Brooke Mackall, Jr., as to all the parties to this suit, and shall stand as a deed of conveyance for such purposes; but as to the remainder of the property described in said conveyance, not relating to said lot No. 7, in square 223, the said conveyance shall be, and the same is hereby, adjudged and decreed to be inoperative, null and void." From that decree the complainants appealed to this court.

As the bill was to set aside the deed as a whole, as having been obtained through undue influence, the decree is apparently incongruous, in that it declares that the deed be sustained as a confirmation of the title of Brooke Mackall, Jr., to lot No. 7, and void as to the other real estate; for if it were, as charged in the bill, a deed obtained through undue influence, it would seem that it should have been adjudged void *in toto*, and not sustained in part. It will be observed, however, that

Brooke Mackall, Jr., took no appeal; so that the question before us is, not whether there was error in declaring the deed void in part, but whether there was error in declaring it valid in part. Error, if error there was, may have been in either portion of the decree; but the limit of our inquiry is as to whether the deed was valid, and should be confirmed as to lot No. 7. If that part of the decree can be sustained, the incongruity is no matter of concern, for defendants have taken no steps to bring before us the other portion.

Further, in respect to this lot No. 7, it must be observed that the answer alleges that the defendant, Brooke Mackall, Jr., was, and had been for many years, the equitable owner. So, if the deed, as an independent and separate instrument, was valid, or the allegation of Brooke Mackall, Jr., that he was the equitable owner of lot No. 7, is true, any informality in the language of the decree may be disregarded, for in substance it was right. This compels an inquiry not merely into the circumstances surrounding the execution of the deed, but also as to the relations of the parties to this litigation to one another, and to the decedent.

More than twenty years before his death differences arose between Brooke Mackall, Sr., and his wife, which culminated in a decree of divorce. In those differences Brooke Mackall, Jr., sided with his father, the other children with their mother; and a large part of the record before us is made up of a story of those differences, and of the conduct and testimony of the children. No good purpose would be served by parading in this opinion those unpleasant facts, or by attempting to pass judgment in approval or condemnation of the conduct of either. Charity kindly throws a mantle of oblivion over these matters of long ago; and justice requires only notice of the fact that in the separation of parents the children took part, the one with the father, the others with the mother. During the score of years which intervened between this separation and the death of Brooke Mackall, Sr., the defendant, Brooke Mackall, Jr., was his constant companion and friend. This intimacy was unbroken, save in two instances of short duration each, the latter one being in the fall of 1879, during

which time the will referred to was executed. That after this temporary estrangement had ceased, he should desire to transfer to this son and constant companion his property, is not only not strange, but most natural and reasonable. It is true the deed was made after his last sickness had commenced; but how natural that during those hours of sickness the relations between himself and his children, during times of trouble and length of years, should present themselves to his mind with exceeding force! It is conceded that up to the time of his sickness he was a strong man, physically and mentally. Such a nature forms strong likes and strong dislikes; and at no time are such likes and dislikes so potent as when the thought of approaching death suggests the last action in respect thereto. That up to and including the time of the execution of this deed he retained his mental faculties in full vigor, unclouded by opiates, the testimony of his physician, his pastor, the justice of the peace before whom the deed was acknowledged, his counsel and his nurse abundantly establishes. Indeed, the contention of counsel on the argument was, not that the grantor was ignorant of the scope and purposes of the deed, or was doing that which he did not intend to do, but rather that the deed thus knowingly and intentionally executed was induced by undue influence; and, in this respect, reference was made to the long intimacy between father and son, the alleged usurpation by the latter of absolute control over the life, habits and property of the former, efforts to prevent others during the last sickness of the father from seeing him, and the subjection of the will of the father to that of the son, manifest in times of health, naturally stronger in hours of sickness. A confidential relation between father and son is thus deduced, which, resembling that between client and attorney, principal and agent, parishioner and priest, compels proof of valuable consideration and *bona fides* in order to sustain a deed from one to the other. But while the relationships between the two suggest influence, do they prove undue influence? In this respect, we quote from the notes to the case of *Small* v. *Small*, 4 Greenl. 220, reported in 16 Am. Dec. 259, as follows:

"Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practised, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. *Matter of Gleespin's Will*, 26 N. J. Eq. 523. . . . Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence. *Lee* v. *Lee*, 71 N. C. 139. Nor does the fact that the testator on his deathbed was surrounded by beneficiaries in his will. *Bundy* v. *McKnight*, 48 Indiana, 502. . . . Nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, his other children having forsaken him. *Elliott's Will*, 2 J. J. Marsh. 340; *S. C.* Redf. Am. Cas. on Wills, 434. . . . It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them.

"Undue influence must destroy free agency. It is well settled that in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising the influence."

That the relations between this father and his several children during the score of years preceding his death naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the

others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something of that nature, must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained. So that if this case turned simply upon the question of undue influence, compelling a voluntary conveyance, it would be difficult to find enough in the testimony to overthrow this deed.

But the case does not rest upon this alone. Brooke Mackall, Jr., alleged in his answer that lot seven was equitably his, having been given him years before by his father; and this allegation seems to have been recognized as true by the court below, for it established the deed as a confirmation of his title. It appears that in November, 1851, Brooke Mackall, Sr., purchased the lot, one-half of Key and Dunlop, and the other half of W. W. Corcoran. Neither party at the time made a deed, and from Key and Dunlop the title was only acquired thereafter by a decree in equity. A deed from Corcoran was not obtained until some time in 1865. Prior to this time the father had given the property to the son, and placed him in possession. This fact is proved, not alone by the testimony of the son, or the uncertain recollection of witnesses, but from written statements, which carry no taint of failing memory, and speak the same language one day and another. On October 6, 1865, Mr. Hyde, the agent for Mr. Corcoran, gave a certificate, in which, after mentioning the balance claimed to have been owing, he adds: "This sum has been paid, and Mr. Mackall asks, in lieu of the delivery of the deed as aforesaid to himself, to have the property conveyed to Brooke Mackall, Jr., he being a party to the same." On November 28, 1865, Brooke Mackall, Sr., gave a deposition, which was filed in a case in the Supreme Court of the District of Columbia, in which he stated: "Mr. Corcoran also refused to give me a deed unless I paid him additional for some back taxes, which I refused to do. I never did get a deed until the other day, since his return from Europe. This property

I gave my son, Brooke Mackall, Jr., some years ago, and he has had it in possession ever since, and has subdivided them into six lots. There is not a more valuable property in the city, as is the belief of many good judges. He rented the part occupied as a restaurant on the 9th of February, 1863, and has been drawing the rent ever since." There was also filed in the testimony in that case the following letter and relinquishment:

"WASHINGTON, *March* 3, 1866.

"Maj. Gen'l MEIGS, Quartermaster General.

"SIR: During the lifetime of Gov. Corwin, I employed him individually in behalf of my son, Brooke Mackall, Jr., of this city, who owns the lot on the corner of New York Avenue and 14th Street, occupied by paymaster-general department, to procure and collect from said department what was due to said Brooke Mackall, Jr., for rent and use of the premises. Since Gov. Corwin's death neither Brooke nor myself, as his agent, has ever recognized any one except Black, Lamon & Co. as attorneys in the premises, as will appear by power of attorney to them from Brooke Mackall, Jr. Mr. Corwin desired me to allow his partner, Judge Johnson, to assist in the claim, but I refused to allow any one but himself to take charge of it, having confidence in him as an old friend.

"Very respectfully, (Signed) B. MACKALL.

"I hereby relinquish all right to, and authorize Brooke Mackall, Jr., to receive the amount awarded for use of, property on 14th Street and New York Avenue, as it is his.

"Witness: (Signed) B. MACKALL.

"(Signed) L. G. BRANDEBURG.

"22d October, 1865."

On July 12, 1871, Brooke Mackall, Sr., filed an answer under oath in said cause, which was entitled *Alfred Richards et al.* v. *Brooke Mackall et al.*, in which he alleged "that he purchased said lot and promised to give it to his son, Brooke Mackall, Jr., at some future time, but has not since been in

a financial condition to carry out such intention, and has never given him any conveyance of the said lot, nor any paper-writing relating to said lot."

Again, litigation concerning this lot has been twice at least to this court. *Mackall* v. *Richards*, 112 U. S. 369; *Richards* v. *Mackall*, 124 U. S. 183. In each of these cases the equitable title of Brooke Mackall, Jr., was recognized. We refer to these various statements and decisions not as conclusive against the appellants; but as furnishing a solid foundation upon which to rest the testimony of Brooke Mackall, Jr., that the lot was given to him twenty years before the execution of this deed, possession taken, and improvements made by him. A party who receives a parol gift of real estate, enters into possession and expends money in improvements thereon, presents equitable considerations which will uphold a decree establishing a subsequent conveyance as a confirmation of his equitable title. So that in this respect, also, the ruling of the court below finds abundant support.

Another matter requires notice: The will referred to gives his property to his children other than Brooke Mackall, Jr., and this, notwithstanding the fact that he had made two prior wills, giving his property to Brooke Mackall, Jr. But as explaining this last will, in the second item he says: "I do not give, devise, or bequeath to my son, Brooke Mackall, Jr., any part, parcel or portion of my property whatever, as the said Brooke Mackall, Jr., heretofore received from me many and large advances." While no property is mentioned, yet, reading between the lines, it is evident that the testator recognized the validity of his parol gift of lot 7; and doubtless that was what was meant when he said that Brooke Mackall, Jr., had heretofore received from him large advances. It was his other property which he was giving to his other children; and it would be straining the language of the will to suppose that thereby he intended to ignore his parol gift, and to dispossess this son of that which he had given to him theretofore.

Putting these various matters together, we think that whatever criticism may be made upon the form of the decree, it is substantially right, and therefore it is *Affirmed.*

COMMERCIAL MANUFACTURING COMPANY *v.* FAIRBANK CANNING COMPANY.

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

No. 253. Argued and submitted April 11, 1890. — Decided April 21, 1890.

Reissued letters patent No. 10,137, granted June 13, 1882, to the Commercial Manufacturing Company, Consolidated, for an improvement in treating animal fats, the original patent, No. 146,012, having been granted December 30, 1873, to Hippolyte Mége, as inventor, expired by the expiration in April, 1876, of a Bavarian patent, and in May, 1876, of an Austrian patent, granted to Mége for the same invention.

The question of the identity of the United States patent with the Bavarian and the Austrian patents, considered.

IN EQUITY. The case is stated in the opinion.

Mr. Charles K. Offield, for appellants, submitted on his brief.

Mr. B. F. Thurston and *Mr. T. D. Lincoln* also filed briefs for appellants.

Mr. Lysander Hill (with whom was *Mr. T. S. E. Dixon* on the brief) 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 Illinois, on the 11th of December, 1882, by the Commercial Manufacturing Company, Consolidated, a New York corporation, and The National Dairy Company, an Ohio corporation, against the Fairbank Canning Company, an Illinois corporation, for the infringement of reissued letters patent, No. 10,137, granted June 13, 1882, on an application filed May 20, 1882, to the Commercial Manufacturing Company, Consolidated, for an improvement in treating animal fats. The original patent, No. 146,012, was granted December 30, 1873, having been applied for December 13, 1873, to Hippolyte Mége, as in-

ventor. It was assigned to the United States Dairy Company, and was reissued to that company as No. 8424, September 24, 1878. That reissue was then assigned to one Remsen, who assigned it to The Commercial Manufacturing Company, Consolidated, to which reissue No. 10,137 was granted. The National Dairy Company was the exclusive licensee for the State of Illinois, in which State the infringement was alleged to have taken place.

The answer set up, among other defences, that the United States patent had expired before the last reissue thereof was granted, by reason of the expiration of certain foreign patents granted to Mége for the same invention; that the last reissue was invalid; and that the defendant did not infringe.

So much of the specification of reissue No. 10,137 as is important in the present case is as follows: "Be it known that Hippolyte Mége, of Paris, France, now deceased, chemist manufacturer, did invent an improved means for transforming animal fat into butter, of which the following is a specification: This invention, which is the result of physiological investigations, consists of artificially producing the natural work which is performed by the cow when it reabsorbs its fat in order to transform the same into butter. The improved means he employed for this purpose are as follows:

"I. Neutralization of the ferments. In order to prevent the greasy substance which is settled in the tissue of the animals from taking the disagreeable taste of the fat, it is necessary that the ferments which produce this taste shall be completely neutralized. For this effect, as soon as possible after the death of the animal, he plunged the raw fats, called 'graisses en branches,' into water containing fifteen per cent of sea salt and one per cent of sulphite of soda. He began thus the transformation an hour, at least, after the immersion, and twelve hours, at most, afterward.

"II. Crushing. A complete crushing is necessary in order to obtain rapid work without alteration. For this purpose, when the substance is coarsely crushed, he let it fall from the cylinders under millstones, which completely bruise all the cells.

"III. Concentrated digestion. The crushed fat falls into a vessel which is made of well-tinned iron or enamelled iron or baked clay. This vessel must be plunged in a water bath of which the temperature is raised at will. When the fat has descended in the vessel he melted it by means of an artificial digestion, so that the heat does not exceed 103° Fahrenheit, and thus no taste of fat is produced. For this purpose he threw into the wash-tub containing the artificial gastric juice about two litres per hundred kilograms of greasy substance. This gastric juice is made with the half of a stomach of a pig or sheep, well washed, and three litres of water containing thirty grams of biphosphate of lime. After a maceration during three hours he passed the substance through a fine sieve, and obtained the two litres which are necessary for a hundred kilograms. He slowly raised the temperature to about 103°, F., so that the matter shall completely separate. This greasy matter must not have any taste of fat. It must, on the contrary, have the taste of molten butter. When the liquid does not present any more lumps he threw into the said liquid one kilogram of sea salt (reduced to powder) per hundred kilograms of greasy matter. He stirred during a quarter of an hour and let it set until obtaining perfect limpidness. This method of extraction has a considerable advantage over that which has been previously essayed. The separation is well made and the organized tissues which do deposit are not altered.

"IV. Crystallization in a mass. In order to separate the oleomargarine from the stearine, separate crystallizers or crystallizations at unequal temperatures have been already employed. He contrived for this purpose the following method, which produces a very perfect separation, and is as follows: He rendered the molten fat in a vessel which must be sufficient for containing it. This vessel is placed in a wash-tub of strong wood, which serves as a water bath. In this wash-tub he put water at the fixed temperature of 86° F., for the soft fats proceeding from the slaughter-house, and 98° for the harder fats, such as mutton fat. Afterward the wash-tubs are covered, and after a certain time, more or less long according

to the fats, the stearine is deposited in the form of teats in the middle of the oleomargaric liquid.

"V. Separation by centrifugal force. In order to avoid the numerous inconveniences of the employment of the presses which have been hitherto used, he caused the mixture of stearine and oleomargarine to flow into a centrifugal machine called 'hydro-extractor.' The greasy liquid passes through the cloth and the stearine is collected. When all the liquid is passed he put the machine in motion, and the crystals of stearine are entirely exhausted without the auxiliary of the presses. However, during certain seasons there are animals which produce crystals of stearine soft enough for rendering necessary the stroke of a press as a last operation, but in this case this operation has little importance, because it is applied only to a fraction of the product. In all cases the oleomargarine is separated from the stearine when it is cold, and passed to the cylinder, constituting, especially if its yellow color has been raised, a greasy matter of very good taste, and which may replace the butter in the kitchen, where it is employed under the name of 'margarine;' but, if it is desired to transform it into more perfect butter, he employed the following means."

The claims in that reissue are as follows: "1. The improved material herein described, produced by treating animal fats so as to remove the tissues and other portions named, with or without the addition of substances to change the flavor, consistency, or color, as set forth. 2. The process herein described of treating animal fats in the production of oleomargarine."

The claims of reissue No. 5868 were six in number, and those of reissue No. 8424 were nine in number; while the claims of the original patent and of reissue No. 10,137 were identical in number and language.

After a replication to the answer, proofs were taken, and the case was heard before Judges Gresham and Blodgett. The opinion of the court, delivered by the latter, is found in 27 Fed. Rep. 78; and, in accordance with its conclusions, a decree was entered, on the 22d of March, 1886, dismissing the bill. From that decree the plaintiffs have appealed.

The ground for the dismissal was, that the Bavarian patent, which was granted April 8, 1873, expired April 8, 1876; that the Austrian patent, which was granted October 31, 1869, expired May 26, 1876; and that, therefore, reissue No. 10,137 was invalid, because the application on which it was granted was not made until May 20, 1882. Mége also took out a patent in France for his invention, July 15, 1869, for fifteen years. The defendant contends that the Bavarian and the Austrian patents were granted for the same invention as reissue No. 10,137, while the plaintiffs allege the contrary.

The text of the specification of the Bavarian patent is as follows:

"The crude fats and the crude tallow have, until the present time, been used in a very imperfect manner for the preparation of edible fat or soaps, or the fabrication of melted tallow for the preparation of fatty acids, by means of chemical modes of saponification or other purposes.

"The new modes of procedure described herein consist both of chemical and physiological processes; they are not intended to improve the former methods of fabrication, but, on the contrary, on account of their nature and better properties, furnish neutral and new products. They are especially intended to benefit the navy and the less wealthy classes, by furnishing excellent edible and preservable fats at a price considerably lower than that of present similar products, — for instance, butter and the finer grades of fats.

"The reduction in the price of butter will, in a large measure, contribute to the general wealth, for stock-raisers, instead of making butter, will feed their milk to calves and thereby get more stock, thus furnishing more cattle for slaughtering purposes and at a lower price. The new procedure is also of considerable importance, from a hygienic point of view, in doing away with the emanation of bad odors inevitable with the former chemical methods, and due to the excessive high temperature to which fats had been exposed. The new procedure depends upon the following conclusions of modern science: 1, That the malodorous, colored, acid and rancid ingredients are not originally contained in the crude

fats as they occur in nature; 2, That these harmful substances are developed by the activity of the organized tissues under the influence of fermentation, heat and chemical agents; 3, That the fats of milk, termed butter, consist only of the immediate fat, which is altered first by a cellular tissue and then by the organized tissue of the udder. By utilizing these principles in industrial pursuits, or in domestic economy, there is obtained from the crude fats and the tallow —

"A. A pure fat, without the customary fatty smell and taste, which does not stick to the palate, and which resembles the fatty bodies most desired for eating purposes.

"B. Stearine for candles.

"C. As a residue, common tallow.

"D. This fat, really identical with the fat of butter, taken from its source before it has been changed in the milk gland, can be made into different kinds of butter, which, although prepared by an artificial process, is really butter, and differs only from the ordinary butter by keeping fresh for a much longer length of time.

"The means employed in the new preparation of these partly new, partly known, products constitute, in their details and in their entirety, the invention which we claim as our property. They are as follows:

"1. Washing and crushing. The crude fat is exposed to a jet of cold water between the conical cogs on two iron cylinders; it is finely subdivided by the current of water and the pressure, and falls thence into a tank, where a current of cold water completes the washing.

"2. Artificial digestion. This fat, now freed from all soluble animal substances, is mixed with artificial gastric juice, (stomach of the pig or sheep in acidulated water,) to the extent of immersing it completely, or to 1000 kilo. of fat, 300 kilo. of water, one kilo. bicarbonate of sodium, and two stomachs (pig or sheep) are added. This mixture is then kept at the temperature of the animal body, (by means of steam-pipes, or otherwise,) until all the molten fat has been dissolved by the pepsin of the stomachs, and appears in a clear layer on the surface. It is allowed to settle, or it is decanted, and the

process repeated, in order to extract all the fatty constituents, which now have lost the odor of animal fat, but have obtained a particular taste. The residue is tallow.

"3. Cooling. The fluid fat is poured into vessels which have an opening at the bottom and contain a layer of tepid water. They are covered, and when crystallization has occurred in consequence of cooling, the water is drawn off through the opening, the vessel is inverted and the cake is allowed to fall on a table.

"4. Pressure. This operation is intended to separate the hard constituent which makes the fat granular, congeal rapidly, and stick to the palate. The cooled fat is cut into slices about one inch thick, and put into a cloth between hot plates of a press. The portion which runs off is a mixture of margarine and oleine, resembling lard in composition, and of about the taste of fresh butter. It melts in the mouth like butter and does not stick to the palate like beef fat. The solid residue taken out of the cloth is good stearine, fit for making candles immediately.

"5. Uniformity and ductility. In order to remove the granular appearance of the margarine produced by congelation, and to give it the solid and uniform appearance usually possessed by fats, and in order, also, to remove any air which may have entered and might interfere with its preservation, without admitting air again, a vessel is filled with the fat, completely closed, and a churning or stirring apparatus in its interior is set into motion. The margarine is thus kept in motion and is then withdrawn from the vessel before cooling. It is now hard or even brittle, according to the temperature. It is rendered soft and ductile by rolling it between wooden cylinders. It is put into the form of plates or filled in tubs to be put in the market.

"6. Decolorization. The first fat is ordinarily of a light yellow color. If it is desired to remove this color without attacking the fat, the property which the fat possesses of remaining fluid for some time before cooling can be utilized. In this state an acid — for instance, muriatic acid — is added in sufficient quantity to remove the color, and it is then

washed with tepid water until the last trace of acid has disappeared.

"This entire procedure, with or without pressure, can be applied to all crude fats.

"The white or faintly yellowish fat obtained by means of the described procedure is remarkably pure, and has a taste of almonds, hitherto not known of any animal fat. It is especially available for —

"A. Food, as a substitute for animal fats and lard.

"B. For the fabrication of fine toilet soaps.

"C. The manufacture of ordinary soaps to replace the olive oil.

"D. The lubrication of machinery, which is never attacked if the one hundredth part of calcined magnesia be added to the fat.

"E. The artificial production of butter.

"7. Transformation into butter. The pure fat which has undergone no change by heat or chemical agents is the same substance which the cow consumes in its organism in order to have it pass through the udder in the form of milk fat or butter. The fat is, therefore, but butter in its original form. This observation, and the observation that the milk gland of a cow contains a kind of pepsin possessing the property of making a milky emulsion of fat and water, are the basis of the industrial procedure of changing fat into butter, a physiological operation to be carried out as follows:

"At the temperature of the animal body, one part of fat is mixed with the same quantity of water, to which $\frac{1}{50}$ part (two per cent milk cheese, or milk without water, or cream in water) has been added, and with $\frac{1}{100}$ part of carbonate of sodium, and $\frac{1}{50}$ part of the tissue of the mammary gland. The mixture is kept at the temperature of the body and allowed to work. When the fat becomes milky it appears at first like a thick milky cream; later on it changes into butter, which is allowed to cool with the precautions explained in articles 3 and 5. The gland tissue of the mixture can also be replaced by artificial products, but with a less satisfactory result. Butter thus prepared keeps longer than milk butter, and does not, like the latter, acquire the pungent odor [due]

to butyric acid, or it contains less caseine, insoluble in ether, and may contain less water or buttermilk, as may be desired, than butter obtained in the usual manner.

"Since the above-described modes of procedure, dependent on known and on unknown methods, are new in their industrial entirety and furnish new products, we claim them as our exclusive property for the entire term of the patents."

The text of the specification of the Austrian patent is as follows :

"My invention consists in the production of neutral fatty bodies of hitherto unknown natural appearance and excellent properties. By means of special treatment of the crude tallow, I obtain a pure fat devoid of smell and taste, which does not become rancid and which keeps for a long time. This substance I obtain through procedures partly known, partly new, the entirety of which constitutes the following methods:

"1. Perfect washing. This is done by crushing the fresh fat just taken from the animal between rollers under a spray of fresh water. The fat, subdivided finely by the action of the water and the pressure, falls into a tub, where the washing is completed by a current of water.

"2. Artificial digestion. This fat, from which all soluble animal substances have been removed, is mixed with artificial gastric juice, (maceration of a pig's stomach in acidulated water,) in sufficient quantity to immerse it, and the mixture is kept at the temperature of the animal body until the fat appears as a clear layer on the surface. The mixture is allowed to settle, and the sediment is subjected to another operation, in order to extract all fatty matter, which in this case has no longer the odor of animal fat, but the taste of finest fats.

"3. Pressure. This operation separates the hard constituent which makes the fat granular and causes it to congeal rapidly. This work, hitherto very difficult, is carried out on a commercial scale, in the following manner: The fluid clear fat is poured into vessels with an opening at the bottom and containing a layer of tepid water. They are covered, and when the cooling and the crystallization have taken place the

water is drawn off through the opening, the vessel is inverted, and the mass allowed to fall upon a table. It is cut into cakes one to two centimeters thick. These are put into canvas and pressed between two warm plates. By this method there is obtained about sixty per cent of a fatty body resembling butter, and identical in composition with lard, but free from odor and of a perfectly pure taste. The solid portion remains in the canvas.

"4. Uniform solidity is given to this fatty body in the following manner: In order to make it hard and not granular, without admitting air, it is poured into a tinned-iron vessel filled thus completely. This well-closed vessel contains a stirring apparatus kept in motion from the outside. The vessel is, besides, kept surrounded by cold water, so that the fat which is being stirred, while cooling without the admission of air, becomes thick and uniform. It is then put into another vessel, where it becomes completely solid and hard.

"This hard fat is finally cut or sliced into thin slices, by some cutting machine similar to the mechanical arrangement used for cutting fine soaps, the blades being set to furnish thin slices. This work, giving the fat the proper ductility, can also be done by hand.

"5. Decolorization can be employed or omitted as desired. This fat is usually of a yellow tinge. This color can be removed easily and without damage, by utilizing the property of the fat of remaining fluid for some time in cooling. In this state it is mixed with enough fine acid — for instance, muriatic acid — to remove the color. It is then repeatedly washed with warm water until the last trace of the acid has been removed.

"This entire procedure, with or without pressure, can be employed in the case of any fresh fat just taken from the animal. By means of the same, I obtain partly solid partly soft, white or faintly yellowish, perfectly pure fatty bodies, which have a faint flavor of almonds. These new fatty bodies are applicable to various industrial purposes, according to their degree of consistency, especially to —

"1. The fabrication of toilet soap, particularly fine and beneficial to the skin.

"2. The fabrication of ordinary soaps, to replace the olive oil and give a large yield.

"3. The lubrication of machinery, which is never attacked by this excellent lubricating material, especially when $\frac{1}{1000}$ part of calcined magnesia has been added.

"I claim, therefore, as my invention, the above-described mode of preparation of a wholly new fatty body. The peculiar points of importance of my procedure consist in washing, digesting, pressing, solidifying and decolorizing."

It is contended by the plaintiffs that they have shown, by the testimony of experts, that reissue No. 10,137 differs from the foreign patents in these particulars: (1) The neutralization of the ferments is entirely lacking in each foreign patent; (2) Complete crushing is provided for in the United States patent, so as to bruise all the fat cells, while the foreign patents do not provide for such complete crushing, but do provide for coarse crushing and washing, both of which actions render difficult, if not impossible, the production of the article which is the result of the United States patent, and involve a different process; (3) Each of the foreign patents makes vital the use of an artificial digestion, produced by a large proportion of gastric juice, while the United States patent practically dispenses with this gastric juice as an operative element in the process and product, and relies upon the slow increase of temperature to produce complete separation; (4) Each foreign patent directs the cooling of the product to solidification, so as to be sliced into pieces to be pressed, while the United States patent directs a crystallization at a uniform temperature, above 86°, leaving the oil fluid; and (5) Each foreign patent provides for the separation of oil from the stearine by pressing the cold-sliced or solidified cakes between hot or warm plates, while the United States patent separates the oil from the stearine with the product at the temperature of uniform crystallization, namely 86°. The contention is, that no step of the foreign patents is found in the United States patent, nor any equivalent therefor; and that the artificial digestion, the cooling to solidification, and the pressing between hot plates found in each of the foreign patents, is an absolute bar to the

production of the article which is the result of the United States patent.

Professor Henry Morton, an expert witness for the plaintiffs, says: "There is, of course, a difference in the improved product described and claimed in the Mége patent, according as it is made with or without the addition of materials affecting its color, consistency and flavor. I will, therefore, refer to each of these conditions separately. When the improved product of Mége, without these additions referred to, is compared with ordinary dairy butter, we find it to be substantially identical therewith, as regards its main constituents and its general consistency and character. Both products then consist substantially of mixtures in nearly the same proportions, in either case, of stearine, margarine, and oleine, and both are unctuous solids varying in consistency, being quite solid near the melting point of ice, quite fluid at a temperature of about 90°, and more or less soft and plastic at intermediate temperatures. The Mége product, however, differs from dairy butter, in the first place, as to its composition, by reason of the presence in the dairy butter of several substances not found in the Mége product. Thus, the dairy butter contains about five per cent to six per cent of the peculiar fat known as butyrine; it also contains a smaller amount of caseine, some trace of albumen; also extremely minute quantities of caprilin, caproilin and caprylin. None of these substances would be present in the Mége product, as above referred to, which would therefore lack the peculiar flavor due to the presence of these products. The amount of water and of salt would also, as a rule, be greater in dairy butter than in the Mége product. There would also be a difference in consistency, inasmuch as the dairy butter would not constitute a homogeneous mass of fatty substance, but would be a solid emulsion of such fatty substance, in which the same existed as minute spheroids or particles of the said fatty substance, separated from each other by an aqueous fluid consisting of water, holding in solution salt and traces of albumen and caseine. When the Mége product has been converted into a more perfect butter, as he calls it, by

the addition of certain substances, as indicated by him, it will then contain all or nearly all the materials found in dairy butter, though not in exactly the same proportions, all these distinctive matters being, as a rule, present in smaller proportions in the Mége product than in the dairy butter. As regards the water and salt, the relative proportions may vary either way in different samples, depending upon the amount of salt added and the amount of working to which the butter of the Mége product has been subjected. As regards consistency of the more perfect butter of the Mége patent and ordinary dairy butter, there will be a substantial identity, both being solid emulsions of fatty matter with an aqueous fluid. . . . As articles of food, the Mége product and ordinary dairy butter are only distinguishable by characteristics which are variations of degree. Thus the Mége product, in its simplest form, would have less flavor and a less agreeable consistency than good dairy butter, while, on the other hand, its freedom from disagreeable flavor would render it superior to a low or poor grade of dairy butter. When the flavoring materials were added, the Mége product would then be extremely difficult to distinguish from the best dairy butter, but, as compared with a very fine and highly flavored dairy butter, would be lacking in flavor. As regards wholesomeness, I do not think there would be any difference between the Mége product in either of its conditions and ordinary good dairy butter, though the Mége product would be better in this respect than a strong or rancid quality of dairy butter. The same remark applies to the nutritiousness of the materials compared, while as regards palatableness the Mége product would, I think, hold an intermediate place between the highest and the lowest grades of dairy butter, being better than the low grades and not quite equal to the highest in this respect."

On the question of the identity of the Bavarian patent with reissue No. 10,137, the opinion of the Circuit Court, after quoting the text of the specification of the Bavarian patent, says: "Here we have the directions of the Bavarian patent for producing the Mége product, consisting, first, of crushing

between cogged cylinders and washing, by which it is 'finely subdivided.' The American patent says: 'A complete crushing is necessary under millstones.' So that it would seem there is only a difference in degree in the Bavarian and American processes, as to the crushing. The American process says the fat must be completely crushed so as to bruise all the cells. The Bavarian patent says it is to be finely subdivided by the current of water and by crushing between the conical cogs of iron cylinders. In both patents Mége uses the word 'crushing' as a title or heading for his directions. The directions for the artificial digestion are the same for the two patents, except that in the Bavarian he does not instruct specifically how to make the artificial gastric juice. He simply says it is 'the stomach of the pig or sheep in acidulated water;' but the proof in this case shows that the mode of making artificial gastric juice was well known in the arts before the date of Mége's invention, and he undoubtedly assumed that the person who would attempt to use the process covered by his patent would have sufficient physiological and chemical knowledge and skill to make artificial gastric juice. The American patent also states that the fat, while in the process of digestion, is to be kept at a temperature of 103° F., while the Bavarian patent says it is to be the temperature of the animal body; but the proof in this case shows that 103° F. is the temperature of the animal body, so it would seem there is no substantial difference between the processes of digestion described in the two patents. The third step in the Bavarian patent is entitled 'Cooling,' the process of which is pouring the clear liquid fat into vessels which have an opening at the bottom, and containing a layer of tepid water, where they are covered and remain until crystallization has occurred in consequence of the cooling. He does not give specific directions as to the temperature at which the fat is to be kept during the crystallizing process, but evidently leaves that to the skill of the operator, assuming that he will sufficiently understand by the use of the word 'crystallization' what the process must be. The next step after crystallization is the separation of the oleo and margarine from the crystallized stearine; and this in the Bavarian

patent is accomplished by pressure between the hot plates of a press. Inasmuch as the centrifugal machine, or the hydro-extractor and the press are analogous devices for accomplishing the same results, — that is, of expelling the liquid or fluid contents from the mass, — there is no essential difference between the Bavarian and American patents in this step of the process. The Bavarian patent is also silent as to the neutralization of the ferments or germs of decay; but it can hardly be possible that any person would enter upon the manipulation of animal fat without sufficient common knowledge and skill to know, without instruction by the specific terms of the patent, that, in order to produce sweet and pure oil or fat, the process of fermentation and decay must be prevented. So that, taking the Bavarian patent as a whole, there would seem to be such an identity in the processes described as to make them essentially the same. Probably because Mége assumed that whoever would attempt the transformation of crude fats under his process in Bavaria would possess more knowledge or experience in regard to the handling of fats than he assumed would be known in this country, as a matter of general knowledge, he deemed it necessary in his American patent to give more minute and specific directions in regard to some of the steps of the process than he did in his foreign patents. Yet we think there can be no doubt that he has substantially described the same process in both patents."

In regard to the Austrian patent, the opinion of the Circuit Court says: "In the Austrian patent issued to Mége, October 31, 1869, he describes the first process under the title of 'Perfect washing,' which he says is done 'by crushing the fresh fat just taken from the animal between rollers under a spray of fresh water.' The second step, 'Artificial digestion,' consists in mixing the crushed fat 'with artificial gastric juice, (maceration of a pig's stomach in acidulated water,) in sufficient quantity to immerse it, and the mixture is kept at the temperature of the animal body until the fat appears as a clear layer on the surface.' Here we have the same process as in the American patent, except that the directions for crushing do not include grinding or crushing under millstones,

and he gives no recipe for making artificial gastric juice, except that of the maceration of a pig's stomach in acidulated water, which we must infer he assumed was a sufficient direction to enable an ordinarily intelligent person, skilled in the art of manipulating or handling fats, to make the gastric juice. The directions for crystallization require the clear fluid fat to be poured into a vessel with an opening at the bottom, and containing a layer of tepid water. The vessel is then covered, and, when the cooling and crystallization have taken place, the cooled mass is turned out, cut in slices, and placed in canvas bags and pressed between warm plates, by which method he says there is obtained about sixty per cent of a fatty body resembling butter, and identical in composition with lard, but free from odor and of a perfectly pure taste."

The opinion then proceeds: "The French and the English patents give substantially the same description for the process as is contained in the Austrian and Bavarian patents. All the steps of the American patent, with the exception of the neutralization of the ferments, are specifically called for and described, although, perhaps, not with all the minute directions which are found in the American patent. All the proofs agree that Mége was a man of inventive genius and high scientific acquirements, and it can hardly be possible that if, between the time he took out the French, English and Austrian patents, in 1869, and the Bavarian patent, in April, 1873, and the time when he applied for his American patent, in December, 1873, he had discovered any substantially new and material addition to the process covered by those foreign patents, he would not have specifically named and stated wherein the American differed from the foreign patents. As already said, it seems clear, from Mége's own statements, and those of his solicitors, that the purpose was to cover by the American patent what had been covered by his French patent of 1869, and we cannot believe that, if anything in addition to this foreign patent had been intended to be introduced into the American patent, it would not have been stated in some explicit terms; and there can be no doubt that the French, Austrian and Bavarian patents are substantially identical."

In regard to the foreign patents, the opinion of the Circuit Court says: "The scientific experts called by the complainant, Professors Morton, Chandler and Wheeler, have testified that they do not think the invention described in the American patent is found in either of the foreign patents. Their reasons for such conclusion, briefly summarized, are: (1) That the crushing spoken of in the foreign patents is not so complete and thorough as that called for by the American patent, where the fat is to fall from cylinders under millstones, which shall completely bruise all the cells; (2) That in the American patent the digestion is to be accomplished with a less quantity of gastric juice than is called for by the foreign patents, as the foreign patents say the crushed fat is to be immersed in the artificial gastric juice; (3) That by the American patent the temperature may be raised above 103° F., 'so that the matter shall completely separate,' while the foreign patents limit the degree of heat to the temperature of the animal body; (4) That in the foreign patents the process of cooling is allowed to proceed to such a point that the mass can be cut in pieces or slices, while in the American patent the product is not allowed to cool so as to become rigid, but is retained at a temperature of about 86°.

"With all due respect to the opinions of these eminent chemists, we must say that the points of difference suggested by their testimony are purely and wholly differences in degree. The necessity of crushing is stated in all the patents, both American and foreign. The degree of crushing would obviously affect the quantity of oil extracted from the fat by the process of digestion, as the only object of the crushing is to release the fat from the tissues in which it is held in its natural condition. The necessity for thorough and minute comminution is one that would suggest itself from any operative's common knowledge. Any man who had intelligence enough to know the uses of his own teeth would know the necessity of the complete comminution of any article to be subjected to the process of digestion or the action of the gastric juice. It would hardly require a scientist to instruct an operative that the more finely a substance is comminuted

the more direct and prompt would be the action of the gastric juice and the process of digestion.

"As to the differences in the process of digestion between the American and foreign patents, it would seem to be true that the measured quantity of gastric juice directed to be used in the American patent is less than that called for in the foreign patents, because he gives specific directions as to the number of litres of gastric juice for 100 kilogrammes of fat in the American patent, while in the foreign patent he says the fat must be immersed in the gastric juice; but the proof shows that the formula for the gastric juice in the American patent gives a more potent and effective product, and we presume Mége may, by his experience and practice under his patents, have ascertained, at the time he took the American patent, that the process of digestion could be accomplished with a less quantity of gastric juice than was described in his first patents; but this is only a difference in degree, and with a larger quantity of gastric juice and not so complete comminution, about the same result would probably be obtained as with complete and thorough crushing of all the fat cells and a smaller quantity of gastric juice, especially if made stronger or more potent; so that the difference in the American and foreign patents in that regard seems to us wholly immaterial and unsubstantial.

"As to the claim that these witnesses find in the American patent permission to raise the temperature above 103° F., we do not think it is well founded when the whole of Mége's specifications in his American patent are considered. Under the third head, 'Concentrated digestion,' Mége says, 'When the fat has descended in the vessel he melted it by means of artificial digestion, so that the heat does not exceed 103° F.' Further on, in the same paragraph, he says, 'He slowly raised the temperature to about 103° F., so that the matter shall completely separate.' Taking these two expressions together, it seems to us the first limits the second, and that the directions of the patent are specific not to raise the temperature above 103° F. Certainly the language, 'I slowly raise the temperature to about 103°,' does not authorize rais-

ing the temperature above that point. When the distinction immediately before is that it must not exceed 103° F.; and when we consider this language of the specifications in the light of the testimony in the case, which shows that gastric juice is destroyed whenever its temperature is raised much above 103° F., we think there can be no doubt that the eminent scientist who devised this process intended to keep within the limits in which his gastric juice would be operative for the purposes of digestion.

"The last and final distinction, that the foreign patents contemplated a cooling of the mass below 86°, or until it had become stiff so that it could be handled and cut, before the pressure was applied for the purpose of separating the oleomargarine from the stearine, is a distinction, as it seems to us, without a difference. If the stearine had become crystallized in the mass, although it might at one time have been cooled below 86°, when it was sliced and placed between the warm plates in the press, the oleomargarine would again become liquid, and flow out under the action of the warm plates and the press, so as to secure the separation; and that such was the result is sufficiently established by the statements in the foreign patents, notably the Austrian and English, that about sixty per cent of a mixture of the margarine and oleine, of a composition identical with lard, but of superior flavor, was obtained by the pressure, and would seem to show, in the light of the proof in this case, that he obtained as large a product as is obtained by the process of the American patent.

"A fair test of the question as to whether the American patent is anticipated by the foreign patents, or is included in them, we think would be: Were a person in this country, after the issue of the present American patent, to commence the manufacture of oleomargarine by the precise process described in the Bavarian or Austrian patents, supposing that process had not been patented abroad, would the courts refuse an injunction to restrain the use of the process on the ground that it infringed that covered by the American patent? We can hardly deem it possible that any intelligent court would deny an injunction if applied for under such circumstances,

and we think this fairly illustrates the relation of the foreign to the American patent."

The conclusion of the Circuit Court was that the plaintiffs' patent expired by the expiration of the Bavarian and Austrian patents.

We have carefully considered the arguments urged in the briefs of the counsel for the plaintiffs, in connection with the testimony of their experts, and are of opinion that the views of the Circuit Court, above quoted, are correct. Its decree is

Affirmed.

VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY *v.* SMITH.

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

No. 276. Submitted April 11, 1890. — Decided April 21, 1890.

A suit was brought to recover from T. possession of a tract of land of about 35 acres, part of a larger tract of 186 acres, which the plaintiff claimed to own. The lessor of T. of the 35 acres was made defendant, and answered, claiming to own the land sued for and also the rest of the 186 acres. The plaintiff recovered a judgment for the 35 acres, their value not exceeding $2000. The value of the 186 acres was about $10,000. The lessor having brought the case to this court by a writ of error, it was dismissed, on the ground that the amount involved was not sufficient to give this court jurisdiction, because it did not exceed $5000, exclusive of costs.

THE case is stated in the opinion

Mr. Edward Colston and *Mr. Frank P. Stubbs* for plaintiffs in error.

Mr. A. H. Leonard for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Western District of Louisiana, by

Robert N. Smith, Elizabeth A. Smith (wife of Marine Duval, joined, authorized and assisted by her husband), William L. Smith, Elizabeth W. Smith, (widow of James F. Smith,) citizens of Kentucky, and John S. Smith, a citizen of Colorado, as legal heirs of William W. Smith, deceased, against George A. Turner, a citizen of Louisiana.

The petition avers that the State of Louisiana, on the 14th of May, 1853, sold to William W. Smith a certain tract of land known as Silver Lake, situated in section 31, township 18, ranges 13 and 14, in the parish of Caddo, in the State of Louisiana, containing an area of 186.57 acres, at the maximum price of $1.25 per acre, which at the same time was paid into the treasury of the State by said Smith; that, after that sale, and on the 24th of February, 1855, the State issued a patent for said tract of land to Smith; that it acquired said tract as swamp and overflowed land, granted to it by the acts of Congress of 1849 and 1850, and sold the land to Smith as swamp and overflowed land; that all sales of land in Louisiana, claimed by the State as swamp and overflowed lands, whether made by the United States or by the State, and whether the land sold was of that character or not, were confirmed by the act of Congress of March 2, 1855, entitled "An act for the relief of purchasers and locators of swamp and overflowed lands;" that the act of 1855 was extended to sales made after its passage, and was continued in force, by the act of March 3, 1857, to confirm all selections of swamp and overflowed lands by the several States under the acts of 1849 and 1850; that the act of 1855 confirmed the title of Smith to the tract of land known as Silver Lake, whether it belonged to the State under the swamp-land acts of Congress, or whether it belonged to the United States; that Smith acquired a title to the land both from the State and the United States, by purchase and by confirmation by act of Congress; that that title is paramount to all subsequent claims from the government, and is indefeasible under the act of confirmation of March 2, 1855; that the plaintiffs are the owners of the tract of land known as Silver Lake, which is illegally withheld from them, and a part of it, containing 40 acres or more, is

in the possession of George A. Turner, a citizen of Louisiana, who refuses to deliver to the plaintiffs that part of the land; and that the part in possession of Turner is worth at least $600. The prayer of the petition is for a citation to Turner, and for judgment for the recovery of said tract of land in his possession, with its revenues, from judicial demand.

Turner was served with a citation, and put in an answer alleging that he was in the possession of a portion of the property described in the petition, as a tenant of the Vicksburg, Shreveport and Pacific Railroad Company, and praying that his said lessor and the owner of the property be made defendant, and he be discharged. An order was made by the court that the company be made a defendant in his place, and a citation was issued to it, with which its president was duly served. It was a Louisiana corporation.

The company first filed an exception to the capacity of the plaintiffs to sue, on the ground that they were not the legal heirs of Smith, and if they were, were not his sole heirs. This exception was tried and overruled. A plea and exception of *res adjudicata* to the suit was then filed by the company, on the ground that, in a suit entitled "*The State of Louisiana* v. *W. W. Smith*," in the District Court of Caddo Parish, Smith put at issue the validity and legality of his title to the land described in the plaintiffs' petition under the certificate and patent described therein; that, upon a final hearing, judgment was rendered in that suit decreeing said certificate and patent null and void, and that they be cancelled and delivered to the State of Louisiana; and that the plaintiffs, the heirs of Smith, were bound by the judgment in that suit.

The company also put in an answer to the petition, denying its allegations, and alleging that the sale or entry of the land, as set forth in the petition, was cancelled by the register of the state land office, on the 10th of June, 1853, and the cancellation was duly notified to Smith; that the sale, entry and patent were without authority of law, for reasons set forth in the answer; that the land was never selected by the State of Louisiana as swamp and overflowed lands, and never reported to the Commissioner of the General Land Office, and never

approved as such by the Surveyor General, the Secretary of the Interior, or the Commissioner of the General Land Office, and never listed or returned by the Secretary of the Interior to the State as swamp and overflowed lands; that the State had never claimed or acquired the land as such; that the land did not belong to that class of lands, but to the other class, known or designated as "shallow lakes," and therefore was not embraced in the grant from the United States of swamp and overflowed lands, under the acts of Congress of 1849 and 1850; that the company was the owner of the land, by grant from the United States to the State, under the act of Congress of June 3, 1856, to aid in the construction of railroads in the State, and which was accepted by the State for that purpose; that, all the requirements of said grant having been complied with by the State and by the Vicksburg, Shreveport and Texas Railroad Company, the land described in the petition, being embraced in that grant, was acquired by that company, and duly certified or patented by the United States as belonging to that company, and had been legally sold or transferred by it to the defendant company; and that the land described in the petition and sought to be recovered in the suit was worth at least $10,000. The answer prayed that the plaintiffs' demand be rejected, and for judgment decreeing the company "to be the owner of said land and quieted in possession thereof, and for general relief."

The case was tried by a jury, which rendered the following verdict: "We, the jury, find for plaintiffs, and that the land sued for is described in the plat made by W. R. Devoe and filed in evidence." A motion for a new trial was made and overruled, and a judgment was entered against Turner and the company, adjudging that the plaintiffs were the owners of the land in controversy, and entitled to its possession, the land "being known and described as follows," and then giving a description of it by courses and distances, "containing thirty-five $\frac{18}{100}$ acres, situated in the parish of Caddo, Louisiana, and as shown and described on map and survey of same made by W. R. Devoe, civil engineer, on file and of record in said cause." The judgment also ordered that writs

of possession issue in favor of the plaintiffs and against the defendants; that the plaintiffs have judgment against the defendants for costs; and that the plea of *res adjudicata* be overruled. The railroad company has brought a writ of error to review the judgment.

There are six bills of exceptions found in the record. One of them states that on the trial the company offered three persons as competent witnesses to prove that the land described and claimed by the plaintiffs in their petition, under a certificate and patent from the State of Louisiana, "and which is claimed by defendant under a grant from the United States government to the State of Louisiana to aid said railroad, and for which defendant prays judgment, recognizing their ownership, etc.," was worth $10,000; that the plaintiffs' counsel objected, on the ground that the only part of the Silver Lake tract of 186.57 acres that was in controversy in this suit was the part alleged to be in the possession of Turner, "and it was admitted by counsel for defendant that said part or parcel of land was not worth exceeding $2000." The bill of exceptions states that the objection of the plaintiffs was sustained by the court, on the ground that the petition claimed only the number of acres in the possession of Turner; that the judgment in this case, if for the plaintiffs, could affect only the land held by him; and that the claim set up by him or by the railroad company did not make this a suit for more than the number of acres of land claimed by the plaintiffs, "which is about forty acres, more or less, and is shown by admission of counsel not to be worth more than two thousand dollars."

The plaintiffs move to dismiss the writ of error, on the ground that the matter in dispute does not exceed the sum of $5000, exclusive of costs. The railroad company contends that the plaintiffs, by their petition, claim to be the owners of the entire Silver Lake tract of 186.57 acres; that the company, by its answer, also claims title to the entire tract; that it is stated by the court, in one of the bills of exceptions, that, if the suit involves title to the 186.57 acres, the land "is worth about $10,000, as is admitted by counsel for plaintiffs;" and that, therefore, this court has jurisdiction of the writ of error.

Counsel for Parties.

But we are of opinion that this court is without jurisdiction of the case. All that the plaintiffs, in their petition, claimed to recover was the part of the land which was in the possession of Turner, alleged therein to contain 40 acres or more. The answer alleged that the land sought to be recovered in the suit was worth at least $10,000, and prayed that the plaintiffs' demand be rejected, and for judgment decreeing the company "to be the owner of said land." This put in issue only the land in the possession of Turner. The judgment is limited to a piece of land described by metes and bounds, and containing $35\frac{18}{100}$ acres, as shown by a map and survey of the same, on file and of record in the cause. The value of that parcel of land is shown clearly to be not over $2000, and this is conclusive as to our jurisdiction. *Elgin* v. *Marshall*, 106 U. S. 578, and cases there cited; *Opelika City* v. *Daniel*, 109 U. S. 108; *Bruce* v. *Manchester & Keene Railroad*, 117 U. S. 514; *Gibson* v. *Shufeldt*, 122 U. S. 24.

Writ of error dismissed.

UNITED STATES *ex rel.* MILLER *v.* RAUM.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1572. Submitted April 7, 1890. — Decided April 21, 1890.

When the Commissioner of Pensions, in executing an instruction from the Secretary of the Interior to increase a pension, gives a construction to a statute which had not been construed by the Secretary, but which had been left open to the commissioner to construe, mandamus does not lie to compel the commissioner to give a different construction to it.

THE case is stated in the opinion.

Mr. J. G. Bigelow for the plaintiff in error.

Mr. Assistant Attorney General Maury for the defendant in error.

Opinion of the Court.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The relator, Charles R. Miller, applied for a peremptory mandamus against the respondent, Green B. Raum, Commissioner of Pensions, to command him to reissue the relator's pension certificate, with the rates of $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874; and $72 per month from June 17, 1878; and to allow him the monthly difference between these sums and what had been allowed him. From the statements of the petition, it appears that the sums heretofore allowed to the relator by way of pension have been $8 per month from the date of his discharge from military service, August 27, 1865; $15 per month from June 6, 1866; $18 per month from June 4, 1872; $24 per month from November 23, 1881; $30 per month from March 3, 1883; and $50 per month from January 14, 1885.

The injuries of which the relator complains are anchylosis, or rigidity, of the spinal column, and of the left leg, resulting from wounds received in the service, and making him nearly helpless, so as to require, as he alleges, the regular personal aid and attendance of another person.

After repeated applications for an increase of his pension, in which he succeeded in getting only $30 per month from March 3, 1883, under the act of that date, he finally appealed from the Commissioner of Pensions to the Secretary of the Interior, who rendered a decision on the 6th of February, 1885, directed to the commissioner, and declaring, amongst other things, that "the pensioner is greatly disabled; and it is evident from the papers in his case that he is utterly unable to do any manual labor, and is therefore entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office." On a reconsideration of the case, a further decision was made on the 12th of February, 1885, in which the secretary said:

"Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner

made, and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of the injured leg for the reason that the 'nearest point that can be reached by hand from foot is 23 inches,' and for the further reason that from 'necrosis of the lower vertebræ of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves,' he is unable to bend his back.

"After a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

"The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance."

Upon the receipt of this decision the then Commissioner of Pensions reissued the relator's certificate at $50 per month from January 14, 1885, the time of his last examination by the medical officers of the bureau. To this rate the present commissioner adheres, refusing to make a further reissue. This is the ground of the relator's complaint, and hence his application for a mandamus.

A rule to show cause being granted in pursuance of the former decision of this court in *United States ex rel. Miller* v. *Black*, 128 U. S. 50, the commissioner filed an answer, by which he claims, amongst other things, that his official action in the matter of pensions is not subject to revision by the courts. He further states that from the records of the Pension Bureau it appears that the relator has been borne on the pension rolls and paid as a pensioner as set forth in his petition; which rates have been fixed by the several commissioners of pensions, from time to time, in the exercise of their lawful discretion in the execution of the several pension laws applicable to the relator's case; that there is no law prescribing for a disability of the character of that of the relator a specific rate of pension; and that, in determining the rates of pension to which the relator was from time to time entitled, the several commissioners have had to determine, and in the lawful exercise of their discretion have determined, to what spe-

cific disability, the rate of pension for which was fixed by law, the unspecified disability of the relator was equivalent. The commissioner, further answering, denies that he has failed and refused to carry out the decision of the Secretary of the Interior; and alleges that the decision of the secretary made on the 6th of February, 1885, (as was the fact,) confirmed the action of the Pension Bureau in granting the relator a pension of $8 per month from August 27, 1865; $15 per month from June 6, 1866; $18 per month from June 4, 1872; and $24 per month from March 3, 1883; with the exception that his pension was improperly reduced on June 4, 1882, from $24 to $18 per month. The commissioner further states that, in pursuance of the decision made by the Secretary of the Interior on the 12th day of February, 1885, the Pension Bureau issued a new certificate to the relator at $24 per month from 4th June, 1882; and at an increase of $30 per month from 3d March, 1883, and at $50 per month from 14th January, 1885, the date of the last examination of the relator by the medical officers of the Pension Bureau; and that this action of the Pension Bureau was afterwards affirmed on the relator's appeal by Assistant Secretary of the Interior Hawkins.

The commissioner, further answering, says:

"That the provision of law under which the relator claims to be entitled to be carried on the pension rolls and paid a pension at the rate of seventy-two dollars ($72) per month from June 17, 1878, is contained in the act of Congress approved June 16, 1880, (21 Stat. at Large, p. 281,) the operation of which is limited to 'all soldiers and sailors who are now (*i.e.*, at the date of said act) receiving a pension of fifty dollars per month ($50) under the provisions of an act' therein cited, whereas the relator, according to the showing of his own petition and in fact, was at that time only receiving a pension of $18 per month, which said rate had been theretofore fixed, as hereinbefore set forth, by the Commissioner of Pensions for the time being, in the exercise of his lawful discretion in the premises."

It is true, as stated by the commissioner, that the relator relies upon the act of June 16, 1880; and that this act only

provides for soldiers and sailors who were then (at the date of the act) receiving a pension of $50 per month; and that the relator was not then receiving such pension, but only a pension of $18 per month.

Without assuming to decide whether the construction given by the commissioner to the act was right or wrong, the question which we are to consider is, whether, in adopting the construction he did, and acting upon it, he disregarded and disobeyed the decision of the Secretary of the Interior. In *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, we held that the courts will not interfere with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, inasmuch as no appellate power is given them for that purpose; but that when such officers refuse to act at all in a case in which the law requires them to do so, or when by special statute, or otherwise, a mere ministerial duty is imposed upon them, and they refuse to perform it, a mandamus lies to compel them to act or to perform such ministerial duty. And in *United States ex rel. Miller* v. *Black*, 128 U. S. 50, argued at the same time, we held that when a subordinate officer is overruled by his superior having appellate jurisdiction over him, his duty to obey the decision of such superior is a ministerial duty, which he can be compelled by mandamus to perform. In the latter case, in which the relator was the same person as in the present, the record was very meagre, and did not set forth all the facts; but on the showing of the petition it seemed *prima facie* that the Commissioner of Pensions had refused to carry out the decision of the Secretary of the Interior; and we held that the court below ought at least to have granted the relator a rule to show cause why a mandamus should not issue. The relator thereupon filed a new petition, being the petition in the present case, and the court below, in obedience to our decision, granted a rule to show cause, which the commissioner answered, as before stated. He afterwards amended his answer by annexing thereto, as part thereof, a copy of the several decisions of the Secretary of the Interior, made on the 6th and 12th of February, 1885,

and a subsequent decision by the assistant secretary, made on the 28th of July, 1886, confirming the action of the Pension Bureau.

With the additional facts before us which are now presented by these documents, in connection with the answer of the commissioner, we are satisfied that there was no failure to comply with or to carry out the decision of the secretary. That decision was not that the relator was entitled to $72 per month from June 17, 1878, and to the other rates for other dates, as claimed by him; but, taking the secretary's two rescripts of February 6 and February 12, 1855, together, the decision by the first was, that the relator had been receiving all that he was entitled to under the law, except from June 4, 1882, the date when his pension was reduced from $24 per month to $18 per month; that he should be allowed the difference between those amounts; and that he was entitled to $30 per month under the act of March 3, 1883; and by the second rescript, the decision was that the relator came under the meaning of the law granting pensions to those persons who require regular aid and attendance. This was all (which is material) that the secretary decided. And this decision was fully carried out as the commissioner understood the law applicable to it. He issued a new certificate to the relator at $24 per month from 4th June, 1882, and at an increase of $30 per month from March 3, 1883, and at $50 per month from 14th of January, 1885, the latter date being the date of the last medical examination of the relator.

The new certificate follows the secretary's decision specifically except in regard to the last item, that of $50 per month from 14th January, 1885. This item was allowed as the supposed proper rate due to the relator's condition as expressed in the concluding part of the secretary's decision, namely, that he "came under the meaning of the law granting pensions to those persons who require regular aid and attendance." The secretary did not decide what the proper rate for that condition was; but left it to be decided by the commissioner under the laws then in force. The latter, by his construction of the law, rated the pension at $50 per month from the last medical

examination. As before stated, he considered the act of June 16, 1880, as not applying to the case, because the relator was not then in receipt of a pension of $50 per month; and he evidently regarded the case as coming within the terms of the previous act of June 18, 1874, 18 Stat. 78; Rev. Stat. § 4698, by which it was declared that "all persons who, while in the military or naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost; or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month."

But, whatever may have been the grounds on which the commissioner based his conclusion, it is clear that the decision of the secretary left the matter open; that he only decided that the relator came "under the meaning of the law granting pensions to those persons who require regular aid and attendance," and that the commissioner acquiesced in this decision, and rated the pension at $50 upon the basis of it.

The relator, not being satisfied with this action of the commissioner, again appealed to the Secretary of the Interior, and the decision of the assistant secretary (Hawkins) dated July 28, 1886, was as follows: "After a careful consideration of all the papers in this case, the Department is of opinion that there is nothing in the evidence to show that Mr. Miller has been entitled to a higher rate of pension than that allowed by your office."

The making of the rate of $50 per month to commence from January 14, 1885, the date of the last medical examination of the relator, by which his condition of total and permanent disability was finally established, was based on section 4698½ of the Revised Statutes, which declares that "except in cases of permanent specific disabilities, no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same, made under the

pending claim for increase . . . subject to the approval of the Commissioner of Pensions."

But enough has been said to show that the allegation is unfounded on which the application for mandamus was based, namely, the allegation that the Commissioner of Pensions refused to obey the decision of the Secretary of the Interior.

The judgment is, therefore,

Affirmed.

CENTRAL TRUST COMPANY *v.* GRANT LOCOMOTIVE WORKS.

DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY *v.* GRANT LOCOMOTIVE WORKS.

CENTRAL TRUST COMPANY *v.* GRANT.

DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY *v.* GRANT.

CENTRAL TRUST COMPANY *v.* GRANT LOCOMOTIVE WORKS.

CENTRAL TRUST COMPANY *v.* GRANT.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 1277, 1278, 1279, 1280, 1281, 1282. Submitted March 31, 1890. — Decided April 21, 1890.

If the decree of sale in a suit for foreclosing a railroad mortgage provides that the purchaser shall pay down a certain sum in cash when the bid is made, and such further portions of the bid in cash as shall be found necessary, in order to meet such other claims as the court shall adjudge to be prior in equity to the debt secured by the mortgage, the purchaser is bound by the decision of the court as to such other claims, and has no appealable interest therein.

A decree in a suit for foreclosing a railroad mortgage, that the claim by an intervening creditor of an interest in certain locomotives in the posses-

sion of the receiver and in use on the road, was just, and entitled to priority over the debt secured by the mortgage, is a final decree, upon a matter distinct from the general subject of the litigation; and it cannot be vacated by the court of its own motion after the expiration of the term at which it was granted.

The action of a Circuit Court in refusing to allow an amendment to a petition previously filed in a cause, or to permit it to be filed as a bill of review as of the date of the previous filing, is not subject to review here.

A bill of review based upon errors apparent in the record must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed; and if it is based upon matter discovered after the expiration of that time, a neglect to file it promptly on the discovery will be laches.

MOTIONS TO DISMISS OR AFFIRM. The court stated the case as follows:

On August 1 and 2, 1883, upon a creditor's bill brought by Granville D. Braman, a judgment creditor of the Toledo, Cincinnati and St. Louis Railroad Company, Edwin D. Dwight was appointed receiver of all the property of the company in Illinois, Indiana and Ohio, by orders made in the Circuit Courts of the United States in districts of those States. August 14, 1883, the Central Trust Company filed its bill in the United States Circuit Court for the Southern District of Ohio, against the Toledo, Cincinnati and St. Louis Railroad Company, the Cincinnati Northern Railway Company, and the said Braman and another, asking a foreclosure of certain mortgages therein described. This cause was numbered 3554. In October, 1883, the Central Trust Company filed its bill in the same court against the Toledo, Cincinnati and St. Louis Railroad Company, the Toledo, Delphos and Burlington Railroad Company, and the said Braman, for a foreclosure of certain mortgages therein set forth, which cause was numbered 3578. On October 25, 1883, one William J. Craig was appointed receiver of the mortgaged property in each of these causes, took possession of it and superseded the possession of the former receiver, Dwight. October 27, 1883, the Grant Locomotive Works and the American Loan and Trust Company by leave filed their intervening petition in No. 3578, set

ting up a contract between the Toledo, Cincinnati and St. Louis Railroad Company and the Grant Locomotive Works, for the leasing and conditional purchase by and sale to the railroad company of ten locomotives, Nos. 57 to 66, for the price of $105,000, payable in instalments, the title to the locomotives remaining in the Grant Locomotive Works until payment was fully made; that the whole purchase price was represented by bonds of the railroad company, made payable at the office of the American Loan and Trust Company at Boston, and certified to by said trust company as trustee; the default of the Toledo, Cincinnati and St. Louis Railroad Company; and praying a surrender of the ten locomotives and the payment of all arrears due for rent, interest and repairs up to that time under said contract, and also of any deficiency that might arise upon a resale by them of the said ten locomotives, and for other relief.

On the same day, R. S. Grant filed in No. 3554 his intervening petition, alleging a similar contract with the Cincinnati Northern Railway Company in respect to other locomotives at the price of $90,558.97, of which $18,558.97 was paid in cash, and the remaining $72,000 was made payable in monthly instalments, represented by bonds of the Cincinnati Northern Railway Company, the payment of which was assumed by the Toledo, Cincinnati and St. Louis Railroad Company, upon consolidating with the former company in 1883, the title to the locomotives remaining in the said Grant until payment in full was completed; the default of the Toledo, Cincinnati and St. Louis Railroad Company; and praying for the return of the locomotives; the payment of all arrears due for rent, interest and repairs up to that time; and also of any deficiency that might arise upon a resale of the said locomotives, and for other relief.

On December 6, 1883, Craig, as receiver, by his attorney, filed his answer to the intervening petitions, admitted the agreements and the defaults in payment, and further answered that all the locomotives were in his possession and were necessary to the operation of the railroads by him, and prayed that the court would make such order as would enable him to

retain the possession and use of the locomotives. On the 17th of December, 1883, the attorney of the receiver notified the judge of the court that there was no reason why judgment should not go upon the intervening petitions, and that there was no objection to the draft of decrees, as the receiver had only resisted claims for damages, and these had been waived. On the 22d day of December, 1883, of the October term, two orders were entered in each of said causes Nos. 3554 and 3578, in favor of the intervening petitioners. The two in favor of R. S. Grant in No. 3554 were as follows:

"The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner.

"And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotive, No. 73, and is using the same in the operation of the said Cincinnati Northern Railway Company between Cincinnati and Dayton, Ohio, and that said locomotive is one of the ten covered by the agreement of lease set out in said petition, and was acquired by said railway company under the terms of said agreement, and was so held at the date of the appointment of the receiver herein;

"And it further appearing that the present receiver or his predecessor took the said locomotive, with its tender, into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that date without having made any of the monthly payments of rental as provided in said indenture of lease, or other compensation for the use thereof;

"And it further appearing that the said locomotive is, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotive as fixed in said agreement of lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotive and tender, is willing, upon receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

"And the matter being fully heard by the court and upon

due deliberation thereon, it is hereby ordered, adjudged and decreed that the receiver pay to the said petitioner as rental for said locomotive and tender and in full of all claims for rental, interest and repairs down to the first day of December, 1883, the sum of $770.48, the same being the amount due to said date under the terms of said lease;

"And the further sum of $7520, balance in full as purchase money for said locomotive and tender;

"And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said railway out of any money not appropriated for the payment of current labor, supplies and taxes;

"And it is further ordered and decreed that the said several amounts, with interest thereon at the rate of six per cent from the first day of December, 1883, shall be a charge upon the earnings, income and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said Cincinnati Northern Railway Company, as ahead of the first mortgage or other bonded debt of said company or either of them; and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railways shall be a first lien thereon, and the said sale shall be made subject thereto."

The second order commenced:

"The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner. And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives numbered 67, 68 and 72, with their tenders, and is using the same in the operation of the said Southeastern Division of the said defendant company's railroad, between Dayton and Wellston, Ohio, and that the said locomotives are three of the ten covered by the agreement of lease set out in said petition, and were acquired by said railway company under the terms of said agreement, and were so held at the date of the appointment of the receiver herein."

This order continued in the terms of the preceding one, and decreed certain amounts of rentals, interest and repairs down

to December 1, 1883, and a further sum in full as purchase money for said locomotives and tenders, and concluded as follows:

"And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said South-eastern Division out of any money not appropriated for the payment of current labor, supplies and taxes.

"And it is further ordered and decreed that the said several amounts, with interest thereon, at the rate of six per cent, from the 1st day of December, 1883, shall be a charge upon the earnings, income and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said division, prior to the 1st mortgage or other bonded debt of said railroad or said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or said division shall be a first lien thereon, and the said sale shall be made subject thereto."

Upon the 7th day of March, A.D. 1884, the same being one of the days of the February term, 1884, of the court, these orders were suspended by an order of court, the petitioner objecting.

On the 15th day of March, A.D. 1884, the Central Trust Company filed its petition in the cause, which it prayed might be taken as an answer to the intervening petition of Grant, and also as a petition for rehearing and review of the orders of December 22, 1883, which it further asked should be annulled and set aside.

On the 10th day of April, of the April term, 1884, an order was entered in the Circuit Court as follows:

"This day this cause came on further to be heard upon the intervening petition of R. Suydam Grant, filed in this cause October 27, 1883, and the court, being fully advised in the premises, does order, adjudge and decree as follows, to wit:

"The court finds that the two decrees herein made and entered upon said intervening petition on the 22d day of December, A.D. 1883, were entered without notice to the complainant herein and without proof; that the said decrees

are erroneous and unjust to the bondholders for whom said complainant is trustee; that said decrees are not authorized by the pleadings, and are based upon a misrecital of the facts, as evidenced by the record of this cause.

"That said decrees were authorized by the court without examination, in the erroneous belief, entertained at the time, that all the parties in interest had assented to said decrees, and that the parties adversely interested acquired no knowledge of the allowance of said decrees until about the 24th day of February, A.D. 1884, and after the adjournment of the term of court at which the same were entered.

"And thereupon it is by the court, of its own motion, ordered, adjudged and decreed that the said decrees be, and they are hereby, annulled, set aside and held for naught.

"And the court, coming now to determine the question arising upon the said intervening petition of R. Suydam Grant, does order, adjudge and decree as follows, to wit:

"That the relief prayed for in said intervening petition be, and it is hereby, denied except as hereinafter provided.

"And the court does further find that the said petitioner is entitled to fair compensation for the use of said rolling stock described in his said intervening petition by the receiver of this cause upon the railroad of the Cincinnati Northern Railway Company, defendant herein, and for any deterioration by reason of such use.

"But the court defers the determination of the amount of such compensation until the coming in of the report thereon of the master appointed in this cause on the 5th day of April, A.D. 1884.

"And the court does further find that the said petitioner is entitled to take and repossess himself of his said rolling stock, wherever the same may be found, in the possession of the receiver appointed in this cause, or of the receiver appointed in causes Nos. 3576, 3577, 3578 and 3579 in this court.

"And leave is hereby granted to said petitioner to apply at any time to this court for any additional orders that may be necessary in that behalf.

"And the said R. Suydam Grant applied for leave to answer

the petition of the complainant, the Central Trust Company, filed March 15, 1884, and to support his answer by affidavits or other proof, and the court, entertaining the opinion that the answer and affidavits proposed are, by the force of the foregoing decree, rendered unnecessary, declined to grant the leave asked, and refused to permit an answer to said petition for rehearing, on affidavits or other proof in support thereof, to be filed; and thereupon the intervening petitioner, R. Suydam Grant, in open court, prayed an appeal from the foregoing decree, which is disallowed by the court."

Two like orders, *mutatis mutandis*, were entered in case 3578 on the petition of the Grant Locomotive Works and the American Loan and Trust Company, December 22, 1883, and were suspended March 7, 1884, and set aside April 10, 1884, by similar orders to those in No. 3554.

In June, 1884, the Southeastern Division of the Toledo, Cincinnati and St. Louis Railroad Company was sold under a decree of foreclosure, which sale was reported and confirmed July 18, 1884. The Cincinnati Northern Division of the said railroad was sold under a decree of foreclosure and the sale confirmed by order made on July 9, 1884. The decree for the sale of the Southeastern Division provided that unless the railroad company defendant should within ten days pay into court the amount of interest in arrear, and the sum of $20,000 to be applied to the payment of costs and expenses, including the receiver's indebtedness, then the property should be sold, and that upon the sale not less than $20,000 should be paid in cash, and such further portions of the purchase price should be paid in cash as the court should from time to time direct, to meet other claims which the court should adjudge to be prior to the first mortgage, the court reserving the right to resell in case of failure to comply with any order in that regard; and that the balance of the purchase money should be paid either in cash or bonds taken at their net value under the decree. The fund arising from the sale was directed to be applied to the payment: 1st. Of costs, fees and expenses of sale; 2d. Of receiver's expenses and indebtedness, "and to the payment of any other claims which have been or which may be adjudged by

this court in this cause to have priority over said first mortgage;" 3d. To the payment of the first mortgage bonds. The decree for the sale of the Cincinnati Northern Division made provisions similar in all respects, except that the amount to be paid for costs and expenses and the amount of the bid to be paid down in cash was $50,000. The Southeastern Division was sold to N. H. Mansfield and others as trustees for $500,000, and the Cincinnati Northern Division to J. N. Kinney, A. S. Winslow and others for $200,000. On the confirmation of each of the said sales, it was ordered that the purchasers, upon paying in cash the $20,000 or the $50,000, respectively, should receive a conveyance of the mortgaged property and become subrogated to all the rights thereof of the lien holders, parties to the suit, and that the receivers should thereupon surrender possession of the mortgaged property to such purchasers. Each of the orders of confirmation contained the following clause:

"And it is further hereby ordered, adjudged and decreed that this decree of confirmation of the sale of the premises and property, rights and franchises aforesaid be subject to the terms and provisions of the decree of sale heretofore entered in this cause, whereby it is provided that of the purchase price so bid at said sale such further portions thereof, in addition to the said sum of fifty thousand dollars heretofore mentioned, shall be paid in cash as this court might from time to time in this case direct, in order to meet other claims which this court has or hereafter may adjudge in this case to be prior in equity to said first mortgage, and whereby this court did reserve the right to resell in this cause said premises and property, rights and franchises, upon the failure to comply within twenty days with any order of this court in that regard; and the right, title and interest of the said purchasers in and to the premises and property, rights and franchises aforesaid by virtue of the said sale, and of this confirmation thereof and of the deed to be made in pursuance hereof shall be deemed to be acquired subject to said provision."

On the 8th day of February, 1887, the Grant Locomotive Works and R. S. Grant severally filed petitions in the causes

Nos. 3554 and 3578, setting up the matters hereinbefore detailed, and alleging that the orders of April 10, 1884, purporting to annul the decrees of December 22, 1883, were void; that the decrees were still in full force; and praying that the said decrees of December 22, 1883, be adjudged to be in full force and effect, and that the same be carried into execution. The Central Trust Company answered, and the purchasers of the Southeastern and of the Cincinnati Northern Divisions demurred, and on the 11th of June, 1887, the following order was entered on each of said petitions:

"This cause this day was heard upon the petition of R. S. Grant and the Grant Locomotive Works, respectively, herein filed February 8, A.D. 1887, praying that the court set aside certain orders hereinbefore made on the 10th day of April, 1884, setting aside certain other orders theretofore made herein on December 22, 1883, upon the intervening petition of R. Suydam Grant, filed herein on October 27, 1883, and was argued by counsel; and the court being fully advised in the premises, it is ordered, adjudged and decreed that said order of said 10th day of April, A.D. 1884, be, and the same hereby is, set aside and held for naught, and that said orders of December 22, 1883, be, and the same hereby are, restored.

"And thereupon came complainant, The Central Trust Company, and prayed an appeal to the Supreme Court of the United States from this decree setting aside said order of April 10, 1884, and restoring said orders of December 22, 1883, which appeal is allowed upon complainant giving bond in the sum of five hundred dollars for costs, to be approved by the clerk of this court."

The appeals so allowed were never perfected.

January 28, 1889, the intervening petitioners having moved that the purchasers of the railroad property be required to pay into the registry of the court, for the use of the intervenors, the amounts due under the decrees, and that in default thereof the said railroad company property be resold for the benefit of the intervenors, decrees were entered in each case, reciting: "And the said intervenor being present, by his counsel, and the purchasers of the Dayton and of the Cincinnati Divisions

being represented by C. W. Fairbanks, their solicitor, and the Cincinnati, Lebanon and Northern Railway Company, assignee of the purchasers at the foreclosure sale of the Cincinnati Northern Railway, by William M. Ramsey, its solicitor, and the Dayton, Fort Wayne and Chicago Railroad Company, assignee of the purchasers of the Southeastern Division, and of the purchasers of the Iron Railroad, by John C. Coombs, its solicitor, and R. D. Marshall, the present receiver of the said railroad company, and the purchasers of the main line, the Toledo Terminal, and the St. Louis Division, being present by Clarence Brown, their solicitor, objecting to the jurisdiction of the court, and the complainant, the Central Trust Company of New York, opposing said motion of the said intervenor, being represented by Edward Colston, its solicitor. And, thereupon, pending the hearing upon the said motion, comes the complainant, the Central Trust Company of New York, [and prays that its petition for rehearing, filed] on the 15th day of March, 1884, be now heard as a petition for a rehearing of the said decrees of December 22, 1883; or, if that relief be denied, that the same be taken and held to be a bill of review, or a bill in the nature of a bill of review; or, if that relief be denied, that the said petition be amended and supplemented in certain respects, as stated in a certain paper now read, and be now docketed as an original bill of review as of the 15th day of March, 1884," which application and each part thereof was denied, and the Trust Company excepted; and, also, pending the hearing, the Dayton, Fort Wayne and Chicago Railroad Company, as assignee of the purchasers of the Southeastern Division, prayed leave to intervene and be heard "in review upon the matters of the original orders and decrees entered herein on December 22, 1883, and as set forth in a petition in writing therefor;" which it moved the court for leave to file herein, which application was denied and the railroad company excepted.

The court, then, having heard argument, decreed that the respective purchasers should make payments into court, within sixty days, of the amounts still due to the intervening petitioners, and that in default of such payment the mortgaged

property should be resold. The decrees recited the setting aside, on the 11th of June, 1887, of the orders of the 10th of April, 1884, as void, and that all the orders or decrees entered in pursuance or in execution of the said order of April 10, 1884, were equally void and of no effect, and that the decrees entered on December 22, 1883, were in full force and effect; and ascertained the amounts remaining due, after deducting credits, to the Grant Locomotive Works for locomotives which had been used upon the Southeastern Division, with interest from a date named, and for a locomotive which had been used on the Cincinnati Northern Division; and the amounts remaining due, after deducting credits, to Grant for certain locomotives which had been used on the Southeastern Division, and for a locomotive which had been used on the Cincinnati Northern Division, with interest; and ordered that the amounts should be paid, and upon default thereof the divisions should be sold to realize the said amounts respectively. It was provided also that the decrees were "without prejudice to any right the said intervenors may have to apply for orders to resell other mortgage divisions of the Toledo, Cincinnati and St. Louis Railroad for the payment out of the proceeds of such resale of any balance of the amount hereinbefore named;" and without prejudice to the right of contribution as between the purchasers of the divisions named and the purchasers of other divisions of the Toledo, Cincinnati and St. Louis Railroad. From the orders of January 28, 1889, the Central Trust Company was allowed and perfected appeals to this court, which are here docketed as Nos. 1277 and 1279.

Exceptions to the rulings of the court, denying the motions of the Trust Company that its petitions filed March 15, 1884, be amended and supplemented, and permitted to be filed as original bills of review as of that date, appear in the records.

The Dayton, Fort Wayne and Chicago Railroad Company was allowed and perfected appeals to this court from parts of three of the said orders of January 28, 1889. These appeals are Nos. 1278 and 1280.

On the same 28th of January the Central Trust Company, by its solicitors, filed in the clerk's office of the Circuit Court

its bill of review against the Grant Locomotive Works and the American Loan and Trust Company, stating the filing of its bill of foreclosure October 20, 1883, in No. 3578; the appointment of Craig as receiver; the filing of the bill in No. 3554, and in three other cases; the objects of the five bills; the filing of similar bills in October, 1883, for the foreclosure of mortgages, made respectively by other constituent companies on their respective roads, which roads when connected would form a line of railroad extending from Delphos to Toledo, Ohio, and from Delphos through Indiana and Illinois to East St. Louis, Illinois, in the proper Circuit Courts of the United States for the Northern District of Ohio, the District of Indiana, and the Southern District of Illinois; that the Toledo, Cincinnati and St. Louis Railroad Company was a corporation formed by the consolidation, under the respective laws of Illinois, Indiana and Ohio, of the above-named constituent companies and other companies, extending from St. Louis to Delphos, thence to Toledo, and from Delphos to Cincinnati and Ironton; that each mortgage was a separate and distinct mortgage upon separate property, there being no property in one mortgage included in another; that all of said mortgages were made prior to any consolidation and were entirely unaffected thereby; that on October 27, 1883, the American Loan and Trust Company and the Grant Locomotive Works filed their intervening petition in No. 3578, a copy of which is attached to and made part of said bill of review; that certain orders were entered thereon, set aside, etc., giving the proceedings in detail; that the railroad was sold on foreclosure in No. 3578 in June, 1884, but not subject to any claim or lien for locomotives, and none of the locomotives were included in said sale, but were treated as the property of the Locomotive Works and Grant; that they subsequently took and removed said locomotives; that in February, 1887, the Grant Locomotive Works and Grant filed petitions to set aside the orders of April 10, 1884, and restore the orders of December 22, 1883, which petitions were granted on June 11, 1887, and the orders of April 10, 1884, were set aside and adjudged to be null and void, and the orders of December 22,

1883, were restored; that the Grant Locomotive Works filed its motion in No. 3578, asking for an order that the purchasers of the railroad sold in that case pay into court the several amounts mentioned in the orders of December 22, 1883; that thereupon complainant prayed the court to treat such proceedings of March 15, 1884, entitled "petition for rehearing," as a bill of review to correct said orders, and to permit complainant to amend said proceedings of March 15, 1884, by adding thereto the averments contained in this bill of review, and to docket the same as thus amended as an original bill of review as of date March 15, 1884; and that the court refused to allow the same to be done, and ordered, January 28, 1889, the railroad to be sold unless the respective amounts named in the orders of December 22, 1883, should be paid within sixty days by the purchasers of said railroad sold at foreclosure sale in No. 3578. Complainant further says that it was impossible for it to file a bill of review to correct said decrees (of December 22, 1883) at any time between March 15, 1884, and June 11, 1887, because said decrees, by said order of April 10, 1884, had been set aside and annulled, and complainant so regarded them during said period, and moreover it believed, and had the right to believe, that said Grant Locomotive Works and the American Loan and Trust Company and R. S. Grant had abandoned all claim of right under the orders of December 22, 1883; and therefore complainant says that said period of time should not have been counted against it in filing its bill of review; that the said orders of December 22, 1883, "are erroneous and ought to be reviewed, reversed and set aside for the many errors and imperfections common thereto, as shown by the record of the said case 3578, that is to say;" and then follow a number of grounds assigned for the review desired, and special grounds as to each of the orders. Complainant "files herewith a copy of the record in said cases 3554 and 3578, and craves leave to refer to same as part hereof," and prays that the orders be reviewed, reversed and set aside, and that the American Loan and Trust Company and said Grant Locomotive Works may be required to answer the premises, and for general relief. This bill of review was subscribed

and sworn to January 10, A.D. 1889. Process was issued and served on the solicitor of record for the American Loan and Trust Company and the Grant Locomotive Works.

On the 29th day of January, 1889, there came on to be heard the motion of the said Loan and Trust Company and the Grant Locomotive Works, to strike the bill of review from the files, which was argued by counsel, and sustained by the court. From this order the Central Trust Company prayed an appeal to this court, which was granted, and bond given and approved on the 31st day of January, A.D. 1889. The record was filed in this court October 2, 1889, and the cause docketed as number 1281.

On the same 28th day of January the Central Trust Company filed a similar bill of review against R. S. Grant, setting up the prior bill of foreclosure in case No. 3554 and the subsequent proceedings thereon, and on the intervening petition of R. S. Grant, as in the other case, and praying similar relief on the same grounds in respect to the orders of December 22, 1883. This bill of review was likewise stricken from the files on the 29th day of January, 1889, and an appeal prayed to this court, the record being filed herein October 2, 1889, and the cause numbered 1282.

Mr. B. H. Bristow, *Mr. Bluford Wilson* and *Mr. W. S. Opdyke* in support of the motions to dismiss or affirm.

Mr. Edward Colston and *Mr. George Hoadly, Jr.*, opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the Court.

The appeals in 1277, 1278, 1279 and 1280 were taken from the orders of January 28, 1889, requiring payment for the use of the Grant Locomotive Works, and R. S. Grant, of the amounts decreed December 22, 1883, (less what had been received in the intermediate period,) and in execution of said decrees, from the purchasers of the Southeastern Division, and from the purchasers of the Cincinnati Northern Division, of the Toledo, Cincinnati and St. Louis Railroad Company.

These purchasers bought subject to the provisions of the decrees, the terms of sale, and the orders confirming the sales, which were the source of their title, and which provided for the payment down of a specified sum in cash, and of such further portions of their bid in cash as might be necessary in order to meet such other claims as the court might adjudge to be prior in equity to the mortgages, with the reservation of a right of resale in case of default in this particular; and the right, title and interest they acquired was expressly made subject to these provisions. Costs, fees and expenses of sale, receiver's expenses and indebtedness, and claims awarded priority, were to be first paid. The balance of their bid they could pay in cash or in first mortgage bonds. That bid, in the instance of the Southeastern Division, was $500,000, and the purchasers were not required by the orders in question to pay any amount in excess thereof. Neither the purchasers of the Cincinnati Northern Division, nor their assignee, the Cincinnati, Lebanon and Northern Railway Company, took any appeal.

It does not appear to us that the Dayton, Fort Wayne and Chicago Railroad Company, the assignee of the purchasers of the Southeastern Division, has an appealable interest in the premises.

The purchasers were bound to pay such portions of their bid in cash as the court might direct, to meet other claims, and whether the payments of their bids were to be made for the benefit of the bondholders, or partly for the bondholders and partly for the benefit of the appellees, it is clear that they, as purchasers, and the railroad company, as their assignee, had no interest in the matters affected by the decrees appealed from.

In *Swann* v. *Wright's Executor*, 110 U. S. 590, 601, Swann had purchased the railroad under a decree, which provided that the sale should be subject to the liens already established, or which might be established on references then pending, as prior and superior to the lien of the mortgage, and the claim of Wright was one of this class. It was pending before the master and reported on after the sale, when the purchaser applied to oppose its confirmation, and was not allowed to do so; and the sale was afterwards confirmed, expressly subject

to all liens established as specified in the decree of sale. Swann afterwards filed a bill to set aside Wright's claim, for fraud in its inception, which was dismissed, and the dismissal affirmed on the ground that the property was purchased expressly subject to all established claims, or claims that might be established on references then pending, which included Wright's. "If the court," observed Mr. Justice Harlan, delivering the opinion, "had in the decree of sale reserved to the purchaser, although not a party to the proceedings, the right to appear and contest any alleged liens then under examination, and, therefore, not established by the court, an entirely different question would have been presented. But no such reservation was made; and the purchaser was required, without qualification, to take the property, upon confirmation of the sale, subject to the liens already established, or which might, on pending references, be established as prior and superior to the liens of the first mortgage bondholders. . . . All that we decide is, that in view of the express terms of the decree of sale, and since neither the purchaser nor his grantee proposes to surrender the property to be resold for the benefit of those concerned, such purchaser has no standing in court for the purpose of re-litigating the liens expressly subject to which he bought and took title."

In *Stuart* v. *Gay*, 127 U. S. 518, under a decree for the foreclosure of certain liens, which contemplated the payment of the purchase money, on the sale, in money, in annual instalments, Stuart purchased, and by a subsequent order was allowed to be credited on unpaid purchase money with various liens he had acquired. From a later order in respect to allowances of interest upon certain prior liens he appealed to this court, and it was held that he had no appealable interest, as a purchaser of the property, because it was a matter of indifference to him as such how the proceeds of the sale should be distributed among the creditors.

It is argued, however, that the purchase of the Southeastern Division was not made subject to the decrees of December 22, 1883, because it is said that at the time of the purchase "these decrees were dead and thought to be beyond

resurrection;" and "that a purchaser buying under such circumstances ought to have the right to resist their reappearance." This would hardly be contended if the orders of April 10, 1884, were void for want of jurisdiction to enter them. Those orders were not made upon a bill of review or a bill in that nature, nor upon any petition for rehearing, which under equity rule 88 could not then have been filed if the decrees of December 22, 1883, were final and appealable. On March 15, 1884, the Central Trust Company filed certain petitions which it asked might be treated as petitions for rehearing or in review, but the court made no order in regard to them, and did not predicate its action upon them. On the contrary, it was specifically set forth that the orders of December 22, 1883, were annulled and set aside "by the court of its own motion."

If these orders were final decrees, the court could not vacate them of its own motion after the close of the October Term, 1883. *McMicken* v. *Perin*, 18 How. 507, 511. We think they were final. They determined the ownership of the locomotives and the right to their possession; that they were essential to the operation of the roads by the receiver, and should be purchased by him; that certain designated amounts should be paid for the rentals and the purchase price, which amounts were made a charge upon the earnings, income and property of the Toledo, Cincinnati and St. Louis Railroad Company, and especially of the particular divisions named; and that the amounts should be paid by the receiver, and any balance remaining unpaid at the date of the foreclosure and sale of the railroad, or the particular division, should be a first lien thereon and the sale be made subject thereto. They were, therefore, final in their nature, and made upon matters distinct from the general subject of litigation, the foreclosure of the mortgages.

In *Trustees* v. *Greenough*, 105 U. S. 527, an appeal from an order for the allowance of costs and expenses to a complainant, suing on behalf of a trust fund, was sustained. In *Hinckley* v. *Gilman, Clinton & Springfield Railroad Company*, 94 U. S. 467, a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed. In *Williams* v. *Morgan*, 111 U. S. 684, a decree

in a foreclosure suit, fixing the compensation to be paid to the trustees under a mortgage from the fund realized from the sale, was held to be a final decree as to that matter; and in *Fosdick* v. *Schall*, 99 U. S. 235, a decree upon an intervening petition in respect to certain cars used by a railroad company under a contract with the manufacturer was so treated. There was a fund in court in that case, but in principle the orders here are the same. And see *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 206, 213.

The decrees of June 11, 1887, were clearly right in adjudicating the orders of April 10, 1884, to be of no effect, and reinstating the prior decrees.

Even if the orders of April 10, 1884, were voidable merely, the purchasers should have made the defence now suggested, of reliance upon them, when the application was made which resulted in the decrees of June 11, 1887. They did indeed appear and file a demurrer, but they made no resistance upon the merits, and they certainly prayed no appeal from the decrees then entered.

The result is that the appeals of the Dayton, Fort Wayne and Chicago Railroad Company, Nos. 1278 and 1280, must be dismissed.

Turning to the appeals of the Central Trust Company, it is strenuously argued, in support of the motions to dismiss, that as the decrees of January 28, 1889, affected the purchasers only, the bondholders as such had no further interest in the litigation, nor had their representative, the Trust Company; that at least the record does not definitely show that either the Trust Company or the railroad company had certainly an interest; that though one or the other may have had, it is not sufficiently clear which it is; and that, therefore, the appeals of both must be dismissed. It is enough that sufficient color is given to the motions to enable us to pass upon the motions to affirm.

The orders of January 28, 1889, which are alone appealed from, were merely in execution of the former decrees, and as such we do not find that any error supervened in their rendition. The amounts named were not disputed and could not

have been, except in respect to credits, as to which there was no controversy, inasmuch as those amounts had been previously determined, and their payment decreed; and the resale had been expressly provided for in the foreclosure decrees and the order of confirmation.

The action of the Circuit Court in refusing to allow the Trust Company to amend and supplement its petitions of March 15, 1884, and file them as original bills of review as of that date, and in denying the application of the Dayton, Fort Wayne and Chicago Railroad Company to intervene and file a petition in the cases in review of the orders of December 22, 1883, was taken in the exercise of a discretion with which we are not justified in interfering. *Buffington* v. *Harvey*, 95 U. S. 99; *Brockett* v. *Brockett*, 2 How. 238; *Mellen* v. *Moline Iron Works*, 131 U. S. 352.

No appeal having been prosecuted from the orders of December 22, 1883, or those of June 11, 1887, and the appeals from the orders of January 28, 1889, only, not bringing the former orders before us for revision, we are constrained to sustain the motions to affirm in Nos. 1277 and 1279, without entering upon the consideration of the errors so earnestly urged as existing in the December decrees.

It remains to dispose of the motions in Nos. 1281 and 1282. These are appeals from orders of the Circuit Court striking from the files two bills placed there on the 28th of January, 1889, by the Central Trust Company, to review the decrees of December 22, 1883, for errors apparent.

Reference is made to the records in the cases 3554 and 3578, and we do appellant no injustice in assuming that these bills, verified January 10, 1889, are the same presented to the Circuit Court when application was made in those cases for leave to amend and supplement appellant's petitions of March 15, 1884, and docket the same as bills of review of that date. That application having been denied, appellant put these papers on file as the court was entering the other orders. Here again, while the motions to dismiss will not be sustained, we hold there was color for them.

The bills are not based upon new matter or newly discov-

ered evidence, and no leave was given to file them. They are clearly bills for the review of the orders of December 22, 1883, for errors apparent of record. Such bills must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Ensminger* v. *Powers*, 108 U. S. 292, 302. Over five years had elapsed, but it is insisted that the time between the 10th of April, 1884, and the 11th of June, 1887, when the orders of April 10, 1884, were declared void, ought not to be considered in passing upon this question, because of appellant's belief in the validity of and reliance upon those orders and the acquiescence of appellees therein.

It seems to us that appellant was not justified in such belief and reliance, and that, at all events, after the orders of June 11, 1887, it should have moved promptly by way of appeal or bill of review. These bills attack the orders of December 22, 1883, merely, and not the decrees of June 11, 1887, reinstating the former as in full force and effect.

The rule laid down in *Thomas* v. *Harvie's Heirs* is based upon the principle of discountenancing laches and neglect. Under all the circumstances, we cannot concede that appellant acted in apt time, and must therefore affirm the orders of the Circuit Court striking the bills from the files.

The appeals in Nos. 1278 *and* 1280 *are dismissed and the decrees in Nos.* 1277, 1279, 1281 *and* 1282 *are affirmed.*

ST. GERMAIN *v.* BRUNSWICK.

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

No. 257. Argued and submitted April 11, 1890. — Decided April 28, 1890.

The application of an old process, or machine or apparatus to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent,

Statement of the Case.

although the new form of result may not have before been contemplated.

Letters patent No 72,969, granted to Emanuel Brunswick, January 7, 1868, for a revolving cue-rack, are void for want of novelty.

THIS was a bill filed by Emanuel Brunswick against Ferdinand de St. Germain in the Circuit Court of the United States for the District of California, October 25, 1880, for an alleged infringement of letters patent No. 72,969, granted to Brunswick, January 7, 1868, for a revolving cue-rack.

The defendant demurred to the bill February 16, 1881, and among other causes of demurrer assigned that "the said complaint does not describe or set forth any new or useful invention or discovery, or any invention or discovery patentable under the patent laws of the United States, but, on the contrary, the descriptions of the alleged inventions contained in said complaint show that the same is not patentable." The demurrer was overruled, whereupon the defendant answered, denying, among other things, that the alleged invention was of any utility or value. Replication having been filed, proofs were taken, and an interlocutory decree was entered on the 12th of May, 1884, in favor of the complainant, sustaining the patent, finding that there had been infringement, and referring the case to a master to take and state an account of the gains and profits, and also the damages. The master subsequently reported that the defendant had realized $1176 profits from the manufacture and sale of the cue-rack, but that no damages had been sustained by complainant, by reason of respondent's sales, over and above the profits. Exceptions were filed by both complainant and defendant and were overruled by the court, and on the 27th of May, 1886, a final decree in complainant's favor was entered in the case, for the amount reported by the master, with interest and costs, and an appeal duly taken to this court by the defendant.

The first error assigned is "that the court erred in holding that the said letters patent were valid." The specification, drawings and claim are as follows:

"Be it known that I, E. Brunswick, of the city of Chicago, in the county of Cook, State of Illinois, have invented new

Counsel for Parties.

and useful improvements in billiard cue-racks, and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawings, making part of this specification, in which —

"Drawing No. 1 represents the plain revolving cue-rack; and

"Drawing No. 2 represents the lock-up rack for private use.

"The nature of my invention consists in making the billiard cue-rack so arranged that it may revolve and be detached from the wall.

"To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

"Two circular plates, A and B, (drawing No. 1,) are firmly secured to a vertical shaft, C. The lower plate A is provided with a rim, *a*, at its outer edge to prevent the butt ends of the cues from slipping off the plate, and the upper plate B is provided with several openings through which the points of the cues are passed. Each plate is provided with a metallic pin, D, which enters a metallic socket, E, inlaid in the stationary brackets, F F, and revolve in it. The brackets are secured to a wall, a pillar, or any other object, and support the rack.

"I make private cue-racks (drawing No. 2,) in which the lower plate A forms a bottom to a round box, B, open on top, and divided into compartments, C C, by partitions, *p p*, each compartment having a door, D, hung on hinges and provided with a lock and key. The upper plate E forms a bottom to the box B, and is provided with several holes. The rack, being revolving, is very convenient for handling the cues.

"What I claim as my invention and desire to secure by letters patent is —

"The revolving billiard cue-rack constructed and operating substantially as and in the manner herein described and specified."

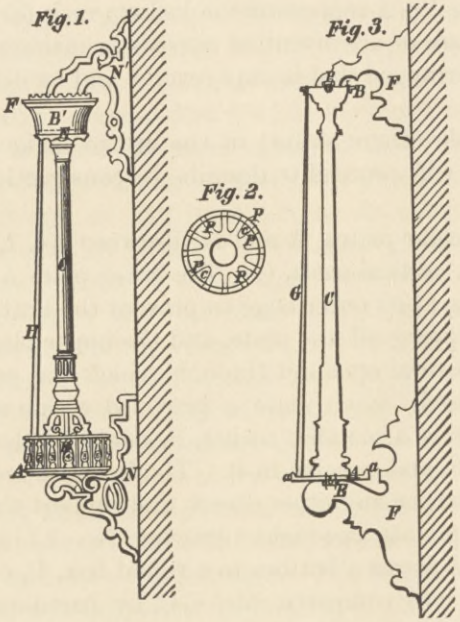
Mr. M. A. Wheaton, for appellant, submitted on his brief.

Mr. Willard Parker Butler, (with whom was *Mr. John L. Boone* on the brief,) for appellee.

Opinion of the Court.

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

This case falls within the familiar rule that the application of an old process, or machine or apparatus to a similar or



analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, although the new form of result may not have before been contemplated.

The ordinary cue-rack was made with the upper part perforated with holes to receive the small ends of the cues when put in the rack, and with a ledge or moulding along the front of the lower part, on which the cues stood, so as to prevent them from slipping off. The horizontal and straight upper and lower parts of the ordinary cue-rack were changed by complainant into two circular disks, called "plates" in the specification, having the perforations and the rim secured to

a vertical shaft, and each provided with a metallic pivot, entering into and revolving in a metallic socket, inserted in ordinary brackets attached to the wall, or pillar or any other object, for the support of the rack.

As the revolving rack held the cues in the same way and by the same means as the ordinary rack, if patentable novelty existed at all it must be found in making the racks revolve, when constructed and operating in the manner stated.

But revolving contrivances, such as table casters and the like, for the reception and carriage of articles, so as to bring them easily within reach, were well known, and the application of such a contrivance to the holding and carrying of cues was but the application of an old device to a new and analogous use, with such changes only as would naturally be made to adapt it thereto.

The making of the old cue-rack circular, putting in the revolving apparatus, and suspending it on brackets, a common use of the latter, involved mechanical skill simply, and not the exercise of invention, in the creation of a novel, substantive result.

The state of the art, as shown by the prior patents for revolving dining tables and bottle casters, introduced on behalf of defendant, illustrates the correctness of this conclusion.

These tables and casters were so arranged as to revolve about a common centre and bring around dishes and decanters in that way, as desired. The office performed was the same in respect to dishes and decanters as that performed by complainant's contrivance in respect to cues. The difference between revolving and stationary tables and casters and between revolving and stationary cue-racks is the same. Those revolve and these do not. We think that competent knowledge and skill in his calling on the part of an intelligent mechanic would have enabled him, on request, to construct the revolving billiard cue-rack in question, without calling the inventive faculty into play.

The patent was void for want of novelty, and

The decree is reversed and the cause remanded, with a direction to dismiss the bill.

LODGE *v.* TWELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 284. Submitted April 18, 1890. — Decided April 28, 1890.

A decree in equity setting aside a conveyance of personalty and of real estate as fraudulently made to hinder, delay and defraud the plaintiff, and appointing a receiver of all the property of both classes, and ordering a sale of all that remained, and an accounting by the defendants of so much of the personalty as they had parted with and of the proceeds thereof, and the payment of arrears of alimony due the plaintiff from the proceeds of the sale, and further ordering that the receiver should hold the balance subject to the order of the court as to alimony subsequently to accrue, is not a final decree from which an appeal can be taken, inasmuch as there still remains to be determined what personal property had been parted with, and what was its value and the amount of the proceeds to be accounted for.

AMANDA TWELL brought her action in equity in the District Court, Second Judicial District, Deer Lodge County, Montana Territory, against Richard Twell, Joseph Lodge and Samuel Beaumont, to set aside certain transfers of property by Twell to Lodge and Beaumont, on the ground that they were made with intent to defraud the appellee in the matter of alimony awarded her by a decree of divorce, and to have the property applied to the payment of such alimony. The divorce decree was entered December 17, 1883, and adjudged that defendant Twell pay to complainant, during her natural life or until further order of the court, the sum of $50 per month, and that he give security therefor.

The bill averred that defendant Twell had failed to obey said decree in that he had not paid the monthly instalments for alimony and had failed to give the required security; that he had departed from the Territory without making any provision for the payment, and leaving unpaid the sum of $150; that on December 22, 1883, being the owner of real estate situated in Deer Lodge County of the value of $1200 and of

personal property worth $5000, to avoid the process of the court for the enforcement of said decree, he made a pretended sale and assignment of his property to the defendants Lodge and Beaumont; and that said sale and assignment were fraudulent and void, and were intended and made for the purpose of delaying and hindering and defrauding the plaintiff, to the knowledge of defendants Lodge and Beaumont, who made the purchase to enable Twell to so defraud the plaintiff of her rights. The bill also alleged that said Twell had no other property within the jurisdiction of the court, and prayed that the sale and assignment be declared fraudulent and void as against the plaintiff; that a receiver be appointed; that Lodge and Beaumont be required to account for all the property received by them, with the rents, issues and profits, and all proceeds arising from sales thereof; that the defendants be enjoined from disposing of any of said property or its proceeds; and that the receiver be directed to sell the property, and pay the $150 then due and whatever sum might be due at the time of the sale, holding the balance subject to the order of the court to pay on the aforesaid decree. A decree by default was entered against the defendant Twell. Lodge and Beaumont demurred, which demurrer was overruled and the defendants excepted. They also filed their separate answer denying the allegations of the bill touching fraud. The cause came on for trial on the 6th of December, 1884, and the defendants, Lodge and Beaumont, by leave of court amended their answer, and denied "that the value of the property sold or assigned to these defendants, Lodge and Beaumont, as specified in complainant's complaint, was, at the time of the purchase thereof, of the value of six thousand two hundred dollars, or any greater value than about three thousand five hundred dollars." This amendment was verified by Lodge and Beaumont.

The trial court found that the sale was fraudulent and void, and made with intent to hinder, delay and defraud the plaintiff, and that plaintiff was entitled to the relief asked for in her complaint, and, among other facts, "that the property sold by defendant Twell to defendants Lodge and Beaumont

was, at the time of said sale, of the value of at least $4200, and that defendants Lodge and Beaumont have realized from the personal property sold, since said sale, the sum of about twenty-five hundred dollars, and still have all the real estate and personal property, of the value of at least $600, in their hands." The defendants Lodge and Beaumont moved the court for judgment, notwithstanding the findings, which motion was overruled and the defendants excepted. A decree was then entered in favor of the plaintiff, setting aside the sale and assignment by Twell to Lodge and Beaumont, and appointing a receiver of the property and effects of Twell, which he had at the time of the entry of said decree of divorce, and sold and conveyed to Lodge and Beaumont on or about December 22, 1883, which property was described as consisting at that date of personalty of the value of at least $4200, and real estate of the value of $600; and it was further decreed that Lodge and Beaumont account for all property received by them or either of them under either the sale or assignment above mentioned, and for all proceeds arising from any sale or sales thereof, and for the rents, issues and profits thereof; that they deliver possession of the same to the receiver; that the receiver sell the property delivered; and that out of the proceeds he pay the costs and expenses of the sale and receivership, and all sums due by defendant Twell to the plaintiff under and by virtue of the decree of divorce, and hold the balance of the proceeds of such sales, subject to the order of the court in the above-mentioned decree of divorce between plaintiff and defendant Twell, and for costs. From this decree Lodge and Beaumont appealed to the Supreme Court of the Territory, which affirmed the judgment, and they then appealed to this court, which appeal was allowed February 25, 1886, and an appeal bond then given and approved. An affidavit of value was filed as stated in the opinion.

Mr. S. S. Burdett for appellants.

Mr. James I. Brownson, Jr., for appellee.

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

Opinion of the Court.

It will be perceived that the decree did not identify the particular property to be delivered nor specify the amount of money to be paid or collected. The court had found that Lodge and Beaumont had sold part of the original property and realized therefrom about twenty-five hundred dollars, but the exact amount was not determined by the decree, nor the amount of the rents, issues and profits received by them, nor that Lodge and Beaumont, while directed to account for the property, should respond, as of the date of the invalidated sale, for the value of so much as they had disposed of, or for the proceeds only. The receiver was directed to sell the property delivered to him, but what that property would be necessarily could not appear, until what had been sold by Lodge and Beaumont had been ascertained. Until these matters were adjusted, and the account taken, it was impossible to tell for what amount an order of payment or a money decree should go against the defendants Lodge and Beaumont, after the delivery of the property they had on hand to the receiver. What was left to be done was something more than the mere ministerial execution of the decree as rendered. The decree was interlocutory, and not final, even though it settled the equities of the bill. *Craighead* v. *Wilson*, 18 How. 199; *Young* v. *Smith*, 15 Pet. 287; *Keystone Iron Co.* v. *Martin*, 132 U. S. 91.

In *Railroad Co.* v. *Swasey*, 23 Wall. 405, 409, Mr. Chief Justice Chase, in passing upon a decree of foreclosure and sale, observed that an appeal may be taken from such a decree "when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled. The sale in such a case is the execution of the decree. By means of it the rights of the parties, as settled, are enforced. But to justify such a sale, without consent, the amount due upon the debt must be determined and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to

be sold has been judicially identified. Such adjudications require the action of the court." "The authorities are uniform," said Mr. Chief Justice Waite, in *Dainese* v. *Kendall*, 119 U. S. 53, 54, "to the effect that, a decree to be final for the purposes of an appeal must leave the case in such a condition that if there be an affirmance here, the court below will have nothing to do but to execute the decree it has already entered."

Upon applying for the allowance of an appeal to this court, Lodge and Beaumont made affidavit that by the judgment and decree of the District Court, it had been found that the personal property sold to them by Twell was of the value of forty-two hundred dollars, and that the real estate was of the value of six hundred dollars, and they stated in effect that they had received, up to the rendition of the judgment of the Supreme Court, rents and profits sufficient, if added to those sums, to make an aggregate in excess of $5000. But, as we have seen, the decree referred to the value of the property as of the date of the alleged sale and assignment, and did not in terms require Lodge and Beaumont to account at that value, so that until the entry of another decree it would remain problematical whether the money which might thereby be decreed to be paid and the value of the property recovered in specie together, would be equal to the amount necessary to give us jurisdiction.

Taking this decree as a whole, we are satisfied that the appeal from the judgment affirming it will not lie, and it is accordingly

Dismissed.

HARTRANFT *v.* MEYER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 148. Argued April 18, 1890. — Decided April 28, 1890.

Cloth composed partly of silk, partly of cotton and partly of wool, silk being the component material of chief value, and the proportion in value of wool being less than twenty-five per cent, is dutiable as a non-enumerated article under Schedule L, § 2502 of the Revised Statutes as amended by the act of March 3, 1883, 22 Stat. 510; and not as a similar article under Schedule K in that section, 22 Stat. 508.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Frank P. Prichard for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

In 1885 Meyer & Dickinson were merchants in the city of Philadelphia, and John F. Hartranft was collector of customs for that district. They imported various lots of matelassé cloth. This cloth was composed partly of silk, partly of cotton and partly of wool, silk being the component material of chief value, and the proportion in value of wool being less than twenty-five per cent. The question presented in this case is, whether the goods were dutiable under Schedule "K" or Schedule "L," section 2502, of the act of March 3, 1883, 22 Stat. 508 and 510.

Schedule "K," which is entitled "Wool and Woolens," imposes a certain rate of duty upon "woollen cloths, woollen shawls and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act." Schedule "L," entitled "Silk and Silk Goods," imposes a different duty on "all goods, wares and merchandise, not specially enumerated or provided for in

this act, made of silk, or of which silk is the component material of chief value." If either schedule stood alone in the statutes, obviously the goods would be dutiable under that schedule, for they were made in part of wool as described in Schedule "K," and they were goods of which silk is the component material of chief value, as described in Schedule "L." Both schedules being found in the same statute, we must deduce from them, taken in connection with other provisions, the intent of Congress in reference to goods of this description; for it cannot be assumed that Congress intended two rates for the same goods, to be selected at the pleasure of either the collector or the importer. In each schedule are found the words "not specially enumerated or provided for in this act," so that neither description is absolute or exclusive. We place no stress on the position of the two schedules in the act, or on the fact that Schedule "L," coming after Schedule "K," expresses the later thought and purpose of Congress; but we turn rather to the character of the descriptive language used in the one, it being more general than in the other. In Schedule "K" it is "made wholly or in part of wool," thereby reaching to all manufactured articles of which any portion is wool, while in Schedule "L" it is narrower and more limited, — "made of silk, or of which silk is the component material of chief value." This is a special enumeration rather than the other. This idea was presented in *Solomon* v. *Arthur*, 102 U. S. 208, 212, in which the descriptions compared were these: "Manufactures composed of mixed materials, in part of cotton, silk," etc., and "manufactures of which silk is the component part of chief value." Both expressions were held to be merely descriptive, and the true interpretation to be given to them was thus clearly stated by Mr. Justice Bradley in the opinion of the court: "It is observable that the description of 'manufactures made of mixed materials, in part of cotton, silk,' etc., is more general than that of 'manufactures of which silk is the component part of chief value.' Logically, the two phrases standing together in the same act or system of laws would be related as follows: 'Goods made of mixed materials, cotton, silk, etc., shall pay a duty of thirty-five per cent; *but if* silk is

the component part of chief value, they shall pay a duty of fifty per cent.'" Applying the same rule of construction here, the circuit judge, in deciding this case, and holding that the goods were dutiable under Schedule "L," *Meyer* v. *Hartranft*, 28 Fed. Rep. 358, well said that the statute was in substance to be read thus: "All manufactures of wool of every description, not especially enumerated or provided for in this act, shall be subject to a duty of thirty-five cents per pound and thirty-five per centum ad valorem; but if silk is the component material of chief value, they shall be subject to a duty of fifty per cent ad valorem." We think this construction harmonizes the two sections better than any other, and gives force to the intent of Congress.

Another matter is also worthy of notice, and that is the change made in section 2499 of the Revised Statutes by the act of 1883. In the Revised Statutes the section contained this provision: "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;" while in the act of 1883 the provision is changed so as to read: "And on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable." It is true that this section, at least in its main provisions, refers solely to non-enumerated articles, and these goods must be considered as enumerated. *Arthur's Executors* v. *Butterfield*, 125 U. S. 70. And yet, though this clause may apply solely to non-enumerated articles, it shows the intent of Congress in reference to a question of the kind presented. Instead of making the duty depend on the highest rate at which any component part is chargeable, it is made to depend on the highest rate at which the component material of chief value is chargeable. Applying that idea here, the rate would be that chargeable under Schedule "L," for silk, as appears from the findings, was the component material of chief value.

The judgment of the Circuit Court was correct, and it is

Affirmed.

ECKLOFF *v.* DISTRICT OF COLUMBIA.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 244. Submitted March 27, 1890.— Decided April 28, 1890.

Under the act of June 11, 1878, 20 Stat. 102, c. 180, the commissioners of the District of Columbia have the power to summarily remove and dismiss from the police force of the District officers and members of that force.

ASSUMPSIT against the District of Columbia, to recover salary alleged to be due the plaintiff as an officer in its police corps. Judgment for defendant, to which this writ of error was sued out. The case is stated in the opinion.

Mr. C. C. Cole and *Mr. W. L. Cole* for plaintiff in error.

Mr. George C. Hazleton for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On March 31, 1883, the plaintiff in error, who had been for years theretofore a lieutenant of the police force of the District of Columbia, was removed from office by the commissioners of the District. This removal was without any written charges preferred against him, or any notice or hearing. Challenging the validity of such removal, he brought his action for salary subsequent thereto. At the trial of the case, at a special term of the Supreme Court of the District, his summary removal was adjudged unauthorized, and his claim for salary sustained. This judgment was reversed by the court at its general term, and the action dismissed at his cost. 4 Mackey, 572. To reverse that judgment of the general term, this writ of error is prosecuted.

The single question presented by the record is, as to the power of the commissioners to remove a police officer without charges, notice or hearing. The act of June 11, 1878, 20 Stat. 102, c. 180, by which the police force was placed under the control of the commissioners of the District, empowers them,

(§ 3,) "to abolish any office, to consolidate two or more offices, reduce the number of employés, remove from office and make appointments to any office under them authorized by law." If this were all the legislation, there would be no question, for the grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice; but the contention of the plaintiff in error is, that this unrestricted right of removal is limited by the provisions of prior statutes.

In 1861 an act was passed creating a metropolitan police system for the District of Columbia, and establishing a police for such district. 12 Stat. 320, c. 62. By that act a board, consisting of five commissioners, was created, to whom was given full control over the police force. This board was continued until the act of 1878, and its power of removal was limited by this provision: "No person shall be removed from the police force except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defence; and no person removed from the police force for cause shall be reappointed to any office in said force." Sec. 8 of the act of 1861, embodied in Rev. Stat. D. C. § 355. And the contention is that the act of 1878 simply changed the control from one board to another; that this limitation on the power of removal was not expressly repealed by the act of 1878; that repeals by implication are not favored; and therefore that, construing the old law with the new, whatever power the new board had over other subordinates, its power over the police was subject to that limitation. On the other hand, it appears that in 1871 an act was passed providing a government for the District of Columbia. 16 Stat. 419, c. 62. This established a territorial government, with a governor and legislative assembly, to which the general administration of the affairs of the District was committed. It did not change the police department, which was left, as theretofore, under the charge of the police commissioners. This territorial system not proving satisfactory, Congress, in 1874, (18 Stat. 116,) abolished it, and vested the affairs of the District in a commission. That act

contained the provision we have heretofore quoted from the act of 1878; and gave to this commission large powers of administration, but without control of the police or the schools. Evidently this scheme of administration was experimental, as section 5 of the act provided for the appointment of a committee of Congress, to prepare a suitable frame of government for the District and report the same to the succeeding Congress. The experiment was found to be satisfactory, and in 1878, four years thereafter, the act from which we first quoted was passed, which was entitled "An act providing a permanent form of government for the District of Columbia." Following the idea and enlarging the scope of the act of 1874, the general administration of affairs was vested in a commission, and to that commission was given control also over the police and schools; for by section 6 it was provided: "That from and after the first day of July, eighteen hundred and seventy-eight, the board of metropolitan police and the board of school trustees shall be abolished; and all the powers and duties now exercised by them shall be transferred to the said commissioners of the District of Columbia, who shall have authority to employ such officers and agents and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act. And the commissioners of the District of Columbia shall, from time to time, appoint nineteen persons, actual residents of said District of Columbia, to constitute the trustees of public schools of said District, who shall serve without compensation and for such terms as said commissioners shall fix. Said trustees shall have the powers and perform the duties in relation to the care and management of the public schools which are now authorized by law."

It will be noticed that a distinction is provided between the police and the schools. An intermediate board is to be appointed for the latter, while the direct control of the police is given to the commissioners; and they "are authorized to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this act." When to a board having general administrative supervision of

the affairs of a community, and with plenary power in the matter of appointment and removal of subordinates, is added the control of another department, and no express words of limitation are found in the act making the transfer, it is to be presumed that such board has the same plenary power in respect to this new department, and is not hampered by limitations attached to the board which theretofore had control of it. The presumption against implied repeal obtaining in the construction of ordinary statutes yields to the inferences arising from the subject matter of legislation. Plenary powers having been found by experience valuable in the management of affairs already under the control of the board, the transfer of another department to the same control carries with it a strong implication that the added department is subject to the same plenary powers. The primary thought is not a mere transfer of authority, but the bringing of the added department within the control of the general supervising board. It is unity of administration and not change of commission.

But our conclusions are not controlled by this construction alone. The court below placed its decision on what we conceive to be the true significance of the act of 1878. As said by that court, it is to be regarded as an organic act, intended to dispose of the whole question of a government for this District. It is, as it were, a constitution for the District. It is declared by its title to be an act to provide "a permanent form of government for the District." The word permanent is suggestive. It implies that prior systems had been temporary and provisional. As permanent it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the act itself for their extent and limitations. It is not one act in a series of legislation, and to be made to fit into the provisions of the prior legislation, but is a single complete act, the outcome of previous experiments, and the final judgment of Congress as to the system of government which should obtain. It is the constitution of the District, and its grants of power are to be taken as new and independent grants, and expressing in themselves both their extent and limitations. Such was the view

taken by the court below; and such we believe is the true view to be taken of the statute. Regarded in this light, but one interpretation can be placed upon the section quoted. The power to remove is a power without limitations. The power is granted in general terms, as well as the authority to adopt such provisions as may be necessary to carry it into execution. Full authority is given to the commission; and in the absence of rules and regulations directing a different procedure, its act of summary dismissal cannot be challenged.

The judgment is affirmed.

BEATTY *v.* BENTON.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 279. Submitted April 18, 1890. — Decided April 28, 1890.

In this case, on a writ of error to review the judgment of the Supreme Court of a State, it was held that no federal question was involved, because the case was decided by the state court on a ground broad enough to maintain the judgment independently of any federal question; and the writ was dismissed.

THE case is stated in the opinion.

Mr. Salem Dutcher for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 3d of May, 1854, one Carrie executed and delivered to Elijah D. Robertson, a white man, a warranty deed of a lot of land in Augusta, Georgia, 82 feet 6 inches in width by 200 feet in depth. The consideration expressed in the deed was $600, and it conveyed to Robertson, his heirs and assigns, forever, the lot in question, in trust, nevertheless, to and for the sole use, benefit and behoof of the following free persons of

color, of Augusta, "to wit, Fanny Gardner, the wife of Thomas Gardner, and their daughter, Frances Gardner, and any future issue of the said Fanny by the said Thomas, and, in case of the death of the said Frances and Fanny, in trust for the next of kin of the said Thomas Gardner." The deed also authorized Robertson, in case it should be deemed advisable and to the interest of all concerned that a sale of the property should take place, to sell and make titles to it, provided the consent of the said Frances and Fanny, their guardian or guardians, should be first had and obtained.

In March, 1879, Fanny Gardner filed a bill in equity, in the Superior Court of Richmond County, Georgia, setting forth the purchase of the lot of land by Gardner from Carrie, for $600, and the making of such deed; that Gardner, who was her husband, and the father, by a former wife, of Frances Gardner, who had intermarried with one Beatty, died in 1865; that all of those persons were free persons of color; that, on the 3d of May, 1854, Gardner and the plaintiff and Frances took possession of the property; that afterwards, Frances having married, Gardner divided the lot and erected a house on a part of it for Frances; that the parties thus continued in possession of the property until the death of Gardner; that from that time Frances had remained in the possession of the portion of the lot on which the house was erected for her use, and the plaintiff had occupied the remaining part of the lot; that the deed to Robertson was void, because at that time all conveyances of real estate in Augusta to or for the use of free persons of color residing therein were prohibited by law; that the plaintiff acquired title to the property occupied by her, by actual adverse possession of the same for twenty years, and Frances had acquired title in the same way to the premises occupied by her; that the plaintiff desired to sell her part of the property, but could not do so, because Frances claimed that, under the terms of the trust deed, she owned a remainder interest in the whole of the property, and the plaintiff had only a life estate therein; and that the property could not be sold except with the consent of Frances.

The bill prayed for a decree that the plaintiff owned a fee-

simple title to the portion of the lot so occupied by her; that the trust deed be cancelled; that, if the court should hold that the title of the plaintiff and of Frances was derived from seven years' possession under the trust deed, as color of title, it would decree that the terms of such deed did not bind the plaintiff or limit her title in the property; that, if the plaintiff did not have a fee simple title to the part in her possession, she and Frances might be decreed to be tenants in common of the entire property, and the same might be divided by commissioners, or be sold and the proceeds divided, share and share alike, between the plaintiff and Frances, and for general relief.

The bill was afterwards amended by inserting an allegation that the plaintiff furnished to Gardner at the time of the purchase one-half of the purchase money of the property, the same being the proceeds of her labor as a free person of color; and further, that if the court held that the plaintiff acquired no legal interest under the division of the lot by Gardner, in the part which he gave to her and on which she had since lived, and no interest that could ripen by prescription, then Gardner died in possession of all of the lot, leaving the plaintiff and Frances as his only heirs; that such heirs had, by tacit consent, actually occupied, held and claimed the portions so divided to them by Gardner, from the time of his death; and that Gardner made no will and left no other heirs.

Frances, being then the wife of one Davis, answered the bill, denying that the property was ever divided between her and the plaintiff by Gardner, or since his death, otherwise than that Gardner built another house for her on the property, for convenience, because she was married and had many children; and that her title and that of the plaintiff was that of *co-cestuis que trust* for life, with remainder over to the children of Frances who should be living at the termination of such equitable life estate.

By way of cross-bill, the answer averred, that, before January 1, 1863, no proceedings were ever instituted to escheat the property as being conveyed for the benefit of free persons of color; that, by section 2627 of the Code of Georgia, becom-

ing of force on January 1, 1863, it was declared that escheat should lie only on failure of heirs; that by the act of Georgia of March 17, 1866, free persons of color were vested with all the property rights of white persons; that among those rights was that to a prescriptive title by adverse possession for seven years under written evidence of title; that by possession adverse to all the world, under the trust deed, for seven years and more prior to the bringing of the bill, the plaintiff and Frances had a good prescriptive title to the property under the limitations of the deed, and had an equitable life estate in common, with remainder in fee, on their death, to the next of kin of Gardner; that Frances had six children then living, two of them by her first husband, Beatty, one of whom was an adult and the other a minor, and four of them by her husband, Davis, all of whom were minors, such six children being the next of kin after Frances to Gardner, their grandfather; and that Gardner had no issue by the plaintiff.

The answer prayed that the court might declare the trust to be valid, and appoint a trustee to hold the property for the joint use and benefit of the plaintiff and the defendant during their lives, or the life of either of them, and, at the termination of such lives, to convey the property to such children of the defendant as might then be living, and, should there be none such, then to whoever should be next of kin to Gardner; and that the adult son of the defendant be made a defendant, with a guardian *ad litem* to be appointed for her minor children.

The answer was afterwards amended by averring that Gardner died in November, 1865; that from the date of the trust deed to that time the plaintiff and the defendant and Gardner resided together on the lot, being in occupation of it under and by virtue only of the trust deed; that, from the time Gardner died until the bringing of the suit, the plaintiff and the defendant continued to occupy the lot; that more than seven years elapsed from the death of Gardner to the bringing of the suit; that under the laws of Georgia, as they existed from the date of the trust deed, any instrument in writing purporting to convey a title to land, even if void, was good as

color of title, and adverse possession of the land thereunder for seven years gave a good title by prescription to the land; that, under the first section of the act of Congress of April 9, 1866, all persons within the jurisdiction of the United States became entitled to the equal benefit of all laws and proceedings for the security of person and property as was enjoyed by white citizens, and all citizens of the United States became entitled in every State to the same rights as were enjoyed by the white citizens thereof, as respected real and personal property; that, under the first section of the 14th article of amendment to the Constitution of the United States, it was provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States, nor 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; that under said act of Congress and said amendment the defendant became entitled to the same rights, as to prescriptive title by possession under color of title, as any white person; that under said act of Congress and said amendment, the act of Georgia of December 19, 1818, and that of December 22, 1819, could not be lawfully enforced as against the rights of the defendant under the trust deed as color of title, even if the deed were originally void; and that, under said act of Congress and the 14th amendment, the plaintiff and the defendant, under the trust deed, and their occupancy of the lot thereunder for seven years after the death of Gardner, had an equitable life estate in common in the lot, with remainder in fee to the next of kin of Gardner.

The answer was also amended by averring that the claim of the plaintiff that she had furnished to Gardner, at the time of the purchase, one-half of the purchase money of the property, was barred by the statute of limitations, the claim being first asserted by an amendment to the bill, made June 28, 1884, more than thirty years after the purchase of the property by Gardner; and that the plaintiff was estopped by laches from asserting such claim.

A guardian *ad litem* was appointed for the minors, and he

and the adult Beatty were made defendants. The case was tried by a jury. The court at the trial charged the jury as follows: "Under the law in force at the time of making this deed, free persons of color could not hold real estate, and the deed from Carrie to Gardner in trust was absolutely void; and the fact that the war and its results, as declared by the constitution of the United States and the acts of our own legislature, have put all colored persons on the same footing with white persons, does not and cannot make the laws invalid or validate any title acquired under them, and no continuance of possession for any number of years by the wife and daughter under this void deed can ripen it into a good title. The transaction being illegal and void, no act of either and no post-war enactments can galvanize it into life. If you believe that Thomas Gardner paid Carrie for this land, it being admitted that there were no proceedings before 1860 to escheat this property, and remained in possession of the land until after the close of the war, and died in November, 1865, then, notwithstanding the law which made a trust deed void, and he died in possession of the land, the wife and daughter took this estate by inheritance absolutely, each being entitled to one-half. If the evidence does not show that, but shows that Thomas Gardner paid the purchase money and went into possession, and then divided the lot between Fanny and Frances, and that they both went into possession and remained in possession until after the war closed and are still in possession, Frances is estopped from denying the title of Fanny to the one-half now claimed by her; so that you see that my view of the law is that the trust deed cannot be enforced or be made the basis of any title. If, therefore, you find for the complainant, Fanny, you may appoint three discreet persons to make the division of the lot, providing for a sale in case no division of the kind can be made."

The defendants requested the court to charge the jury as follows, which requests were declined: "2. If you find, from the evidence in this case, that Thomas Gardner bought this land for the joint use of Fanny and Frances during their lives, and at their death to go to his next of kin, and had the deed of 1854 made to carry out this purpose, and that Frances and

Fanny entered on the occupancy of the land by virtue of the deed, and were in the occupancy of the land under the deed at the time free persons of color became entitled to equal property rights under the law with white persons, and remained in such possession and occupancy for seven years thereafter, then I charge you that, even if the deed itself were void, they obtained a good prescriptive title such as set out in the deed — that is, a good prescriptive title to the joint use and enjoyment of the land during their lives. The fact that the deed was void, or that Fanny or Frances were free persons of color, in nowise prevents such a prescriptive title as stated accruing to them, if the evidence shows the facts above stated. 3. Whenever two persons are from any cause entitled to the possession simultaneously of any property in this State, they are tenants in common, and each entitled to the use and enjoyment of one-half of the common property, and are each liable for one-half of the burdens imposed by law on the common property, such as taxes. If, therefore, you find, from the evidence in this case, that Fanny and Frances became simultaneously entitled to the possession of this property, they were tenants in common, equally entitled to its benefits and equally liable for its burdens. If you find that one lived on one half and one on the other, this is nothing more than the law entitled them to; and if one paid the taxes on her half and the other on hers, this is nothing but what the law required them to do. The fact of one living on one half and the other on the other, or of one paying the taxes on one half and the other the taxes on the other, no matter how long this was kept up, would not give either one a fee-simple title to the particular half on which she lived and paid taxes. At the end of half a century they would still be tenants in common, each having the right to possess the joint property and to use and enjoy one-half of it. No tenant in common can set up an exclusive right by prescription against his cotenant in the whole or any part of the property, unless he actually ousts his cotenant, or expressly notifies his cotenant that he holds adversely to his rights, or unless he assumes exclusive possession of the whole property, and refuses to admit his cotenant

to his rightful participation, after the cotenant demands such admission. If, therefore, you find that Frances and Fanny became simultaneously entitled to the use and enjoyment of this lot, they were tenants in common and are so still, unless you find that Fanny has taken some of the steps above mentioned against Frances, and followed it up with adverse possession for seven years under color of title or twenty years without it. 4. The next of kin to Thomas Gardner, as the words are used in the deed of 1854, mean his nearest blood relations after his own child Frances. A man's nearest blood relations after his own children are his grandchildren. Thomas Gardner's grandchildren are parties respondent to this bill. If Fanny and Frances are tenants in common for life in this land, these grandchildren, should they outlive them, would be entitled to the land, share and share alike. Fanny claims that she has a fee-simple interest in a part of this land, by possession thereof for twenty years, and consequently there is no remainder in this part for the next of kin. You cannot find that Fanny has a fee-simple interest in any part of this land by adverse possession for twenty years, unless you find that she has been in such possession of such part for the full period of twenty years from the time that free persons of color became vested in this State with the same property rights as white persons. 5. If you find that a good prescriptive title has arisen under this trust deed, the effect is, that Fanny and Frances will each be entitled for life to the use and enjoyment of one-half of the property, and at their death it goes to the next of kin of Thomas Gardner. If you find that Fanny has a fee-simple interest in that part of the lot whereon she now resides, the next of kin of Thomas have no rights whatever therein. Fanny may dispose of it while living as she pleases, and if she dies intestate it would go to her next of kin. 6. If you find, from the evidence, that the complainant did not set up any claim to the property in dispute, by having furnished part of the purchase money, until twenty years had expired from the time the purchase was made, I charge you that she is now barred by the statute of limitations from setting up title to the property, for that reason."

The jury found the following verdict: "We, the jury, find for the complainant the exclusive right and fee-simple title to that portion of said property now occupied by her." The defendants moved for a new trial, alleging as grounds therefor error on the part of the court in charging the jury as set forth, and in refusing to charge them as requested. The motion for a new trial was overruled, and a judgment was entered to that effect. The defendants excepted to the judgment, and a bill of exceptions was made and certified to the Supreme Court of Georgia, to which the defendants took the case by a writ of error. The plaintiff having died, leaving a will which was duly admitted to probate, her executrix and sole legatee, Georgia Benton, was made a party in her place. The case was heard in the Supreme Court, and it affirmed the judgment of the Superior Court of Richmond County, in an opinion reported in 73 Georgia, 187, which was as follows: "This is a bill filed by Fanny Gardner against Frances Beatty and children, to settle her title to one-half of a lot in Augusta, occupied by her, while Frances occupied the other half. The lot was bought by Thomas Gardner, deceased, in 1854, and one-half the purchase money was paid by him, and the other half by complainant, who was his wife. Frances, the defendant, was the daughter, by a former wife, of deceased, and married Beatty afterwards. Up to that time the lot was one, only one house being on it; then it became crowded and was divided, and a house built for Beatty and wife, who occupied it ever since. All the parties were free persons of color before the war. When the purchase was made in 1854, a deed was taken to the property in the name of Robertson, trustee, a white person, to the use of Fanny and Frances for life, and then to the next of kin of Thomas Gardner. If that trust deed was valid when made, the complainant only had a life estate, and having died and left a will since this writ of error was brought, she and her executrix now can take nothing. So that the verdict and decree, being that she shall keep the half set apart to her in the division, and so long in her possession, is wrong, if that trust deed be operative.

"1. Under the decision of this court in *Swoll et al.* v. *Oliver*

et al., 61 Georgia, 248, that deed, as the law of Georgia stood in 1854, was void. So, in *Planters' Loan and Savings Bank* v. *Johnson*, 70 Georgia, 302, (an Augusta case,) the same point is decided emphatically, based on the act of 1818, Cobb's Digest, p. 993. Therefore, the trust deed is out of the way.

"2. When the law freed slaves in Georgia and put free persons of color, as to real property, on the same footing as whites, this lot, as divided, was in possession of these two colored women, a moiety with a house on it, erected by the husband and father, in possession of each. The primary element of title, possession, being thus in each, and the State never having escheated the property whilst the old law stood, this possession is good against the claim of all others, and the verdict and decree giving each her several share is right.

"3. The decree is all the more equitable, because complainant paid one-half of the purchase money. Cases of this sort, under the anomalous condition of such property remaining in the possession of a class of persons who could not formerly hold title thereto, should be adjudicated under broad views of natural equity.

"There is nothing in the minor points made by the able and indefatigable counsel for plaintiffs in error which can unsettle the result which the above principles necessitate, we think, as the law of this case. Judgment affirmed." To review such judgment of affirmance the defendants have brought a writ of error.

We are of opinion that this writ must be dismissed, because no federal question is involved. The Supreme Court of Georgia decided that, if the trust deed was valid when made, the plaintiff took under it only a life estate, and that that had ceased by her death; that the deed, however, was void under the Statute of Georgia which existed when the deed was made in 1854; that, therefore, the trust deed was entirely out of the way; that at the time it became the law of Georgia that free persons of color were put, as to real property, on the same footing as white persons, each of the two women was in possession of a part of the lot, each part having a house upon it; that, as the State had never enforced an escheat of the property, such

possession of each of the parties was good against the claim of all other persons; and that, therefore, the verdict and judgment, which gave to each her several share in fee-simple title to the part of the property which was in her occupation, was right.

We see nothing in these conclusions of the state court which raises any federal question. The construction of the trust deed, and the question of its validity under the statutes of Georgia of 1818 and 1819, were matters for the exclusive decision of the Supreme Court of that State; and the case was decided upon the rights of the parties as they existed by virtue of the acts of Gardner, and of their own acts, during his lifetime, and as they stood at the time of his death in 1865, and thereafter, down to the bringing of this suit in 1879. The rights thus adjudicated existed and were passed upon independently of the act of Congress referred to, and of the 14th amendment to the Constitution, and were not, and could not be, affected by any provisions thereof. The case was decided against the plaintiffs in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment. In such a case, even though the state court also decides a federal question against the plaintiffs in error, this court dismisses the writ of error without considering the federal question. *Marron* v. *Brinkley*, 129 U. S. 178, 181; *Hale* v. *Akers*, 132 U. S. 554, 565, and cases there cited; *San Francisco* v. *Itsell*, 133 U. S. 65, 66; *Hopkins* v. *McLure*, 133 U. S. 380, 386.

Writ of error dismissed.

UNITED STATES v. CHASE.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 241. Argued March 28, 31, 1890. — Decided April 28, 1890.

The knowingly depositing an obscene letter in the mails, enclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, is not an offence within the act of July 12, 1876, 19 Stat. 90, c. 186.

A sealed and addressed letter is not a "writing" within the meaning of that act.

A certified question: "Does the indictment charge the defendant with any offence?" is too general to be made the subject of a Certificate of Division.

The case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff.

Mr. Warren O. Kyle for defendant.

Mr. Justice Lamar delivered the opinion of the court.

This was an indictment on the act of Congress of July 12, 1876, chapter 186, found and returned in the District Court, and remitted, pursuant to section 1037 of the Revised Statutes, to the court below, charging that on the twenty-fifth day of January, 1876, at North Attleborough, in the District of Massachusetts, "Leslie G. Chase did unlawfully and knowingly deposit and cause to be deposited in the mails of the said United States, then and there for mailing and delivery, a certain obscene, lewd and lascivious letter, which said letter was then and there non-mailable matter, as declared by section one of an act of Congress approved on the twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-six, and which said letter is and then and there was so grossly obscene, lewd and lascivious that the same would be offensive to the court here, and is unfit and improper to appear upon the records thereof, wherefore the jurors aforesaid do

not set forth the same in this indictment, which said letter was then and there enclosed in a certain paper wrapper, which said wrapper was then and there addressed and directed as follows, that is to say, 'Watchweer Print, Providence, R. I.,' against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided."

After a plea of guilty had been entered and before sentence, a motion in arrest of judgment was made, on the following grounds:

"1. The indictment does not set forth the contents of the letter which is alleged to be obscene, lewd, lascivious and non-mailable, nor does it describe said letter or any part thereof, nor does it in any way identify said letter.

"2. The indictment does not allege that the defendant knew the contents of said letter at the time of the alleged deposit thereof in the mails of the said United States.

"3. The indictment does not allege that the defendant deposited said letter in the mails of the said United States for the purpose of circulating and disposing of, or of aiding in the circulation or disposition of, anything declared to be non-mailable matter by any law of the United States.

"4. The indictment does not allege that the defendant deposited, or caused to be deposited, for mailing or delivery, anything declared to be non-mailable matter by section one (1) of an act of Congress approved on the twelfth day of July, A.D. 1876, or by any law of the United States.

"5. The indictment does not charge the defendant with any offence."

At the hearing in the Circuit Court upon the motion in arrest of judgment, the following questions arose upon which the judges by whom the court was held were divided in opinion, viz:

"First. Is the knowingly depositing in the mails of an obscene letter, enclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, an offence within the act of July 12, 1876, chapter 186?

"Second. Does this indictment allege that the defendant deposited, or caused to be deposited, for mailing or delivery, anything declared to be non-mailable matter by that act or by any law of the United States?

"Third. Does this indictment charge the defendant with any offence?

"Thereupon, at the request of the counsel for the United States, it is ordered that these questions be stated as aforesaid and be certified under the seal of this court to the Supreme Court of the United States at its next session."

Objection is taken to the consideration of the questions presented by this certificate of division, for several reasons, none of which are deemed sufficient to preclude our taking jurisdiction of the case; and we shall, therefore, proceed to consider the questions certified in the order they are arranged in the certificate.

Sec. 1 of the act July 12, 1876, 19 Stat. 90, on which this indictment is founded, is as follows:

"Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or of whom or by what means any of the hereinbefore mentioned matters, articles or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of,

or of aiding in the circulation or disposition of the same, shall be guilty of a misdemeanor, and shall for each and every offence be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The contention on the part of the United States is, that the term "writing," as used in this statute, is comprehensive enough to include, and does include, the term "letter," as used in the indictment; and it is insisted, therefore, that the offence charged is that of unlawfully and knowingly depositing in the mails of the United States an obscene, lewd and lascivious "writing," etc., etc.

We do not concur in this construction of the statute. The word "writing," when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms "letter" and "writing" equivalent expressions. When in ordinary intercourse men speak of mailing a "letter" or receiving by mail a "letter," they do not say mail a "writing" or receive by mail a "writing." In law the term "writing" is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds and notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. And in the many discussions to which this statute has given rise, these instruments are referred to as "the writing" or "some writing." But in its most frequent and most familiar sense the term "writing" is applied to books, pamphlets and the literary and scientific productions of authors. As for instance, in that clause in the United States Constitution which provides that Congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective *writings* and discoveries."

In the statute under consideration, the word "writing" is used as one of a group or class of words, — book, pamphlet,

picture, paper, writing, print, — each of which is ordinarily and *prima facie* understood to be a publication; and the enumeration concludes with the general phrase "or other publication," which applies to all the articles enumerated, and marks each with the common quality indicated.

It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written.

We do not think it a reasonable construction of the statute to say that the vast mass of postal matter known as "letters" was intended by Congress to be expressed in a term so general and vague as the word "writing," when it would have been just as easy, and also in strict accordance with all its other postal laws and regulations, to say "letters" when letters were meant; and the very fact that the word "letters" is not specially mentioned among the enumerated articles in this clause is itself conclusive that Congress intended to exclude private letters from its operations.

Upon this point Judge Hammond, in his opinion in *United States* v. *Huggett*, 40 Fed. Rep. 636, 641, makes the following apt and, to our minds, conclusive remarks: "I have taken the trouble to examine with care the legislation concerning our postal affairs, and do not find a single instance where Congress has ever used any other word to include 'letters' than that word itself, except such expressions as 'the mail,' 'mail-matter,' 'bag or mail of letters,' etc. . . . Whenever the legislation in hand requires specific classification or enumeration, I find no word ever substituted for 'letters' to express that which is commonly known as letters in relation to the postal service. We have 'letter and newspaper envelopes,' 'letter correspondence,' 'registered letters,' 'unclaimed letters,' 'dead letters,' 'request letters,' 'non-delivered letters,' 'all letters and other mail matter,' 'foreign letters,' 'letters or packets,' 'letters and packets,' 'letter postage,' 'letter mail,' 'letter and other mail matter,' and such like, almost innumerably; and these I have taken quite at random from the

Revised Statutes. Can it be possible that Congress, then, wishing to include 'letters' in any particular and accurate enumeration, shall drop that word so imbedded in our postal laws and that of our ancestors beyond the sea, and adopt some unfamiliar, inferior, and in every sense ambiguous term to express the idea?"

A further argument in support of the view we have asserted is found in the fact that the statute, after it has declared by enumeration, in the clause under consideration, what articles shall be non-mailable, adds a separate and distinct clause declaring that "every letter *upon the envelope of which* . . . indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed . . . shall not be conveyed in the mails," and the person knowingly or wilfully depositing the same in the mails "shall be deemed guilty of a misdemeanor," etc. This distinctly additional clause, specifically designating and describing the particular class of letters which shall be non-mailable, clearly limits the inhibitions of the statute to that class of letters alone, whose indecent matter is exposed on the envelope. It is an old and familiar rule that, "where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." *Pretty* v. *Solly*, 26 Beavan, 610, per Romilly, M. R.; *State* v. *Comm'rs of Railroad Taxation*, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560.

The decisions of the Circuit Courts upon the question presented to us by this certificate have been conflicting. Those sustaining indictments in cases similar to this hold that the term "writing" comprehends "letters," and insist that even if the general phrase "other publication" is allowed to apply to the word, the sending or mailing a letter by one person to

another is a sufficient publication to bring a letter within the statute, as is held to be the case in an action of slander and libel.

The reply to this is, that the statute prohibits the conveyance by mail of matter which is a publication before it is mailed, and not such as becomes a publication by reason of its being mailed.

Another argument on which indictments of this character have been sustained by some of the Circuit Courts is, that a reasonable construction must be given the statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress. *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Morris*, 14 Pet. 464, 475; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Reese*, 92 U. S. 214.

But we cannot concede that the policy of the statute was so sweeping as the argument assumes. We think that its purpose was to purge the mails of obscene and indecent matter as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination. *Ex parte Jackson*, 96 U. S. 727. This object seems to have been accomplished by forbidding the use of the mails to books, pamphlets, pictures, papers, writings and prints, and other publications of an indecent nature, and also to private letters and postal cards whereon the indecent matter

is exposed to the inspection of others than the person to whom the letter is written.

Ashurst, J., said in *Jones* v. *Smart*, 1 T. R. 51: "It is safer to adopt what the legislature have actually said than to suppose what they meant to say." In the *Queensborough Cases*, 1 Bligh, 497, Lord Redesdale said: "The proper mode of disposing of difficulties arising from a liberal construction is by an act of Parliament, and not by the decision of court." Congress seems to have acted upon this idea; and if further argument were needed in support of our view, it will be found, we think, in the fact that in an amendment to this statute passed September 26, 1888, 25 Stat. 496, c. 1039, for the first time in the history of the postal service the word "letter" was included in the list of articles made non-mailable by reason of their obscene, lewd, lascivious or otherwise improper character. If letters were embraced in the statute on which this indictment was founded, why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that that body did not put the construction on the prior statute claimed in behalf of the United States, else we have it doing a useless and vain act. But as the amendment of 1888 is not involved in this case, no opinion is expressed as to whether the term "letter," as used therein, can, under a proper construction of that statute, be held to include a strictly private sealed letter.

With reference to the argument that the word "writing" occurs, in the legislation on this subject, as an amendment, we have only to remark that the entire history of that legislation, so far from forming a basis for a different construction of this act, confirms it.

For the reasons above given our answer to the first question certified is in the negative. This being decisive, we need not consider the second question; and the third, as has been repeatedly held, is too general to be the subject of a Certificate of Division.

IN RE MILLS, Petitioner.

ORIGINAL.

No. 4. Original. Submitted April 3, 1890. — Decided April 28, 1890.

The words "punishable by imprisonment at hard labor" in the act of March 1, 1889, 25 Stat. 783, c. 333, "to establish a United States court in the Indian Territory, and for other purposes," embrace offences which, although not imperatively required by statute to be so punished, may, in the discretion of the court, be punished by imprisonment in a penitentiary.

Where a statute of the United States prescribing a punishment by imprisonment does not require that the accused shall be confined in a penitentiary, a sentence of imprisonment cannot be executed by confinement in a penitentiary, unless the sentence is for a period longer than one year.

A judgment of a district court sentencing a prisoner who had pleaded guilty to two indictments, for offences punishable by imprisonment, but not required to be in a penitentiary, to imprisonment in a penitentiary, in one case for a year and in the other for six months, is in violation of the statutes of the United States.

Habeas corpus. On the 4th of November, 1889, *Mr. Van H. Manning* presented a petition for the writ. Leave was granted, November 11th, and a rule to show cause issued, returnable on the first Monday of December then next. Return was made, and on the 5th of December leave was granted to proceed *in formâ pauperis*, and on the 3d of April the petition for the writ was filed and submitted.

Mr. Van H. Manning and *Mr. Thomas Marcum* for the petitioner.

Mr. Assistant Attorney General Maury opposing.

Mr. Justice Harlan delivered the opinion of the court.

This is an original application to this court for a writ of *habeas corpus*. Leave to file the petition having been given, a rule was granted against the warden of the State Penitentiary at Columbus, Ohio, in which the petitioner was imprisoned, requiring him to show cause why the writ should not be

issued. The return to that rule shows that the petitioner was received by the respondent, August 1, 1889, from the marshal of the United States for the Western District of Arkansas, pursuant to a judgment of the District Court of the United States for that district, sentencing the prisoner to confinement in that penitentiary.

It appears that the prisoner was charged by indictment in the District Court of the United States for the Western District of Arkansas with the offence of having, on the 7th day of July, 1889, "at the Creek Nation, in the Indian country," within that district, unlawfully engaged in and carried on the business of a retail liquor dealer without having first paid the special tax required by law. The indictment was based upon section 3242 of the Revised Statutes, providing that "every person who carries on the business of a . . . retail liquor dealer, . . . without having paid the special tax as required by law, shall, for every such offence, be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years." Upon a plea of guilty, the court adjudged that the accused be imprisoned in the Ohio State Penitentiary, at Columbus, for the term and period of one year, and pay to the United States a fine of one hundred dollars, and its costs in the prosecution expended.

It also appears that the petitioner was charged by indictment in the same court with the offence of having on the 7th of July, 1889, "at the Creek Nation, in the Indian country," unlawfully introduced into that country, in said district, spirituous liquors, to wit, one gallon of whiskey. That indictment was based upon section 2139 of the Revised Statutes, providing: "No ardent spirits shall be introduced, under any pretence, into the Indian country. Every person who sells, exchanges, gives, barters or disposes of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars." Rev. Stat.

§ 2139, as amended by the act of Feb. 27, 1877, 19 Stat. 244, c. 69. Upon a plea of guilty, it was adjudged that the accused be imprisoned in the same penitentiary for the period of six months, and pay to the government a fine of fifty dollars, together with its costs; also, that this term of imprisonment commence and date from the expiration of the term of one year, for which he was sentenced in the other case.

The petition for the writ of *habeas corpus* proceeds upon the ground that the court which passed the above sentences was without jurisdiction of the offences charged, and that sole and exclusive jurisdiction thereof was in the court established by the act of Congress, passed March 1, 1889, entitled, "An act to establish a United States court in the Indian Territory, and for other purposes." 25 Stat. 783, c. 333. This question will be first examined.

As the country lying west of Missouri and Arkansas known as the Indian Territory was within the Western District of Arkansas when the above act of March 1, 1889, was passed, and as the district courts have jurisdiction of all crimes and offences cognizable under the authority of the United States, and committed within their respective districts, Rev. Stat. §§ 533, 563, it cannot be disputed that the court below had jurisdiction of the offences charged against the petitioner, unless its jurisdiction was taken away by the act establishing a court in the Indian Territory. That act establishes "a United States court" with jurisdiction extending over the Indian Territory, bounded on the north by Kansas, on the east by Missouri and Arkansas, on the south by Texas, and on the west by Texas and the Territory of New Mexico. Its criminal jurisdiction is thus declared in the fifth section of the act: "That the court hereby established shall have exclusive original jurisdiction over all offences against the laws of the United States committed within the Indian Territory as in this act defined, not punishable by death or by imprisonment at hard labor." As the offences charged against the petitioner were offences against the United States, and were committed in the Indian Territory, the question as to the jurisdiction of the court established by this act depends upon the meaning that may

be given to the words "punishable . . . by imprisonment at hard labor." There are offences against the United States for which the statute, in terms, prescribes punishment by imprisonment at hard labor. There are others, the punishment of which is "imprisonment" simply. But, in cases of the latter class, the sentence of imprisonment — if the imprisonment be for a longer period than one year (§ 5541) — may be executed in a state prison or penitentiary, the rules of which prescribe hard labor. These statutory provisions were referred to in *Ex parte Karstendick*, 93 U. S. 396, 399, where Chief Justice Waite, delivering the opinion of the court, said: "In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus a wide range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them."

In view of this condition of the law at the time of the passage of the act creating a United States court in the Indian Territory, there is fair ground for dispute as to the true interpretation of the words "punishable . . . by imprisonment at hard labor." An offence which the statute imperatively requires to be punished by imprisonment "at hard labor," and one that must be punished by "imprisonment," but the sentence to which imprisonment the court may, in certain cases, and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are, each, "punishable" by imprisonment at hard labor. The former offence certainly must be thus punished; and as the latter may, in the discretion of the court, be so punished, it may, also, and not unreasonably, be held to be "punishable" by imprisonment at hard labor. Shall the act of Congress be so interpreted as to exclude from the jurisdiction of the court established in the

Indian Territory, an offence which the statute imperatively requires to be punished by imprisonment at hard labor, and include within its jurisdiction offences for which the court, in its discretion, may sentence the accused to imprisonment in a penitentiary whose rules require hard labor upon the part of its inmates?

It would seem that the same considerations of public policy that induced Congress to exclude the former from the jurisdiction of the new court would demand the exclusion of the latter. It must be remembered, in this connection, that prior to the passage of the act of March 1, 1889, this court decided, in respect to crimes against the United States that are punishable by "imprisonment," that being punishable by imprisonment in a state prison or penitentiary, they are infamous, within the meaning of the Fifth Amendment of the Constitution, whether the accused is or is not put to hard labor, and, therefore, can be proceeded against only by presentment or indictment of a grand jury. In *Ex parte Wilson*, 114 U. S. 417, 426, it was said that, in determining whether a crime was infamous within the meaning of the Constitution, the question is whether it "is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one." And in *Mackin* v. *United States*, 117 U. S. 348, 352, the court said: "We cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress." Now, it is significant that the act establishing a United States court in the Indian Territory makes no provision for a grand jury, although it does provide for petit juries in civil and criminal cases. A grand jury, by which presentments or indictments may be made for offences against the United States, is a creature of statute. It cannot be empanelled by a court of the United States by virtue simply of its organization as a judicial tribunal. The provisions of the Revised Statutes relating to the empanelling of grand

juries for the District and Circuit Courts (Title 13, c. 15) do not apply to the court established in the Indian Territory by the act of March 1, 1889; for, although the latter is a court of the United States, it is not a District or Circuit Court of the United States. *Reynolds* v. *United States*, 98 U. S. 145, 154; *Ex parte Farley*, *Ex parte Wilson*, 40 Fed. Rep. 66.

We think it apparent from the very face of the act of March 1, 1889, that Congress did not intend to invest the court created by it with power to organize a grand jury, or with jurisdiction of offences that could not be proceeded against except on the presentment or indictment of a grand jury. The offences with which the petitioner Mills were charged could not be proceeded against by information for the reason that, being "punishable" by imprisonment in a state prison or penitentiary, he could not be required to make answer thereto except on the presentment or indictment of a grand jury.

These considerations justify us in holding, as we do, that the words "punishable . . . by imprisonment at hard labor," in the act of March 1, 1889, embrace offences which, although not imperatively required by statute to be so punished, may, in the discretion of the court, be punished by imprisonment in a penitentiary. This interpretation will best effectuate the intention of Congress. A different interpretation would impute to Congress a purpose to invest the court, established by that act for the Indian Territory, with jurisdiction of offences which it could not punish, for the want of authority to empanel a grand jury to return presentments or indictments against the offenders.

It results that the jurisdiction of the court below of the offences charged against the petitioner was not affected by the act of March 1, 1889, creating a United States court in the Indian Territory.

If the application for the writ depended upon the question of the jurisdiction of the District Court of the United States for the Western District of Arkansas, of the offences with which the petitioner was charged, it would be denied. But the petition alleges that his detention in the penitentiary, under

the above sentences, is contrary to the laws of the United States. It is our duty to inquire whether or not that point be well taken. If it appears on the face of the papers, that apart from any question as to whether the court below, or the United States court established in the Indian Territory by the act of March 1, 1889, had exclusive original jurisdiction of the offences with which the petitioner was charged, his detention in a penitentiary is in violation of the laws of the United States, he is entitled to be discharged from the custody of the warden of that institution. *Ex parte Royall*, 117 U. S. 241, 248.

It is provided by section 5541 of the Revised Statutes that "in every case where any person convicted of any offence against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose;" by section 5546, that "all persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a district or territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they may have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney General;" and by section 5547, that "the Attorney General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offences notice of the jail or penitentiary where such prisoners will be confined."

Assuming that the penitentiary at Columbus, Ohio, has been designated as one in which a judgment of the court below, sentencing to imprisonment a person found guilty of an offence

against the United States, may be executed, whenever the sentence is one that may be ordered to be executed in a state prison or penitentiary, we are of opinion that the sentences, under which the petitioner was committed to that institution, are not of that class. A sentence simply of "imprisonment," in the case of a person convicted of an offence against the United States — where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary — cannot be executed by confinement in a penitentiary, except in cases in which the sentence is "for a period *longer* than one year. In neither of the cases against the accused was he sentenced to imprisonment for a period longer than one year. In one case, the imprisonment was "for the term and period of one year;" in the other, "for the term and period of six months." There is consequently, no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers. *Ex parte Lange*, 18 Wall. 163, 176; *Ex parte Parks*, 93 U. S. 18, 23; *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Rowland*, 104 U. S. 604, 612; *In re Coy*, 127 U. S. 731, 738; *Hans Nielsen, Petitioner*, 131 U. S. 176, 182.

Such is the effect of section 5541, which is, in part, and without substantial change, a reproduction of the third section of the act of March 3, 1865, entitled "An act regulating proceedings in criminal cases, and for other purposes." 13 Stat. 500, c. 86. That section provides: "That in every case where any person convicted of any offence against the United States shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state prison or penitentiary within the district or state where such court is held, the use of which prison or penitentiary is

allowed by the legislature of such state for such purposes; and the expenses attendant upon the execution of such sentence shall be paid by the United States." The words "state jail" in section 5541, and "state prison" in the act of 1865 mean the same thing.

For the reasons stated, we are of opinion that the detention of the petitioner by the respondent, the Warden of the Penitentiary at Columbus, Ohio, is in violation of the laws of the United States. The rule is, therefore, made absolute. The petitioner is entitled to the writ of *habeas corpus*.

Writ granted.

UNITED STATES *v.* SANBORN.

SANBORN *v.* UNITED STATES.

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

Nos. 224, 225. Argued March 21, 1890. — Decided April 28, 1890.

The payment made by the United States to Sanborn, which is the subject of this action, was made in consequence of a misrepresentation by the defendant to the Secretary of the Treasury, which created a misapprehension, on his part, of the nature of the defendant's services; and the amount so paid ought, in equity and good conscience, to be returned to the United States.

When the United States makes a long delay in the assertion of its right to recover back money which it is entitled to recover back, without showing some reason or excuse for the delay, interest before the commencement of the action for such recovery is not recoverable; and this is especially true when it does not appear that the defendant has earned interest upon the money improperly received by him.

When the United States are successful in a suit where one of their clerks or officers of the class described in Rev. Stat. § 850 is sent away from his place of business to be a witness for the government, the necessary expenses of such witness, audited by or under the direction of the court upon which he attends as a witness, takes the place, in the bill of costs, of the per diem and mileage which, but for that section, would have been taxed and allowed in their favor.

THE case is stated in the opinion.

Mr. Benjamin F. Butler and *Mr. O. D. Barrett* for Sanborn.

Mr. Alphonso Hart, Solicitor of Internal Revenue, for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

These are writs of error from the same judgment. The action was brought by the United States, October 15, 1883, to recover from John D. Sanborn the sum of $7334, on account of moneys alleged to have been received by him from the government without authority of law and without right thereto, with interest on that sum from August 16, 1873. A jury was waived by the written stipulation of the parties and the case was tried by the court, which made a special finding of facts and of law.

It was provided by an act of Congress, approved May 8, 1872, making appropriations for the legislative, executive and judicial expenses of the government for the fiscal year ending June 30, 1873, that "the Secretary of the Treasury shall have power to employ not more than three persons to assist the proper officers of the government in discovering and collecting any money belonging to the United States, whenever the same shall be withheld by any person or corporation, upon such terms and conditions as he shall deem best for the interests of the United States: but no compensation shall be paid to such persons except out of the money and property so secured; and no person shall be employed under the provisions of this clause who shall not have fully set forth in a written statement, under oath, addressed to the Secretary of the Treasury, the character of the claim out of which he proposes to recover, or assist in recovering moneys for the United States, the laws by the violation of which the same had been withheld, and the name of the person, firm or corporation having thus withheld such moneys." 17 Stat. 69, c. 140.

On the 15th day of July, 1872, Sanborn sent to the Secretary of the Treasury a communication, verified by his oath, submitting a statement under the above act, and proposing to recover, or assist in recovering, moneys due the United States for evasions of, and frauds upon, the laws for the collection of internal revenue tax on spirituous and fermented liquors, as well in making false returns of the amounts manufactured as in evading the payment of taxes upon those returned; and asking to be allowed, in the form of a percentage, such amount from the collections as in the judgment of the Secretary was fit and meet.

This letter was followed by a written contract between Sanborn and the Acting Secretary of the Treasury under date of August 13, 1872, in which it was agreed that the former might proceed to collect the taxes so alleged to be due to the United States by the persons named; that legal proceedings in the premises should be conducted by the proper United States attorneys, the written consent of the Secretary of the Treasury being first obtained; that no settlement of such claims should be made except under the provisions of section 10 of the act of March 3, 1863; that the costs and expenses incurred by him in investigating and prosecuting said claims, of every nature, should be borne by him, and no part thereof paid out of the portion retained by the United States; that whenever required by the Secretary he should make a full report in writing of his acts and proceedings under the contract; that the money collected, either by legal proceedings or "by settlement as compromise," should be placed to the credit of the Secretary of the Treasury, and out of the same there should be paid to Sanborn, in full for his services and for all the costs and expenses of collection, a sum equal to 50 per cent of the gross amount collected and received, which should be paid to him as fast as collected and placed to the credit of the Secretary of the Treasury, the balance to be paid into the Treasury of the United States; and that the contract might be revoked at any time at the pleasure of the Secretary.

On the 25th of October, 1872, Sanborn sent to the Secretary another letter, accompanied by a statement verified by his oath,

asking that his employment be extended and made to relate to claims against the persons whose names were set forth in a schedule annexed to his letter, for moneys illegally withheld by them from the government. "I desire, also," he said, "to state that the foregoing claims, out of which I propose to recover, or assist in recovering, moneys for the United States, arise under the taxes imposed upon legacies and successions and income under the act of July 30, 1864, and subsequent amendatory acts, providing for the collection of taxes for internal revenue. And I further request that the foregoing cases may be brought under my contract with the Secretary of the Treasury, bearing date August 13, 1872."

In the statement referred to in that letter is the following:

"District Waldenham. . . . James A. Burtis . . . John E. Wool."

Pursuant to this request, the Acting Secretary of the Treasury on the 30th of October, 1872, entered into another contract with Sanborn, containing, among other provisions, the following:

"Whereas John D. Sanborn, of the city of Boston, has fully set forth in a written statement signed by him, under oath, and has filed the same in the office of the Secretary of the Treasury, wherein he proposes to recover, or assist the proper officers of the government in recovering, for the United States from the following persons, to wit: . . . John E. Wool estate, . . . large sum of money, that is to say, the sum of fifty thousand dollars, which the said Sanborn claims to be due to the United States, as and for internal revenue taxes which have been withheld by said persons, under and by force of the act of June 30, 1864, and other acts amendatory thereof, imposing taxes upon legacies, successions, and incomes; it is hereby agreed by and between W. A. Richardson, Acting Secretary of the Treasury, of the first part, and the said John D. Sanborn, of the second part, that the contract or agreement entered into by and between the said parties, bearing date August 13, 1872, relating to the proposed recovery of certain moneys alleged to be due to the United States, is hereby extended and enlarged, so as to embrace and

relate to the persons herein specifically enumerated; and all the provisions, conditions and terms of the said contract of August 13, 1872, shall be held to apply to and control this agreement."

The Secretary, under date of February 3, 1873, issued a paper addressed "To supervisors and collectors of internal revenue," in which he requested them to assist Sanborn "in the examination of official records in reference to such cases of alleged violation of the internal revenue laws as he may ask for your coöperation," stating that he was acting under his appointment, and "may need some information from the offices of collectors and assessors for the purpose of verifying his claims." Subsequently, on the 15th of October, 1873, the Secretary issued a similar circular, and asked supervisors and collectors to render Sanborn such assistance as he required.

General John E. Wool died at Troy, New York, November 10, 1869, leaving a large estate, Mrs. Wool surviving him. His will having been duly probated on the 8th of February, 1870, letters testamentary were issued to John A. Griswold and Asher R. Morgan. Subsequently, October 31, 1872, Griswold died, leaving Morgan as sole executor. Mrs. Wool died May 7, 1873.

On the first day of August, 1873, Morgan delivered to Lucien Hawley, a supervisor of internal revenue, in payment of taxes due from the estate of Wool, his draft, as executor, upon the United States Trust Company of New York, payable to the order of the Secretary of the Treasury, for the sum of $14,668. Hawley delivered it to Sanborn on or about its date, and on the 3d of August, 1873, the latter enclosed it to the Secretary of the Treasury, in a letter of which the following is a copy: "Referring to the contract made by me with the Hon. George S. Boutwell, late Secretary of the Treasury, bearing date August 13, 1872, and as amended by the agreement October 30, 1872, I have the honor to report that Asher R. Morgan, executor of the estate of General John E. Wool, deceased, late of Troy, N. Y., and one of the parties named in my schedule accompanying said contract has paid to me the sum of $14,668, being the full amount of taxes due

the government by him arising from the legal assessment on legacies and successions of said trust, and which has never before been paid. I herewith enclose said sum and respectfully request that one half of the same shall be paid into the Treasury to the credit of the Secretary of the Treasury and that the remaining half thereof shall be paid to me in accordance with the terms of my said contract. Please transmit receipt to Mr. Morgan, No. 7 Beekman Street, New York."

The Secretary of the Treasury on the 9th of August, 1873, endorsed this draft to the order of the Treasurer of the United States, and directed the latter to deposit it to the special credit of the Secretary on account of moneys received and paid under the first section of the legislative, executive and judicial appropriation act, approved May 8, 1872. The draft, having been endorsed by the Treasurer of the United States to the Assistant Treasurer of the United States at New York, was paid by the United States Trust Company, and the proceeds were placed to the special credit of the Secretary of the Treasury.

On the 16th of August, 1873, the Secretary delivered to Sanborn a draft on the Treasurer of the United States for $16,001.34, on account of moneys collected in various cases specified in his contract, and of that sum, the above $7334 were on account of collections from the estate of General Wool. That draft on its face directed the Treasurer to charge its amount to the Secretary's special deposit account of moneys received and paid under the first section of the legislative, executive and judicial appropriation act, approved May 8, 1872. Under date of August 16, 1873, the Secretary enclosed to Morgan a writing, acknowledging "the receipt, through John D. Sanborn, special agent, of the sum of fourteen thousand six hundred and sixty-eight dollars ($14,668), being the amount of taxes on legacies and successions due the government from the estate of the late General John E. Wool, of Troy, N. Y."

It was found as a fact that the United States has never refunded any part of the sum collected from the estate of General Wool; that no demand to have the same refunded has

ever been made; and that the taxes were paid without protest. And it was found, as matter of law, that the United States was entitled to recover the said sum of $7334, with interest at the rate of six per cent per annum from August 16, 1873, to the date when judgment should be entered. Judgment was accordingly entered August 14, 1886, in favor of the United States against the defendant for the sum of $13,052.08 damages, and for its costs, which, under the order of the court, were taxed at $83.30.

As by section 125 of the act of June 30, 1864, amended by that of July 13, 1866, 14 Stat. 140, c. 184, a legacy tax was due and payable whenever the party interested was entitled to the enjoyment of the legacy, or to the beneficial interest in the profits accruing therefrom, there was some discussion at the bar in respect to the time when the legacies in question vested in possession and enjoyment; whether immediately upon the death of the testator, as claimed by the defendant, or at the death of the widow, as claimed by the government. The Solicitor of Internal Revenue contends that although the tax was not collectible until Mrs. Wool died, liability therefor arose immediately upon the death of the testator, and that such liability was not discharged, but was saved, by the act of July 14, 1870, abrogating all legacy taxes. 16 Stat. 256. He also contends that these taxes, not being payable until Mrs. Wool died, were not, within the meaning of the act of May 8, 1872, under which this contract of October 30, 1872, with Sanborn purports to have been made, "withheld" from the United States at the time that contract was made. On this last ground he questions the authority of the Secretary of the Treasury to have allowed Sanborn any part of the sum collected from Wool's estate on account of legacies.

It is unnecessary in the present case to examine any of these questions; for both of the parties to the present suit insist that these taxes were, when collected, legally due from Wool's estate to the government. The defendant insists that they were collected under a valid contract between him and the Secretary of the Treasury. If we assume, for the purposes of this case, that such contract was in all respects valid, and was

broad enough to embrace the collection of legacy taxes from Wool's estate, whether due upon the death of the testator or upon the death of the widow, nevertheless, the judgment below, so far as it recognized the right of the United States to recover the amount paid to the defendant out of the sums received from that estate, must be affirmed. It must be affirmed because the payment was made in the belief, superinduced by Sanborn's representations to the Secretary of the Treasury, that the collection from Wool's estate was made by him. What are the facts, disclosed by the finding of the court below, which justify this conclusion?

Within a few weeks after the death of the widow, Morgan — upon his own motion, without having known Sanborn, and without having the matter brought to his attention by Sanborn, or by any one representing him — wrote to the Secretary of the Treasury asking that the question of a succession and legacy tax from the estate of General Wool be referred to some person having authority to pass upon his liability to pay it.

This was followed by a communication, under date of the 12th of July, 1873, by the Commissioner of Internal Revenue, addressed to Collector Masters, in which the former said: "T. J. Cram, of 1817 De Lancey Place, Philadelphia, Pennsylvania, writes: 'Major General Wool, U. S. A., died November 10, 1869, (in Troy, N. Y., his residence,) leaving legacies of $4000 each to my wife and myself. But there was a condition in the will forbidding his executors from paying any legacies until after the death of his wife. . . . Mrs. Wool died 6th May last. The executors propose to retain from the legacies U. S. tax of 6 per cent on payment 18th inst. of the legacies, etc.' There is nothing in the statements above to show that the said legacies are not subject to tax, but the same would appear to be liable, as indicated in Circular 86. (See p. 30, Series 6, No. 1.)"

At the date of General Wool's death Masters was Collector of Internal Revenue, his district including the city of Troy. He and his deputy knew of his death at or about the time it occurred, and knew that he left a large estate. They, also, knew what were the provisions of his will and talked together,

both before and after Mrs. Wool died, in reference to the claim that a legacy tax would be due after her death. Prior to July 31, 1873, Morgan received from the Secretary of the Treasury a letter referring all questions relating to these taxes to Lucien Hawley, supervisor of internal revenue, with whom he had several conversations upon this subject. The collector, Masters, under date of July 31, 1873, addressed a letter to Morgan, as executor, in which he said: "No return has been made to me of the legacies and distributive shares of the estate of the late General John E. Wool, of whose will I am informed you are the only surviving executor who has qualified as such. Inclosed herewith is the 'collector's notice for legacy and succession taxes' and the proper form upon which to make a return of all the legacies and distributive shares arising from personal property, etc., being in your charge and trust as executor as aforesaid. Please make a return to me at your earliest convenience of all such legacies and distributive shares or successions, and all other facts and information as required by law to be made by you as executor." In that letter he enclosed a collector's notice for legacy and succession taxes and the proper blank upon which to make the required return.

It is stated in the finding that about one month after the death of Mrs. Wool the defendant called on Hawley "for aid in the matter of collecting the tax due from the estate of said John E. Wool."

In view of the findings, which, upon this writ of error, we must assume to be true, it is clear that the representation of the defendant to the Secretary of the Treasury, in his letter of August 31, 1873, that the executor of Wool had paid to *him* the sum of $14,668 for taxes due the government on legacies and successions, was not in accordance with the facts. The draft covering the taxes was delivered by the executor of Wool to Hawley, a supervisor of internal revenue, who, instead of sending it directly to the Secretary of the Treasury, as he might properly have done, and as, perhaps, he ought to have done, delivered it to Sanborn, who — so far as the record shows — performed no services in this business, except to call upon Hawley about one month after the death of Mrs.

Wool, and ask his aid in the matter of collecting the taxes claimed from Wool's estate.

It is, however, contended that the court below erred in excluding certain evidence offered by the defendant, which would have disclosed more fully the nature of the services rendered. It is only necessary to say upon this point that the evidence so offered and excluded relates to efforts made by Hawley and his employés to secure the payment of the taxes claimed from Wool's estate. That evidence, if admitted, would have strengthened the case for the government, for it tended to show that what Hawley did was done under his own responsibility and duty as an officer, and not in aid of Sanborn under his contract for the collection of taxes from Wool's estate. The defendant, it is true, communicated to the Secretary of the Treasury, in October, 1872, the fact that the government had a claim against that estate for taxes. But that fact was known long before that time to the collector of the district in which the testator resided at his death, who intended to enforce the rights of the government when the widow died. The defendant is not shown to have performed any services whatever in the matter, except to request the aid of Supervisor Hawley. That, however, did not justify him in representing to the Secretary of the Treasury that *he* had collected those taxes from Wool's estate. In fact, there was no effort upon the part of the executor to evade payment of them. He brought the matter himself to the attention of the Secretary, and sought a decision by competent authority of the question of his liability. As soon as it was determined adversely to him he paid the taxes through the officer to whom the matter was referred by the Secretary and not to Sanborn, of whom he had no knowledge.

The suggestion that Sanborn was entitled to fifty per cent of all collections from the persons named in his contract, by whomsoever, or in whatever mode, such collections were made, is wholly inadmissible. The contract, upon its face, contemplated, as a condition of his receiving compensation, that he should do something of a substantial character in collecting the taxes alleged to be withheld.

Opinion of the Court.

We are of opinion that the payment of the $7334 to the defendant was due to a misapprehension, upon the part of the Secretary of the Treasury, as to the nature of his services — a misapprehension resulting from his representations to that officer — and that the amount so paid ought, in equity and good conscience, to be returned to the United States.

But we are of opinion that the court below erred in allowing interest for any time prior to the institution of this action. More than ten years elapsed after the payment to Sanborn before his right to retain the money was questioned by suit or otherwise. When the facts, disclosed by the evidence, were first discovered by the officers of the government whose duty it was to institute legal proceedings against the defendant, does not appear. It is entirely consistent with the record that the long delay which occurred is without excuse. In *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, the question was whether the plaintiff was entitled, under the circumstances of that case, to recover interest, the action being against a collector, to recover damages for an illegal exaction of customs dues. The court, after observing that interest is recoverable as of right, when reserved expressly in the contract, or when implied by the nature of the promise, said: "But where interest is recoverable not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld." We think that the same rule should be applied against the government when, in a case like the present one, it has long delayed an assertion of its rights, without showing some reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him.

The writ of error on behalf of the government presents a question of costs that must be determined. After judgment was ordered in the court below for the United States, its attorney submitted a bill of costs, which included, among other items, duly certified, the sums paid for the actual and necessary expenses of four clerks, two in the War Department and two in the Internal Revenue Office at Washington, in

going to and returning from Boston, and in attending the court there, by direction of the government, as witnesses in its behalf. These sums amounted to $212.20. The defendant objected to any allowance whatever in the taxation for costs for the travelling or other expenses of witnesses in the employment of the United States. The question having been submitted to the court, this objection was sustained. *United States* v. *Sanborn*, 28 Fed. Rep. 299.

The whole subject of fees in the courts of the United States is regulated by chapter 16, title "Judiciary" of the Revised Statutes. By section 823 it is provided that the fees allowed in that chapter and no other "compensation" shall be taxed and allowed in the courts of the United States, to the officers therein named and to witnesses, except in cases otherwise expressly provided by law; leaving attorneys, solicitors, and proctors to charge and receive from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or as may be agreed upon between the two parties. Sections 824 to 827, inclusive, relate to the fees of attorneys, solicitors, and proctors, and section 828 to the fees of clerks. Section 829 allows a marshal two per centum "for disbursing money to jurors and witnesses and for other expenses," and provides that "in all cases where mileage is allowed to the marshal he may elect to receive the same or his actual travelling expenses to be proved on his oath to the satisfaction of the court." Section 846 provides: "The accounts of district attorneys, clerks, marshals, and commissioners of Circuit Courts shall be examined and certified by the District Judge of the district for which they are appointed before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so reëxamined as to charge any marshal for an erroneous taxation of such fees or costs." Other sections of the

statute bearing more or less upon the question before us are as follows, under the head of "Witnesses' Fees:"

"SEC. 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpœnaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of. When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.

"SEC. 849. No officer of the United States Courts, in any State or Territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating.

"SEC. 850. When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage or other compensation in addition to his salary shall in any case be allowed."

"SEC. 855. In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the Treasury in his accounts."

"SEC. 983. The bill of fees of the clerk, marshal and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

Opinion of the Court.

Upon full consideration of all the provisions of the statute, and in view of the settled practice in different circuits, we are all of opinion that the court below erred in holding that the word "audit" in section 850 means that the necessary expenses of the witnesses, therein provided, are to be audited by the proper executive department or officer, and that nothing was to be taxed for the travel or attendance of the clerks named in the government's bill of costs. The word "audit," in that section, does not necessarily imply that these expenses must be audited, in the first instance, by an executive department or officer. The bill for such expenses is unlike the ordinary claim for per diem and mileage. The statute fixes the amount to be allowed for attendance and mileage to witnesses entitled to claim therefor, and no auditing in respect to such claims is required; whereas, the items that enter into the account of a clerk or other officer, sent away from his place of business as a witness for the government, for his necessary expenses "in going, returning, and attendance on the court," cannot well be known to the court or its clerk, and must be furnished by the witness himself. Those items are to be examined, looked over and adjusted; in other words, they must be audited. The auditing contemplated by section 850 must be done, primarily, in the court in which the case is pending, and where it can be best determined what expenses have been necessarily incurred by the witness. This construction of the section is supported by section 983, which provides that the amount paid, that is, properly paid, to witnesses shall be taxed by a judge or clerk of the court, and be included in and form a portion of the judgment or decree against the losing party; by section 855, providing that in cases where the United States are parties the marshal shall, on the order of the court, to be entered in its minutes, pay to the witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts; and by section 846, providing that the accounts of a marshal for fees or costs paid to witnesses, upon the order of any judge or commissioner, shall not be so reëxamined at the treasury as to charge him for an erroneous taxation of such fees or costs.

It is not disputed that the United States, if successful in a suit, is entitled to have included in the judgment the statutory fees for per diem and mileage for its witnesses, other than its officers who may be sent away from their places of business to attend upon a court. And we cannot think it was intended by section 850 to deny to the government the right, when successful in a suit, to have even the necessary expenses of witnesses of the class described in that section included in the judgment for costs; or that the United States intended to remit to its defeated adversary not only witness fees for per diem and mileage, but the necessary expenses of witnesses who happened to be in its employment, and whom it sent away from their places of business to testify in its behalf. As a person of that class receives, while absent, his stipulated salary, and is paid in that way, for his time, it is not deemed just that he should also receive mileage and per diem. But, instead thereof, he is allowed his necessary expenses, which being audited, by or under the direction of the court upon which he attends as a witness, he is entitled to have paid to him; and the government, being under an obligation to pay them, is entitled to have the amount so audited included in its bill of costs, and in any judgment rendered in its favor. In other words, when the government is successful in a suit, the "necessary expenses" of its witnesses, of the class described in section 850, take the place, in its bill of costs, of the per diem and mileage which, but for that section, would have been taxed and allowed in its favor, just as a marshal may elect to take his actual travelling expenses instead of mileage where mileage is allowed to him.

These views find additional support in section 851, which allows the court, subject to certain restrictions, to fix the compensation to be allowed to a seaman or other person sent to this country by a United States minister, chargé d'affaires, consul, captain or commander, to give testimony in a criminal case pending in a court of the United States. This section, as well as section 850, is brought forward from the third section of an act passed in 1853 to regulate "fees and costs" in the Circuit and District Courts of the United States, in

which act both sections appear under the head of "Witnesses' Fees." 10 Stat. 167, 168, c. 80. As the court was to fix the compensation to be allowed to witnesses under section 851, it is a reasonable interpretation of section 850 to hold that the auditing therein provided for was also to be, primarily, under its direction.

For the reasons stated, we are of opinion that the court below erred in disallowing the item in the bill of costs of $212.20.

The judgment is reversed with directions to enter a judgment in favor of the United States for the sum of $7334, *with interest at the rate of six per cent per annum from October* 15, 1883, *the date of the commencement of this action, and for its costs in the court below, as indicated in this opinion.*

IRON SILVER MINING COMPANY *v.* CAMPBELL.

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

No. 22. Argued March 25, 26, 1890. — Decided April 28, 1890.

A lode patent, issued subsequently to the issue of a placer patent of a tract within whose metes and bounds the lode patent is located, is not conclusive evidence that the lode was so known at the time of the issue of the placer patent as to authorize the issue of the lode patent.

Where two parties have patents for the same tract of land, and the question in a judicial proceeding is as to the superiority of title under those patents, and the decision depends upon extrinsic facts not shown by the patents, it is competent to establish it by proof of those facts.

The provisions in Rev. Stat. §§ 2325, 2326, as to adverse claims to a lode, for which a patent is asked, do not apply to a person who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established his right to the land claimed by him; and had received his patent therefor.

THE case is stated in the opinion.

Opinion of the Court.

Mr. Ashley Pond and *Mr. L. S. Dixon* for plaintiff in error.

Mr. T. M. Patterson (with whom was *Mr. C. S. Thomas* on the brief) 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 Colorado. The action was brought in that court by Peter Campbell *et al.*, plaintiffs, against The Iron Silver Mining Company, defendant, and was in the nature of an ejectment to recover possession of a mineral lode called The Sierra Nevada lode mining claim. The pleadings merely set up that the plaintiffs were the owners of said lode or claim, describing it, and that defendants had intruded upon their possession. The defendants denied that plaintiffs were the owners of the claim, and asserted their own title. The case was submitted to the court without a jury. The court made the following finding of facts and conclusions of law on which it rendered a judgment for the plaintiffs:

"This cause coming on for trial before the court, and the parties appearing by their attorneys, and having, in open court and by their stipulation in writing filed with the clerk, waived a trial by jury, and the court, having duly heard and considered the evidence, oral and documentary, offered by the respective parties, and having duly deliberated thereon, finds the following facts and conclusions of law, viz.:

"That the defendant, The Iron Silver Mining Company, is a corporation created and organized and existing under and by virtue of the laws of the State of New York, and has complied with the laws of the State of Colorado, so as to entitle it to do business and sue and be sued in the State of Colorado.

"That the mining ground and property described in the pleadings in this action were a part of the public domain of the United States until the title thereof passed out of the United States by the issuing of patents, as hereinafter set forth.

"That the said patent of the Sierra Nevada lode mining

claim was issued to the said plaintiffs and their grantors and predecessors in interest at the time thereto stated, and by duly executed and recorded deeds of conveyance the title to the land mentioned and described in the said patent and the complaint in this action has been conveyed to and is seized, owned and possessed by the said plaintiffs, and was so seized, owned and possessed by them at the time of the commencement of this action.

"That on the 13th day of November, 1878, said William Moyer duly made application in the proper United States land office to be allowed to enter and pay for a patent for said William Moyer placer mining claim, being survey lot No. 300 and mineral entry No. —; that on the 21st day of February, 1879, said William Moyer was allowed to and did make entry in said land office of the United States and paid for the said placer claim, and that on the 30th day of January, 1880, the said William Moyer placer patent was issued to the said William Moyer for the tract of land described in said placer patent, and that by virtue of duly executed and recorded deeds of conveyance the said defendant company has become the owner of and seized of all the right, title and interest in and to the said tract of land described in and conveyed by the said placer patent.

"That the ground described in said patent of plaintiffs for the said Sierra Nevada lode claim is principally located or situated within the exterior boundaries of the tract of land described in said placer patent for the said William Moyer placer claim and is a part of the same land, and the maps introduced in evidence and contained in the bill of exceptions and record correctly delineate the surface of the ground comprised within the exterior boundary lines of the said placer patent and the said lode patent, respectively.

"And the court finds as conclusions of law from the foregoing findings of fact, that it is conclusively presumed and found, from the face of said Sierra Nevada lode patent, that the said Sierra Nevada lode claim had been duly discovered, located, and recorded, and owned by the said patentees in said Sierra Nevada lode patent and their predecessors in interest, (the

said plaintiffs,) within the exterior boundaries of the said tract of land described in said William Moyer placer patent, before the time of the said application for the said placer patent, and the mining ground described in the said complaint and conveyed by the said lode patent is excepted out of the grant of the land described in and conveyed by the said placer patent.

"And the court finds that the plaintiffs were, at the time of the commencement of this action, and still are, the owners and seized of said tract of land described in said complaint and called the Sierra Nevada lode mining claim; that the said defendant company wrongfully withheld, and still does wrongfully withhold, the possession thereof from the said plaintiffs.

"It is, therefore, ordered and adjudged that the plaintiffs have judgment against said defendant company for possession of the mining ground in dispute, as described in the complaint herein, with costs, to be taxed.

"And forasmuch as the matters and things above herein set forth do not appear of record, and the said defendant tenders this its bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, and pursuant to the statutes in such case made and provided, which is accordingly done, this 8th day of July, 1885, being one of the judicial days of the May term of the said court, A.D. 1885, at the city of Denver, in said district.

"(S'g'd) MOSES HALLETT, *Dis't Judge.*"

This finding of facts and conclusions of law is embodied in and made a part of a bill of exceptions. We think the correct practice in cases submitted to a court without a jury is for the court to make its finding of facts and its conclusions of law a separate paper from pleadings or bills of exceptions.

The only thing of any consequence in the bill of exceptions, containing a considerable amount of oral testimony, almost every word of which is objected to by one party or the other, is the two patents under which the adverse parties claim title. From this and the finding of facts it appears that the patent under which the Iron Silver Mining Company claims was issued to William Moyer on his application, made in the proper

land office on the 13th of November, 1878, and bears date January 30, 1880; and that the one under which plaintiffs below claim bears date March 15, 1883. It is conceded that both patents cover the land in controversy. The Moyer patent, being the elder, is for fifty-six acres of placer mining land. The plaintiffs' patent, though of a later date, is for a vein or lode of mineral deposit which runs under the surface of the ground covered by defendant's patent.

The conclusion of law which controlled the judgment of the Circuit Court in the present case is that "it is conclusively presumed and found, from the face of the said Sierra Nevada lode patent, that the said Sierra Nevada lode claim had been duly discovered, located and recorded, and owned by the said patentees in the said Sierra Nevada lode patent and their predecessors in interest, the said plaintiffs, within the exterior boundaries of said tract of land described in said William Moyer placer patent, before the time of the said application for the said placer patent, and the mining ground described in the said complaint and conveyed by the said lode patent is excepted out of the grant of the land described in and conveyed by the said placer patent." It is the soundness of this conclusion of law from the facts found which we are called upon to review.

The real principle on which the plaintiffs relied to establish the superiority of their claim for the lode in controversy is, that it was a known lode, within the meaning of the act of Congress on that subject, at the time of the application for the Moyer patent, and therefore, by the act of Congress on that subject, the title to it did not pass to the grantee in that patent. If the fact were proved that the Sierra Nevada lode was a known lode, within the limits of the placer patent obtained by Moyer, at the time of his application, the contention of the plaintiffs is sound. But notwithstanding nearly all the testimony, particularly all the oral testimony found in the bill of exceptions, was introduced for the purpose of proving the existence of this lode, and that it was known to Moyer or his grantor, and in refutation of that proposition, the court in its finding of facts makes no finding on that subject. It was

obviously the opinion of the court, and it is the ground on which defendants in error support its judgment here, that the patent issued by the government is conclusive evidence that such vein was known so as to authorize the land department to issue a patent for it as being reserved out of the grant in Moyer's patent.

It is very singular that the patent to Campbell and others for the Sierra Nevada claim makes no reference to this reservation in Moyer's patent, and no statement that the existence of the lode was known to anybody at the time the Moyer patent was applied for or when it was granted. There is nothing on the face of this patent to show that there was any contest before the land department on this question of the existence of the vein, and the knowledge of it on which the validity of the patent is now supposed to rest. We have, therefore, the junior patent, which is held to defeat the prior patent, with no reference to any contest between the different claimants before the land office, and we have the court, in deciding the present case, while hearing the testimony which would defeat or sustain that patent, utterly ignoring it, and making no finding upon the subject which the defendants in error believe to be involved in the issue.

The reason of this action by the court is very plain. It proceeds upon the idea that it is conclusively presumed and found, from the face of the Sierra Nevada lode patent, that the said lode claim had been duly discovered, located and recorded within the exterior boundaries of the land described in the said Moyer placer patent before the application for the said Moyer patent. As there is not a word said on the face of the Sierra Nevada lode patent on this subject, we must look for some inference of law, rather than to the statement of facts, upon which this presumption conclusively arises.

That presumption of law, as explained by counsel, is that, since the law under which the Moyer patent issued reserved from its operation any known vein or lode within the exterior boundaries, it is presumed that, when the officers of the land department issued the patent for the Sierra Nevada lode, they made such inquiries into the question of the existence of this

lode, and its being known to the grantee in the Moyer patent, as authorized it to decide that question; and that that decision is binding and conclusive forever upon all parties. We are not able to agree with this statement of the law.

The proceedings in the land department for securing title to government lands are usually *ex parte*. There is no general provision of law which requires a party who can make the necessary proofs, which on their face entitle him to purchase land from the government, to call any individual as a contestant, or to notify other parties interested in the matter that he is about to proceed. Each one proceeds in his own manner, and establishes his own claim, and the officers of the government frequently do not know that there is any other party claiming the same land, while there may be such a party who has also taken proper steps, and whose rights are superior to those of the party presenting himself before the officers of the government. It is this *ex parte* proceeding which is supposed to bind the claimants under the Moyer patent conclusively and forever in regard to their knowledge of the existence of this Sierra Nevada lode at the time they made application for their patent within its limits.

We are not ignorant of the many decisions by which it has been held that the rulings of the land officers in regard to the facts on which patents for land are issued are decisive in actions at law, and that such patents can only be impeached in regard to those facts by a suit in chancery brought to set the grant aside. But those are cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent.

Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of these facts. We do not believe that the government of the United States, having

issued a patent, can, by the authority of its own officers, invalidate that patent by the issuing of a second one for the same property. If it be said that the question of the reservation of this vein as a known lode under the law on that subject makes a difference in this respect, and that the land office has a right to inquire whether such lode existed, and whether its existence was known to the patentee of the first patent, we answer that a patent, issued under such circumstances to the claimant of the lode claim, may possibly be such *prima facie* evidence of the facts named as will place the parties in a condition to contest the question in a court.

But we are of opinion that it is always and ultimately a question of judicial cognizance. The first patent conferred upon Moyer the right to this vein and to all other veins within the limits of his fifty acres of placer claim. There is excepted from that grant any lode existing and known at the time application was made for his patent. Whether such a lode did exist, and whether it was known to him, is a question which he has a right to have tried by a court of justice, and from which he cannot be excluded by the subsequent action of the officers of the land department. It is not necessary to consider whether there may not be reservations of a character which could be thus disposed of by the proper land offices; for instance, a reservation of any land heretofore patented or granted to other parties. There is nothing there to decide but to look at the records of the land office and see whether any land within that boundary ever had been granted. A reservation of a specific boundary, laid down so as to be identified, in the first patent, needs no judicial action to determine what it is that is reserved.

But in the present case, two facts requiring judgment, discretion, knowledge of the law and the balancing of testimony, are essential to the exercise of the right to grant the property to some other party. One of these, the existence of such a vein, is a question often of great conflict of evidence, requiring the weighing of testimony. The other, the most important of all, the most difficult to decide, the least likely to be decided correctly by *ex parte* testimony or in *ex parte* proceedings, is

the question whether, if such mine existed, it was known to the party who applied for the patent at the time application was made. And while we are not prepared to say at this time that the land officers cannot, on a *prima facie* case, decide the right of the applicant to such vein and give him a patent for it, we are satisfied that in any conflict between the title conferred by two patents, whether it be in law or in equity, the holder of the title under the elder patent has a right to require that the existence of the lode, and the knowledge of its existence on the part of the grantee of the elder patent, should be established. Here we have a remarkable fact, the absence of any evidence of a contest before the land department on that subject, and of any hearing on the part of the owner of the elder title. We have no finding or assertion of the existence of such fact in the junior patent, or that it was established even by *ex parte* proceedings before the officers of the government; and the introduction of evidence, on the trial in this case, on that subject, was ignored as any part of the case on which the judgment of the court was based. It rests solely, and as the court says, conclusively, on the presumption that the officers of the government did their duty in the matter, and that what they decided is incapable of contradiction.

The case in this court bearing the nearest analogy to the one before us is that of *Railroad Co.* v. *Smith*, 9 Wall. 95, 99. By the act of September 28, 1850, all the swamp and overflowed lands belonging to the United States were given to the States within which they lay. The Secretary of the Interior was directed by the statute to ascertain and distinguish these lands and certify them to the several States, and it has been repeatedly held by this court that the act itself was a present grant of all such lands. Congress subsequently, by the act of June 10, 1852, granted the right of way and a portion of the public lands to the State of Missouri, in aid of the construction of railroads. This grant was accepted by the legislature of Missouri, which, by a statute, vested the land granted in the Hannibal and St. Joseph Railroad Company, the company having located its road, whereby the even-numbered sections

and quarter sections granted to the State for the use of said road were ascertained. The railroad company, finding Smith, the defendant, residing upon and claiming one of these quarter sections, brought an action of ejectment to recover possession. Smith defended on the ground that the land was swamp land, and the title passed from the United States by the act of 1850, and could not be granted to the State of Missouri, or to the railroad company, by the act of 1852. The latter act contained a reservation from the grant for the railroad of all lands theretofore conveyed or disposed of by the United States. Here then were two grants of the same lands by the United States, these grants operating as effectually as patents to convey title to the property described in them. It became necessary in the suit to ascertain which of these was the superior title. The elder grant *prima facie*, to wit, the grant of the swamp lands to the States, which we have said was a grant *in præsenti*, was the better title. But the question arose as to how it could be shown that this was swamp land within the meaning of the act of 1850, and therefore passed by that statute, and could not afterwards be transferred by the act of 1852.

The act of Congress granting these swamp lands had made it the duty of the Secretary of the Treasury, a duty afterwards transferred to the Secretary of the Interior, to ascertain what were swamp lands, and to make certificate of the fact to the States that were entitled to them. This duty had not been performed by either the Secretary of the Treasury or the Secretary of the Interior. There was no record or documentary evidence, therefore, by which the State claiming those swamp lands, or its grantee claiming under it, could establish the fact that the land which he was occupying was swamp land under the grant of 1850.

The case was brought in a state court of Missouri, and that court permitted Smith to show by parol evidence, the evidence of parties familiar with the land, that it was swamp and overflowed land at the time the grant of 1850 was made by Congress, and had been ever since, and on this testimony a judgment was rendered for the defendant Smith, which was

affirmed by the Supreme Court of the State. From that court it was brought to this court by a writ of error. This court said that "by the second section of the act of 1850, it was made the duty of the Secretary of the Interior to ascertain this fact [namely, whether it was swamp land or not] and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the land department with the state officers, he must, if he attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity? The matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

The subsequent case of *French* v. *Fyan*, 93 U. S. 169, as shown by a careful reading of it, is not in conflict with this decision, because in that case the Secretary having acted upon the matter and certified that the lands then in controversy were swamp and overflowed lands, it was not permitted, in a trial before a jury, to contradict this certificate by oral testimony. And in the still later case of *Wright* v. *Roseberry*, 121 U. S. 488, the principle we are stating is clearly laid down in a case almost identical with the present one.

Opinion of the Court.

It is urged upon us, in answer to this view of the subject, that by sections 2325 and 2326 of the Revised Statutes it is made the duty of a person seeking to avail himself of the discovery of a mineral lode and obtain a patent for the same, previous to making the application for a patent, to file the survey and field-notes of the grant which he claims, and do certain other things showing him to be entitled to purchase the mineral land which he claims, all of which is to be under oath. The statute then declares that the register, upon the filing of such application, field-notes, etc., shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim, and at the end of this sixty days' publication, "if no adverse claim shall have been filed with the register and the receiver" of the land office, "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it is shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 then proceeds to enact that where an *adverse claim* is filed it shall be upon oath of the person making the claim, and shall set out the boundaries, nature and extent of such adverse claim, and all proceedings shall be stayed in the land office until the controversy shall be settled or decided by a court of competent jurisdiction. It makes it the duty of the adverse claimant, "within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, *to determine the question of the right of possession*, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof," may "file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in

other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment rolls to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

The argument we are considering assumes, as a matter of law, that all that was required of the owners of the Sierra Nevada claim, and all that was required of the register and receiver of the land office in regard to these publications, was done and had, and that, therefore, the owners of the Moyer patent are concluded by the proceedings which are thus supposed to have taken place. There are two substantial objections to this view of the subject. The first is that if such proceedings were had, and resulted either in the trial of the adverse claim before a court of justice, or in the failure of Moyer or anybody else to assert an adverse claim, those proceedings are matters of public record, and as, in this case, they must constitute the main reliance of those claiming under the Sierra Nevada patent, for the superiority of their title, this record should have been produced on the trial of the case; and that the mere opinion of the register and receiver of the land office as to what those proceedings are and their effect upon the prior patent of Moyer, should not be substituted for the production of those proceedings themselves, copies of which were easily obtainable at the land office department.

Another reason, which we think more satisfactory, is, that a careful examination of this statute concerning adverse claims leads us to the conviction that it was not intended to affect a

party who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established his right to the land claimed by him, and received his patent; and was reposing quietly upon its sufficiency and validity. It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defence against the party making publication; but throughout the whole of these sections and the original statute from which they are transferred to the Revised Statutes, the words "claim" and "claimant" are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent. And the purpose of the statute seems to be, that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these *claimants* shall have the patent, the final evidence of title, from the government. This view is consistent with the entire statute on the subject, and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims and some other party who is only setting up a claim to the same property.

In the first place, its inapplicability to the present case is shown by the requirement that in all cases the successful party shall pay five dollars per acre before he can get his patent. This argues that it has no reference to a placer patent, because for the land conveyed by a placer patent the party is only required to pay two dollars and a half an acre.

Again, the following language seems inconsistent with the idea that one of the contesting parties may already have a patent for the land in controversy, namely: "After such judgment shall have been rendered, the party entitled to the

possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the General Land Office, and a *patent shall issue thereon for the claim*, or such portion thereof as the applicant shall appear, from the decision of the courts to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the *claim*, each party may pay for his portion of the claim, . . . and patents shall issue to the several parties according to their respective rights."

It is too obvious to escape comment that by this proceeding there are brought before the court adverse *claimants* to mineral land, and that the party who succeeds in establishing the superior right to the *possession* shall have a patent. This may be the party who institutes the original proceeding or it may be the party who sets up the adverse claim. Whichever of these two establishes his better right to the possession gets the patent. How can this apply to a case where one of the parties already has a patent? How can he be required to pay again for the land for which he has already paid all that the law requires? How can he be required to establish before the land office his right to the possession of a mine for which that office has already granted him a patent?

And again, how can such a case be brought within the terms of a statute which provides, that where "several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees," etc., "and patents shall issue to the several parties according to their respective rights." Why should a patent issue to a party for that for which he already has a patent? These expressions of the statute, so clearly applicable to par-

ties who are only claimants and have no title, show what the purpose of Congress was in passing the law, and that it was not intended that a party who had already gone through all these proceedings and established his right to the mine which he claims, and received his patent for it, shall be put upon the same level with mere claimants, who have yet to establish their claim and prove their right even to the possession, and that he is to be brought before a judicial tribunal to make a contest with a party who has no legal standing in court to contest with him, who has the legal title from the government.

And this is just and is sound policy. Why should a party who has the legal title from the government of the United States, on which he relies with safety, be called upon to answer every adventurer who digs a hole in the ground thus conveyed to him and asserts a right to mineral found in that ground? When he has once obtained the patent of the United States for his land, he should be only required to answer persons who have some established claim, and to contest with this party not before the administrative departments, but in courts of justice, by the regular proceedings which determine finally the rights of parties to property. For these reasons, we do not believe that these sections, 2325 and 2326, are intended to apply to the case of a party who has a prior patent for the land which may be the subject of controversy before the register and receiver of the land office. Is it fair and just that the party who has gone through all the processes which the laws of the United States require of him to obtain title to its lands, and has obtained that title, shall be subjected by the officers of the government of the United States to defend that title before them from the attacks of an outsider?

We have more than once held that when the government has issued and delivered its patent for lands of the United States, the control of the department over the title to such land has ceased, and the only way in which the title can be impeached is by a bill in chancery; and we do not believe that, as a general rule, the man who has obtained a patent from the government can be called to answer in regard to that

patent before the officers of the land department of the government. *Ex parte Schurz*, 102 U. S. 378.

For these reasons, we are of opinion that the Circuit Court in refusing to consider the testimony found in the case, in regard to the known existence of the vein of the Sierra Nevada claim at the time of the application for the Moyer patent, was in error; and, also, that it was erroneous to hold that, on the face of the patent for the Sierra Nevada mine, the existence of this vein and the knowledge of its existence were to be conclusively presumed in this action.

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to grant a new trial.

Mr. Justice Brewer, with whom the Chief Justice concurred, dissenting:

I am unable to agree with the opinion of the court, delivered by Mr. Justice Miller.

A placer patent and the statute under which it is issued expressly provide that it shall not include any known lode or vein. So if, within the limits of placer ground there be a vein or lode bearing gold or other mineral of precious value, and that vein or lode was known at the time of the application for the placer patent, it did not pass under the patent. It was as much excepted from its terms as though it were in an adjoining State. It was territory carved out by the very language of the patent and the statute, and not passing to the patentee, remained the property of the government, and subject to location and patent, as fully and in the same manner and upon the same terms as any other mineral vein. Suppose a patent for agricultural lands by virtue of the statute excepted all lakes, ponds and other bodies of water, who would doubt that the title to any lake or pond, within the territory described in such patent, remained in the government and subject to sale by it in any manner it deemed best; or that a title thereto obtained, in the manner prescribed by law, was paramount? So here. There is only one way and one tribunal provided for obtaining

title to any vein or lode, whether within or without the limits of placer ground, and that is by application in the land office. That way was pursued in this case, and a patent obtained. Whether this lode or vein was or was not within the limits of the placer patent depends upon no matter of law, but upon two questions of fact: first, Was there a vein bearing gold or other precious mineral within the limits of the placer territory? and, second, Was it known at the time of the application for the placer patent? These two questions of fact determine the question whether the placer patent took the whole surface ground, and all veins and lodes within its territory. Provision is made by statute for putting such questions of fact in issue. The adverse proceedings prescribed by statute are of common occurrence. It is the ordinary procedure. We have had cases involving such procedure before us this term. But I fear that this decision is equivalent to holding that such statutory adverse proceedings amount to nothing and are unworthy of notice. From *Johnson* v. *Towsley*, 13 Wall. 72, to the present time, the uniform ruling of this court has been, that questions of fact passed upon by the land department are conclusively determined, and that only questions of law can be brought into court.

The right to this patent depends solely upon these two questions of fact, which were considered by the land office when the original patent was issued. I think that its determination upon them was conclusive.

I am authorized by the Chief Justice to say that he concurs in these views.

SOCIÉTÉ FONCIÈRE ET AGRICOLE DES ÉTATS UNIS *v.* MILLIKEN.

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

No. 274. Submitted April 16, 1890. — Decided May 5, 1890.

Section 1373, Rev. Stats. Texas, authorizes the granting of new trials only where the judgment was rendered on service of process by publication.

Whether, in the absence of a statute, a judgment under which property has been levied upon and sold, and which has stood unchallenged for nearly two years, can be set aside otherwise than through proceedings in equity, *quære.*

A foreign corporation doing business in the State of Texas may be brought into court by service of process upon its agent there.

An affidavit, preliminary to the issue of an attachment in Texas upon a foreign corporation, which recites that the defendant "is not a resident corporation, or is a foreign corporation, or is acting as such," is a sufficient affidavit under Rev. Stats. Texas, Art. 152. *Hopkins* v. *Nichols*, 22 Texas, 206, distinguished.

A delay of two years in commencing proceedings to set aside a judgment for usury is laches, and is fatal.

The case is stated in the opinion.

Mr. John T. Harcourt for plaintiff in error.

Mr. A. S. Lathrop for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

On June 8, 1883, two judgments were rendered in the Circuit Court of the United States for the Northern District of Texas, in favor of Sam. H. Milliken and against the Société Foncière et Agricole des États Unis.

On August 7, 1883, September 4, 1883, and April 1, 1884, a large number of lots and a body of lands were sold in satisfaction of an execution issued on these judgments, the bulk of the property being sold in 1883. Thereafter, and on June 6, 1885, an application was made by the defendant, the Société Foncière

et Agricole des États Unis and Edmond Moreau to set aside said judgments and the sales made thereunder. To this application demurrers, general and special, were filed by Milliken, and sustained; and the application was dismissed. From the order or judgment of dismissal this proceeding in error has been prosecuted; and the single inquiry is, whether the court erred in denying the application. It was made under article 1373, Revised Statutes of Texas, cited by counsel: "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant, for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment;" but obviously that article does not refer to a case of this kind. It applies only to cases in which judgment has been rendered upon service of process by publication; but here there was no publication, no service of process attempted in that way. This is the only statutory provision referred to by counsel; and as that is not applicable, we must assume that there is no special statutory provision applicable to a case of this kind.

In the absence of a statute, can a judgment under which property has been levied upon and sold, and which has stood unchallenged for nearly two years, be set aside otherwise than through proceedings in equity? Certainly the ordinary remedy is in equity; and that is one of the grounds of demurrer presented by defendant. But waiving this question, is any sufficient reason shown for setting aside the judgments?

It appears that the plaintiff in error is a foreign corporation, organized under the laws of the Republic of France, and with its principal place of business in Paris; and organized with a special reference to business in the State of Texas, as shown by this statement from its charter: "This society has for its object all real estate, agricultural, and commercial operations of every nature whatsoever regarding the purchase, the acquisition in the way of grants or otherwise, and the improvement as owners or otherwise of lands in the State of Texas, America; the execution of public or private improve-

ments, and improvements of every kind on the lands worked by the society; the sale or transfer of all products, lands, and other real or personal property belonging to the society. The society may also consolidate with other companies and establishments, of same or different nature, situated in France or in America, acquire all rights and obligations of these companies, or take an interest therein." It had an agent in Texas, Henry P. du Bellet, who seems to have had and exercised all the powers of a general agent. As such agent he borrowed money from Milliken; and on July 9, July 21, and December 27, 1882, respectively, executed notes on behalf and in the name of the society for the sums borrowed, and gave deeds of trust to secure the payment thereof. These notes not being paid on the 9th of January, 1883, the first suit was brought; and service of process made upon du Bellet, as agent. On the 16th day of May, 1883, and after the commencement of the first suit, he borrowed more money from Milliken, and gave a new note in the name of the society, upon which the second suit was brought; and, as heretofore stated, on June 8, 1883, judgments were rendered in both suits. At the commencement of the first suit, a writ of attachment was sued out and levied upon the lands above referred to.

The right of du Bellet to borrow money in the name of the society, and to execute the trust deeds in its behalf, is not questioned. The claim is that he had no authority to receive service of process on behalf of the company, and that usurious interest was included in the judgments; also that, at the time of the commencement of the suits, the society had gone into liquidation in France, and that Moreau, the other petitioner, was the duly appointed liquidator.

That du Bellet was an agent, with varied general powers, — in fact *the* agent of the society in Texas, — is clear. His authority to borrow money, execute notes and trust deeds in the name and for the benefit of the society, is conceded. So far as appears, he accepted service of process in each suit, without question; and after service of process in the first case, dealt with the plaintiff, and gave him the new note out of which the second suit arose. Not only that; he is the party by whom the present application is evidently controlled, for

he verifies the application, and in it swears that he is the agent of the society.

Article 1223, Revised Statutes of Texas, 1879, provides: "In suits against any incorporated company or joint-stock association, the citation may be served on the president, secretary or treasurer of such company or association, or upon the local agent, representing such company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours." The language is, "any incorporated company," — language broad enough to include foreign as well as domestic corporations; and that it was intended to include foreign corporations is evident from prior legislation, for which this is a substitute. Chapter 34, Laws 1874, provided as follows: "That hereafter any public or private corporation, including railroad companies, created by or under the laws of this State, or any other State or country, may be sued in any court in this State having jurisdiction of the subject-matter, and in any county where the cause of action or any part thereof accrued, or in any county where such corporation has an agency, or representative, or in the county in which the principal office of such corporation is situated. That service of process on any of such corporations may be had by delivering a copy of such process, with the certified copy of plaintiff's petition, if any, to the president, secretary, treasurer, principal officers or the agent." Article 1223 was evidently substituted for this act, which is cited in the margin of the Revised Statutes, opposite the article. The act of 1874 expressly named corporations created under the laws of other States or countries, as well as those created under the laws of Texas. Article 1223, reducing the number of words, expresses the the same meaning by the words "any incorporated company." It matters not under what law the company is organized, or where its domicil is, service of process may be made upon the local agent representing it within the county in which the suit is brought. *Angerhoefer* v. *Bradstreet Co.*, 22 Fed. Rep. 305. In what county suit may be brought is determined by other sections, which need not be cited here, as

the right to sue in the federal court is not questioned. So, the court having jurisdiction of the cause of action, service might be made upon the local agent representing the society. Du Bellet was unquestionably such agent, and service upon him was sufficient to bring the society into court.

Again, in the first suit an attachment was issued and levied on the lands. Article 152 of the Revised Statutes states twelve separate grounds therefor. The second is: "That the defendant is not a resident of the State or is a foreign corporation, or is acting as such." The affidavit in this case, which by such article is required as preliminary to the issue of attachment, follows the very language of the statute, and alleges that the defendant "is not a resident corporation, or is a foreign corporation, or is acting as such." The disjunctive form of this averment is claimed to render it wholly invalid, and *Hopkins* v. *Nichols*, 22 Texas, 206, is cited as authority. That case held "that an attachment will be quashed, if issued upon an affidavit alleging in the disjunctive the one or the other of two distinct causes for the attachment." But that decision has no application. There are no distinct causes for an attachment stated in this affidavit. The single cause is non-residence, the cause stated in clause two, quoted above; and while the language of the affidavit may be open to criticism, yet its meaning is clear. It describes only one cause for attachment, to wit, non-residence, and was sufficient to sustain an attachment. There can be but little doubt, therefore, that the court had jurisdiction of the lands by attachment, and of the defendant by service upon its agent.

With regard to the question of usury. The application alleges that the usury up to the date of the judgment amounted to $1179.08; it also alleges that the ten per cent attorney's fee, provided in the notes, was simply a cover for usurious interest, and the amount thereof, in fact, taken and received by Milliken. Assuming all this to be true, as it must be upon demurrer, the fact remains that the defendant waited two years, lacking two days, and until more than a year after all the sales had been made, before challenging the validity of the proceedings. No excuse for this delay is shown. Obviously, the defendant

was proceeding under the statute, which we have seen has no application; and independently of the statute, its delay unexcused is fatal. For, conceding the large amount of the judgment to be just, it attacks only an inconsiderable portion. Its agent being served with process, it is charged with knowledge, and some excuse for its long delay must be shown before the court would be justified in setting aside the judgment. The same observation may be made in reference to the matter of the sales; and, in addition, it must be noticed, that no distinct act of wrong is charged. The allegation is, "that the said Sam. H. Milliken, by his management, prevented fair competition, and discouraged and prevented other bidders, so that he could obtain the purchase of all of said property." No specific act of wrong-doing appears in this averment, and no fact is stated from which the court can deduce misconduct. With reference to the allegation, "that the society was in liquidation, and had been placed by the French court in charge of Edmond Moreau, as liquidator," it is enough to say, that that fact would not prevent Milliken from establishing his claim by suit in the courts of Texas against the corporation, and subjecting its property to the satisfaction thereof.

So, in conclusion, waiving any question of the form in which this application was presented, there was no error in denying it.

And the judgment of the Circuit Court is

Affirmed.

WILLARD *v.* WOOD.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 286. Argued April 22, 1890. — Decided May 5, 1890.

The question whether the remedy of a mortgagee against a grantee of the mortgagor, to enforce an agreement of such grantee, contained in the deed to him, to pay the mortgage debt, is at law or in equity, is governed by the *lex fori*.

Statement of the Case.

In the District of Columbia, a mortgagee can enforce an agreement of the grantee of the mortgagor, contained in the deed to him, to pay the mortgage debt, by bill in equity only, although by the law of the place where the land is, and where the mortgage and the subsequent deed were made, he might sue the grantee at law.

A statement of facts agreed by the parties, or case stated, in an action at law, (while it waives all questions of pleading or of form of action, which might have been cured by amendment,) does not enable a court of law to assume the jurisdiction of a court of equity.

This was an action at law by the administrator of the assignee of a mortgage against the executrix of a purchaser of the equity of redemption to recover so much of the mortgage debt as remained unsatisfied after a foreclosure sale. The declaration set forth the substance of the facts afterwards agreed by the parties. The defendant pleaded: 1st. That the testator was never indebted as alleged; 2d. The statute of limitations of three years. The plaintiff joined issue on both pleas. The case was heard in the Supreme Court of the District of Columbia in general term upon an agreed statement of facts, in substance as follows:

On July 7, 1868, at Brooklyn in the State of New York, Martin Dixon executed and delivered to Charles Christmas a bond for the payment of $14,000 in five years, with interest, and a mortgage of land in Brooklyn to secure the payment of the bond.

On July 19, 1869, at Brooklyn, Dixon, by deed beginning with the words "This indenture," but otherwise in the form of a deed poll, and signed and sealed by him only, in consideration of $17,000 to him paid, conveyed the land in fee to William W. W. Wood, "subject, however, to the mortgage" aforesaid, "which said mortgage, with the interest due and to grow due thereon, the party of the second part hereby assumes and covenants to pay, satisfy and discharge, the amount thereof forming a part of the consideration herein expressed and having been deducted therefrom."

Wood immediately entered upon and took possession of the land, and afterwards made two payments of $2000 each, one in 1873 and the other on February 16, 1874, on account of the principal of the mortgage debt, and also regularly paid the in-

terest thereon until March 14, 1874, when he conveyed the land to one Bryan by a deed, in which it was recited that the balance due on the mortgage debt formed a part of the consideration and was deducted from the purchase money, and by the terms of which Bryan assumed and agreed to pay that balance. Wood made no other payment on the mortgage debt.

The bond and mortgage were duly assigned to Frederick L. Christmas, and held by him until his death in 1876, after which, upon proceedings commenced in a court of competent jurisdiction in New York by his administrator, appointed in that State, for the foreclosure of the mortgage, a decree was made for the sale of the land, and on December 10, 1877, after due notice to Wood, the land was duly sold; and on January 5, 1878, the net amount of the proceeds, being the sum of $4566.61, was applied to the payment of the mortgage debt; and on April 18, 1879, an order was made by a court of competent jurisdiction in that State, giving leave to said administrator to sue either Wood or Bryan for the deficiency of $6865.63.

The plaintiff on October 25, 1880, took out ancillary letters of administration, on the estate of Frederick L. Christmas in the proper court of the District of Columbia; and on December 30, 1884, brought this action against Wood's executrix, after demand and refusal of payment, to recover the sum remaining due upon the mortgage debt.

The statement of facts concluded as follows: "It is further stipulated that if upon the said facts the plaintiff is entitled to recover, then and in that case he is entitled to judgment against the defendant for the said sum of $6865.63, being the balance remaining due after the application thereto of the net proceeds of said sale, together with interest on said balance from the said 5th day of January, 1878, assets in the hands of the said executrix (the present defendant) sufficient to pay all debts of said estate being hereby confessed; otherwise, judgment for said defendant."

The court gave judgment for the defendant. 4 Mackey, 538. The plaintiff sued out this writ of error.

Mr. Enoch Totten, (with whom was *Mr. Stephen Condit* on the brief,) for plaintiff in error.

Mr. John Sidney Webb, (with whom were *Mr. W. B. Webb* and *Mr. H. R. Webb* on the brief,) for defendant in error.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

This action is brought by a mortgagee against the executrix of the grantee named in, and who has accepted, a deed executed by the mortgagor only, expressed to be "subject to the mortgage," and by the terms of which the grantee "assumes and covenants to pay, satisfy and discharge" the mortgage debt. After issue joined on the pleas of never indebted and the statute of limitations of three years, the case was submitted, and judgment rendered for the defendant, upon an agreed statement of facts.

By the statute of limitations of Maryland of 1715, c. 23, §§ 2, 5, in force in the District of Columbia, all actions on simple contracts must be brought within three years, and actions on specialties may be brought within twelve years, after the cause of action accrues. 1 Kilty's Statutes.

The decisions of the courts of New York, though proceeding upon various and not always consistent reasons, clearly show that, by the law of that State, (in which the land is situated, and the bond and mortgage, as well as the subsequent deed from the mortgagor, were executed and delivered,) the mortgagee is entitled to maintain a suit, either in equity or at law, against the grantee of the mortgagor to enforce the payment of the mortgage debt. *Halsey* v. *Reed*, 9 Paige, 446; *King* v. *Whitely*, 10 Paige, 465; *Blyer* v. *Monholland*, 2 Sandf. Ch. 478; *Trotter* v. *Hughes*, 12 N. Y. 74; *Burr* v. *Beers*, 24 N. Y. 178; *Campbell* v. *Smith*, 71 N. Y. 26; *Pardee* v. *Treat*, 82 N. Y. 385; *Hand* v. *Kennedy*, 83 N. Y. 149; *Bowen* v. *Beck*, 94 N. Y. 86.

Assuming that the mortgagee has acquired by the law of New York a right to enforce such an agreement against a

grantee of the mortgagor, the form of his remedy, whether it must be in covenant or in assumpsit, at law or in equity, is governed by the *lex fori*, the law of the District of Columbia, where the action was brought. *Dixon* v. *Ramsay*, 3 Cranch, 319, 324; *United States Bank* v. *Donnally*, 8 Pet. 361; *Wilcox* v. *Hunt*, 13 Pet. 378; *Leroy* v. *Beard*, 8 How. 451; *Pritchard* v. *Norton*, 106 U. S. 124, 130, 133.

Much of the argument at the bar was devoted to the question, whether an agreement of the grantee, in a deed signed and sealed by the grantor only, is, as has been held in New Jersey and New York, in the nature of a covenant under seal, and consequently a specialty; *Finley* v. *Simpson*, 2 Zabriskie, (22 N. J. L.,) 311; *Crowell* v. *St. Barnabas Hospital*, 12 C. E. Green, (27 N. J. Eq.,) 650, 652; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Bowen* v. *Beck*, 94 N. Y. 86; or, as held in other States, in the nature of an assumpsit or implied contract, arising from the acceptance of the deed, and consequently a simple contract. *Locke* v. *Homer*, 131 Mass. 93, 102; *Foster* v. *Atwater*, 42 Conn. 244; *Johnson* v. *Muzzy*, 45 Vermont, 419; *Maule* v. *Weaver*, 7 Penn. St. 329; *Hocking County Trustees* v. *Spencer*, 7 Ohio, pt. 2, 149.

But we do not find it necessary to pass upon that question, since, by the law of the District of Columbia, whether the agreement of the grantee is or is not considered as under seal, it is an agreement made with the grantor only, and creates no direct obligation to the mortgagee, upon which the latter can sue at law.

If the agreement of the grantee is considered as under seal, by reason of the deed being sealed by the grantor, it falls within the settled rule of the common law, in force in the District of Columbia, that no one can maintain an action at law on a contract under seal to which he is not a party. *Hendrick* v. *Lindsay*, 93 U. S. 143, 149; *Southampton* v. *Brown*, 6 B. & C. 718; *Chesterfield & Midland Co.* v. *Hawkins*, 3 H. & C. 677; *Northampton* v. *Elwell*, 4 Gray, 81; *Crowell* v. *St. Barnabas Hospital*, 12 C. E. Green, (27 N. J. Eq.,) 650, 653.

If the agreement of the grantee is considered as in the nature of assumpsit, implied from his acceptance of the deed,

still, being made with the grantor only and for his benefit, upon a consideration moving from him alone, there being no privity of contract between the grantee and the mortgagee, and the latter not having known of or assented to the agreement at the time it was made, nor having since done or omitted any act on the faith of it, it follows that, by the law as declared by this court, and prevailing in the District of Columbia, the mortgagee cannot maintain an action at law against the grantee. *Keller* v. *Ashford*, 133 U. S. 610, 620–622, and *National Bank* v. *Grand Lodge*, 98 U. S. 123, there cited. The payments made by the grantee, and accepted by the mortgagee, on account of the mortgage debt, were made pursuant to the grantee's contract with the mortgagor, and did not create, or warrant to be inferred, a new contract between the grantee and the mortgagee. Moreover, if the grantee's liability was in assumpsit only, it was, in any view of the case, barred by the statute of limitations in three years.

In the District of Columbia, the only remedy of the mortgagee against the grantee was, as adjudged upon great consideration in *Keller* v. *Ashford*, above cited, by bill in equity, in which he might avail himself of the right of the mortgagor against his grantee, because in equity a creditor is entitled to avail himself of a security which his debtor holds from a third person for the payment of the debt.

In the Supreme Court of the District of Columbia, as in the Circuit Court of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law. Rev. Stat. D. C. §§ 760, 800; *Fenn* v. *Holme*, 21 How. 481.

A statement of facts agreed by the parties, or, technically speaking, a case stated, in an action at law, doubtless waives all questions of pleading, or of form of action, which might have been cured by amendment; but it cannot enable a court of law to assume the jurisdiction of a court of equity. *Scudder* v. *Worster*, 11 Cush. 573; *McRae* v. *Locke*, 114 Mass. 96; *West Roxbury* v. *Minot*, 114 Mass. 546.

For these reasons, this action cannot be maintained, and the judgment for the defendant must be

Affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *v.* AUSTIN.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 289. Submitted April 22, 1890. — Decided May 5, 1890.

An amendment to a complaint in an action pending in a state court, allowed by the court after the evidence was in, by which the *ad damnum* clause was increased from a sum too small to allow the defendant to petition to have the cause removed to the Circuit Court of the United States to a sum in excess of the jurisdictional sum necessary for that purpose, cannot be reviewed here if the defendant, after such allowance, files no petition for such removal.

Austin brought his action in the District Court of Otter Tail County, Minnesota, to recover damages for the burning of certain growing trees on his land by fire, set by an engine of the Northern Pacific Railroad Company, his complaint alleging the trees to have been of the value of $475, and that he was damaged in that sum, and demanding judgment for that amount, with costs and disbursements. The defendant put in a general denial. The cause coming on for trial, the record states that "after the jury had been duly empanelled and sworn, and before the commencement of the trial, the plaintiff asked to amend his complaint by increasing the *ad damnum* clause therein from the sum of four hundred and seventy-five dollars, the amount originally stated and claimed in said complaint, to the sum of one thousand dollars. To this amendment the defendant objected upon the ground that to allow the same would be an abuse of discretion, and prevented defendant from securing the removal of said action from the above-named court to the Circuit Court of the United States, where it would be entitled to have the same tried had such amendment been moved for at the proper time and granted. The court took under consideration the matter of allowing said amendment." The trial was then proceeded with, and the evidence tended to show that the damages sustained were much greater than $500. Upon the conclusion of

the plaintiff's case, he renewed his motion "to amend his complaint to make the same conform to the testimony. Whereupon the amendment was granted by the court allowing the plaintiff to claim damages in the sum of one thousand dollars, and to which amendment the defendant duly excepted. . . . Plaintiff also renewed his motion to amend the *ad damnum* clause of the complaint. The motion was granted, defendant excepting." The jury found a verdict for the plaintiff and assessed his damages at $750, and judgment was rendered accordingly. The defendant appealed to the Supreme Court of Minnesota, by which the judgment was affirmed, and thereupon a writ of error was sued out from this court.

Mr. James McNaught, *Mr. W. P. Clough*, *Mr. A. H. Garland* and *Mr. H. J. May* for plaintiff in error.

Mr. M. D. Grover and *Mr. J. W. Mason* for defendant in error.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court:

The contention of plaintiff in error seems to be that the right to remove the suit into the Circuit Court of the United States for the District of Minnesota, under the act of March 3, 1875, was specially set up or claimed by it; that the decision was against the right so set up or claimed; and that, therefore, this court has jurisdiction. But the difficulty with that view is, that when the amendment was permitted to be made, after the evidence had satisfied the trial court that its allowance was proper, the defendant filed no petition and made no application to remove the cause. It is true that, when the plaintiff first applied to amend, the defendant objected upon the ground that it would be an abuse of discretion, because the defendant would be obliged to submit to a trial when the amount actually involved would have entitled it to a removal, if that fact had appeared when the suit was commenced or if the amendment had been made at an earlier stage of the case. This was by way of argument, and upon the theory that the

plaintiff had purposely laid his damages in the first instance at a sum which did not permit a removal, and then sought to increase the *ad damnum* after the trial commenced and when it was assumed to be too late to remove.

The Supreme Court of Minnesota, in passing upon the action of the District Court, *Austin* v. *Northern Pacific Railroad*, 34 Minnesota, 473, held that "in respect to the propriety of allowing amendments, the court can make no distinction between cases exclusively triable in the state court, and those claimed to be removable to the United States courts. If the case is one in which an amendment might properly be made in the former class of cases, then it may be made in the latter, because the action of the court is authorized by law, and, while a case remains in the state court and under its jurisdiction, no party can legally complain of proceedings which are in conformity with the laws of the State. There being no complaint that the case was not in itself a proper one for the exercise of the discretion of the court in the allowance of the amendment, under the practice in this State, we think the objection was properly overruled. . . . But there is nothing upon the record in this case to show that the plaintiff's course was a device to prevent a removal. According to the practice as understood and actually prevailing in the United States courts of this circuit when this action was tried, the defendant would not have been entitled to a removal if the complaint had been amended before the case came to trial. *Myers* v. *Union Pacific Railway Co.*, 16 Fed. Rep. 292. But the Supreme Court of the United States subsequently held, by a divided court, that corporations, like the defendant, created and organized under the laws of the United States, were entitled to remove suits against them to the United States courts. *Pacific Railroad Removal Cases*, 115 U. S. 1. Under the circumstances, therefore, we are not warranted in concluding that the allowance of the amendment was an abuse of discretion. If the facts were such as to warrant the inference that the plaintiff purposely brought the action for a smaller amount in order to prevent a removal, and afterwards secured the amendment, a different question would be presented."

Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Spies* v. *Illinois*, 123 U. S. 131; *Chappell* v. *Bradshaw*, 128 U. S. 132. As the defendant did not apply for the removal of the cause, the right now claimed under the statute was not denied by the District Court, nor by the Supreme Court in affirming the judgment. If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought "before or at the term at which such cause could be first tried, and before the trial thereof." But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal, *Ayers* v. *Watson*, 113 U. S. 594, 598, it may, though obligatory to a certain extent, be waived. And as, where a removal is effected, the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him. If, on the other hand, the motives of the plaintiff could not be inquired into, or, if admitted, would not affect the result, as in most cases of remittitur, *Thompson* v. *Butler*, 95 U. S. 694; *Pacific Postal Telegraph Co.* v. *O'Connor*, 128 U. S. 394, the defendant would simply suffer for want of comprehensiveness in the statute. The amendment here was held to have been properly allowed, and we have no power or disposition to interfere with the action of the court in regard to it. The only importance it has, is in its bearing upon the charge of bad faith in respect to the right of removal, and that question cannot properly arise in the absence of an application to remove.

The writ of error must be dismissed, and it is so ordered.

ROYER *v.* SCHULTZ BELTING CO.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 228. Argued April 22, 23, 1890. — Decided May 5, 1890.

At the trial of an action at law for the infringement of a patent, the plaintiff having introduced testimony on the question of infringement, the defendant demurred to the evidence without putting in any of his own. The court sustained the demurrer and directed a verdict for the defendant: *Held*, that the question of infringement ought to have been submitted to the jury under proper instructions; that it was not a matter of mere judicial knowledge that the mechanical differences between the two machines were material, in view of the character of the patented invention, and of the claims of the patent; and that the case was not one where, if the jury had found for the plaintiff, it would have been proper for the court to set aside the verdict.

This was an action at law for the infringement of letters patent. Verdict for the defendant and judgment on the verdict. The plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. M. A. Wheaton for plaintiff in error.

Mr. Chester H. Krum and *Mr. Wilmarth H. Thurston* for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Eastern District of Missouri, by Herman Royer against The Schultz Belting Company, a Missouri corporation, for the infringement of letters patent No. 77,920, granted May 12, 1868, to Herman Royer and Louis Royer, as inventors, for "an improved machine for treating raw hide." The patent expired on May 12, 1885, and this suit was brought on the 16th of November, 1885.

The specification, claims and drawings are as follows:

"The nature of our invention is to provide an improved machine for converting raw hides into leather, of that class which is used for belting, lacings and other purposes where it is necessary to preserve the native strength and toughness without destroying or impairing the natural fibres or grain of the leather.

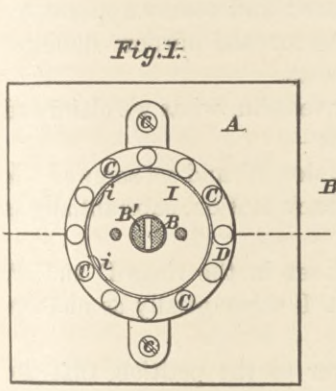
"In order to accomplish our object, we employ a machine mounted on a suitable frame, having a vertical slotted shaft, to which is attached, at its base, a bevelled wheel between two bevelled pinions upon a horizontal shaft. Around the vertical shaft is placed a row of vertical pins or rollers, held in place by upper and lower rings, one of which is firmly bolted to the frame. An iron weight or press is employed for crowding the coil of hide down after it has received the forward and back action around the shaft.

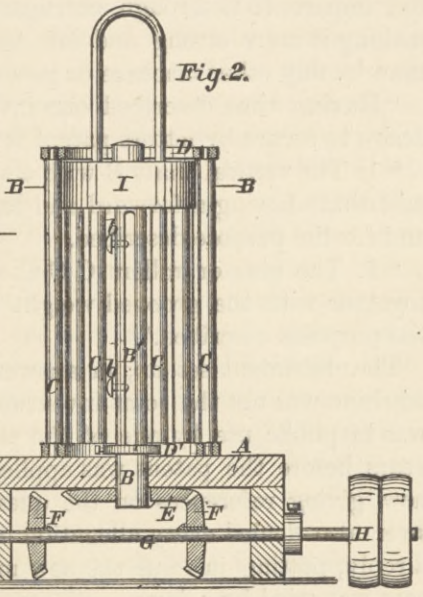
"To more fully illustrate and describe our invention, reference is had to the accompanying drawings, of which figure 1 is a horizontal section through A B; figure 2, a side sectional elevation, showing central shaft; figure 3, a side sectional elevation; figure 4, a horizontal section, showing the hide around the shaft in the circle of pins.

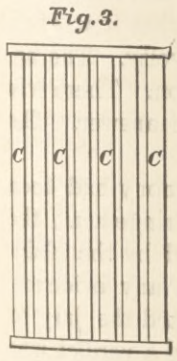
"A represents the frame, of any suitable materials, up through which the vertical shaft B passes, having a slot, B', through which the end of the hide is placed, where it is held in place by the set-screws *b b b b*. C C C are vertical pins or rollers set in the rings D and D', the lower one, or D', being firmly attached to the frame by bolts *c c*. A bevelled wheel, E, is attached to the vertical shaft B, which is actuated by the bevelled pinions F F placed on the horizontal driving-shaft G. This shaft has a pulley, H, for driving the machine. An iron weight, I, having an opening through its centre for the vertical shaft, and vertical grooves, *i i*, in it to prevent its turning, is placed upon the inside of the pins or rollers, and, by pressing upon this weight, the hide is compressed edgewise, after the forward and backward stretching or pressing is performed lengthwise.

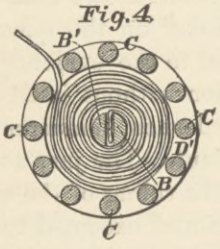
"The operation of our machine is as follows: The end of the raw hide, after it has been deprived of the hair, is intro-

duced into the slot B′, and the set-screws *b b b* turned against it, when motion is imparted to the machine, and the hide is wound tightly around the vertical shaft. When this is accomplished, and sufficient time has elapsed, the shaft is slowly reversed by throwing the other pinion into gear, when the









hide commences to uncoil, or doubling back from the shaft, which, with the folding back, and pressing against the pins or rollers, produces the desired result of stretching in one way, compressing, corrugating, or roughing in the opposite direction, when the weight I is placed upon the top of the hide, and

is pressed downward, which, in a measure, compensates for the stretching lengthwise. The hide so operated upon is then treated with oil and tallow in the usual way.

"By thus treating the hide in our machine, the leather is rendered very tough, and the fibres or grain are not injured, but imparts to it a rough, corrugated and seamy appearance, making it more strong and lasting for the purpose designed than by any other machine or process.

"Having thus described our invention, what we claim and desire to secure by letters patent is —

"1. The vertical shaft B with a slot, B′, and set-screws *b b b*, said shaft having a forward and back motion, substantially as and for the purpose described.

"2. The pins or rollers C C C, set in the rings D and D′, together with the grooved weight I, substantially as and for the purposes described."

The defendant set up, in answer to the petition, that the machine was not the joint invention of the patentees; that it was in public use by one of the patentees for more than two years before the patent was applied for; and that it was not new, giving references on the question of novelty. The answer also denied every allegation in the petition. There was a reply, putting in issue the new matter in the answer. The case was tried by a jury.

The bill of exceptions shows that, after testimony had been put in by the plaintiff on the question of infringement, the defendant demurred to the evidence introduced by the plaintiff on that question without itself putting in any evidence. The court sustained such demurrer and directed the jury to find for the defendant. The jury so found, and a verdict was rendered for it. The ruling of the court is reported in 28 Fed. Rep. 850. The plaintiff excepted to so much of such ruling as sustained the demurrer to the evidence, and to so much of the instruction of the court as directed the jury to find for the defendant. A motion for a new trial was made and overruled, the opinion thereon being in 29 Fed. Rep. 281. Judgment being rendered for the defendant, the plaintiff has brought a writ of error.

The plaintiff's machine has a vertical crib of cylindrical bars standing in a circle around and concentric with a central shaft. The ends of these bars are fastened in appropriate discs or rings, and thus are held in proper position. The crib does not revolve, but the central shaft does. A vertical slot is made in the latter, in which one end of a hide is inserted and there held by set-screws. Several hides can be treated in the machine at the same time. The ends of the hides being fastened, the central shaft is made to revolve, and in doing so it draws the hides into the crib through a space between two of the bars and winds them in a coil around the shaft. A sufficient number of hides is put into the machine at one time to fill entirely the diameter of the inside of the crib when they are compressed. When the hides are all drawn into the crib, and the coil is compressed around the central shaft, filling the crib tightly, the motion of the central shaft is reversed, and the hides are unwound and wound up again around the shaft in the opposite direction, the hides being all the time under pressure. This operation of winding, unwinding and rewinding is continued, and the action on each hide is to bend every particle of it, whether thick or thin, alike and under the same degree of pressure. There is a weight on top of the coil of hides, so as to produce end pressure on them in the direction of the shaft, lengthwise of the crib.

The plaintiff contends that no other machine existed before, which wound hides in one direction and then rewound them in the other direction, while under pressure, and that this produced a new mode of operation in the treatment of hides, which was not the result of a mere improvement on the mechanism of any prior machine. He therefore urges that the case falls within the principle applied in *Morley Machine Co.* v. *Lancaster*, 129 U. S. 263, that "where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine;" and

that, the patentees having been the first persons to succeed in producing an automatic machine for treating raw hide in the manner in which their machine treats it, the claims of the patent must be construed liberally.

The plaintiff, who is one of the patentees, was examined as a witness on the trial, and fully explained the patented machine, its mode of operation, and the improvement it effected in the conversion of raw hides into leather.

The defendant's machine has in it a cylinder which is arranged horizontally instead of perpendicularly, and corresponds to the cylindrical crib of the plaintiff's machine. The cylinder is constructed of two half-cylinders of iron, hinged together, inside of which are fixed semi-circular strips of wood, arranged lengthwise of the cylinder, so that the inside surface of the cylinder, when closed, is practically the same as the inside surface of the plaintiff's crib. The ends of the half-cylinders are secured in position rigidly. The general proportions of the two machines are in size about the same. The defendant's machine has a revolving central shaft, one-half of the diameter of which is removable in that part of it to which the hides are fastened. This half is in sections, which are held to the other part of the shaft, when fastened to it, by screws. The edges of the hides are fastened to the shaft by unscrewing such sections and placing one edge of each hide upon the face of the solid half of the shaft. The sections are then screwed on, over the edges of the hides, in which position they clamp the hides fast between the two halves of the shaft. There are grooves lengthwise along the face of the solid half of the shaft, and ribs along the faces of the removable sections, so that the edge of each hide which is fastened in the shaft is pressed down into the grooves, and is thus held more securely. There is a long opening in the side of the defendant's cylinder, through which the hides are drawn in by the revolution of the shaft, in like manner as they are drawn into the crib of the plaintiff's machine through one of the openings between the bars. As the defendant's machine is in a horizontal position, the end pressure on the coil of hides cannot be produced by a weight. Instead of that, it has two

sliding discs, one at each end of the horizontal coil of hides, which discs have a central hole in them for the central revolving shaft to pass through. There is an arrangement of screw-bolts, nuts and hand-wheels, so that the two discs may be drawn together to make end pressure upon the coil of hides, and retracted therefrom; and there are springs to make the pressure yielding.

The view taken by the Circuit Court was, in regard to claim 1, that the defendant's machine did not have the slot of that claim; and as to claim 2, that the defendant's machine could not be said to infringe it.

We think the Circuit Court erred in not submitting to the jury the question of infringement, under proper instructions. If the patented invention was, within the ruling in *Morley Machine Co.* v. *Lancaster*, *supra*, "one of a primary character," and the patent was "a pioneer patent," which were questions of fact to be passed upon by the jury, then the question, on a proper construction of the patent, whether the defendant's machine infringed its claims, was a question of fact for the jury to determine, on all the evidence which the case might present. *Tucker* v. *Spalding*, 13 Wall. 453.

It was not a matter of mere judicial knowledge that the mechanical differences between the two machines were material, in view of the character of the patented invention and of the claims of the patent; and we are unable to concur with the view of the Circuit Court, in its opinion denying the motion for a new trial, that this is a case where, if the jury had found a verdict for the plaintiff, on the evidence put in by him on the question of infringement, all of which evidence the bill of exceptions states is set forth therein, it would have been proper for the court to set aside such verdict. *Keyes* v. *Grant*, 118 U. S. 25, 36, 37.

As there must be a new trial, we forbear remarking further on the questions involved.

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

Syllabus.

MANSFIELD *v.* EXCELSIOR REFINING COMPANY.

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

No. 239. Argued and submitted March 28, 1890. — Decided May 5, 1890.

In Illinois, the unsuccessful party in an action of ejectment is entitled, by statute, upon the payment of all costs, to have the judgment vacated and a new trial granted, but no more than two new trials can be granted to the same party under the statute. This statute governs the trial of actions of ejectment in the courts of the United States sitting in Illinois.

In an action of ejectment, in Illinois, where the title of one of the parties depends upon a deed made by a trustee, invested with the legal title, and with power to sell and convey to the purchaser upon advertisement and sale, it is not material to inquire — the deed from the trustee not appearing upon its face to be void — whether the trustee conformed to all the terms of his advertisement for sale.

By the statute of Illinois, all deeds, mortgages, and other instruments of writing, authorized to be recorded, take effect and are in force from and after the time of filing the same for record, and not before, as to creditors and purchasers without notice; and all such deeds and title papers must be adjudged void as to such creditors and subsequent purchasers, until the same be filed for record. *Held*, That although a grantee in a quitclaim deed is a purchaser within the meaning of the statute, and the prior recording of such a deed will give it a preference over one previously executed but not recorded until after the quitclaim deed, yet the grantee in the latter deed is charged with notice of what may be done under a trust deed conveying the same lands, filed for record before the quitclaim deed, and his rights are, therefore, subject to those of the grantee in a deed from the trustee, not filed for record until after the quitclaim was recorded. Whatever is sufficient notice to put a purchaser of land on inquiry is sufficient notice of an unrecorded deed.

Where distillery premises, in the occupancy of a distiller, who is operating the same under a lease to expire at a specified time, are seized and sold by a collector of internal revenue for taxes due from the distiller to the government, a sale of such premises, by the collector, by the summary mode of notice and publication provided in Section 3196 of the Revised Statutes, for the taxes so due, will pass to the purchaser only the interest of the delinquent distiller, and will not affect the interest in the premises, either of the owner of the fee or of a third person having a lien thereon, even where the government holds a waiver, executed by the owner of the fee or by such third person having a lien, consenting that the distillery premises may be used by the distiller for distilling spirits

subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes shall have priority of any and all interest and claims which the waiver may have to the distillery and premises.

In the case of such a waiver, the interest of the owner of the fee or the liens on the premises held by other persons, cannot be affected except by a suit in equity to which they are parties, as provided in Section 3207 of the Revised Statutes.

EJECTMENT. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. Henry B. Mason, for plaintiff in error, submitted on his brief.

Mr. W. E. Blake for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action in the nature of ejectment. It was brought by the plaintiff in error, December 24, 1879, to recover from the defendant in error the possession of a tract of land in Henderson County, Illinois, containing ten acres more or less, and upon which was a distillery. The plea was, not guilty of unlawfully withholding the premises described in the declaration. There were three trials of the case, each time by the court, pursuant to a written stipulation of the parties waiving a jury. Upon the first trial there was a judgment for the defendant. At the instance of the plaintiff a new trial was granted in conformity with a statute of Illinois, which provides that at any time within one year after a judgment, either upon default or verdict in an action of ejectment, the party against whom it is rendered, his heirs or assigns, shall be entitled, upon the payment of all costs, to have the judgment vacated and a new trial granted; no more, however, than two new trials to be granted to the same party under the statute. Rev. Stats. Ill. 1845, p. 208, § 30; 1874, p. 447, § 35; 1 Starr & Curtis' Anno. Stat. 989. The first new trial under this statute is the right of the unsuccessful party, and is not dependent upon the discretion of the court. *Vance* v. *Schuyler*, 1 Gilman, 160; *Riggs* v. *Savage*, 4 Gil-

man, 129; *Emmons* v. *Bishop*, 14 Illinois, 152; *Chamberlin* v. *McCarty*, 63 Illinois, 262; *Lowe* v. *Foulke*, 103 Illinois, 58. These statutory provisions govern the trials of actions of ejectment in the courts of the United States sitting in Illinois. *Equator Company* v. *Hall*, 106 U. S. 86. At the second trial there was a judgment for the plaintiff. The defendant then took a new trial under the statute, and when the case was last tried the court ruled that, upon all the evidence, the law did not authorize a recovery by the plaintiff, and gave judgment for the defendant. The present writ of error brings up that judgment for review.

The parties entered into a written stipulation as to the principal facts. The main question in the case arises out of a sale by a collector of internal revenue of the premises in dispute, including the distillery thereon, for taxes due from the distiller.

The facts, so far as it is necessary to state them, may be thus summarized:

On the 20th of September, 1873, the Bank of Chicago was the owner in fee of the premises. It executed to the United States, April 22, 1874, in conformity with the statute of the United States, what is called a waiver, which recited that George E. Hinds intended to carry on the business of distilling and manufacturing high wines in the distillery on these premises, and contained the following provisions: "And whereas the undersigned, the Bank of Chicago, a corporation organized and existing under the laws of the State of Illinois, of the county of Cook and the State of Illinois, has an interest in the title of said lot of land and distillery and appurtenances: Therefore, in order to enable the said George E. Hinds to carry on said business on said lot of land in said distillery, and to comply with the requirements of the eighth section of the act of Congress, approved July 20th, A.D. 1868, and in consideration thereof, the said bank does hereby express and give its consent that said distillery and premises may be used by said Hinds for the purpose of distilling spirits, subject to the provisions of law; and the said bank does hereby expressly stipulate that the lien of the United States for taxes

and penalties shall have priority of any and all its interest and claims to said distillery and premises, and that in case of the forfeiture of the distillery premises or any part thereof the title of the same shall vest in the United States, discharged from any such claim or interest which the said bank has or may have in and to the same, and with the express understanding that this waiver shall take effect and be in force on and after this date." This document was recorded the day succeeding its execution, in the office of the recorder of the county where the land lies.

The bank, on the 10th of July, 1874, executed to Isaac P. Coates a deed or instrument, which was duly recorded on the 30th of March, 1875, conveying various parcels or tracts of land, including the one in controversy, in trust to dispose of the same at public or private sale, and apply the proceeds to the payment of its debts and liabilities. Coates executed, May 3, 1875, under section 3262 of the Revised Statutes, a waiver similar to the one above referred to, and which by its terms was to take effect May 10, 1875. This was also placed on record. By quitclaim deed executed on the same day — May 3, 1875 — Coates, as assignee, conveyed the premises in dispute to Elisha H. Turner, of Burlington, Iowa. The consideration recited was $8500, paid by the grantee. This deed was recorded May 6, 1875, together with the waiver that Coates had executed. Turner, also, on the same day, executed and placed upon record a similar waiver to the United States.

On May 6, 1875, Turner conveyed the premises to George F. Westover, of Chicago, in trust, to secure the payment of three promissory notes given by Turner for the price of the premises, all dated May 6, 1875, and payable to the order of Isaac P. Coates, assignee; one for $1500 due July 1, 1875; one for $3000 due May 1, 1876; and one for $3000 due May 1, 1877; each note drawing interest at the rate of eight per cent per annum until due, and ten per cent after maturity. This deed provided, among other things, for a sale by the trustee upon default by Turner in the payment of the notes or any part thereof, or of the interest accruing thereon, and for a conveyance to the purchaser. It gave the trustee power to adjourn

the sale from time to time, at discretion, and constituted him attorney for the grantor to execute and deliver deeds to the purchaser or purchasers; applying the proceeds to the payment of the notes and for other purposes specified, and reconveying to the grantor, after the objects of the trust were accomplished, such part of the premises as remained unsold. This deed was recorded the day of its execution, and at the same time with the deed from Coates to Turner.

In conformity with the terms of the trust deed, Westover, on the 1st day of September, 1876, advertised the premises to be sold, at public vendue, on the 7th day of October, 1876, to the highest bidder for cash, together with all the right, title, benefit and equity of redemption therein of Turner, his heirs and assigns. The advertisement stated that the sale was because of default in the payment of the first two above-described notes of Turner to Coates, and of the interest due thereon, and because of the application by the legal holders of the notes to the trustee to sell and dispose of the premises under the authority conferred by the trust deed. A sale was made by the trustee on the day and at the place named in the notice.

By quitclaim deed, dated October 9, 1876, and duly acknowledged the next day, Westover conveyed the premises to Coates, as purchaser at the trustee's sale. The deed described the default, on account of which the sale was made, as having occurred "in the payment of the second of said notes, and the interest on the second and third notes," and stated that the premises were sold, under the advertisement, on the day and year and at the place mentioned, and that Coates became the purchaser. This deed was duly acknowledged on the 10th day of October, 1876, but was not filed for record and recorded until December 22, 1879. By quitclaim deed, dated December 18, 1879, acknowledged the succeeding day, and filed for record December 22, 1879, Coates and wife conveyed the premises to the plaintiff, Howard Mansfield.

The stipulation between the parties states that "December 16, 1876, the said real estate in controversy was seized, and afterwards a sale made by the United States collector of internal revenue for the 4th district of Illinois, for the non-pay-

ment of taxes and assessment of internal revenue against George E. Hinds, a distiller operating under a lease expiring May 1, 1877, the distillery on the said property in controversy, sufficient goods, chattels or other effects to satisfy such taxes and assessments not having been found by said collector;" also, "that George F. Westover and Isaac P. Coates received no notice of such seizure and sale, (prior to said sale,) and only knew of such seizure and sale by reports long after such seizure and sale occurred." The collector's advertisement was on December 21, 1876, and was for the sale, on the 10th of January, 1877, of "the property generally known as the Sagetown or Turner distillery, lately operated by George E. Hinds, consisting of 10 acres, more or less, with the distillery buildings thereon," etc. The report of that sale shows that Albert W. Parsons, of Burlington, Iowa, became the purchaser of the property sold by the collector, at the price of $2240, the amount of the assessments, liabilities and costs claimed by the government. The property not having been redeemed within the time prescribed by the laws of Illinois, and T. W. Barhydt, trustee for the Merchants' National Bank of Burlington, Iowa, having become the owner, by assignment, of the certificate of purchase given to Parsons, the collector, November 4, 1878, made a deed to Barhydt, trustee, conveying all the right, title and interest of the United States. That deed was acknowledged November 14, 1878, and recorded December 22, 1879. The defendant claims title under the collector's sale and deed. It also claims under a quitclaim deed executed to it by Elisha H. Turner and wife, of date May 14, 1878, which was acknowledged on that day, and filed for record October 28, 1878. This last deed purported to have been given "for the consideration of good and valuable considerations hereby acknowledged, and one dollar," and to "convey and quitclaim" Turner's interest in the premises.

Our attention will be first directed to certain objections urged by the defendant to the plaintiff's title. Its contention is that the power conferred upon Westover by the trust deed of May 6, 1875, was not so executed as to pass the title to Coates, the purchaser at the trustee's sale of October 7, 1876.

This objection is based upon two grounds, the first of which is that the trustee's advertisement stated that the sale was by reason of the default in the payment of the first two promissory notes given by Turner to Coates, and of the interest due on those notes, whereas the deed from Westover to Coates recites that the default was in respect to the second note, and the interest on the second and third notes. The second ground is, that the trust deed authorized the trustee, upon default in the payment of the notes or of any part thereof, or of the interest accuring thereon, and after advertisement, to sell the premises and all the right and equity of redemption of the grantor "at public vendue, to the highest bidder for cash, at the premises or at the front door of the court-house," in the county where the premises were, "at the time appointed in said advertisement, or may adjourn the sale from time to time, at discretion;" and that while the advertisement fixed the hour of 11 o'clock of the forenoon of October 7, 1876, as the time of the sale, the deed to Coates, although reciting that the sale occurred "upon the day and year and at the place" mentioned in the advertisement, was silent as to the hour of the day on which the sale took place. These objections — if, under any circumstances, available to Turner or to those claiming under him — are of no consequence in this action involving simply the legal title to the premises. The trustee had power to sell upon notice, and to convey the legal title to the purchaser. He did sell upon notice which described the nature of the default upon the part of Turner that made a sale necessary. While the deed does not accurately state the particulars of such default, it does recite a sale pursuant to the notice, and makes that notice a part of the deed. Neither this error in its mere recitals, nor its silence as to the precise hour of the day when the sale occurred, made the deed void upon its face, or ineffectual as a conveyance of the legal title by a trustee invested with power to sell upon notice, and to convey the title to the purchaser. *Kœster* v. *Burke*, 81 Illinois, 436, 439; *Graham* v. *Anderson*, 42 Illinois, 514, 517.

Another contention of the defendant is, that, independently of any right acquired under the collector's sale and convey-

ance, its title, as derived from Turner's quitclaim deed of May 14, 1878, filed for record October 28, 1878, must prevail in this action against the plaintiff's title, derived from the deed of Westover to Coates, not filed for record until December 22, 1879. This contention is based upon that provision of the statute of Illinois which declares that "all deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all creditors and subsequent purchasers without notice, until the same shall be filed of record." Rev. Stats. Ill. 1845, p. 108, § 23; 1874, p. 278, c. 30, § 30; 1 Starr & Curtis, p. 591, § 31. The defendant claims to be a subsequent purchaser from Turner without notice of the prior sale and conveyance by Westover to Coates. It relies upon those cases in the Supreme Court of Illinois which hold that "a deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect there is no distinction between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the *same* lands which had previously been conveyed." *McConnel* v. *Reed*, 4 Scammon, 117. See also *Kennedy* v. *Northup*, 15 Illinois, 148, 154; *Holbrook* v. *Dickenson*, 56 Illinois, 497; *Harpham* v. *Little*, 59 Illinois, 509. So in *Brown* v. *Banner Coal & Coal Oil Company*, 97 Illinois, 214, 219: "The land being within the description, the grantees under this quitclaim deed are purchasers; and nothing indicating bad faith or notice of the former sale, the unrecorded deed, as against them, was inoperative until recorded, and not being recorded until after the record of the deed of release, by the *very words* of our statute, cannot prevail."

We do not perceive that these cases sustain the position of

the defendant. Turner did not have the legal title to the premises at any time after the execution of his deed to Westover. The legal title was in Westover from the date of Turner's conveyance to him, May 6, 1875, until the former's deed to Coates of the 9th of October, 1876. Granting that the defendant, when it received the quitclaim deed of 1878, was a purchaser, — although it does not appear affirmatively that it paid anything of value to Turner, — it was not, within the meaning of the statute, a purchaser without notice; for it was informed by the record of deeds that the legal title was in Westover in trust to secure the notes held by Coates, and that Turner's interest in the property, after the execution of that deed, arose out of the clause requiring the trustee, after the objects of the trust were attained, to reconvey to him such of the premises as remained unsold. Turner's deed to the defendant, as we have seen, only purported to pass his interest in the premises. The defendant did not acquire by that deed the legal title; for the legal title had long before that been conveyed to Westover. In Illinois an unrecorded deed will pass the title, except as to creditors and subsequent purchasers without notice. But as the deed of trust to Westover was recorded before Turner's conveyance to the defendant, the latter took with notice of what might be done under the trust deed. *Snapp* v. *Peirce*, 24 Illinois, 156, 157. In *Farrar* v. *Payne*, 73 Illinois, 82, 88, in which the title of one of the parties arose out of a sale under an attachment levied on the interest of the grantor in certain real estate, covered by a trust deed, after that deed was recorded, — the deed to the purchaser at the sale under the attachment being filed for record before the deed to the purchaser at the trustee's sale, — the court said: "The trust deed had been recorded previous to the attachment, and that was enough. The published notice of the sale was all the required notice of any proceeding under the trust deed. The recording of the trust deed gave notice of its existence to subsequent claimants of the equity of redemption, and pointed out the source of information of what might be done in pursuance of the deed, and they were bound to take notice of the proceedings thereunder. The title of

Cranston [the purchaser at the trustee's sale] related back to the execution of the deed of trust. The subsequent proceedings under the deed of trust were connected with and in aid of the title conveyed by that deed." This language was cited with approval in *Heaton* v. *Prather*, 84 Illinois, 330, 333, the court adding: "It was also held in *Rupert* v. *Mark*, 15 Illinois, 540, and *Hankinson* v. *Barbour*, 29 Illinois, 80, that whatever is sufficient to put a purchaser of land on inquiry is sufficient notice of an unrecorded deed." It results that, as between Westover, Coates and Turner, the legal title passed to Coates before the execution of Turner's quitclaim deed; and that title, being of record when this action was brought, relates back to the date of the trust deed to Westover, and was not affected by the intermediate deed made by Turner to the defendant.

This disposes of all the questions arising out of the plaintiff's chain of title that we deem important to notice.

We come now to the examination of the question relating to the seizure, sale and conveyance by the collector of internal revenue. We have seen that such seizure occurred on the the 16th day of December, 1876, previous to which time there had been placed upon record a deed by Turner, conveying the premises to Westover in trust to secure the payment of three notes, aggregating $7500, given by Turner to Coates for the price of the property, two of which notes were past due when the collector made his seizure; and previous to which time, also, the legal title had been, by deed duly acknowledged, conveyed to Coates as the purchaser at the sale made by the trustee. This deed to Coates not having been recorded at the time of the seizure and sale by the collector, what interest in the premises passed by the collector's sale and deed? If, as contended, the collector's sale and deed passed, and, under the statute, could have passed, nothing more than the distiller's interest in the premises, — which was a leasehold interest ceasing May 1, 1877, — then the court below erred in not rendering judgment for the plaintiff, as the holder of the legal title. This question depends upon the meaning to be given to numerous sections of the Revised Statutes to be found in Title 35, "Internal Revenue."

Those statutory provisions must be considered as a whole in order that the purpose of Congress in enacting them may be understood. The material ones are as follows: If any person "liable to tax" fails to pay the taxes assessed against him within the time prescribed, the collector may "make distraint therefor as provided by law." § 3185. The tax so due from any person "liable to pay" it, together with the interest, penalties and costs that may accrue in addition thereto, is a lien in favor of the government upon all property and rights of property "belonging to such person." § 3186. The goods, chattels and effects, including stocks, securities and evidences of debt "of the person delinquent as aforesaid," may be distrained and sold for such taxes in the manner provided. § 3187. The collector's certificate of the sale of such personal property, securities, and evidences of debt transfers to the purchaser all right, title and interest therein "of such delinquent." § 3194. In case of the insufficiency of such goods, chattels or effects of the delinquent, to satisfy the taxes due from him, the collector may seize and sell real estate. § 3196. Besides making publication in a newspaper of the county, and posting at the nearest post-office, notice of sale, in the case of the seizure of real estate by the collector, must be given by the officer to the person "whose estate it is proposed to sell," by giving "him in hand, or leaving at his last or usual place of abode, if he has any such within the collection district where said estate is situated, a notice, in writing, stating what particular estate is to be sold, describing the same with reasonable certainty, and the time when and the place where said officer proposes to sell the same." § 3197. When real estate is sold by the collector, he must give to the purchaser a certificate of purchase describing the real estate purchased, for whose taxes it was sold, the name of the purchaser, and the price paid for the property, which shall be followed by a deed to the purchaser if the property is not redeemed in due time. § 3198. Such deed shall be *prima facie* evidence of the facts therein stated, and, if the proceedings of the officer, as set forth, have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance

of all the right, title and interest "the party delinquent" had in and to the real estate thus sold at the time the lien of the United States attached thereto. § 3199. When the property, real and personal, so seized and sold, is insufficient to satisfy the claim of the government, other property liable to seizure, "of the person against whom such claim exists," may be seized and sold, until the amount due "from him," together with all expenses, is fully paid. § 3205. When real estate is seized for taxes, the Commissioner of Internal Revenue may direct the institution of a suit in chancery, in a District or Circuit Court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned "by the delinquent," or in which "he" has any right, title or interest to the payment of such tax; to which suit all persons having liens upon, or claiming any interest in, the real estate sought to be subjected as aforesaid "shall be made parties," and "be brought into court as provided in other suits in chancery; and in which suit the court shall adjudicate all matters involved therein, and finally determine "the merits of all claims to and liens upon the real estate in question, and, in all cases where a claim or interest of the United States therein is established, shall decree a sale of such real estate, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States." § 3207. Every proprietor or possessor of, and every person interested in the use of any still, distillery, or distilling apparatus, are jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures and tools therein, "the lot or tract of land whereon the said distillery is situated, and on any building thereon, from the time said spirits are in existence as such until the said tax is paid." § 3251. If the distiller "defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or any part thereof," he shall "forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw

materials for the production of distilled spirits found in the distillery and on the distillery premises," and shall be fined not less than $500 nor more than $5000, and be imprisoned not less than six months nor more than three years. § 3257. The bond of the distiller shall not be approved "unless he is the owner in fee, unencumbered by any mortgage, judgment or other lien of the lot or tract of land on which the distillery is situated, or unless he files with the collector, in connection with his notice, the written consent of the owner of the fee, and of any mortgagee, judgment creditor or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment or other incumbrance, and that in case of the forfeiture of the distillery premises, or of any part thereof, the title of the same shall vest in the United States, discharged from such mortgage, judgment or other incumbrance." § 3262.

What effect did the above waivers in favor of the United States have upon the title to the tract of land on which the distillery stood? That is the vital question in this case. The contention of the defendant is, that those waivers entitled the government, when enforcing its claim for taxes, to treat the premises just as if they were owned by the delinquent distiller. This view is based upon that part of § 3262 requiring the waiver to show the consent of the owner of the fee, or of the mortgagee judgment creditor or other person having a lien thereon, that the premises be used for the purpose of distilling spirits, "subject to the provisions of law." But this does not mean that an interest in the premises passes by the waiver to the distiller, even for a time. It is true that the person executing the waiver, whether he owns the fee or holds simply a lien upon the premises, consents that the taxes accruing to the government shall be a first lien on the distillery and on the lot or tract of land on which it stands. This construction is supported by the requirement that the waiver shall expressly stipulate that the lien of the United States for

taxes and penalties shall have *priority* of any mortgage, judgment or other incumbrance held by the person giving the waiver. In other words, if the person executing the waiver owns the fee, the government, with his consent, is to have a first lien on the distillery premises; if he holds an incumbrance simply, then the lien of the United States is to have priority over that incumbrance. But in neither case, does the distiller acquire an interest in the premises; in neither, does the government acquire anything more than a first or prior lien.

But in what mode may the government enforce its prior lien? In order to collect the taxes due from Hinds, the distiller, it might have instituted a suit in equity, to which not only the distiller, who had simply a leasehold interest, but all persons having liens upon, or claiming any interest in, the premises could be made parties; in which suit, it would have been the duty of the court to determine finally the merits of all claims to and liens upon the property, and to order a sale distributing the proceeds among the parties according to their respective interests. Of course, the United States having, by stipulation, priority of lien, would have been first paid out of the proceeds. But no such course was pursued. The officers of the government preferred to adopt the summary method of sale by the collector upon notice and publication, as provided for in § 3197. It may be conceded that if the distiller had been the owner of the fee, a sale in that mode would have passed *his* interest subject to the rights of any prior incumbrancer, and subject to the right of any subsequent incumbrancer to redeem the premises. But the delinquent distiller had no interest except a leasehold interest, and that expired, as we have seen, on the 1st of May, 1877. We are of opinion that the collector's sale in the summary mode prescribed in § 3197 passed, and under the statute could have passed, nothing more than the interest of the delinquent distiller. When the collector distrains and sells personal property for taxes, his certificate, by the express words of the statute, (§ 3194,) transfers to the purchaser the right, title and interest of the *delinquent* in the property sold. When he

sells real estate for taxes, the statute, in terms equally explicit, (§ 3199,) declares that his certificate of purchase shall be considered and operate as a conveyance of the right, title and interest the *party delinquent* had in the real estate so sold. Now, if Congress intended to invest the collector with authority to sell, by the summary process of notice and publication, the interest of any other person than the delinquent distiller, the statute would have described a certificate that would pass the interest of such person in the property sold. The provision that the certificate of purchase shall pass the interest of the delinquent in the property sold by the collector excludes, by necessary implication, the interest of any other person. This is made clear by the fact that the statute, in the case of a sale by the collector, requires notice to "the person whose estate it is proposed to sell," (§ 3197,) which person is, of course, the one who is delinquent in the matter of taxes. Any other construction would impute to Congress the purpose, in order that the taxes against the delinquent distiller, having only a leasehold interest, might be collected, to seize and sell the interest of the owner of the fee, and to destroy the lien of an incumbrancer, without giving either an opportunity to be heard.

It is said that, under this interpretation of the statute, the execution of the waiver was a useless requirement, since, without such waiver, the government had the right to sell the leasehold interest of the tenant distiller. This view is more plausible than sound. By the waiver the government acquired one thing it would not have had without it; namely, a lien upon the premises prior to that held by Coates as security for the notes specified in the deed of trust to Westover. And it acquired the right, by a suit in equity, to have sold, under the decree of a court, not only the distiller's leasehold interest, but the fee in the premises, and to have obtained priority in the distribution of the proceeds over the person giving the waiver, whatever his interest might have been. It is of no consequence that the collector's notice of sale did not specify the leasehold interest as the thing he proposed to sell. His authority to sell, upon notice and publication, was given by

the statute, and was fettered by the condition that he could give a certificate of purchase passing the interest of the delinquent. He had no authority, in that summary mode, to sell and convey the interest of one who was not a delinquent. His deed — if construed as conveying anything more than the interest of the government — shows upon its face, in connection with the statute, that he attempted to convey what he had no power to convey, the fee in the premises. As a conveyance of such fee, it was a nullity. The government neglected to pursue the only mode by which the fee could be sold; namely, a suit in equity, in which all persons interested in the property could have been made parties. When the distiller was in default in respect to taxes, it was for the proper officers of the government to elect whether they would seek satisfaction of its demands by means of a seizure and sale by the collector of the distiller's interest only, or by a suit to which all persons having claims upon the premises on which the government had a lien should be made parties. They chose to adopt the former method, under which only the interest of the delinquent distiller could be seized and sold. That interest being only a leasehold interest, the purchaser at the collector's sale acquired nothing more.

Some stress is laid upon the fact that the property was not redeemed from the collector's sale within the time prescribed by the laws of Illinois. It is sufficient to say that no redemption was necessary. All that the purchaser got was the leasehold interest of the distiller, and that, it is agreed, ceased in May, 1877.

It is proper to say that the proceedings for the sale of these premises were not taken under any provision of the statute relating to the title vesting in the United States in case of the forfeiture of the distillery premises. A forfeiture could not have occurred unless the distiller defrauded, or attempted to defraud, the government of the taxes due from him. Sec. 3257; *United States* v. *Stowell*, 133 U. S. 1. It is admitted that there was no ground for forfeiture by reason of the non-payment of the taxes due from the distiller Hinds.

Syllabus.

Upon the whole case we are of opinion that the legal title of the plaintiff must prevail in this action.

The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff.

YALE LOCK MANUFACTURING COMPANY *v.* BERKSHIRE NATIONAL BANK.

BERKSHIRE NATIONAL BANK *v.* YALE LOCK MANUFACTURING COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 261, 262. Argued April 11, 14, 15, 1890. — Decided May 5, 1890.

Claim 3 of reissued letters patent No. 7947, granted November 13, 1877 to James Sargent, for an "improvement in combined time-lock, combination lock, and bolt-work for safes," the original patent, No. 195,539, having been granted to Sargent, September 25, 1877; namely, "3. The combination, with the bolt-work of a safe or vault-door, of a combination or key lock controllable mechanically from the exterior of said door, with a time-lock having a lock-bolt or obstruction for locking and unlocking controllable from the interior of the door, both of said locks being arranged so as to rest against or connect with the bolt-work, the time-lock being automatically unlocked by the operation of the time-movement, both of said locks being independent of each other, and arranged to control the locking and unlocking of the bolt-work, so that said safe or vault-door cannot be opened when locked until both of said locks have been unlocked or have released their dogging action, to enable the door to be opened, substantially as described," is invalid, because the specification of the original patent was not defective or insufficient, and the patent was not inoperative; and the sole object of the reissue was to obtain claim 3 as an enlarged claim; and the proceedings in the Patent Office prior to the granting of the original patent show that Sargent abandoned that claim; and because, although the reissue was applied for only 13 days after the granting of the original patent, there was not a clear mistake, inadvertently committed, in the wording of a claim.

Claims 1 and 7 of reissued letters patent No. 8550, granted to the Yale Lock Manufacturing Company, January 21st, 1879, for an "improve-

ment in time-locks," the original patent, No. 146,832, having been granted to Samuel A. Little, as inventor, January 27th, 1874, and having been reissued as No. 7104, to that company, May 9th, 1876, and again reissued to it, as No. 8035, January 8th, 1878; namely, "1. The combination of independent multiple bolt-work with the time mechanism and locking or dogging mechanism of a time-lock, automatically both dogging and releasing the bolt-work at predetermined times, substantially as described." "7. In a time-lock, the combination, substantially as above set forth, of the time movements and two adjustable devices, one for determining the time of locking, and the other of unlocking," are invalid, because the original patent was not inoperative or invalid by reason of a defective or insufficient specification, within the terms of the statute, so as to warrant the reissues; and because the claims are enlarged; and because of the unexcused delay of more than two years in applying for a reissue; and because the claims were formally abandoned during the proceedings in the Patent Office.

IN EQUITY. The case is stated in the opinion.

Mr. George Ticknor Curtis and *Mr. Edmund Wetmore* for the Yale Lock Manufacturing Company, Sargent and Greenleaf.

Mr. William C. Cochran for the Berkshire National Bank and Hall's executors.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought January 29, 1879, in the Circuit Court of the United States for the District of Massachusetts, by the Yale Lock Manufacturing Company, a Connecticut corporation, and James Sargent and Halbert S. Greenleaf, composing the firm of Sargent & Greenleaf, against the Berkshire National Bank, a national banking corporation doing business at North Adams, in Massachusetts.

The suit was brought for the infringement of two reissued letters patent. One of them is reissue No. 7947, granted November 13, 1877, to James Sargent, as inventor, for an "improvement in combined time-lock, combination lock, and bolt-work for safes," on an application filed October 8, 1877, the original patent, No. 195,539, having been granted to Sargent, September 25, 1877. Only claim 3 of reissue No.

7947 is alleged to have been infringed. The other reissue is No. 8550, granted to the Yale Lock Manufacturing Company, January 21, 1879, on an application filed October 14, 1878, for an "improvement in time-locks," the original patent, No. 146,832, having been granted to Samuel A. Little, as inventor, January 27, 1874, and having been reissued as No. 7104, to the Yale Lock Manufacturing Company, May 9, 1876, and again reissued to that company, as No. 8035, January 8, 1878. Only claims 1 and 7 of reissue No. 8550 are alleged to have been infringed.

After the filing of the bill, and by agreement of the parties, Joseph L. Hall, of Cincinnati, Ohio, was admitted as a defendant. An amended bill was filed, and the bank and Hall answered it. As to both reissues, the answer denied that, before they were granted, the patents were inoperative by reason of a defective or insufficient specification; that any errors arose by inadvertency, accident and mistake; that any reissues were necessary or are valid; and that the reissues were for the same inventions as were shown and described in the original patents. It also set up want of novelty and non-infringement.

After replication, proofs were taken on both sides, and the case was heard in the Circuit Court by Judge Lowell. His opinion is reported in 17 Fed. Rep. 531. He held that claim 3 of the Sargent reissue, No. 7947, was invalid, and ordered a decree for the plaintiffs as to claims 1 and 7 of the Little reissue, No. 8550. On the 14th of August, 1883, an interlocutory decree was entered, adjudging reissue No. 8550 to be valid, as to claims 1 and 7; that the defendants had infringed those claims; and ordering a reference to a master to take an account of profits and to report damages.

In July, 1884, the defendants were allowed to amend their answer by setting up an additional anticipation of the Little patent, proofs were taken thereon, and the case was reheard, before Judge Colt, on the new evidence. He affirmed the former decree, in an opinion reported in 26 Fed. Rep. 104.

The master reported $60 damages in favor of the plaintiffs, and both parties excepted to the report. A final decree was

entered on the 12th of February, 1886, confirming the report, overruling the exceptions of both parties and adjudging a recovery in favor of the plaintiffs for $60 damages and certain costs, dismissing the bill as to the Sargent reissue, No. 7947, and awarding a perpetual injunction as to claims 1 and 7 of the Little reissue, No. 8550. From this decree both parties have appealed. Joseph L. Hall having died, his executors and trustees have been made parties in his place.

The respective specifications and claims of the original Sargent patent, No. 195,539, and of its reissue, No. 7947, are set forth below in parallel columns, the parts in each which are not found in the other being in italic. The drawings are the same in both.

Original patent, No. 195,539.

"Be it known that I, James Sargent, of the city of Rochester, in the county of Monroe and State of New York, have invented a certain new and useful improvement in locks; and I do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the accompanying drawings, in which figure 1 *is an elevation of my improvement applied to* a safe-door. Fig. 2 *is a section of the* bolt *of the* time-lock. Fig. 3 *is* an inside view of *the same.* Fig. 4 represents detached views of the *dial*, pallet, and escape-wheel. Fig. 5 *is a* bolt *constructed as integral with the holding-latch.*

Reissue No. 7947.

"Be it known that I, James Sargent, of the city of Rochester, in the county of Monroe and State of New York, have invented a certain new and useful improvement in *combined time*-locks, *combination-locks, and bolt-work for safe and vault doors;* and I do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the accompanying drawings, in which figure 1 *illustrates a portion of* a safe *or vault* door *having thereon a time-lock and a combination lock, both of said locks being represented in a locked condition, with the bolt-work projected and locked.* Fig. 2 *illustrates one form of lock-*bolt *or obstruc-*

tion for use in a time-lock. Fig. 3 *illustrates* an inside view of *said lock-bolt or obstruction.* Fig. 4 represents detached views of the pallet and escape-wheel, *and a portion of one of the revolving dials.* Fig. 5 *illustrates another form of lock-*bolt *or obstruction for use in connection with the time-lock for admitting of locking or unlocking of the bolt-work.*

"*My invention consists, first, in the combination with the bolt-work of a safe or vault-door, of a time-lock and a combination or key-lock, both constructed to be applied on a safe, vault, or other door, so as to rest against or connect with the bolt-work on said door, and provided with a device whereby the bolt-work may be retained in the unlocked position for shutting the door, and be automatically locked by the lock-bolt or obstruction of the time-lock, and mechanically by the combination or key lock, the whole so arranged that the bolt-work cannot be withdrawn when locked till both locks have been unlocked; second, in the combination of a time-lock and a combination or key-lock, both constructed to be applied on a safe, vault, or other door, so as*

to rest against the bolt-work, each of said locks being provided with a lock-bolt or obstruction, that of the combination-lock or key-lock being of the usual construction, while that of the time-lock has an opening or offset, which is automatically brought into and out of coincidence with the tongue of the bolt-work, whereby the bolt-work may be retained in the unlocked position for shutting the door, and prevented from being retracted when locked, until both locks have been unlocked; third, in the combination, with the bolt-work of a safe or vault-door, of a combination-lock, controllable mechanically from the exterior of said door, with a time-lock, controllable automatically for unlocking by the operation of its time mechanism, both of said locks arranged to control the locking and unlocking of the bolt-work, so that said safe or vault-door cannot be opened when locked until both of said locks have been unlocked or released their dogging action to enable the door to be opened, substantially as hereinafter described.

"*My improvement relates to that class in which two independent locks are employed*

"*The construction and arrangement of the time-lock will be more fully hereinafter de-*

upon a safe, vault, or other door for the purpose of preventing the unlocking of the door-bolts until both locks have been unlocked. Combination or key-locks have *only* heretofore been used for *this* purpose, *so far as I am aware.* As such locks are set on combinations, or operated by means of keys, burglars can force the holders of the combination or key to unlock the *door, and hence* such locks are not a *perfect* safeguard against robbery. Clock-locks have also been used upon doors for the purpose of opening the door *only* at a determined hour, thus placing it beyond the power of any person to open the door *until that hour arrives;* but *so* far as I am aware, such locks have either been used singly on a door (*in which case* when *the* lock *releases* the bolt or other fastening the door *is* unlocked and *may* be opened by any one,) or *else* a time-movement *has* been combined *directly* with a lock in such a manner that the two really *constitute* but a single lock, *in which case* if violence *is* applied to *the* lock *it at once destroys* the efficiency of the time movement.

scribed; but it is evident that any form or construction of a time-lock may be used as a part constituting one element of the combination called for in my claims.

"Combination or key-locks have heretofore been used *by bankers and others* for *the* purpose *of preventing the unlocking of the bolt-work of a safe or vault-door; but* as such locks are "set on" combinations, or operated by means of keys, burglars can force the holders of the "combination" or key to unlock the *combination-lock or locks, and thus admit of the bolt-work being retracted and the door thrown open. Therefore* such locks are not a safeguard against robbery.

"Clock-locks have also been used upon *safe or vault*-doors for the purpose of opening the door at a *pre*-determined hour, thus placing it beyond the power of any person, *until the arrival of the appointed time,* to open the door; but *as* far as I am aware such *clock*-locks have either been used singly on a *safe*-door, *so that,* when *said* lock *released* the bolt-*work* or other fastening *of* the *said* door *it was* unlocked, and *the door could* be opened by

"*My invention consists, primarily, in the combination, with the door-bolt, of a clock-lock and a combination or key-lock applied separately upon the door, having each an independent action, whereby the clock-lock will not release its bolt until a certain determined hour, and when it does release its bolt the combination or key-lock still remains locked and secures the door.*

"*My invention further consists in combining a clock-lock with a combination or key-lock, both constructed to be applied on a safe, vault, or other door, to operate in connection with the bolt-work of such door, said clock-lock being provided with a lock-bolt constructed with an opening or offset, which is automatically brought in and out of coincidence with the tongue of the door-bolt in such a manner that the door-bolt may be retained in an unlocked condition for shutting, and prevented from being withdrawn when locked until both locks have been unlocked, the prime object being that each lock shall have an independent action, so that the clock-lock will not release the bolt until a certain determinate hour, and when it does release its bolt the combination* any one, or, *in another instance, when* a time-movement *had* been combined with a *combination*-lock in such a manner that the two really *constituted* but a single lock, *the time mechanism constructed and provided with a lever to engage with the fence or dog of the combination-lock, so that the entire mechanism of the time-movement and combination-lock really constitute but a single lock, as aforesaid, the result being that,* if violence *be* applied to *such a* lock *through the dial spindle or otherwise,* the efficiency of the time-movement *will be destroyed.*

or key-lock still remains locked and secures the door.

"A *represents the* combination or key-lock, and B the *clock*-lock. These locks are *provided with* bolts C D, *of any desired kind, against which strike the* studs *a a' of the tie-piece* E. *When the locks are locked, the bolts hold said studs out and both locks have to be unlocked to allow the door-bolt to retract.*

"*Referring to the drawings, the letter* A *designates a* combination or key-lock, and B the *time*-lock. These locks are *illustrated as being upon a portion of a safe or vault-door, with the bolt-work projected and locked, the lock-bolts or obstructions being in a locked position. The lock*-bolts *or obstructions* C D *are, in the present example, shown as being constructed each with a notch or recess, so that, when said notches or recesses are brought in line with the tongue-pieces or* studs *a a', arranged upon the carrying-bar* E *of the bolt-work, they (the said tongue-pieces or studs) can, by a movement of the bolt-work, be made to enter said notches or recesses, and thus the bolt-work can be retracted and the safe or vault-door thrown open. When the bolt-work is projected or cast so as to lock the safe or vault-door, the lock-bolts or obstructions can be brought into a locked position, the lock-bolt or obstruction of the combination-lock being placed in a locked position by mechanically operating the dial-spindle, which controls the movements of the tumblers and*

"The *locks A B* are separate *and independent of* each other, and complete in *themselves*, and may be *located* at any position on *the* door. The combination or key-lock *will naturally* be located in line with the spindle *that* operates it; but the *clock*-lock may be *placed* anywhere where space is *best found* for it *on the door*, and the *stud a'* of the *door*-bolt, *which connects* with *it*, *may be lengthened*, *bent*, *or otherwise arranged to* rest against the lock-*bolt in whatever* position *it may be*, *as shown in Fig. 1.*

other portions of the lock, while the lock-bolt or obstruction of the time-lock will automatically bring itself into a locked position after the door is closed, whereby the door of the safe or vault will be locked and guarded by two locks, one of which is operated from the exterior mechanically, while the other operates on the interior automatically, there being no hole through the door whereby it might be operated upon by any mechanical means.

"The *combination-lock and the time-lock* are separate *from* each other *in performing their office or function with respect to the bolt-work on the safe or vault-door*, and *each of said locks should be* complete in *itself*, and *so constructed that they* may be *placed* at any position on *a safe or vault*-door.

"The combination or key-lock *should* be located in line with the *dial*-spindle *or key which* operates it, but the *time*-lock may be *located* anywhere *on the safe or vault-door* where *sufficient* space is *present* for it, and the *tongue-pieces or studs on the carrying-bar* of the bolt-*work may be of any required length, bent or otherwise arranged so as to connect* with *or*

"*In locking* the safe or vault-door some device *is necessary* to *allow* the *door*-bolt *to remain back in the* unlocked position *until* the door *is* closed, *without interfering with the clock-lock.*

rest against the lock-*bolts or obstructions, when the latter is moved to the proper* position *for obstructing or dogging the bolt-work, and prevent its retraction or unlocking, thus retaining the door in a locked position until both locks have been unlocked.*

"*When it is desired to lock or fasten the bolt-work of* the *safe* or vault-door *by means of a combination-lock and a time-lock,* some *mechanical arrangement or* device *should be employed* to *enable* the *lock-*bolt *or obstruction of the time-lock to be set or adjusted while the safe-door is open and the bolt-work in a retracted or* unlocked position, *so that* the door *can be* closed *to admit of the bolt-work being projected or cast. The lock-bolt or obstruction will, as hereinafter set forth, present its lock-bolt or obstruction automatically, thus securing the door in a locked position until the arrival of the time determined by the time mechanism or register, at which time the lock-bolt or obstruction will be automatically moved and brought into a position for admitting of the releasing and unlocking of the bolt-work, so that said door can be opened.*

"*To accomplish such mechanical arrangement or device in the time-lock, a lock-bolt or obstruction is employed in the time-lock itself, or by means of an adjustable tongue-piece or stud connected with the carrying-bar of the bolt-work — such, for instance, as those illustrated in Figs.* 1, 2, 3, 5 *of the accompanying sheets of drawings.*

"*The lock-bolt or obstruction D, illustrated in Figs.* 1, 2, *and* 3, *is one of the devices that should be employed to enable the time-lock to be set while the bolt-work remains in a retracted or unlocked position, so that the bolt-work will remain in such retracted position without interfering with the time-lock, the combination-lock, of course, during such interval, being in an unlocked position, and through such mediums the bolt-work when projected for closing the door will be held in a locked position by the automatic movement of the lock-bolt or obstruction of the time-lock, and by the lock-bolt of the combination-lock, which is brought into a locked position by the mechanical operation of the dial-spindle.*

"*In Fig.* 1 the bolt *D* of the *clock*-lock is constructed in two

"The *lock*-bolt *or obstruction* of the *time*-lock is constructed

parts, D′ D², *turning* independently on the same *bearings c.* The inner part, D², has *the socket d*, into which the stud *of the door-bolt* enters *in drawing back. It* is connected to the outer part, D′, by a *coiled* spring, *f*, *Fig.* 3, resting in a cavity in the side of the outer part. The outer part is also connected by a *similar coiled* spring, *g*, with the *fixed* bearing, *c. Instead of the spring g it may have a counter-weight, g′, Fig.* 5. The spring *g* causes the outer part, D′, to *turn back or fall*, so that the *socket d* of the inner part *comes in* position to allow the *stem a′* of the *door-bolt* to enter *therein.* When *this is done*, the outer part is turned *up* to engage the *dog*, (*presently to be described,*) while the inner part remains stationary *on the stem of the door-bolt. The door is then shut and the door-bolt thrown out, and the tension of the spring g causes the part D² to turn when released, thereby locking the door-bolt.* The parts D¹ D² are *provided* with suitable stops, by which *the* motion is *gaged* to bring the *socket* of the part D² in proper position in its *throw.*

in two parts, D¹ D² *adapted to turn* independently *of the other* on the same *bearing c.* The inner part, D², has *a notch or recess, d*, into which the *tongue-piece or* stud *on the carrying-bar* enters *when the bolt-work is retracted, so as to open the safe or vault-door if the combination-lock be unlocked. The said inner part D²* is connected to the outer part D¹ by a spring, *f*, resting in a cavity *or recess* in the side of the outer part. The outer part *D¹* is also connected by a spring, *g*, with the bearing *c.* The spring *g being connected with the outer part D¹, and with its bearing c*, causes the outer part D¹, to *be moved or turned on its axis*, so that the *notch, recess, or offset d* of the inner part *D² is brought into a* position to allow the *tongue or stud a′* of the *carrying-bar* to enter *it, and thus the bolt-work can be retracted, and* when *so retracted* the outer part *D¹* is turned *or moved, and made* to *connect and* engage *with* the *portion of a yoke*, while the inner part *D²* remains stationary, *being prevented from moving or turning on its axis by the tongue-piece or stud on the carrying-bar resting in the notch*

"*The device above described forms a part of the clock-lock, being the bolt of the same. In Fig.* 1 *is shown another device for the same purpose, situated outside the lock, which is the subject-matter of a separate application. It consists of a socket or bearing, h, attached to the tie-piece E of the door-bolt and sliding on an independent stud, a', resting against the lock-bolt. A spring locking-pin, i, is used to connect the parts when the door-bolt is thrown forward to connect with the jamb. In this case the lock-bolt D may be made solid, and may be either of the turning or sliding kind.*

"*The parts constituting the lock-bolt or obstruction, and forming a part of the time-lock, being thus constructed, arranged, and adjusted, the time mechanism having been previously wound, and the dials set for a certain predetermined time, the bolt-work is projected or cast, when the lock-bolt or obstruction of said time-lock will automatically be brought into a locked position, and the door of the safe or vault securely guarded by a combination-lock, if it be locked, and a time-lock, and the bolt-work be or recess of the part* D^2 *of the bolt-lock or obstruction.*

prevented from being retracted, or the safe or vault-door opened, until both locks have been unlocked.

"The parts D^1 D^2 *composing the lock-bolt or obstruction* are *supplied* with suitable stops, by which *their* motion *or throw* is *limited so as* to bring the *notch recess, or offset* of the part D^2 in proper position in its *rotation to coincide with the tongue-piece or stud on the carrying-bar of the bolt-work.*

"*In lieu of forming the lock-bolt or obstruction in two parts, as above described, it has been found eminently practical and successful to employ a lock-bolt or obstruction made in a single piece, or as an integral. Such a lock-bolt or obstruction is shown in Fig.* 5 *of the drawing, and, as it will be perceived, it is constructed with a notch, recess, or offset, to admit of a tongue-piece or stud entering it when the bolt-work is retracted for unlocking the safe or vault-door, and said lock-bolt or obstruction is likewise provided with an arm, g', having a pin or stud for connecting or engaging with a yoke in such a manner that when said arm and yoke are in connection the lock-bolt or obstruction will be*

placed so as to prevent the retraction of the bolt-work, and when said arm and yoke are disconnected through the medium of revolving dials, to be hereinafter mentioned, the lock-bolt or obstruction will be automatically brought to a position for allowing the bolt-work to be retracted, and such automatic movement of the lock-bolt or obstruction is due to the action of the arm g' acting as a counterweight.

"*When a lock-bolt or obstruction of the character last described is employed, some provision must be made for adjusting and setting the time-lock or the lock that measures time, prior to closing the safe or vault-door, and this must be accomplished while the bolt-work is in a retracted position; therefore to enable such to be done, there is arranged on the carrying-bar of the bolt-work a socket or bearing, which is provided with a movable tongue-piece and a spring-bolt, constructed and arranged in such a manner that when the spring-bolt is moved out of contact with the socket or bearing of the movable tongue-piece or stud of the carrying-bar, it, together with the bolt-work, can be retracted as the*

socket or bearing on said carrying-bar moves or slides along the tongue-piece or stud in a longitudinal direction, one end of it bearing upon the lock-bolt or obstruction of the time-lock, and in such condition the safe or vault-door can be closed, and when the bolt-work is projected or cast into the jamb of the door, the socket or bearing moves along the tongue-piece until the spring-bolt engages with it, when it — the socket or bearing — will be automatically locked in place, and the bolt-work, performing its office, will securely fasten the safe or vault-door, upon which the combination-lock is placed, together with the time-lock.

"*From the foregoing it will be seen that the lock-bolt or obstruction shown in several figures are each stationary except during the brief interval of time when locking or unlocking is being effected, and that each is adapted to be turned on its pivot or bearing for obstructing or dogging the bolt-work for preventing its retraction or for releasing the bolt-work at the time appointed, so that it can be retracted; and it should be noticed that the lock-bolt or obstruction of the time-lock is so*

"*G is a dog for holding the lock-bolt D up in the locked position. It turns on an axis, k, and its point* engages under a stop, *l*, preferably a roller, *of the bolt when the latter is raised. It is held in engagement by a light spring, j. The dog has two branching arms, m, m, projecting inward over the faces of the dial-wheels H H. The dial-wheels have pins n n projecting out from their faces, and when they or either of them strike the levers m m they release the dog from its engagement with the bolt and the latter turns back or falls, thereby unlocking the lock, as before described.*

located in the time-lock that if pressure be exerted upon the lock-bolt or obstruction by force applied to the bolt-work, such pressure will not be transmitted to the delicate workmanship forming part of the time-lock, for the lock-bolt or obstruction, so to speak, is isolated from the time mechanism, in order to bring and retain the lock-bolt or obstruction in a position to have the same obstruct and prevent the retraction of the bolt-work, or to move it to release the bolt-work, whereby the same may be retracted.

"*There is arranged within the time-lock a yoke, G, which is capable of being oscillated or turned on its axis or pivot, said yoke being acted on by two rotating dials, H H, in such a manner that said yoke will be operated by either or both of said dials at the predetermined time for which said revolving dials have been set.*

"*In the example shown in the time-lock in Fig.* 1, *the yoke* engages under a stop, *l*, preferably a roller, *arranged on the lock-bolt or obstruction, and when the latter is brought into a position for obstructing the bolt-work, to prevent its retraction until the arrival of the*

"*I prefer* to use two independent time-*movements or* *predetermined time, while in the example shown in Fig.* 5 *said yoke connects or engages with the bolt-lock or obstruction.*

"*In both examples the yoke retains the lock-bolt or obstruction in a position for obstructing and preventing the retraction of the bolt-work until the arrival of the predetermined time for which the revolving dials carrying pins have been set.*

"*The arms or members m m of the aforesaid yoke extend over a portion of the revolving dials, from which project pins, and when either of said pins comes in contact with the arms or members of said yoke, which will occur at the arrival of the time previously determined upon when setting the revolving dials, it (the said yoke) will be operated or turned on its axis or pivot, and release the lock-bolt or obstruction, and leave the same to be brought into a position to permit the bolt-work to be retracted, which is accomplished by turning the knob or handle connected with the carrying-bar, said knob or handle being on the outside of the safe or vault-door.*

"*It is preferred* to use two independent time *mechanisms*,

clocks, each connected with and operating one of the *dial-wheels H*, so that if one *movement* should accidentally stop the other would be sure to *unlock the lock.*

"The *dial-wheels* are indexed or marked with a scale *of hours* from 0 to 48, or any other number corresponding with each connected with and operating one of the *revolving dials*, so that if one of *the time mechanisms* should accidentally stop the other would be sure to *operate the yoke, and by its movement release the lock-bolt or obstruction, which would automatically assume such a position as to present an unobstructed pathway for the tongue-piece or stud to move in and thus the bolt-work could be released and be left free to be withdrawn or retracted.*

"*The revolving dials are cogged — that is, provided with teeth, which engage with the arbor O of the mainspring-barrel, either directly or by means of the pinion p attached to said arbor, or through intermediate gearing — so that the setting of the time mechanism for operating the yoke at any given time will necessarily wind up the time mechanism, to the extent, at least, that it will unwind by the arrival of the predetermined time at which the lock-bolt or obstruction is to be released for enabling the bolt-work to be retracted.*

"The *revolving dials* are indexed or marked with a scale from *zero* (0) *upward* to 48, or any other number correspond-

the longest interval the lock is to *remain locked* at one time — say from Saturday night to Monday morning. This scale is used in conjunction with a pointer, *e, at the top of the wheel.* In setting the lock the *dial-wheels* are moved backward from 0 to any number in the scale that will indicate the number of hours the safe or vault is to remain closed; and the pins *n n* must be so *located* with reference to the *scale* as to *strike* the *levers m m and* release the bolt when the 0 mark *comes forward to* the pointer. *The time-movements or mechanism may be of any ordinary construction to measure time.*

"*Each of the dial-wheels H H is cogged, and engages with* the arbor *o* of the mainspring-barrel *either directly by means of the pinion p attached to said arbor or through intermediate gearing. The arbor o is the stem by which the clock is wound.*

"*When the clock is finished, it is fully wound up before the dial-wheel is adjusted in place. The motion is then imparted to the dial-wheel, which runs forward to unlock the lock, and in moving the dial-wheel back to* ing with the longest interval the *time*-lock is to *present its lock-bolt or obstruction to obstruct the bolt-work* at one time — say, from Saturday night to Monday morning. This scale is used in conjunction with a pointer *or index, e, arranged in the time-lock above the revolving dials.*

"In setting the *time*-lock the *revolving dials* are *turned or* moved backward from *zero* (0) to any number in the scale that will indicate the number of hours the safe or vault-*door* is to remain closed *or locked,* and the pins *n of the revolving dials* must be so *adjusted* with reference to the *yoke* as to *come in contact with* the *arms or members m m of the yoke, so that either or both of the said arms or members will act upon the yoke, causing it to move so as to* release the *lock*-bolt *or obstruction of the time-lock* when the *zero* (0) mark *arrives at* the *index or* pointer.

"*The winding up of the time mechanism and the setting of the revolving dials is performed simultaneously by imparting proper motion to* the arbor *o* of the mainspring-barrel.

"*The revolving dials are provided with* a pin, *r, as shown*

reset the lock the clock is re-wound.

"The dial-wheel is turned back to *reset* the lock by a key applied at the winding-arbor *o*.

"By the means above described I obviate a great objection to common clock-locks, which run on until they run down, thus subjecting the lock to the danger of *being locked in* by neglect of winding. By this means the lock cannot be *reset* without winding, for the pins *n n*, resting in contact *in* Fig. 4, *the same serving as* a stop.

"On the pallet *s*, which engages with the *escape*-wheel *t*, is a pin, *u*, which projects out through a slot, *v*, of the stationary *time-mechanism* frame, *the whole arranged in such a manner that* as soon as the *revolving* dial has acted upon the *yoke for causing it* to *release* the lock-*bolt or obstruction*, the pin *r*, of the *said revolving* dial *will strike* the pin *u* of the pallet, and *lock* the latter in the *escape*-wheel, thereby stopping the *time mechanism*, *so that* there *will be* no loss of *power*, *as it is intended that the time-lock should be wound up when first finished, prior to adjusting in place the revolving dials; and, further by stopping the time mechanism, as above described, the revolving dials cannot* get out of position with respect to the *index or* pointer.

"*By my invention the time-lock cannot be reset without winding, for the pins of the revolving dials, resting in contact with the arms or members of the yoke, prevent it from being brought into action with the lock-bolt or obstruction until the revolving dials have been moved back the number of hours*

with the *levers m m, prevent the dog G from being* engaged with the bolt until the dial-wheels have been moved back, as described. The *relocking* of the lock *therefore* requires rewinding of the *clock* as a necessity.

"*On the back of the dial-wheel H is* a pin, *r*, Fig. 4, *forming* a stop. On the pallet *s*, which engages with the *scape*-wheel *t*, is a pin, *u*, which projects out through a slot, *v*, of the stationary *clock*-frame. As soon as the dial-*wheel* has acted upon the *lever m* to *unlock* the lock the pin *r* of the dial-*wheel strikes* the pin *u* of the pallet and *locks* the latter in the *scape*-wheel, thereby stopping the *clock*. There *is*, *therefore*, no loss of *motion*, *nor can the dial-wheel* get out of position with respect to the pointer.

"By combining an independent *clock*-lock and combination or key-lock *with the door-bolt*, *as described*, I produce an effect which cannot be produced by a *clock*-lock alone or by two or more combination-locks together. The *for which it is designed to obstruct the bolt-work. Thus* the *resetting* of the *time*-lock requires rewinding of the *time mechanism* as a necessity, *and hence no danger of its being unlocked accidentally during the period of hours for which it is set.*

"The dial-wheel is turned back to *set* the *time*-lock by a key applied at the winding-arbor *o*.

"By the means above described I obviate a great objection to common clock-locks, which run on until they run down, thus subjecting the lock to the danger of *a 'lock-out,' caused* by neglect of winding.

"By this means the *time*-lock cannot be *set* without winding, for the pins *n n*, resting in contact with the *arms of the yoke*, *it* (*the yoke*) *cannot be* engaged with the *lock*-bolt *or obstruction* until the dial-wheels have been moved back *to set the lock*, as *before* described.

"By combining an independent *time*-lock *of the character described* and *a* combination or key-lock, I produce an effect *or result* which cannot be produced by a *time*-lock alone, or by two or more combination-locks together.

clock-lock serves as a safeguard by night *and the combination-lock by day. If the holder of* the combination *is* forced to open the combination-lock *at night*, the *clock*-lock *remains* intact, and cannot be opened by the burglars or the *holder* of the combination. *On the other hand, when the clock-lock releases its bolt in the morning, the combination-lock still remains locked, and burglars cannot make an entrance to the safe.* Such results cannot be accomplished by a *clock*-lock alone, because when it releases its bolt the safe is absolutely unlocked; nor by two or more combination-locks together, because the holders of the *combination* may be taken to the bank and forced to open the *lock*. Neither can tampering with the combination-lock affect the *clock*-lock.

"The *time*-lock serves as a safeguard by night, *in connection with the combination-lock, for holding the bolt-work in a locked condition; but when the time-lock releases the bolt-work at the appointed hour, the bolt-work will remain locked, and the safe or vault-door closed, until the combination-lock is unlocked by the holder of the combination on which said lock is set, when the bolt-work can be retracted and the door opened, thus leaving the time-lock free from performing any locking action, which leaves the combination-lock free for use during the day for locking or unlocking the safe or vault-door — an important desideratum present in my invention.*

"*If the time-lock present on the safe or vault-door is set for holding the bolt-work from the time the bank closes in the afternoon to release the bolt-work at a certain hour the next morning, it will admirably and with certainty perform its office, leaving the combination-lock to be opened before the bolt-work can be retracted; and should the officer of the bank holding* the combination *be seized during the night, carried to the bank, and* forced to open the combi-

"The combination-lock may be punched from *place*, but the *clock*-lock, being separate and independent from it, *and having no opening through the door*, cannot be affected. It is therefore superior to a lock which has the time-movement combined directly with the combination-lock, both forming one lock, in which case any violence to the lock-work disarranges the *clock*. Another advantage of *this* invention is the capability of the separate locks *of* being applied on different parts of the door indifferently. The bolt-work on different doors is frequently

nation-lock, the *time*-lock *will remain* intact, and cannot be opened by the burglars or the *officer in charge* of the combination. Such results cannot be accomplished by a *time*-lock alone, because when it releases its bolt-*work* the safe *or vault-door* is absolutely unlocked, *and no lock present for use during the day;* nor by two or more combination-locks together, because the holders of the *combinations* may be taken to the bank and forced to open the *locks*. Neither can tampering with the combination-lock affect the *time*-lock.

"The combination-lock may be punched from *its position by burglars;* but *then* the *time*-lock, being separate and independent from it, cannot be affected *or disturbed*, *because there is no opening through the door by which it can be reached.* It is therefore superior to a lock which has the time-movement combined directly with the combination-lock, both forming one lock, in which case any violence to the lock-work disarranges the *time-movement.*

"Another advantage of *my* invention is the capability of the separate locks being ap-

such that the *two locks* cannot be applied together. The *clock*-lock *in such case may be attached at the most convenient location, as before described. It can also* be applied with facility *on* old safes having the combination or key-lock already on, thus securing the advantage of a *clock*-lock and combination-lock without the necessity of removing the old lock *and substituting a new one having a time-movement combined directly with the lock.*

"I do not claim, broadly, a *clock*-lock; nor do I claim two or more combination-locks combined with the *door*-bolt; *but*

"I claim —

"1. The combination with *a door*-bolt, *E*, of a *clock*-lock, *B*, and a combination or key-lock, *A*, applied independently on a safe, vault, or other door, so as to rest against or connect with *said door*-bolt, and plied on different parts of the *safe or vault*-door, *with respect to the bolt-work*, indifferently.

"The bolt-work on different *safe or vault*-doors is frequently such that the *time-lock and the combination or key-lock* cannot be applied together; *but in such case the time-lock may be attached at the most convenient location, as no opening through the door is requisite.*

"The *time*-lock *can* be applied with *ease and* facility *to the doors of* old safes *or vaults* having the combination or key-lock already *there*on, thus securing the advantage of a *time*-lock and *a* combination *or key*-lock without the necessity of removing the old lock.

"I do not claim, broadly, a *time*-lock *of any peculiar construction;* nor do I claim two or more combination-locks combined with the bolt-*work of a safe or vault-door, as such are old and well known.*

"*What* I claim, *and desire to secure by letters-patent, is* —

"1. The combination, with *the* bolt-*work of a safe or vault-door* of a *time*-lock and a combination or key-lock, *both* applied independently on a safe, vault, or other door, so as to rest against or connect with

provided with a device whereby the *door*-bolt may be retained in the unlocked position for shutting the door, the whole arranged *so* that the *door*-bolt cannot be withdrawn, when locked, *until* both locks have been unlocked.

the bolt-*work on said door*, and provided with a device whereby the bolt-*work* may be retained in the unlocked position for shutting the door, *and be automatically locked by the time-lock and mechanically by the combination or key-lock when the bolt-work is cast*, the whole *so* arranged that the

Fig 1.

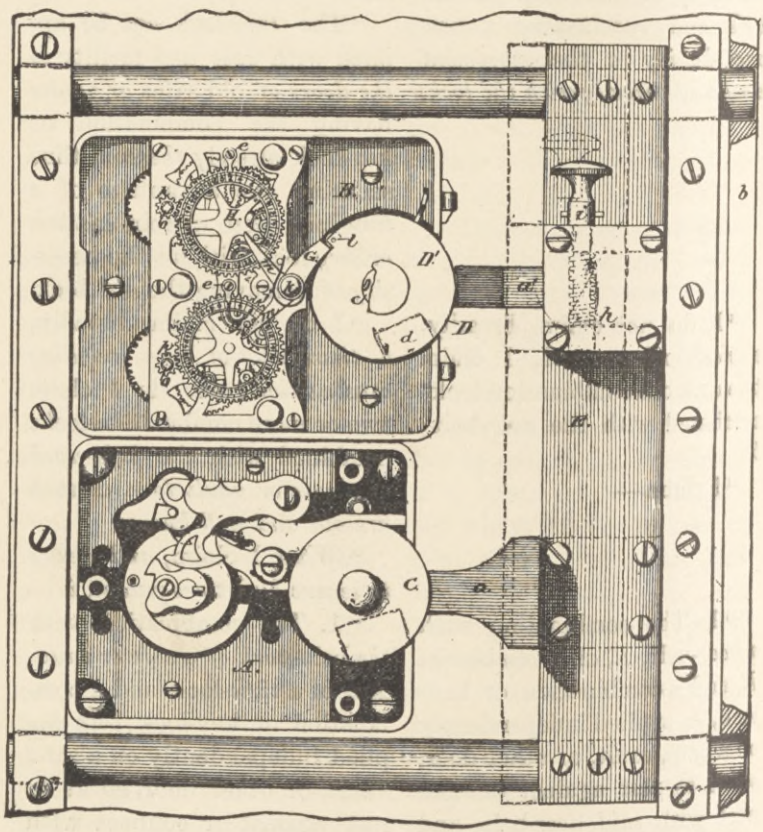


Fig. 2.

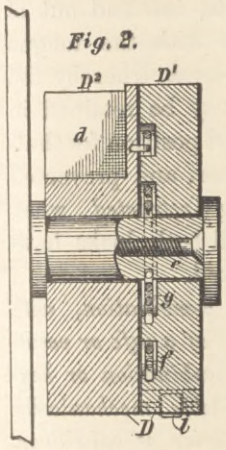


Fig. 3.

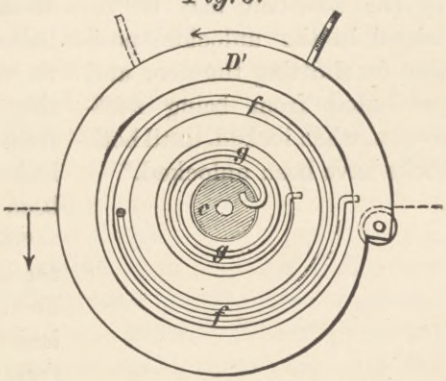


Fig. 5.

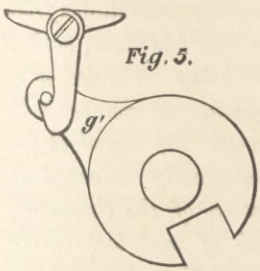
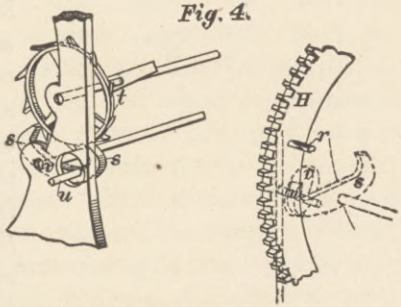


Fig. 4.



"2. The combination of a *clock*-lock and a combination or key-lock, both constructed to be applied on a safe, vault, or other door, so as to rest against the *door*-bolt, and provided with a lock-bolt having an opening or *an* offset, which is automatically brought *in* and bolt-*work* cannot be withdrawn when locked *till* both locks have been unlocked.

"2. The combination of a *time*-lock and a combination or key-lock, both constructed to be applied on a safe, vault, or other door, so as to rest against the bolt-*work* and provided with a lock-bolt *or obstruction* having an opening or offset, which is automati-

out of coincidence with the tongue of the *door*-bolt, whereby the *door*-bolt may be retained in the unlocked position for shutting the door and prevented from being *withdrawn*, when locked, until both locks have been unlocked."

cally brought *into* and out of coincidence with the tongue of the bolt-*work*, whereby the bolt-*work* may be retained in the unlocked position for shutting the door, and prevented from being *retracted* when locked, until both locks have been unlocked.

"3. *The combination, with the bolt-work of a safe or vault-door, of a combination or key-lock controllable mechanically from the exterior of said door, with a time-lock having a lock-bolt or obstruction for locking and unlocking controllable from the interior of the door, both of said locks being arranged so as to rest against or connect with the bolt-work, the time-lock being automatically unlocked by the operation of the time-movement, both of said locks being independent of each other, and arranged to control the locking and unlocking of the bolt-work, so that said safe or vault-door cannot be opened when locked until both of said locks have been unlocked or have released their dogging action, to enable the door to be opened, substantially as described.*"

Claim 3 of reissue No. 7947 was passed upon by Judge Shipman in the Circuit Court for the District of Connecticut, in March, 1881, in the suits of *Yale Lock Manufacturing Com-*

pany v. *Norwich National Bank*, and the *Same Company* v. *New Haven Savings Bank*, reported in 19 Blatchford, 123, and 6 Fed. Rep. 377. He held that claim 3 covered a new and patentable invention and was valid. On the question of the validity of the reissue as to claim 3, he said: "It is next urged that the third claim of the reissue is void, because it was abandoned by the patentee upon the objection of the Patent Office, when the original application was pending. In Sargent's original application he made one broad claim. The application was rejected by the examiner, whose decision was reversed by the board of examiners. The examiner then requested that a new application be made, upon the ground that the case presented to the board was not the same case which had been presented to him. A new application was made, containing only the first two claims of the reissue. Then followed a long and earnestly contested litigation in the Patent Office between various interfering applicants, in which, apparently, both patentability and priority were discussed. The Little application contained the broad claim, and the board of examiners said, at one stage of the litigation, whether this question was properly before them or not, that this claim was patentable; so that, when the question came before them upon appeal from the decision of the examiner against the Sargent reissue, the board say: 'The claim in controversy is the same, in substance, as the first claim of Little, whose application was once in interference with Sargent, and which was admitted to be patentable by the Office at the time of the declaration of the interference. The patentability of Little's claim has once been before us in the aforesaid interference, and, after full argument, we concluded that his claim was tenable, and held that some one who was first to combine with the bolt-work on a vault or safe-door, a key-lock and time-lock acting independently of each other, but jointly upon the bolt-work, might have a valid patent therefor.' These facts exclude the third claim from the decision, or the *dicta*, in the case of *Leggett* v. *Avery*, 101 U. S. 256. I do not understand that the objection that the reissue is for a different invention from the original was pressed by either of the counsel for the defendant. It is sufficient to say,

that the claims of the original were for the combination of the third claim, provided with a device whereby the bolt-work may be retained in the unlocked position, for shutting the door, and be automatically locked by the time-lock and mechanically by the key-lock when the bolt-work is cast. The patentee had shown 'means whereby' but, if I have been correct thus far, the gist of his invention consisted, not in that device, but in the triple combination. Other different 'devices whereby,' could be introduced by other inventors, which would destroy the value of his patent, if it was unduly limited. As said by the board of examiners, 'means whereby,' while being essential to the convenient use of this combination, is merely incidental to the main idea, and may be varied indefinitely without departing from the spirit and scope of the applicant's invention."

The only remark made by Judge Lowell, in his opinion in the present case, as to the validity of reissue No. 7947, as respects claim 3, is, that the patent "was reissued so soon after its granting that it is not obnoxious to the objection of undue delay." The application for the reissue was filed 13 days after the original patent was issued, and the reissue was granted 36 days after the application for it was filed. Judge Lowell held claim 3 to be invalid on the ground that, if it was a claim irrespective of any particular means for carrying it out it was void as a patent for a principle, independently of the state of the art; and that, in view of the state of the art, it was void. He was of opinion, that there was no patentable novelty in putting a time-lock, which was old, in place of one of two combination locks, where two combination locks had been before used to dog one combined bolt-work; that it was not patentable to substitute a well-known multiple bolt-work for two such bolt-works, where a time-lock and a combination lock had been before combined in the use of two multiple bolt-works; and that there was no patentable novelty in combining two locks with a single door.

A history of the proceedings in the Patent Office in regard to patent No. 195,539 and reissue No. 7947, shows that claim 3 of that reissue must be held to be invalid.

Opinion of the Court.

On the 9th of May, 1874, Sargent filed an application for a patent which claimed broadly the combination of a time-lock, an ordinary lock and a safe-bolt connected with both of them. The claim he made was as follows: "What I claim is the combination, with a clock or time-movement lock and an ordinary lock, attached independently to a safe or vault-door, of a safe-bolt constructed so as to rest against or connect with both of said locks, substantially as described, whereby the safe-bolt cannot be withdrawn till both locks have been unlocked."

In the specification he then filed he said: "This improvement belongs to that class in which two locks are applied upon a safe or vault-door for the purpose of preventing the withdrawal of the safe-bolt till both locks have been unlocked. . . . I employ one ordinary combination or key-lock and one time-movement or clock-lock, attached independently to the door, and employ in combination therewith a safe-bolt that bears against or connects with both of said locks in such a manner that though the ordinary lock may be picked or opened, yet the clock-lock cannot be reached, and the safe-bolt therefore cannot be released till the clock has performed its office and unlocked its lock at the predetermined hour. . . . But it is by no means essential to this invention that the circular form of lock-bolt should be used, as the ordinary style of sliding-bolt, or other forms of shifting bearings, could be employed, if desired. . . . Clock-locks have before been used both separately and in connection with combination locks. Where used alone they are insecure, for the reason that burglars, ascertaining the hour upon which the lock is set, may, by confining or disabling the officers of the bank having control of the same, open the safe when the hour arrives. In my improvement such result cannot occur, because the combination lock still locks the safe. Where clock-locks have been combined with ordinary locks heretofore, so far as I am aware, the said locks have been connected by a lever or other connection, so that their actions are dependent on each other. In such case, if the combination or key-lock is injured by a lock-pick, by violence or otherwise, the clock-lock is liable to

injury also. By making these independent, as described, I avoid these difficulties."

This application was rejected by the examiner, but, on appeal, his decision was overruled by the examiners-in-chief, February 17, 1875. The examiner then ascertained that the case had been argued before the examiners-in-chief on an invention which had not been before the examiner, and that another model was used before the examiners-in-chief in place of the one properly in the case. The new feature of invention was a device by which the time-lock could be properly set and the door then be closed; but that device, which made the invention an operative one, was not shown in the drawing, the specification or the model, which had been before the examiner. In a communication made to Sargent by the examiner at the time, February 20, 1875, he said: "As far as the Office knows by the record of the case, this new invention may not have been contemporaneous with the first one. The examiner would suggest that a new case be at once filed embodying this invention, which makes the devices operative, and against the patentability of which no question will be raised. The claim, however, must be not broadly for A combined with C, which is not conceded to be entirely inoperative, but A and B combined either with C or some mechanical equivalent thereof, which alone makes A and B operative." He also said: "It is suggested to applicant that he file a new case introducing the new combining device which allows the door to be shut after the time-lock is set, and thus takes it out from the new reference cited, and the examiner will, in all proper ways, hasten the case forward upon a legitimate claim for A and B with suitable combining device to allow the door to be closed after the time-lock is set, inasmuch as no obstacle exists, as the examiner is at present advised."

In accordance with this suggestion, Sargent, on the 10th of March, 1875, filed a new application, which resulted in the granting of patent No. 195,539. The specification of this application said: "In locking the safe or vault-door, some device is necessary to allow the door-bolt to remain back in the unlocked position until the door is closed, without interfering

with the clock-lock. [A variety of devices may be employed for this purpose.]" This clause in brackets was afterwards erased.

The specification of this application also said: "In Fig. 1 is shown another device for the same purpose, situated outside the lock, which is the subject matter of another application. It consists of a socket or bearing, *h*, attached to the tie-piece, E, of the door-bolt, and sliding on an independent stud, *a'*, resting against the lock-bolt. A spring locking-pin, *i*, is used to connect the parts, when the door-bolt is thrown forward to connect with the jamb. In this case, the lock-bolt, D, may be made solid, and may be either of the turning or sliding kind. [Other devices might be used to allow the door to shut. I do not wish to confine myself to any particular form of the device.]" The sentences in brackets were afterwards erased.

Sargent thus limited himself to combinations wherein one or the other of the peculiar devices invented by him should be an essential element, which is further evidenced by the fact that, in claim 1, as accepted by him, the combination of the clock-lock and combination lock, as applied to the door-bolt, was to be provided with a device whereby the door-bolt might be retained in the unlocked position for shutting the door; and in claim 2, the same combination was to be provided with a lock-bolt having an opening or an offset which was automatically brought in and out of coincidence with the tongue of the door-bolt, whereby the latter might be retained in the unlocked position for shutting the door.

On the 16th of March, 1875, the examiner rejected claim 1, saying that it was to be found substantially in the patent granted to Cornell, August 10, 1858, for "safe bolt-work," and referring also to three prior patents for time-locks, and adding, that "merely to substitute either one of the above time-locks for one of the locks shown in Cornell's patent, is not regarded as a patentable difference." To this Sargent's attorney replied, on the 17th of March, 1875: "The combination is such as to require something else to be done other than to simply substitute for one of the key-locks shown in Cornell's patent one of the time-locks cited by the examiner."

This referred to the devices invented by Sargent, by which his combination was made operative.

On the 19th of March, 1875, Sargent's attorney struck out the parts in brackets, before quoted, and also struck out claim 1 and substituted as claim 1 what is claim 2 in the original patent as granted. On March 20, 1875, the attorney reinstated claim 1, and added as claim 2 what is claim 2 in the original patent.

On the 22d of March, 1875, the examiner rejected both of the claims, on the references before made, and referred also to the English patent to W. Rutherford, of April 14, 1831. He added, that "a rotating lock-bolt having an opening or an offset is not new," and referred especially to two prior patents, and said: "The second claim may possibly be allowed if amended by inserting the words 'constructed in two parts and' after 'lock-bolt.'"

An appeal was taken from this decision, and on the 27th of March, 1875, the board of examiners-in-chief reversed the decision of the examiner, doing so on the ground that the combination embracing Sargent's peculiar devices for retaining the door-bolt in an unlocked position, for shutting the door, were new and patentable. Before Sargent's patent could issue, he was put into interference with Stockwell, Burge and Little, and also with Pillard and Lillie. It is evident, from decisions made by the examiner of interferences, and by the Commissioner of Patents, in questions arising in some of these interferences, that Sargent was regarded as making no claim to a broad combination between the bolt-work of a door, and a time-lock, and an independent non-time-lock, which is the subject matter of claim 3 of reissue No. 7947.

The examiner, the examiners-in-chief and the Commissioner of Patents decided priority of invention in favor of Sargent, as to the combination, by Sargent, of the bolt-work, with a time-lock, and a non-time-lock, and his device for retaining the door-bolt in its retracted position, for shutting the door without interfering with the lock mechanism. The patent No. 195,539 was then issued, on September 25, 1877, with the

two claims before set forth, limited by the proceedings which so took place in the Patent Office.

The lock of the defendants did not infringe either of the two claims of the original patent, for it did not contain what is called in claim 1 "a device whereby the door-bolt may be retained in the unlocked position for shutting the door," after the time-lock is set; nor did it contain what is called in claim 2 "a lock-bolt having an opening or an offset which is automatically brought in and out of coincidence with the tongue of the door-bolt." This is apparent from the fact that it is not contended that the defendants' lock infringes either claim 1 or claim 2 of reissue No. 7947, which two claims are substantially identical with claims 1 and 2 of the original patent.

On the 8th of October, 1877, Sargent filed an application for a reissue of patent No. 195,539. He inserted in his specification what is claim 3 of the reissue as granted. That claim is as broad as the claim made in his application of May 9, 1874, which, as before shown, he abandoned. The examiner rejected this claim twice, and after the second rejection, and on the 26th of October, 1877, Sargent appealed to the examiners-in-chief. In the statement of appeal his attorney said: "All time-locks used with bolt-work must have some mechanical arrangement to enable the bolt-work to be retracted for closing the door. Such is present in many old patents, and has never been claimed by my client; but what is claimed by him is for the union of such an old, well-known time-lock with a combination lock and bolt-work all arranged on the same door." This shows the breadth of the claim, as compared with claims 1 and 2 of the original patent.

The examiner, in his answer to the reasons of appeal, said: "Leaving out the descriptive and recitative parts of the claim as well as all superfluous and misleading matter, we have as the claim, the following elements and arrangements, viz.: A combination or key-lock, and a time-lock, combined with the bolt-work of a safe-door, both used independently and resting against or connecting with the bolt-work. The only elements are the two locks and the bolt-work, no other element being hinted at even, and the arrangement of

said elements is, that the locks rest against or connect with bolt-work and are used independently of each other. To recite, in the claim, that the 'key-lock is controllable from the outside' and the 'time-lock upon the inside only' is entirely unnecessary, for all key or combination locks of safes are controlled only from the outside, and all time-locks, as a matter of course, upon the inside, are automatically unlocked. It is a well-settled principle that a mere explanation of parts or recital of functions neither adds to nor takes away from a claim. All the matter which recites that the door cannot be opened until the lock allows it is a mere superfluity. If, in an ordinary lock patent, we were to add to the claim 'the arrangement being such that the door cannot be opened until it is unlocked,' it would be simply laughable, as all locks of all sorts serve just this purpose. This vast mass of words in the claim, while at first glance seeming to restrict the claim, will be found to be entirely misleading, the indisputable scope of the claim being 'the simple independently-acting time and combination or key-lock resting against bolt-work of a safe.' That is all — no more, no less. It is to be carefully noted, that the claim does not restrict to using the locks upon the door, but only 'in combination with the bolt-work of the door,' and that the claim covers putting on Little or Derby, in the usual way, a Sargent or other combination-lock." After reviewing the various decisions which took place during the pendency of the application of Sargent for his original patent, and showing that the limitation of claims 1 and 2 thereof so as to embrace the peculiar devices of Sargent was what saved them on the question of patentability, the examiner said: "It very clearly follows, that the claim, expanded so as to omit those restrictions, is entirely untenable, in accordance with the very terms of the commissioner and board decisions." The examiners-in-chief, however, on appeal, reversed the examiner's decision, and the reissue was granted.

It is very clear, from a comparison of the specification of the original patent No. 195,539 with that of reissue No. 7947, that the specification of the original was not defective or insufficient, and that the patent was not inoperative. Not only is there no

evidence in this suit to that effect, but the evidence is to the contrary. The sole object of the reissue was manifestly to obtain claim 3 as an enlarged claim. Not only is claim 3 an enlarged claim, but, assuming that it was new and for a patentable combination, and that Sargent would have been entitled to make it in his application for his original patent, he was debarred from making it in his reissue. As has been shown, he made such a claim in May, 1874, and abandoned it. The application on which his patent, No. 195,539, was granted, was pending in the Patent Office from March 12, 1875, to September 25, 1877, and no such claim was made. On the contrary, he struck out from his specification matters evincing an intention to claim something more than the specific devices he had invented; and it is quite evident that the consideration by the Patent Office of those specific devices, and the evidence of invention afforded by them, enabled him to procure his original patent with its limited claims 1 and 2.

The effect of such an abandonment of a claim upon the validity of a reissue has been often adjudged by this court. *Leggett* v. *Avery*, 101 U. S. 256, 259; *Mahn* v. *Harwood*, 112 U. S. 354, 359; *Cartridge Co.* v. *Cartridge Co.*, 112 U. S. 624, 644; *Shepard* v. *Carrigan*, 116 U. S. 593, 597, 598; *Roemer* v. *Peddie*, 132 U. S. 313, 317.

Nor does the fact that reissue No. 7947 was applied for only thirteen days after the grant of the original patent establish its validity. In *Coon* v. *Wilson*, 113 U. S. 268, 277, enlarged claims in a reissued patent were declared invalid, although the reissue was applied for a little over three months after the original was granted, on the ground that a clear mistake, inadvertently committed, in the wording of a claim, was necessary, without reference to the length of time. See also *Ives* v. *Sargent*, 119 U. S. 652, 663; *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87, 103.

These views dispose of claim 3 of reissue No. 7947, independently of the ground on which the Circuit Court held it to be invalid and all other considerations urged by the defendants.

We come now to consider claims 1 and 7 of reissue No. 8550

of the Little patent, granted January 21, 1879, on an application filed October 14, 1878.

The specification, drawings and claims of Little's original patent, No. 146,832, were as follows:

"Be it known that I, Samuel A. Little, of Buckland, in the county of Franklin and State of Massachusetts, have made certain new and useful improvements in clock-locks, whereof the following is a specification, reference being had to the accompanying drawings, in which Figure 1 is a front view of my improved clock-lock attached to the inside of a safe, adjacent to the hinged part of the safe-door. Fig. 2 shows a seventh-day wheel, marked A in Fig. 1. Fig. 3 shows a cam-wheel, marked B in Fig. 1. Fig. 4 shows a graduated cam-wheel, marked C in Fig. 1. Fig. 5 represents the inside of a safe with the door-bolts locked forward by the lever-dog, which is elevated by the clock-lock. Fig. 6 represents a horizontal section of my clock-lock detached from the clocks, the dog-lever excepted, taken through the line $x\ x$ of Fig. 1. Fig. 7 represents a vertical section of the same, (similarly detached, except that the clock-wheels to which the same is immediately attached are shown,) taken through the line $y\ y$ of Fig. 1. In the various figures, similar letters indicate similar parts.

"D and E are two clock-movements fastened to the inside, F, of a safe, adjacent to the hinged part of a safe-door, G. Said clock-movements, through the wheels and ratchets K and L, (shown by the dotted lines, Fig. 1,) which are rotated once in twelve hours by the clock, propel the wheels H and I in the same time in the direction of the arrows thereon. The wheels H and I are both geared to the common wheel M, having twice as many teeth as either H or I, and propel the same in the direction of the arrow thereon, so that, while H and I are rotated once in twelve hours, M is rotated once a day. It will therefore be seen that both clocks work together in turning the wheel M, and thereby operating the lock, while, if either clock stops, the wheel H or I of the other will alone continue to rotate the wheel M and operate the lock, as the ratchet allows free motion to the wheel I or H of the other clock, although said clock may be stopped. Forming part of the

wheel M is the toothed wheel N, which is geared into and drives the toothed wheel O. Forming part of the wheel O is the toothed wheel P, which is geared into and drives the seventh-day wheel A. A has twice as many teeth as P, and O has three and a half times as many teeth as N. Therefore, while M revolves once in a day, it propels A to revolve once in seven days. The wheel C, which is graduated for the hours of the day, is fastened upon the hub *a* of the wheel M by the projection *b*, and rotates with the same. On the same hub is the wheel B, which is fastened by friction to C in different positions by the thumb-screw Q, which forms part of the wheel B, and passes through the slot *c* of the wheel C. *p p p p p* are pivots, on which the several wheels revolve. The wheel B is cut away on the outer edge, leaving the depression *d* and the cam-projection *e* thereon; and the edge of C is similarly cut away, leaving the depression *f* and the cam-projection *g* thereon. When the two wheels B and C are fastened together by the thumb-screw Q, side by side, they form one wheel, and have a common depression, *h*, which may be enlarged or diminished by rotating the wheel B on the wheel A with the thumb-screw, and setting the same, and a common cam or projection *i*, which may be enlarged or diminished in the same manner. Pivoted near the lock is the two-armed lever, R, whereof one arm carries the roller, S, and is lifted through the same by the cam *i*, revolving under the same at said cam's inclined plane *k*, and, at the same time, the other arm, T, of said lever lifts the dog-lever, V, as shown by the dotted lines, Fig. 1, up behind the door-bolts W W W W into the position shown in Fig. 5, thereby locking said bolts forward behind the jamb of the safe so the door cannot be opened. Said dog-lever V is pivoted at *l*. On the other hand, when the cam *i* is rotated entirely under the roller S, said roller is suffered to drop by gravity into the depression *h* at the inclined plane *m*, which allows the dog-lever V to fall from behind the safe-bolts, and the safe to be opened. The seventh-day wheel A has on its edge a cam-projection, *n*, which rotates once while the depression *h* rotates seven times, as described, and is so arranged relatively to the said depression *h* that, on every

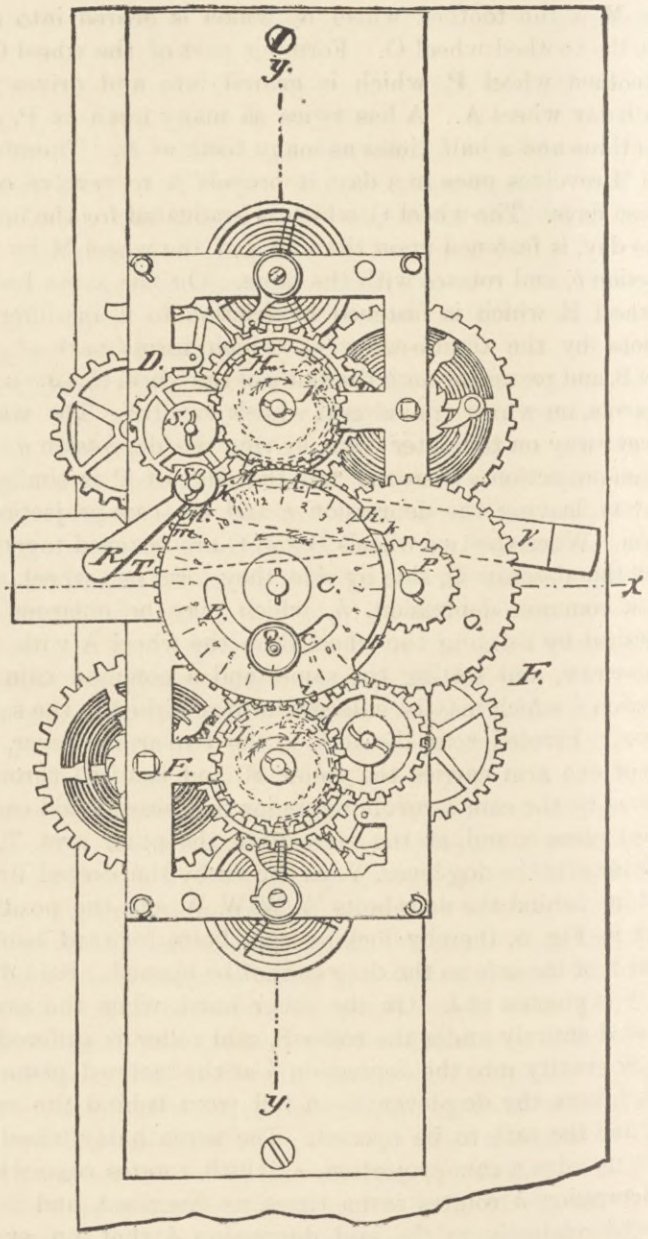

y.
D.
K.
C.
F.
E.
x
y.

Fig. 2.

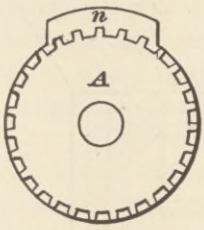
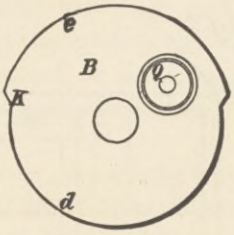


Fig. 3.



seventh revolution thereof, it is brought under the roller S, and holds up the lever R while the depression *h* passes under it, so that every seventh day the same prevents the safe from being unlocked.

"From the description aforesaid, the mode of operation will be obvious. The clocks are set to true time by bringing the hour-mark on the dial C under the roller S, which is readily done by turning the dial, as the wheels A, B, C, and M are freely turned in the direction of the arrow on C, inasmuch as the ratchets behind H and I do not interfere with motion in that direction, but take up, and, through the clock's force, proceed with, whatever advance of said wheels may be made. The lock is then set to lock up at any given hour, by loosening the thumb-screw Q and turning the inclined plane *k* of the wheel B to the mark of the required hour, and then fastening the wheels B and C together by setting the thumb-screw Q.

"If it is desired to have the lock open any amount of time earlier than the set time, (nine o'clock,) the wheel C must be turned, as described, until the time indicated under the roller shall be that amount fast of true time, the closing-mark being altered, if desired, to suit the case. If it is desired to open later, the clocks must be stopped until they are slow of time as much as it is desired the lock shall open later than the set time, correcting the closing-mark, if desired.

"If the wheels A, B, C, and M are turned, as described, until the cam part *n* of the wheel A shall be in position to come under the roller S, and keep the lock from opening on Sunday, it will continue to do so on Sunday each week if the clocks run on unchanged. In case that it shall be desired

Fig. 5.

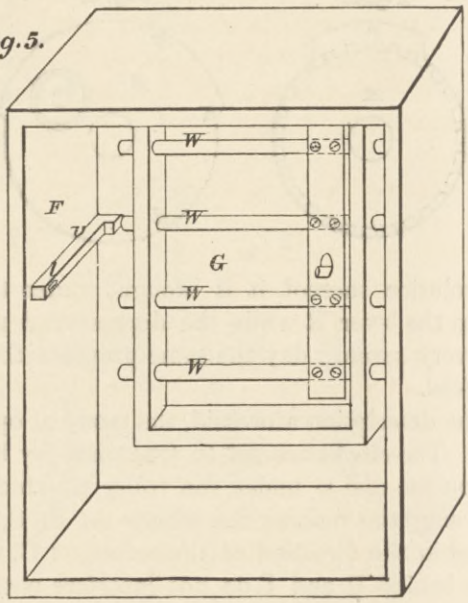


Fig. 6.

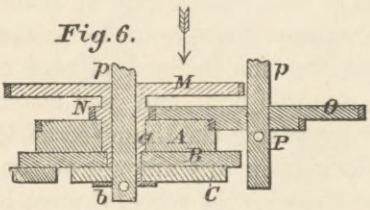


Fig. 7.

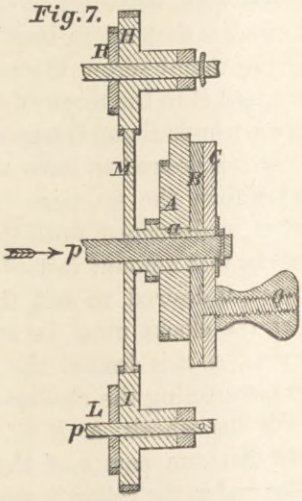
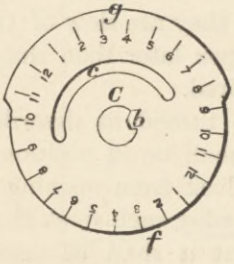


Fig. 4.



that the lock shall not open for a holiday or other day, the said wheels may be rotated until said cam part *n* is in position to come under and hold up the lever R on said day.

"The lock is affixed to the side F of the safe, as described, to avoid derangement or stoppage of the clocks by concussion on the door.

"It is evident that the dog-lever V and the lever R may be the same piece. The object in making the same in two parts is to save the weight of the part V, which depends upon the pivot *l*, from adding to the labor of the clocks.

"What I claim as my invention, and for which I pray letters-patent, is —

"1. The combination, with one or more clock-movements, of one or more wheels, H I, one or more ratchets, K L, and a common wheel, M, arranged as described, for the purposes set forth.

"2. The wheels B and C, with the depressions *d* and *f* and the projections *e* and *g*, located relatively to each other as described, to increase and diminish the surface of a common cam, *i*, or depression *h*, by rotation on each other, for the purposes described.

"3. The wheel A with a cam, *n*, adjusted as described, to prevent the falling of the lever R and dog V, either periodically or at required times, as described."

The specification, claims, and drawings of reissue No. 8550 are as follows:

"Be it known that I, Samuel A. Little, of Shelburne, in the county of Franklin and State of Massachusetts, have invented certain new and useful improvements in chronometric locks; and I do hereby declare that the following is a full, clear, and exact description thereof, that 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 the letters of reference marked thereon, which form a part of this specification.

"The object of my invention is to construct a time-lock which shall dog and release the multiple bolt-work of a safe or vault at certain predetermined times, both the dogging and

releasing being caused by the operation of the time mechanism. By this means the time when the lock will dog the bolt-work depends entirely on the adjustment of the internal mechanism of the lock, hereinafter described.

"I provide adjustable devices, so that the periods when the lock shall be locked and unlocked may be varied at will; and I also provide a device whereby, at certain intervals — say on every seventh day — the lock will remain locked during the time when ordinarily it would be unlocked.

"It will thus be seen that I have constructed a lock which will, of itself, dog and release bolt-work at a regular hour each day, except on certain predetermined days — Sundays, for example — when it will remain in the locked position all day. My lock, when once adjusted, is therefore absolutely automatic, requiring no attention except winding, and it is, so far as I am aware, the first time-lock which locks at a time determined by the time mechanism, while at the same time the hours for locking and unlocking can be changed without altering the construction of the lock.

"To diminish the chances of accident from the stoppage of the time mechanism, I provide two independent movements, both of which assist in rotating the dial to actuate the lock; but, should one stop, the other will continue to rotate the dial.

"The particular construction of my lock is, that the two time-movements rotate a graduated dial so arranged that its motion oscillates, at certain regular determinable intervals, a pivoted bent lever, which in turn, in one instance, for automatic locking, lifts the free part of, and thus oscillates on its stationary pivot, a metallic dog or obstruction, so as to cause it to rest in the way, and prevent the retraction of the sliding bolt-work; and in the other instance, for automatic unlocking, it withdraws its support from under and permits the dog to oscillate by gravity, so as to clear the way for the retraction of the bolt-work.

"The adjustability of my lock for locking and unlocking I obtain by means of my dial, which is so arranged that what I may call its 'bolt or dog-actuating points' can readily be

changed from one position to another, so that they will actuate the dogging mechanism at any desired hours for locking or unlocking; and it is to be noted, that in all continuously running dials, the adjustability for unlocking or locking preferably will be obtained in substantially the same way — *i.e.*, by varying the position of the dog-actuating points — because the dial itself should always be running on correct time.

"I cause the lock to remain locked on Sundays or other desired days, by means of a supplemental cam, which temporarily assumes one of the functions of my dial, and by which I can at any desired time cause the lock to remain locked during a greater period than twenty-four hours.

"Referring now to the drawings in aid of a description of my lock in detail, figure 1 is a front view of my improved time-lock attached to the inside of a safe, adjacent to the hinge part of the safe-door; Fig. 2, a view of the same, partly in elevation and partly in section, on the line 2 2 of Fig. 1; Fig. 3, a horizontal transverse section thereof on the line 3 3 of Fig. 1, with the upper time-movements removed, showing a plan of the locking mechanism proper; Fig. 4, a horizontal transverse section through the centre of the locking dials; Fig. 5, a perspective view of the interior of a safe, showing the door-bolts locked forward by the lever-dog; Fig. 6, a perspective view of the graduated dial (marked C in Fig. 1); Fig. 7, a similar view of wheel B in Fig. 1; Fig. 8, a similar view of a seventh-day wheel (marked A in Fig. 1).

"D and E designate two time-movements fastened to the inside, F, of a safe, adjacent to the hinged part of the safe-door G. These time-movements, through the wheels and ratchets K and L, propel the wheels H and I in the direction of the arrows thereon. These wheels H and I rotate once in twelve hours, and are both geared to the common wheel M, which has twice as many teeth as either of them, and they propel it in the direction of the arrow thereon, so that while wheels H and I are rotated once in twelve hours, wheel M is rotated only once a day.

"It will be seen that both time-movements work together

in turning the wheel M, and thereby operate the lock; but if either accidentally stops, the wheel H or I of the other will alone continue to rotate the wheel M and operate the lock, because each ratchet will allow free motion to either wheel I or H, in the absence of its normal impelling force.

"The toothed wheel N, forming part of the wheel M, is geared into and drives the toothed wheel O. The toothed wheel P, forming part of the wheel O, is geared into and drives the seventh-day wheel A, which turns loosely on the hub *a* of the wheel M. This wheel A has twice as many teeth as wheel P, and wheel O has three and a half times as many teeth as wheel N. Therefore, while wheel M revolves once in a day, it only causes wheel A to revolve once in seven days. The wheel C, which is graduated for the hours of the day, is fastened rigidly upon the hub *a* by means of the projection *b* and rotates with it. Loose on the same hub is the wheel B, which may be fastened by friction to the wheel C in different positions by the thumb-screw Q, that is attached to, or forms part of, the wheel B, and passes through the slot *c* of the wheel C.

"*p p p p p* designate pivots, on which the several wheels revolve. The wheel B is cut away on its periphery, leaving the depression *d* and the cam projection *e*, and the periphery of the wheel C is similarly cut away, leaving the depression *f* and the cam projection *g*, of the same form and size as the depression and projection of the wheel B. When these two wheels are fastened together by the thumb-screw Q side by side, they form one wheel or dial, having a depression *h*, which may be enlarged or diminished by rotating the wheel B by means of the thumb-screw, and then setting it, and also having a cam or projection, *i*, which may be enlarged or diminished in the same manner. Pivoted near its middle to the lock-case is the bent lever R, one arm of which carries the friction-roller S, and is lifted by the cam *i*, revolving under the roller at the cam's inclined plane *k*, and at the same time the other arm, T, of said lever lifts the dog V, pivoted at *l*, up behind the door-bolts W W W W into the position shown in Fig. 5, thereby locking the bolts forward behind the jamb of

the safe, so that the door cannot be opened. In due time, when the cam *i* is rotated entirely from under the roller S, the latter will drop into the depression *h* at the inclined plane *m*, which allows the dog V to fall from behind the safe-bolts, when they may be retracted and the safe opened.

"It will be noted that the dog always tends to turn on its pivot automatically by gravity, so as to present a free space for the retraction of the bolt-work, and it is held up only for predetermined periods, to be measured by the time mechanism, by the bent lever.

"The seventh-day wheel A has on its periphery a cam projection, *n*, which rotates once while the depression *h* rotates seven times, as described, and it is so arranged relatively to the depression *h*, that on every seventh revolution thereof it is brought under the roller S and holds up the lever R, while the depression *h* passes under it, so that every seventh day this projection *n* prevents the safe from being unlocked.

"From the foregoing description the mode of operation will be obvious.

"The time-movements should be set to correct time by bringing the hour-mark on the dial C under the roller S, which is readily done by turning the dial, as the wheels A, B, C, and M turn freely in the direction of the arrow on wheel C, because the ratchets behind wheels H and I do not interfere with motion in that direction, but take up, and, through the force of the time-movements, proceed with, whatever advance of said wheels may be made. The lock should then be set to lock up at any given hour by loosening the thumb-screw Q, and turning the inclined plane *k* of the wheel B to the mark of the required hour, and then fastening the wheels B and C together by setting the thumb-screw Q. The dial will then indicate the time of locking and unlocking, and the operation of the time-movements will cause the oscillation of the dog into position to obstruct the retraction of the bolt-work in a little time, or at whatever time may have been decided upon, and it will be held there until the time arrives for unlocking, when the continued operation of the time-movements will withdraw its support, and it will fall out of the way.

"If it is desired to have the safe opened any given amount of time earlier than the set time, — say 9 o'clock, — the wheel C must be turned, as described, until the time indicated under the roller shall be that amount fast of the correct time, the closing-mark being altered, if desired, to suit the case. If it is desired to open later, the clocks must be stopped until they are slow of the time as much as it is desired the lock shall open later than the set time, correcting the closing-mark, if desired.

"If the wheels A, B, C, and M, are turned, as described, until the cam part *n* of the wheel A shall be in a position to come under the roller S and keep the lock from opening on Sunday, it will continue to do so on Sunday each week, if the time-movements run on unchanged. Thus, the necessity for setting the mechanism on every Saturday, so that it shall keep the safe locked over Sunday, is obviated, which is a great convenience to bankers, and is, furthermore, a security against neglect to set the mechanism weekly, which might sometimes occur. In case it shall be desired that the lock shall not open for a holiday or other day, the said wheels may be rotated until the cam projection *n* is in position to come under the roller S and hold up the lever R on such day.

"The lock is affixed to the side F of the safe, as described, to avoid derangement or stoppage of the time-movements by concussion on the door; but it is obvious that it may be affixed to the door without modifying its construction, if desired, that being merely a change of location.

"It is evident that the dog V and the lever R may be one and the same piece. The object of making them in two parts is to save the weight of the part V, which depends upon the pivot *l*, from adding to the labor of the time-movements, and also to make the dog or obstruction entirely distinct from the time mechanism.

"I am aware of the patent granted to Williams and Cummings, No. 17,245, and dated May 5, 1857, and do not claim anything shown therein, but intend to limit my claims to comprehend only the improvements I have made over the peculiar combinations shown in that patent, whereby I reduce the number, modify the construction, change the relative

position and mode of operation of the parts, and simplify my mechanical organization, as will fully appear by comparison.

"What I claim as my invention is —

"1. The combination of independent multiple bolt-work with the time mechanism and locking or dogging mechanism of a time-lock, automatically both dogging and releasing the bolt-work at predetermined times, substantially as described.

"2. The combination, in a time-lock, of a continuously revolving adjustable device for determining the time of operation of the unlocking mechanism, a pivoted arm or lever actuated by said device, and a dog or obstruction movable directly by said pivotal arm at regularly-recurring periods, to permit the retraction of the bolt-work, substantially as described.

"3. In a time-lock, the combination of time mechanism, a revolving dial actuated thereby, a dog and suitable connecting mechanism, whereby the continuous revolution of the dial causes the dog to move into the locked and unlocked positions alternately, substantially as described.

"4. In a time-lock, the combination of a continuously-rotating dial and mechanism which causes the lock to lock and unlock automatically, substantially as described.

"5. In a time-lock, a continuously-rotating dial provided with an adjustable device for automatically determining the time of locking, substantially as described.

"6. In a time-lock, the combination, substantially as above set forth, of the time-movements and an adjustable device for automatically determining the time of locking.

"7. In a time-lock, the combination, substantially as above set forth, of the time-movements and two adjustable devices, one for determining the time of locking, and the other of unlocking.

"8. In a time-lock, the combination with the time mechanism and the locking or dogging mechanism, of an adjustable device which, through the continuous operation of the time mechanism, will periodically, or at required times, cause the lock to remain locked during a greater period than twenty-four hours, substantially as described.

"9. In a continuously-running automatic time-lock, the

Fig 1.

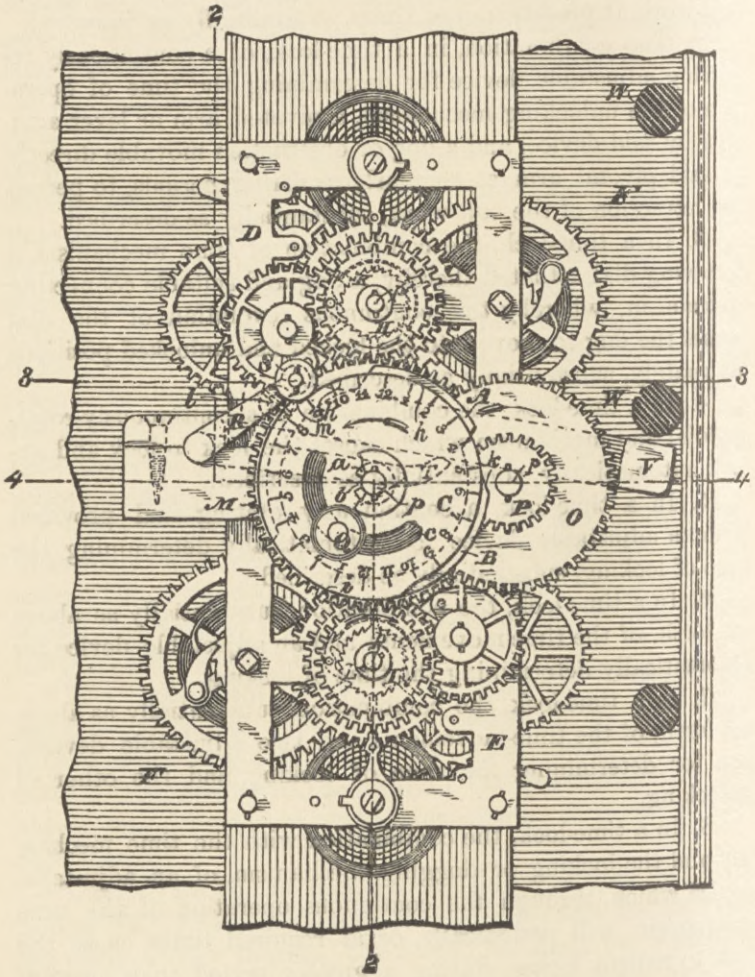


Fig. 2.

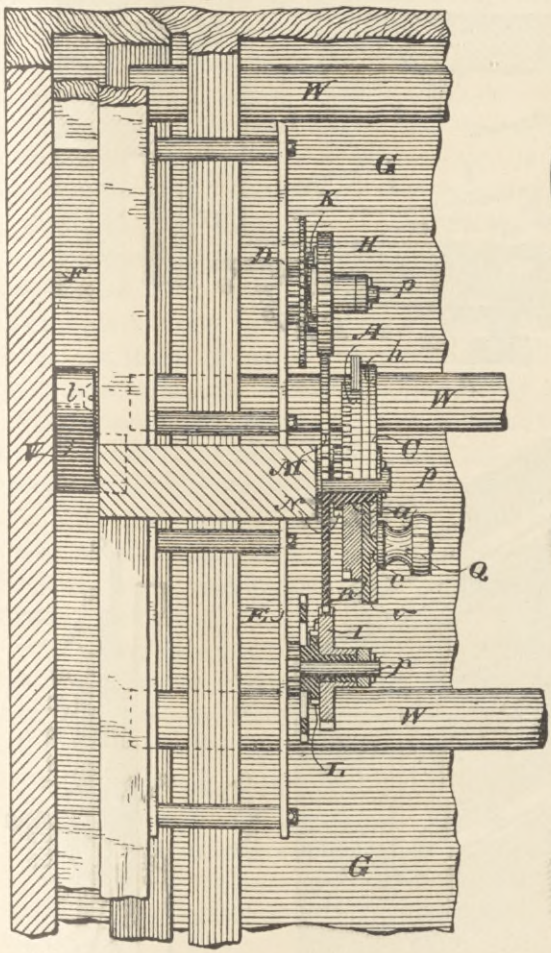


Fig. 6.

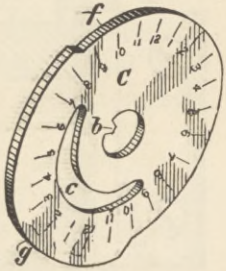


Fig. 7.

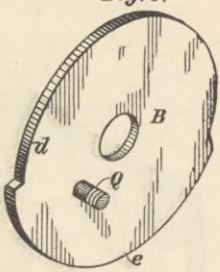


Fig. 8.

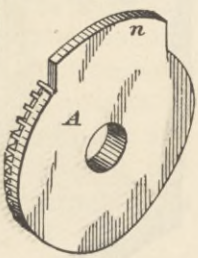


Fig. 3.

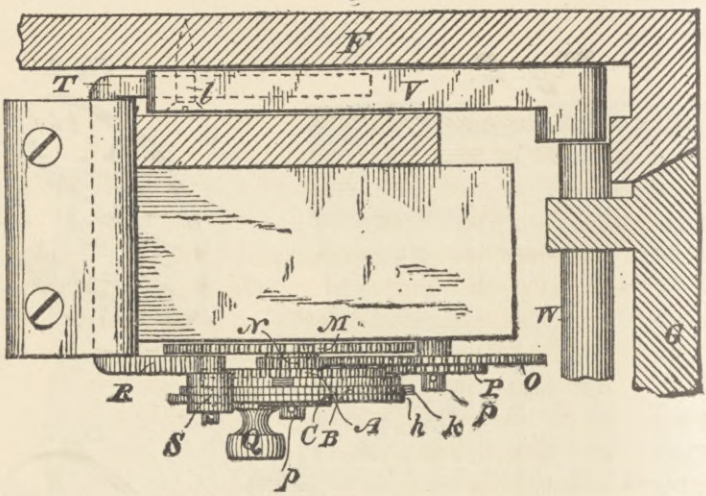


Fig. 5.

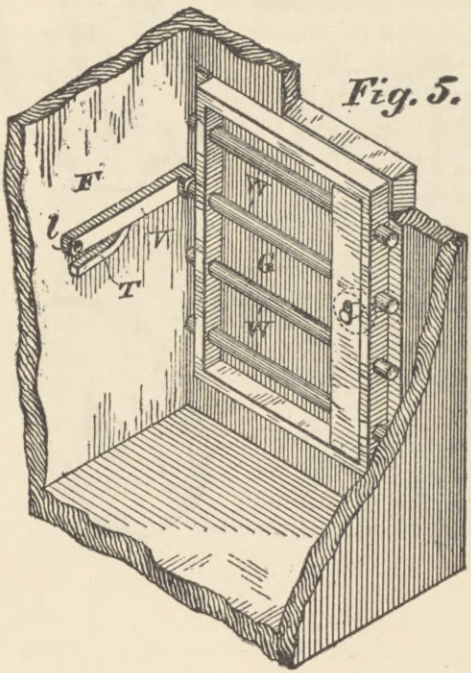
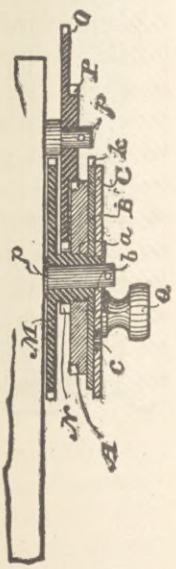


Fig. 4.



combination, with the time mechanism and the locking or dogging mechanism, of an independent device adapted to be set to prevent, at any desired time, the unlocking of the lock for a greater period than twenty-four hours, substantially as described.

"10. The combination, substantially as above set forth, of the adjustable mechanism for continuously locking and unlocking daily the time-movements, and a device for preventing unlocking during a greater period than twenty-four hours.

"11. In a time-lock provided with two independent time-movements and an interlocking device common to both, the combination, with each of said movements, of a ratchet and pawl interposed between the last or driving arbor of each movement and the said common unlocking device, whereby the said device may be driven by either or both of the movements, and the stoppage of one movement will not necessarily cause the stoppage of the other, substantially as described.

"12. The combination, with the time-movements, of the wheels H and I, the ratchets K L, and the common wheel M, arranged substantially as described, for the purpose set forth.

"13. In combination with the dial, the seventh-day cam-wheel A, adjustable, as described, to prevent the falling of the bent lever R and dog V, either periodically or at required times, as described.

"14. The combination, in a time-lock, of time mechanism, a revolving graduated dial actuated thereby, a bent lever oscillated by the revolution of the dial on an immovable pivot, and a dog or obstruction, also oscillated on an immovable pivot, the lever and dog being so arranged that when one arm of the lever is pushed aside at a predetermined time by the revolution of the dial, the other arm withdraws its support from under and permits the dog to turn by gravity, thereby leaving a free space for the retraction of the bolt-work, substantially as described.

"15. The combination of multiple sliding bolt-work, a dog or obstruction oscillated on an immovable pivot, and tending, by gravity, to turn so as not to dog the bolt-work, a bent lever, oscillated also on an immovable pivot, for holding the

dog in position against gravity, to dog the bolt-work, a revolving graduated dial, which, by its revolution at a predetermined time, oscillates the bent lever, and time mechanism that actuates the dial, substantially as described.

"16. The combination, substantially as before set forth, by means of suitable connecting mechanism, of the following elements, adapted, as combined, so to secure the door of a safe or vault, and to automatically release the same at a predetermined time, viz.: first, the multiple sliding bolt-work; second, the oscillating stop or dog, adapted to prevent the retraction of the bolt-work, and to be turned on its pivot to release the bolt-work at a time determined by the clock-work; third, the vibrating lever for holding the stop or dog in position to prevent the retraction of the bolt-work; and, fourth, the clock-work for determining the time when said lever shall be moved to permit the stop or dog to release the bolt-work.

"17. In a chronometric locking mechanism, the combination, substantially as before set forth, of the following elements, adapted as combined, to guard or dog the bolt-work of a safe or vault-door, and to automatically release the same at a predetermined time, viz.: first, the oscillating stop or dog, adapted to prevent the retraction of the bolt-work, and to be turned on its pivot to release the bolt-work at a time determined by the clock-work; second, the vibrating lever for holding the dog in position to prevent the retraction of the bolt-work; third, the clock-work for determining the time when said lever shall be moved to permit the dog to fall to release the bolt-work; and, fourth, the graduated wheel or dial, rotated by the clock-work, and adapted to operate said lever, and to be set for varying and controlling the time when said lever shall be moved to permit the dog to release the bolt-work."

Only claims 1 and 7 of the reissue are alleged to have been infringed. They take the place of claim 2 of the original patent. They were before Judge Shipman in the cases in 19 Blatchford and 6 Fed. Rep. above referred to, and he held that they covered new inventions and patentable improvements. Judge Lowell, in his opinion in the present case,

states that he fully agrees with the views of Judge Shipman as to the novelty and patentability of claims 1 and 7. Although the defendants' lock has but one time-movement to control the lever which controls the dog, Judge Lowell held that that did not affect the question of the infringement of claims 1 and 7.

In September, 1887, in *Yale Lock Mfg. Co.* v. *New Haven Savings Bank*, 32 Fed. Rep. 167, in the Circuit Court for the District of Connecticut, Judge Shipman had before him the question of a rehearing as to the validity of claims 1 and 7, and especially the question whether claim 7 was an enlargement of claim 2 of the original patent. He held that claim 7 "should be limited to the invention which was described and claimed in the original patent, which invention was not confined to a 'common cam,' or to a device which was connected with the compound wheel in the same way in which the cam was connected, but was broad enough to include equivalent means of connection with the dog." He held also that the owners of the patent had not abandoned, by proceedings in the Patent Office in respect to the two prior reissues of it, their right to claim, in reissue No. 8550, a double or compound disc, and to obtain a valid patent therefor.

Claims 1 and 7 were sustained also by Judge Sage, in the Circuit Court for the Western Division of the Southern District of Ohio, in May, 1889, in the case of *Yale & Towne Mfg. Co.* v. *Consolidated Time-Lock Co.*, 38 Fed. Rep. 917.

This patent, as before stated, was reissued May 9, 1876, as No. 7104, and again, January 8, 1878, as No. 8035. The lock used by the defendants is made under letters patent No. 173,121, granted to Henry Gross, February 8, 1876, for an "improvement in time-attachments for locks." This patent was issued prior to the granting of any reissue of the Little patent. While the original patent, No. 146,832, had only three claims, reissue No. 7104 had eight claims, reissue No. 8035 had six claims, and reissue No. 8550 has seventeen claims. On comparing the various reissues with the original patent, it is found that the drawings and the description of them are substantially the same in all, with some changes in nomenclature; and it is quite apparent that the original patent was not

inoperative or invalid by reason of a defective or insufficient specification, within the terms of the statute, so as to warrant the reissues.

There is in the record a copy of the file-wrapper and contents of reissue No. 8035, applied for December 15, 1877, and granted January 8, 1878. The specification presented with the application contained only two claims, both of which made "a revolving dial" an essential element. On the 18th of December, 1877, an entirely new specification and claims were put in, the claims being ten in number. Claim 3 was as follows: "3. In a time-lock, the combination, substantially as above set forth, of the clock-work and two adjustable devices for determining, respectively, the times of locking and unlocking." That claim 3 is very similar to claim 7 of reissue No. 8550. On the 21st of December, 1877, that claim 3 was amended by striking out the word "clock-work," and inserting the words "time-movements," so that it became almost exactly the same as claim 7 of reissue No. 8550. On the 26th of December, 1877, that claim 3 was erased.

Claim 4 of reissue No. 8035, as originally applied for, read as follows: "The combination with one or more time-movements, of one or more wheels, H I, one or more ratchets, K L, and a common wheel, M, arranged as described, for the purposes set forth." This claim 4 was erased with claim 3, and in their place there was inserted the following as claim 3: "The combination with the time-movements of the wheels H I, the ratchets K L, and the common wheel, M, arranged as described, for the purpose set forth."

Claim 5 of reissue No. 8035, as applied for, was identical with claim 2 of the original patent, No. 146,832, as granted. That claim 5 was rejected by the examiner, on the ground that it was old in valve-gear for steam engines, with a reference to a prior patent; and on the 26th of December, 1877, it was erased and abandoned. Therefore, more than a year before reissue No. 8550 was granted, claim 2 of the original patent was abandoned by Little; and at the same time he also abandoned claim 3 of his application, after he had put it in such shape that it became substantially the same as claim 7 of

reissue No. 8550. Reissue No. 8035 was taken out without those claims. No one of the six claims of reissue No. 8035 was infringed by the lock of the defendants, which was applied to use during the existence of reissue No. 8035. A little over nine months after it was granted, the application for reissue No. 8550 was filed; and the present suit was brought eight days after that reissue was granted.

In the specification of reissue No. 8035, the following statements were made: "The object of my invention is to construct a time-lock, and to combine it with the multiple sliding bolt-work of a safe or vault-door, so that, by the continuous movement of its time mechanism, locking and unlocking will be effected daily or periodically. . . . The gist of my invention, therefore, is the combination, in a time-lock, of time mechanism revolving a graduated dial, which serves to oscillate a pivoted bent lever, that, in turn, induces the oscillation of a pivoted dog or obstruction to the retraction of the multiple sliding bolt-work. Subordinate to this main principle or chief organization of my time-lock, I provide that my dial shall be composite in its construction, whereby I obtain what I term a 'differential cam' for convenience of adjustment." These statements do not appear in the specification of reissue No. 8550. In the latter specification, what had been previously called "a revolving graduated dial" is called "adjustable devices;" the dial is said to have "bolt or dog-actuating points;" and a statement is made that the lock of Little "is, so far as I am aware, the first time-lock which locks at a time determined by the time mechanism, while at the same time the hours for locking and unlocking can be changed without altering the construction of the lock." So that, in this reissue, which was granted almost five years after the date of the original patent, and over three years after the Gross patent was issued, the attempt is made by Little to cover all devices for determining the time of locking and unlocking, on the view that he was the first to invent a lock that would lock up as well as unlock at a predetermined time. This attempt is embodied in claims 1 and 7 of reissue No. 8550, which are here repeated: "1. The combination of independent multiple

bolt-work with the time mechanism and locking or dogging mechanism of a time-lock, automatically both dogging and releasing the bolt-work at predetermined times, substantially as described." "7. In a time-lock, the combination, substantially as above set forth, of the time movements and two adjustable devices, one for determining the time of locking, and the other of unlocking."

Although the first reissue, No. 7104, was applied for March 15, 1876, more than two months after the Gross patent was issued, no such claims as the above were applied for or taken, nor were they taken in reissue No. 8035. Claims 3, 7 and 8 of reissue No. 7104 were abandoned in reissue No. 8035, and severally appear as claims 7, 16 and 17, in reissue No. 8550, claim 7 in No. 8550 being in these words, as claim 3, in No. 7104: "3. In a chronometric locking mechanism, the combination, substantially as before set forth, of the clock-work and two adjustable devices for determining, respectively, the time of locking and unlocking." Claims 1, 2, 3, 4, 5, 8, 9 and 11 in No. 8550 are entirely new. Claim 2 of the original patent, No. 146,832, was not retained in No. 8550, and only two claims out of the seventeen in No. 8550 are found in the original patent.

Infringement is alleged of claim 1 of reissue No. 8550, which is an entirely new claim, not found in the original patent or in any prior reissue, and of claim 7, which was claim 3 in reissue No. 7104, and was first amended and then abandoned in the application for reissue No. 8035. If claim 1 of reissue No. 8550 is construed to cover only the specific devices of Little, operating in the mode described by him, and thus is no broader than claim 2 of the original patent, the defendants' lock does not infringe it. If it is not so limited, it is void, under numerous decisions of this court.

In Little's time-lock, there is a compound cam-wheel or disc, composed of two cam-wheels placed face to face on the same axis, each having a portion of its outer edge cut away, and so arranged that they can be turned with relation to each other so as to increase the length of their common projection or common depression, and be fastened together in any de-

sired position by means of a slot and a thumb-screw in one of them. When adjusted, this compound cam-wheel is revolved by clock-work and made alternately to lift up and let down a lever which in turn lifts up or lets down another lever, the end of which is supported in a position behind one of the bolts of the door, or is allowed to drop away from behind it, thus alternately dogging and releasing the bolt. It is the office of the common projection on the wheels to lift, and then hold up, the levers in the dogging position; and the length of time the bolts will remain dogged depends solely on the length of the common projection.

In the defendants' lock there is only one time-movement, and there are no wheels of any kind, much less wheels like the cam-wheels B and C of Little's original patent, with projections and depressions, which can be rotated so as to increase and diminish the surface of a common cam or depression; nor has it any cam projection or cam depression of any kind, formed in any manner, whose office is to lift and hold up and let fall a lever, and thus dog and release the bolt of a safe-door; nor has it a device of any kind capable of performing the function of Little's cam-wheels. Little does not describe or suggest, in his original patent, any way by which he can dispense with the use of his cam projections to lift and hold up the dog; and he confines claim 2 of his original patent to a combination in which two cam-wheels, capable of being rotated and adjusted with relation to each other, so as to increase and diminish the surface of a common cam, for the purpose of lifting and holding up the dog, are essential.

Claim 7 of reissue No. 8550 was evidently drawn so as to cover the time-attachment of the defendants' lock, which does not itself lock up or unlock the bolt-work, but only determines the time when the bolt work may be unlocked by the combination-lock. Claim 7 is not limited to devices which automatically lock and unlock, but extends to devices which merely interfere with mechanical locking and unlocking. Such a construction of claim 7, a claim once abandoned in the Patent Office and restored in this reissue, cannot be admitted in consistency with numerous decisions of this court on the

subject of reissues. If, however, claim 7 is so construed as to be no broader than claim 2 of the original patent, then the defendants' lock, as it did not infringe the latter claim, does not infringe claim 7.

It is shown that it was old to use time mechanism, revolving dials with adjustable devices, pivoted levers and dogs, to lock and unlock door-bolts; and that the combination of clock-work, adjustable cam-wheels, and a two-armed lever oscillated thereby, was old. In this view, in his original patent, Little very properly limited his claims to his mode of connecting two clocks with a common wheel, so that both could act together in turning it, and either one could turn it alone in case the other stopped; and to the employment of the specific cam-wheels with depressions and projections so located as to increase and diminish the surface of a common cam by rotation on each other, so as to lift and hold up the dog behind the bolt of the door; and to the introduction of his Sunday wheel. The lock of the defendants did not infringe any of the claims of the original patent, because it did not have the two clocks, the Sunday wheel, the cam-wheels or any mechanical equivalent therefor, and did not move the dog automatically into the dogging position.

The application for reissue No. 7104 was made more than two years after the original patent was granted, and one month and seven days after the Gross patent was issued, containing the devices which are employed in the defendants' lock. Reissue No. 8550 was applied for nearly four years and nine months after the original patent was granted, and more than two years and eight months after the Gross patent was issued, and after the lock of the defendants had been put into use. No excuse is shown for these delays; nor is there any defect or insufficiency in the specification of the original patent. In December, 1877, during the pendency of the application for reissue No. 8035, Little acquiesced in the rejection, for want of novelty, of claim 2 of his original patent, and then abandoned a claim corresponding with claim 7 of reissue No. 8550, and took out reissue No. 8035 without such claim.

The lock of the defendants did not infringe any claim of

reissue No. 8035. Claim 1 of reissue No. 8550 is entirely new, and claim 7 of that reissue is the same as claim 3 of the application for reissue No. 8035, which claim was first amended and then abandoned. It was not lawful to introduce claim 7 into reissue No. 8550, after such formal abandonment of it. If either claim 1 or claim 7 of reissue No. 8550 covers a device which would not have been covered by claim 2 of the original patent, or by any of the claims of reissue No. 8035, it is invalid; and even if claims 1 and 7 could properly be restricted to the cam-wheels of the specification or their mechanical equivalents, operating as described, as claim 2 of the original patent was restricted, the lock of the defendants does not infringe either claim 1 or claim 7.

For these reasons, it must be held that the plaintiffs have no cause of action against the defendants under claims 1 and 7 of reissue No. 8550.

It results that the decree of February 12, 1886, must be affirmed so far as it relates to the Sargent reissue No. 7947, and reversed so far as it relates to the Little reissue No. 8550, and the cause be remanded to the Circuit Court with a direction to dismiss the bill of complaint, with costs to the defendants. As the plaintiffs fail in this court on both appeals, they are to pay the costs of this court on both appeals.

IN RE BAIZ, Petitioner.

ORIGINAL.

No. 11. Original. Argued March 31, April 1, 1890.— Decided May 5, 1890.

The Consul General of Guatemala and Honduras in New York, being a citizen of and resident in the United States, was accredited by the government of Honduras as its diplomatic representative here. The Secretary of State declined to receive him as such, on the ground that the immunities and privileges attaching to the office made it inconsistent and inconvenient that a citizen of the United States should "enjoy so anomalous a position." The Consul General then inquired whether the Department would regard him as chargé d'affaires *ad hoc* of Honduras, without relieving him of his duties and responsibilities as a citizen; to which the Department replied that it could not recognize his agency as con-

Statement of the Case.

ferring upon him any diplomatic status. A diplomatic representative was then accredited to the United States from Guatemala, Honduras and Salvador, and was received as such. Three years later, being about to temporarily absent himself from his post, this representative requested the Secretary of State "to allow that the Consul General of Guatemala and Honduras in New York," the same person still holding that office, "should communicate to the office of the Secretary of State any matter whatever relating to the peace of Central America, which should without delay be presented to the knowledge of your Excellency." The reply of the Secretary, directed to "The Consul General of Guatemala and Honduras," stated that he would "have pleasure in receiving any communication in relation to Central America of which you may be the channel as intimated;" and notes were subsequently interchanged between him and the Department, and *vice versa*, until the arrival of an accredited diplomatic representative. *Held*, that the Consul General of Guatemala and Honduras did not thereby become the diplomatic representative of Guatemala, Honduras and Salvador during the absence of the regularly accredited representative, and that, in the absence of a certificate from the Secretary of State that he was such representative, he was not entitled to the immunity from suit except in this court which is granted by the Constitution to such persons.

On an application to this court, by a person claiming a diplomatic privilege, for a writ of prohibition or a writ of mandamus, to restrain a district court from the exercise of its ordinary jurisdiction on the ground that the petitioner is a privileged person, the respondent is called upon to produce any evidence that exists to countervail the petitioner's proof of his privilege.

When a person claims in this court the rights and privileges of a foreign minister, the court has the right to accept the certificate of the Department of State that he is, or is not, such a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.

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

On the 29th day of June, 1889, an action was commenced by one John Henry Hollander in the District Court of the United States for the Southern District of New York against Jacob Baiz, to recover damages for the publication of an alleged libel upon the plaintiff, and a summons was served upon him on the 2d day of July of that year. The defendant entered a general appearance in the action, which was filed July 17, 1889. On the 25th day of September, 1889, the defendant verified his answer, which contained a plea to the jurisdiction of the District Court in the following language:

"The defendant alleges that he is now, and ever since the month of July, 1887, has been, the Consul General of the Re-

Statement of the Case.

public of Guatemala at the city of New York, and that in or about the month of May, 1889, he received from the Republic of Guatemala a duly authenticated copy of a decree in the English language, dated at the National Palace in Guatemala, May 14, 1889, with instructions in writing from said government to publish the same in the newspapers of the United States, and which said decree had previously been published in the official *Gazette*, or newspaper, published in said republic, and that pursuant to such instructions, which were sent to him both by letter and by cable, and not otherwise, he did, on or about the 9th day of June, 1889, send to the managers of the Associated Press, in the city of New York, said authenticated copy of said decree, stating that it was possible that said managers would find it of sufficient interest to publish. That prior to the 16th day of January, 1889, one Señor Don Francisco Lainfiesta was envoy extraordinary and minister plenipotentiary of the Republic of Guatemala in the United States, and on or about that day he departed from the United States upon a temporary leave of absence, duly granted to him, and that from on or about that day, down to on or about the 10th day of July, 1889, this defendant became and was the acting minister and sole representative of the said Republic of Guatemala in the place, and during the absence, of the said envoy extraordinary and minister plenipotentiary, and was exclusively in charge of the diplomatic affairs of the said republic in the United States.

"And by reason of the facts herein alleged this defendant claims that this court has no jurisdiction of this action, and that if any jurisdiction for said act in fact exists in any court, it is vested solely in the Supreme Court of the United States, pursuant to the provisions of the Constitution and the statutes of the United States in such case made and provided."

In January, 1890, a motion was made "for an order setting aside the service of the summons and all subsequent proceedings in the action, and that the court dismiss the same, on the ground that it has no jurisdiction of this action, and had no jurisdiction over the defendant at the time of the commencement thereof." This motion was based on the defendant's

affidavit and upon proofs consisting of original written communications from the State Department to Baiz, and on duly-certified copies of papers on file in said department; and was resisted by the plaintiff on certain affidavits, and an original letter from the department. On the 17th day of February the motion was denied, and an application was then made to this court for a rule to show cause why a writ of prohibition should not issue to the judge of the District Court, prohibiting him from proceeding further in said action; or if a writ of prohibition could not issue, then for a rule to show cause why a writ of mandamus should not issue, commanding the judge to enter an order dismissing the cause, for the reason that the jurisdiction of said action existed solely in the Supreme Court under the Constitution and laws of the United States; or for such other and further relief as might be proper in the premises. The application was made upon the petition of the defendant in the action in the District Court, and annexed to the petition and forming a part of it was a certified copy of the entire record in the District Court, including every paper used upon the motion, and the opinion of the court. A rule having been issued, the judge of the District Court returned thereto that the motion was denied upon the facts and considerations appearing in the record and opinion, copies of which were attached to the petition, and to the order to show cause, and submitted to this court whether the District Court should take further cognizance of the said cause or should dismiss the same.

It appeared before the district judge, as it does here, that Mr. Baiz was and is a citizen of the United States and a resident of the city of New York, and that he has been since 1887 Consul General of Guatemala; that Señor Lainfiesta was, on the 16th day of January, 1889, the minister of Guatemala, of Salvador and of Honduras, in the United States, and that on that day Señor Lainfiesta addressed a note to the Secretary of State, advising him that he was compelled to go to Guatemala for a short time, and saying: "Meanwhile, I beg your Excellency to please allow that the Consul General of Guatemala and Honduras in New York, Mr. Jacob Baiz, should communicate to the office of the Secretary of State

any matter whatever relating to the peace of Central America, that should without delay be presented to the knowledge of your Excellency."

The Secretary of State accordingly, on the 24th day of January, informed Señor Baiz, "Consul General of Guatemala and Honduras," that the note of Minister Lainfiesta had been received and that he would "have pleasure in receiving any communication, in relation to Central America, of which you may be made the channel, as intimated by Señor Lainfiesta." On the 6th of March, 1889, Mr. Blaine having been appointed Secretary of State, information of that fact was communicated by him to "Señor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador and Honduras," the receipt of which was acknowledged by the latter under date of March 7, the note of reply being signed, "Jacob Baiz, Consul General." April 1, the Secretary of State addressed a communication to "Señor Don Jacob Baiz, in charge of the business of the legations of Guatemala, Salvador and Honduras," informing him of the appointment of Mr. Mizner as envoy extraordinary and minister plenipotentiary of the United States to the Republics of Guatemala, Salvador and Honduras, and asking him to "kindly apprise the governments of Guatemala, Salvador and Honduras" of the appointment.

In the official circular issued by the Department of State, "corrected to June 13, 1889," concerning the "foreign legations in the United States," under the heads of Guatemala, Salvador and Honduras, mention is made of the absence of Mr. Lainfiesta, and a foot-note is referred to which reads "Jacob Baiz, Consul General, in charge of business of legation, New York City." That circular shows that Russia, Austria and Corea were represented by ministers who were absent, and had chargés d'affaires *ad interim*, whose names are severally given, described as such, and the dates of their presentation. Brazil and Venezuela had no ministers, but were represented by a chargé d'affaires or a chargé d'affaires *ad interim*, the name of the incumbent and the date of his presentation being given in each of these instances. Portugal had

no minister, and the name appears of "Baron d'Almeirim, consul, and acting consul general, in charge of business of legation," and the fact and date of his presentation. Consul General Baiz is alone referred to in a foot-note, and is not shown to have been presented.

Señor Lainfiesta did not return as minister, and on or about the 10th day of July, 1889, Dr. Fernando Cruz arrived in this country and was presented by the Secretary of State to the President as the envoy extraordinary and minister plenipotentiary of the Republic of Guatemala to the United States.

Mr. Baiz answered in the action brought by Hollander September 25, 1889.

On the 3d of October, 1889, counsel for the plaintiff addressed to the State Department a letter, in which he inquired who was the minister of the State of Guatemala from January to August, 1889; and received an answer under date of October 4, 1889, signed by the Second Assistant Secretary of State, as follows:

"I have to acknowledge the receipt of your letter of the 3d inst., and to say in reply that Señor Fernando Cruz presented his credentials as the envoy extraordinary and minister plenipotentiary of Guatemala here, July 11, 1889.

"Prior to that Señor Lainfiesta was the accredited and recognized minister, but had been for some time absent from the United States. During his absence the business of the legation was conducted by Consul General Baiz, but without diplomatic character."

On the 11th of January, 1890, Señor Cruz sent the following communication to the State Department:

"Mr. Michael H. Cardozo, counsel for Don Jacobo Baiz, in the suit which has been brought against the latter by Mr. J. H. Hollander in New York, presented to your Excellency a brief of the facts in the case and made application to you to be pleased to order that he be furnished with a certain certificate in regard to the character of Mr. Baiz during the absence of Don Francisco Lainfiesta, and until I arrived to take his place.

"It being urgent to possess this document, since the day

approaches to make use thereof, and the government of Guatemala having instructed Mr. Baiz to make the publication upon which the suit is brought, under the belief that he was its representative in this country from the day of Señor Lainfiesta's departure, I take the liberty of begging your Excellency to be pleased to order that the certificate applied for by Mr. Cardozo be issued as soon as possible, and sent to me in order that I may forward it without loss of time."

The acting Secretary of State replied January 21, 1890, acknowledging the receipt of Señor Cruz's note of the 11th, and continuing thus:

"The facts are, that on January 16, 1889, Mr. Lainfiesta informed the Department of his proposed departure from the United States for Guatemala on a leave of absence. In conveying this information to the Secretary of State, Mr. Lainfiesta said: 'In the meantime I beg your Excellency to permit Mr. Jacob Baiz, Consul General of Guatemala and Honduras at New York, to communicate to the Department of State any information connected with the peace of Central America that may be of sufficient importance to be brought without delay to your Excellency's notice.' Referring to this note the Department, on January 24, 1889, wrote to Mr. Baiz, saying: 'The Secretary of State will have pleasure in receiving any communication in relation to Central America, of which you may be made the channel, as intimated by Señor Lainfiesta.' The next communication of the Department to Mr. Baiz bears date March 6, 1889, in which he was informed of the accession to office of the present Secretary of State, which Mr. Baiz acknowledged on the following day.

"On April 1st, 1889, the Department addressed a communication to Mr. Baiz, 'in charge of the business of the legations of Guatemala, Salvador and Honduras,' in which he was informed of the recall of Mr. Henry C. Hall, as envoy extraordinary and minister plenipotentiary of the United States to the Republics of Guatemala, Salvador and Honduras, and of the appointment by the President, by and with the advice and consent of the Senate, of Mr. Lansing B. Mizner to that post. Mr. Baiz was requested to apprise the respective governments

of this appointment. This communication Mr. Baiz acknowledged on April 2d, 1889. On May 17th, 1889, Mr. Baiz announced to the Department your appointment by the government of Guatemala as its minister plenipotentiary at this capital in place of Mr. Lainfiesta, which was duly acknowledged by the Department on the 20th of the same month. Subsequently correspondence took place between the Department and Mr. Baiz in relation to your entrance into the United States and to your reception as minister. On June 14, 1889, Mr. Baiz enclosed to the Department an autograph letter from the President of Guatemala dated May 20, 1889, to the President of the United States, relative to the recall of Mr. Hall as United States minister to the States of Central America. Of this communication the Department acknowledged the receipt, on June 25, 1889. This, it is believed, is a correct résumé of the facts in regard to Mr. Baiz' action as the representative of Guatemala in the absence of her duly accredited minister from the United States."

After the return to the rule, counsel appearing in opposition to granting the writ moved for an order that the petitioner show cause why certain papers presented by him should not be submitted for the consideration of the court in the determination of the matter; and the petitioner, after objecting to the granting of the order and protesting against the receipt of the papers, submitted certain papers on his part. These papers taken in chronological order are as follows: A letter dated February 2, 1886, from the Minister of Foreign Affairs of the Republic of Honduras to Mr. Baiz, transmitting an appointment as chargé d'affaires of the Republic of Honduras to the government of the United States, and hoping that he will accept said appointment, "filling it to the best interests of the country, endeavoring principally to prevent filibustering expeditions," etc., etc. Accompanying it was a communication addressed to the State Department under date of February 1, 1886, and conveying information of the fact of the appointment. This was presented to Mr. Bayard then Secretary of State, who replied on the 22d of March, 1886, as follows:

Statement of the Case.

"Agreeably to the promise made to you in person recently by Assistant Secretary Porter, I have considered the questions involved in your nomination as chargé d'affaires of Honduras in the United States.

"A difficulty arises in the fact stated by you to Mr. Porter, that you are a citizen of the United States. It has long been the almost uniform practice of this government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position. The very few past exceptions to this rule have served to show its propriety, especially when, as in your case, it has been sought to supplement the consular functions (which an American citizen, may, if otherwise acceptable, hold with perfect propriety) by an added diplomatic rank and function.

"Were it merely a question of conducting public business with you as the *de facto* chargé d'affaires *ad interim* during the absence of a regularly accredited envoy of Honduras, there would be little difficulty. In fact, you now stand on that footing for all practical purposes, since the Department of State corresponds with you as consul general, upon whatever diplomatic business may arise; but it is to be borne in mind that this is done because the office of the envoy is for the time being unfilled. Your substitutionary agency is cheerfully admitted, but this is different from recognizing you as invested with the diplomatic character as the incumbent of the mission.

"While this motive would alone constrain me, although with regret, from acceding to the expressed desire of the government of Honduras and receiving you as its diplomatic representative, I find another consideration in the phraseology of your official letter of credence."

The Secretary then considers the objection arising out of the fact that that instrument "announces that the office of chargé d'affaires is conferred upon you for the express purpose

of negotiating with this government to prevent the organization in the United States of hostile expeditions against Honduras and causing certain persons named therein to be put under bonds, 'not to contrive in any way against the peace of Honduras.'"

The letter of credence and also the letter of the Honduranean Minister of Foreign Relations were returned.

On the 24th day of March, 1886, Consul General Baiz acknowledged the receipt of the dispatch of the 22d, and said:

"I will lose no time to inform the government of Honduras of our correspondence, and that Your Excellency has kindly consented to admit my substitutionary agency in the absence of a minister by virtue of my being the consul general.

"I thank you for this recognition, the extent of which I appreciate, but in order to fully satisfy the government of Honduras, which has conferred this honor on me, I take the liberty to ask whether, in the absence of a minister, the State Department will consider the consul general chargé d'affaires *ad hoc*, or as diplomatic agent of Honduras, for all practical as well as official purposes, without relieving me of duties and responsibilities incumbent on a citizen of the United States?

"The declination of the State Department of my credentials on the ground that they express a purpose of a negotiation not admissible under the laws of the United States will, no doubt, be satisfactory to the government of Honduras."

On the 3d day of April, 1886, the Secretary of State answered the inquiry of Mr. Baiz in these words:

"I have received your letter of the 24th ultimo, in which, after referring to the willingness expressed in my letter to you of the 22d March to admit, in the absence of a minister of Honduras, your substitutionary agency in virtue of your office as consul general, you enquire 'whether, in the absence of a minister, the State Department will consider the consul general chargé d'affaires *ad hoc* or as a diplomatic agent of Honduras for all practical as well as official purposes, without relieving' you 'of duties and responsibilities incumbent on a citizen of the United States.'

Argument for Petitioner.

"In reply, I have to inform you that it is not the purpose of the Department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever. Your agency is admitted to be such only as is compatible with the continued existence of a vacancy in the diplomatic representation of Honduras in the United States. To recognize you as chargé d'affaires *ad hoc* would be to announce that the vacancy no longer existed, and that diplomatic representation was renewed in your person.

"It is a common thing to resort to a temporary agency, such as yours, in the conduct of the business of a mission. A foreign minister, on quitting the country, often leaves the affairs of his office in the friendly charge of the minister of another country, but the latter does not thereby become the diplomatic agent of the government in whose behalf he exerts his good offices. The relation established is merely one of courtesy and comity. The same thing occurs when the temporary good offices of a consul are resorted to. In neither case is a formal credence, *ad hoc* or *ad interim*, necessary."

Mr. Joseph H. Choate (with whom was *Mr. Michael H. Cardozo*) for the petitioner.

I. The object of the constitutional and statutory provisions respecting "ambassadors and other public ministers," (Const. Art. III. § 2; Rev. Stat. § 687,) was to prevent such person from being sued in any court save the highest court of the nation, trusting to it alone to determine whether the act complained of could be punished by any judicial tribunal "consistently with the law of nations."

II. This court has power to issue a writ of prohibition in the case now before it.

If the jurisdiction is exclusive in this court to entertain the suit now pending against the petitioner in the United States District Court, because of the position he occupied, then some writ to assert that jurisdiction and to prevent another court from exercising it, is necessary to the maintenance of the exclusive jurisdiction of this court. The writ which is "agreeable to the usages and principles of law" is primarily the writ of prohibition.

If there is any authority to issue it this is a fit case for the exercise of that authority. *Ex parte Phœnix Ins. Co.*, 118 U. S. 610, 625; *Smith* v. *Whitney*, 116 U. S. 167, 173.

III. If this court has no power to issue a writ of prohibition under § 716, then it may issue a writ of mandamus under § 688, Rev. Stat. It is elementary that a writ of mandamus is the proper remedy to require a court to assume jurisdiction of a case which properly belongs to it, or to decide a matter which is properly before it for judicial determination. *Hollon Parker, petitioner*, 131 U. S. 221; *Chateaugay Iron Co., petitioner*, 128 U. S. 544; *Ex parte Parker*, 120 U. S. 737; *Ex parte Morgan*, 114 U. S. 174; *Ex parte Burtis*, 103 U. S. 238; *Ex parte Railway Co.*, 101 U. S. 711; *Ex parte Flippin*, 94 U. S. 348, 350.

Assuredly, if a writ of mandamus is the proper remedy and will issue to compel a court to assume jurisdiction where it possesses it, it is also the proper remedy and should issue to compel a court to dismiss a case and refrain from attempting to exercise jurisdiction where it does not possess such jurisdiction.

At any rate, in this court, exercising its appropriate jurisdiction to entertain an application for a writ of prohibition or mandamus, the respondent here is called upon to produce any evidence that exists to countervail the petitioner's proof of his privilege.

IV. The right of a foreign minister, temporarily leaving this country, to designate some one to act as chargé d'affaires for the government he represents during his absence, is universally conceded.

Mr. Lainfiesta being about to leave this country on a temporary leave of absence, exercised that right and designated the petitioner to act in his place during such absence, and the petitioner did so act down to the time of the receiving of the new minister, Don Fernando Cruz, in July, 1889.

The State Department recognized the right of Mr. Lainfiesta, as exclusively it was vested with authority to do, to make such designation, and treated the defendant in a diplomatic character, from the time of Mr. Lainfiesta's departure to the time of the arrival of Dr. Cruz.

Argument for Petitioner.

The State Department under date, March 6th, 1889, sent to the defendant as "In charge of the Legations of Guatemala, Salvador and Honduras," notice of the appointment of Mr. Blaine to his position as Secretary of State.

Such a communication is never made to those acting as consuls, but only to those exercising diplomatic functions.

The petitioner was not the Consul of Salvador, and yet he was recognized by the Department as representing not alone Guatemala and Honduras, of which he was consul, but also as representing Salvador.

Clearly it was only by reason of the recognition of our government of the fact that the petitioner was, by virtue of the letter of Mr. Lainfiesta, exercising diplomatic functions, that he was recognized by our government as in any way representing a country of which he was not even consul.

V. The authorities clearly and abundantly support the position here contended for by the counsel for the petitioner and show, manifestly, that in cases where the facts are not in any degree as strong as they are here indisputably shown to be, the courts of the United States have recognized that persons were acting in a diplomatic character. *United States* v. *Ortega*, 4 Wash. C. C. 531; *United States* v. *Liddle*, 2 Wash. C. C. 205; *United States* v. *Benner*, Baldwin C. C. 234.

VI. The authorities on International Law uniformly recognize the position which the petitioner occupied as one clothed with diplomatic functions. Woolsey's Int. Law, 4th. ed. (1876), 164; Wheaton's Int. Law, 8th. ed. (1866), § 215; Kent's Comm., on Int. Law, by Abdy, 129, 130; Hall's Int. Law, 2d. ed. (1884), 292, § 105; Davis' Int. Law, (1887), 144; Twiss' Law of Nations, (1884), 350, § 209; Levi's Int. Law, 118; Pomeroy's Int. Law, §§ 331, 410; Phillimore's Int. Law, 2d. ed. 2, § 220; Halleck's Int. Law, new ed. 274; Bouvier's Law Dic. Tit., "Chargé d'Affaires;" Heffter's Droit International Public de l'Europe, 388; Martens' Guide Diplomatique, 5th. ed. § 16, 61; Klüber, Droit des Gens Mod., § 182; 3 Pradier-Fodéré, Traité de Droit International Public, 113, § 1284; Ferd. De Cussy, Réglements Consulaires, 97; De Cussy, Dictionnaire du Diplomat et du Consul, 129;

1 De Clercq et De Vallat, Guide Pratique des Consulats, 4th. ed. 93; 3 Pasquale Fiore, Nouveau Droit International Public, traduit de l'Italien par Antoine, p. 49, § 1106; Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen, von Dr. August Wilhelm Heffter, 6th ed. 395.

It is true that nowhere in the correspondence between the Department of State and the petitioner is he addressed with the technical title of "chargé d'affaires," but it is also true that the letter of Mr. Lainfiesta to the Department of State under date January 16th, 1889, clearly shows that the minister of the three Central American Republics, being about to leave temporarily this country, presented the petitioner to the Department of State as the person who was to be the medium of communication between the three Central American Republics and the United States during his absence; and the State Department in its letter to the petitioner, under date of January 24th, 1889, acknowledged the receipt of Minister Lainfiesta's communication and assented to his corresponding with our Department of State. Under all the authorities it is clear that the petitioner was, by this correspondence, made chargé d'affaires *ad interim*, of the three Central American Republics, during the absence of Minister Lainfiesta.

Because the Department of State did not use the technical French term of diplomacy, "chargé d'affaires," in addressing the petitioner, when informing him of the appointment of Mr. Blaine as Secretary of State, but addressed him with the English words "In charge of the Legations of Guatemala, Salvador and Honduras," or because the Department of State addressed the petitioner by the English phrase "In charge of the business of the Legations of Guatemala, Salvador and Honduras," when requesting him to do the distinctively diplomatic act of informing the three Central American Republics of the recall of Mr. Hall, our former minister, and of the appointment of Mr. Mizner, our new minister, can it be said that the use of the literal English translation of the French title of office deprived the petitioner of the position which, under all the authorities, he occupied?

It is the office, the discharge of the duty, the performance

of a diplomatic function which produce the privilege, and if the person claiming the privilege is shown to be duly invested with the authority to discharge the diplomatic functions and to be duly discharging the same, however the individual may be called, does not the privilege attach to the person? It is strictly because the person is authoritatively presented and received as the official representative of the foreign sovereign, and as the medium of its communication with ours that he has the privilege.

VII. It will be clear to the court that as to the Republic of Salvador, to which the petitioner bore no relation whatever prior to his appointment by Mr. Lainfiesta, his functions during Mr. Lainfiesta's absence could not possibly be anything but diplomatic functions, and that, of itself, is enough for the purposes of the petitioner's present application.

VIII. The question as to the jurisdiction of the District Court was properly raised by motion. The jurisdiction of the United States Courts being limited, unless the facts required to support the jurisdiction affirmatively appear, it is the duty of these courts to forthwith suspend proceedings and dismiss the action. Indeed, the presumption in every stage of the case is against their jurisdiction unless the contrary expressly appears from the record itself. *Chapman* v. *Barney*, 129 U. S. 677; *Börs* v. *Preston*, 111 U. S. 252; *Grace* v. *Am. Central Ins. Co.*, 109 U. S. 278; *Robertson* v. *Cease*, 97 U. S. 646.

Mr. Robert D. Benedict opposing.

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

The judicial power of the United States extends to "all cases affecting ambassadors, other public ministers, and consuls." Const. Art. III, sec. 2.

By section 687 of the Revised Statutes, it is provided that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations;

and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or a vice-consul is a party." By section 563, it is provided that "the District Courts shall have jurisdiction as follows: . . . Seventeenth. Of all suits against consuls or vice-consuls," except for certain offences. The petitioner has been, since July, 1887, the consul general of the Republic of Guatemala, and therefore the District Court had jurisdiction of the action in question, unless he belonged to the class of official personages subject to suits or proceedings only in this court. This he insists was the fact, and avers in his petition, as he did in his plea in the District Court, that at the time of the commencement of the action and until and including the 10th day of July, 1889, which was the eighth day after service of process upon him, he was "the acting minister and sole representative of said republic [of Guatemala] in the United States," and for that reason came within the words of section 687, "other public ministers."

The exemption asserted ceased on the 10th of July, 1889, and on the 17th of July the petitioner gave a general notice of appearance in the action, but did not set up the want of jurisdiction until the 25th of the following September. Suit could have been brought in that court against him on the 11th day of July, but as in his view this could not have been done on the 29th of June or the 2d of July, he contends that the District Court should be ordered to dismiss the suit, though it could at once be recommenced therein. But it is said that the appearance did not waive the right to be sued in this court rather than in the District Court, because that was the privilege of the country or government which he represented. Without pausing to inquire how far this is a correct application of the international privilege of not being sued at all, its assertion, even in this restricted form, serves to emphasize petitioner's contention that he was at that time the minister or diplomatic agent of the republics of Guatemala, Salvador and Honduras in the United States, entrusted by virtue of his office with authority to represent those republics in their negotiations and to vindicate their prerogatives.

Opinion of the Court.

Under section 2, Art. II, of the Constitution, the President is vested with power to "appoint ambassadors, other public ministers and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers."

These words are descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign power or by a foreign power to the United States, and the words are so used in section 2 of Art. III. These agents may be called ambassadors, envoys, ministers, commissioners, chargés d'affaires, agents, or otherwise, but they possess in substance the same functions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence or dignity. 7 Opinions Attys. Gen. (Cushing), 186.

Hence, when in subdivision fifth of section 1674 of the Revised Statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, agents and secretaries of legation, and none others," we understand that to express the view of Congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States.

But the scope of the words "public ministers" is defined in the legislation embodied in Title XLVII, "Foreign Relations," Rev. Stat., 2d ed. 783. Section 4062 provides that "every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court." Section 4063 enacts that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minis-

ter, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void. Section 4064 imposes penalties for suing out any writ or process in violation of the preceding section; and section 4065 says that the two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States "in the service of a public minister," and process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a "domestic servant of a public minister," unless the name of the servant has been registered and posted as therein prescribed.

Section 4130, which is the last section of the title, is as follows: "The word 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, vice-consul general, consul or vice-consul."

Sections 4062, 4063, 4064 and 4065 were originally sections 25, 26, 27 and 28 of the Crimes Act of April 30, 1790, c. 9, 1 Stat. 118; and these were drawn from the statute 7 Anne, c. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed, in *Heathfield* v. *Chilton*, 4 Burrow, 2015, 2016, the act did not intend to alter and could not alter.

In that case, involving the discharge of the defendant from custody, as a domestic servant to the minister of the Prince Bishop of Liége, Lord Mansfield said: "I should desire to know in what manner this minister was accredited — certainly, he is not an ambassador, which is the first rank — envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called 'minister,' 'tis true; but minister (alone) is an equivocal term." The statute of Anne was passed in consequence of the arrest of an ambassador of Peter the Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death, 1 Bl. Com. 254; and it was in reference to this

that Lord Ellenborough, in *Viveash* v. *Becker*, 3 M. & S. 284, where it was held that a resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempt from arrest on mesne process, remarked: "I cannot help thinking that the act of Parliament, which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried."

Three cases are cited by counsel for petitioner arising under or involving the act of 1790. In *United States* v. *Liddle*, 2 Wash. C. C. 205, in the case of an indictment for an assault and battery on a member of a foreign legation, it was held that the certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States. The certificate from the Secretary of State, Mr. Madison, stated that "when Mr. Feronda produced to the President his credentials as chargé des affaires of Spain, he also introduced De Lima, as a gentleman attached to the legation and performing the duties of secretary of legation," and the certificate was held to be the best evidence to prove that Feronda was received and accredited, and that at the same time De Lima was presented and received as secretary attached to the legation. In *United States* v. *Ortega*, 4 Wash. C. C. 531, there was produced in court an official letter from the Spanish minister to the Secretary of State, informing him that he had appointed Mr. Salmon chargé d'affaires; a letter from the minister to Mr. Salmon; a letter from the Secretary of State addressed to the Spanish minister, recognizing the character of Mr. Salmon; two letters from the Secretary of State addressed to Mr. Salmon as chargé d'affaires; and the deposition of the chief clerk of the State Department that Mr. Salmon was recognized by the President as chargé d'affaires, and was accredited by the Secretary of State. In *United States* v. *Benner*, Baldwin, 234, the court was furnished with a certificate from the Secretary of State that the

Danish minister had by letter informed the Department that Mr. Brandis had arrived in this country in the character of attaché to the legation, and that said Brandis had accordingly, since that date, been recognized by the Department as attached to the legation in that character.

These cases clearly indicate the nature of the evidence proper to establish whether a person is a public minister within the meaning of the Constitution and the laws, and that the inquiry before us may be answered by such evidence, if adduced.

Was Consul General Baiz a person "invested with and exercising the principal diplomatic functions," within section 4130, or a "diplomatic officer," within section 1674? His counsel claim in their motion that he was "the acting minister or chargé d'affaires of the Republics of Guatemala, Salvador and Honduras in the United States," and so recognized by the State Department, and that he exercised diplomatic functions as such, and therefore was a public minister, within the statute.

By the Congresses of Vienna and Aix-la-Chapelle four distinct kinds of representation were recognized, of which the fourth comprised chargés d'affaires, who are appointed by the minister of foreign affairs, and not as the others, nominally or actually by the sovereign. Under the regulations of this government the representatives of the United States have heretofore been ranked in three grades, the third being chargés d'affaires. Secretaries of legation act *ex officio* as chargés d'affaires *ad interim*, and in the absence of the secretary of legation the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs.

Wheaton says: "Chargés d'affaires, accredited to the ministers of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc*, who are originally sent and accredited by their governments, or chargés d'affaires *per interim*, substituted in the place of the minister of their respective nations during his absence." Elements Int. Law (8th ed.), § 215.

Ch. de Martens explains that "[1] chargés d'affaires *ad hoc* on permanent mission are accredited by letters transmitted to the minister of foreign affairs. Chargés d'affaires *ad interim* are presented as such by the minister of the first or second class when he is about to leave his position temporarily or permanently." Guide Diplomatique, Vol. 1, p. 61, § 16.

"They," observes Twiss in his Law of Nations, § 192, "are orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited."

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, 1 Calvo, Droit Int. 586, 2d ed. Paris 1870, and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

[2] "There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." Guide Pratique des Consulats, Vol. 1, p. 93.

---

[1] Les Chargés d'affaires *ad hoc*, en mission permanente, sont accrédités par des lettres remises au ministre des affaires étrangères. Les chargés d'affaires *ad interim* sont présentés comme tels par le ministre de première ou 2de Classe lorsqu'il se dispose à quitter son poste temporairement ou définitivement.

[2] Il reste une dernière supposition à prévoir: celle où un consul est chargé provisoirement de la gestion des affaires d'un poste diplomatique; il est

That it may sometimes happen that consuls are so charged is recognized by section 1738 of the Revised Statutes, which provides:

"No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed Mr. Justice Story, in *The Anne*, 3 Wheat. 435, 445, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."

When a consul is appointed chargé d'affaires, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as chargé d'affaires and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. Atty. Gen. Cushing, 7 Opinions, 342, 345.

---

accrédité, dans ce cas, en sa qualité diplomatique, soit par une lettre du ministre des affaires étrangères de France au ministre des affaires étrangères du pays où il doit résider, soit par une lettre de l'agent diplomatique qu'il doit remplacer, soit enfin par la présentation personelle de cet agent au ministre des affaires étrangerès du pays.

This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the Consul General of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that government, since he was not recognized as performing any acts as such, which he was not equally competent to perform as Consul General. 1 Whart. Dig. Int. Law, 2d ed. c. 4, § 88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, chargé d'affaires *ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687; and the District Court had jurisdiction.

The letter of Señor Lainfiesta of January 16, 1889, was neither an appointment of Mr. Baiz as chargé d'affaires *ad interim*, nor equivalent to such an appointment. It was a request in terms that the Secretary of State would "please allow that the Consul General of Guatemala and Honduras, in New York, Mr. Jacob Baiz," should communicate to the office of the Secretary of State any matters relating to the peace of Central America of which that department ought to be informed without delay. This is not the language of designation to a representative position, and is the language designating a mere medium of communication; and the reply of Mr. Secretary Bayard so treats it, in declaring that the department would be pleased to receive any communication in relation to Central America of which Consul General Baiz might be made the channel. This reply is addressed to Mr. Baiz as "Consul General of Guatemala and Honduras," and not as chargé d'affaires *ad interim*. The mere fact that the usual note conveying the information to the legations of Mr. Secretary Blaine's accession chanced to be addressed to "Señor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador and Honduras," was not a recognition that he was chargé d'affaires *ad interim*, or exercising diplomatic functions; and Mr. Baiz in acknowledging the receipt of that

announcement properly signs his letter "Consul General." It may be that such announcements are not sent to any but those exercising diplomatic functions; but this courtesy could not operate as in itself a deliberate recognition of the right to exercise such functions, nor that the person to whom the communication was addressed was in such exercise as a matter of fact. It was entirely proper, since Consul General Baiz was the channel of communication between Guatemala, Honduras and Salvador and the State Department, that the notification should be sent to him, and even if that course had not been usual, the courtesy could not be availed of to impart a character which the recipient did not otherwise possess.

The proofs show that of ten letters from the State Department to Mr. Baiz, between January 16 and July 10, 1889, two were addressed to him as in charge of the legations, or the business of the legations, of Guatemala, Salvador and Honduras; two were addressed to him as Consul of Honduras; and six as Consul General of Guatemala, or Guatemala and Honduras. Of seven letters from Mr. Baiz to the department, one was signed Jacob Baiz, and six, Jacob Baiz, Consul General. The acknowledgment of notice of the accession of the Secretary of State, and of the appointment of Mr. Mizner, and the transmission of a letter from the President of Guatemala, and the announcement of the appointment of Minister Cruz, by the Consul General, can hardly be regarded as the performance of diplomatic functions as such.

The official circular issued by the Department of State, corrected to June 13, 1889, gives the names and description of the chargés d'affaires *ad interim*, in the case of countries represented by ministers who were absent and of countries having no minister, and the date of their presentation. In the instance of Portugal, the name is given of "Consul and acting Consul General, in charge of business of legation," and the fact of the presentation with the date appears in the list; while in the instance of Guatemala, Salvador and Honduras, the name of Mr. Baiz is referred to in a foot-note, with the title of Consul General only; nor does it appear, nor is it claimed to be the fact, that he was ever presented. As stated by

counsel, Mr. Webster took the ground, in the case of M. Hülsemann, that as chargé d'affaires he was not, as matter of strict right, entitled to be presented to the President; and this is in accordance with the regulations of the State Department. Cons. Reg. 13. But such presentation is undeniably evidence of the possession of diplomatic character, and so would be the formal reception of a chargé d'affaires *ad interim* by the Secretary of State. The inference is obvious, that if the Department of State had regarded Mr. Baiz as chargé d'affaires *ad interim*, or as "invested with and exercising the principal diplomatic functions," his name would have been placed in the list, with some indication of the fact, as the title of chargé, or, if he had been presented, the date of his presentation. Nor can a reason be suggested why the petitioner has not produced in this case a certificate from the Secretary of State that he had been recognized by the Department of State as chargé d'affaires *ad interim* of Guatemala, or as intrusted with diplomatic functions, if there had been such recognition. A certificate of his status was requested by the Guatemalan minister, and if the State Department had understood that Mr. Baiz was in any sense or in any way a "diplomatic representative," no reason is perceived why the Department would not have furnished a certificate to that effect; but instead of that, it contented itself with a courteous reply, giving what was in its judgment a sufficient résumé of the facts, the letter being in effect a polite declination to give the particular certificate desired, because that could not properly be done.

Mr. Baiz was a citizen of the United States and a resident of the city of New York. In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself. Wheaton, 8th ed. § 210; 2 Twiss, Law of Nations, 276, § 186; 2 Phill. Int. Law, 171. Even an appointment as consul of a native of the place where

consular service is required, is, according to Phillimore "perhaps, rightfully pronounced, by a considerable authority, to be objectionable in principle." Vol. II. p. 291, citing De Martens & De Cussey, Recueil des Traités, Index explicatif, p. XXX, tit. "Consuls."

[1] "Other powers," says Calvo, vol. 1, p. 559, 2d ed., "admit without difficulty their own citizens as representatives of foreign States, but imposing on them the obligation of amenability to the local laws as to their persons and property. These conditions, which, nevertheless, ought never to go so far as to modify or alter the representative character, ought always to be defined before or at the time of receiving the agent; for otherwise, the latter might find it impossible to claim the honors, rights and prerogatives attached to his employment." See also Heffter, 3d Fr. ed. 387.[2]

In the United States, the rule is expressed by Mr. Secretary Evarts, under date of September 19, 1879, thus: "This government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And again, April 20, 1880, while waiving the obstacle in the particular instance, he says: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he is sent." 1 Wharton Dig. Int. Law 2d ed. § 88*a*, p. 628. Of course the objection would

[1] D'autres puissances admettent sans difficulté leurs nationaux comme représentants d'États étrangers, mais, en leur imposant l'obligation de rester soumis aux lois territoriales pour leurs personnes et pour leurs biens. Ces conditions, qui cependant ne sauraient jamais aller jusqu'à modifier ou à altérer le caractère représentatif, doivent toujours être exprimées avant ou au moment de reçevoir l'agent; car autrement celui-ci se trouverait dans l'impossibilité de revendiquer les honneurs, les droits, et les prérogatives attachés à son emploi.

[2] En pareil cas le consentement du gouvernement étranger est indispensable, et ce consentement peut être conditionel et limité.

not exist to the same extent in the case of designation for special purposes or temporarily, but it is one purely for the receiving government to insist upon or waive at its pleasure. The presumption, therefore, would ordinarily be against Mr. Baiz's contention, and, as matter of fact, we find that when in 1886, he was appointed chargé d'affaires of the Republic of Honduras to the government of the United States, Mr. Secretary Bayard declined receiving him as the diplomatic representative of the government of that country, because of his being a citizen of the United States, and advised him that: "It has long been the almost uniform practice of this government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position." And in a subsequent communication rendered necessary by a direct question of Mr. Baiz, the Secretary informs him "that it is not the purpose of the department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever." This correspondence disposes of the question before us. The objection which existed in 1886 to the reception of Mr. Baiz as chargé d'affaires *ad hoc* or *ad interim*, or according to him any diplomatic status whatever, whether temporary or otherwise, existed in 1889; and it is out of the question to assume that the State Department intended to concede the diplomatic status between January 16 and July 10, 1889, upon the request of Señor Lainfiesta that Consul General Baiz might be allowed to be a medium of communication during his absence, which it had refused to accord to the Republic of Honduras itself. It is evident that the statement of the Assistant Secretary, October 4, 1889, was quite correct, that "the business of the legation [of Guatemala] was conducted by Consul General Baiz, but without diplomatic character."

It is objected that we ought not to have allowed these

official papers to come before us, but should have prohibited the District Court from exercising jurisdiction, because the evidence that established it had not all been before that court when the question was raised; but the rule governing this class of cases involves no such consequences. The district judge was of opinion that inasmuch as there were two kinds of direct evidence which would show that the defendant was a "public minister," to wit: (1) A certificate of the Secretary of State that he was such, was received as such and was exercising such functions; or (2) proof of the exercise by the defendant of "the principal diplomatic functions," under some one of the titles of diplomatic office, as recognized by our statutes and the law of nations; and as such direct evidence had not been furnished, and the plaintiff was not required to produce his counter evidence on a motion like that under consideration instead of at the trial, he was justified in retaining jurisdiction until the issue raised by the pleadings was regularly determined. But to this latter suggestion, counsel for petitioner answered in argument: "At any rate, in this court, exercising its appropriate jurisdiction to entertain an application for a writ of prohibition or mandamus, the respondent here is called upon to produce any evidence that exists to countervail the petitioner's proof of his privilege." This is undoubtedly the correct view. The question here is whether the District Court had jurisdiction, and not whether its order refusing to set aside the service of summons and the subsequent proceedings in the action, and dismissing the same, should be reversed.

The practice in prohibition was formerly to file a suggestion, an affidavit in support of which was required where the prohibition was moved for upon anything not appearing upon the face of the proceedings. Upon a rule to show cause, if it appeared to the court, on cause shown, that the surmise was not true, or not clearly sufficient to ground the prohibition upon it would be denied, otherwise the rule would be made absolute: or, if the matter were doubtful, the party was ordered to declare, and issue joined on such declaration was regularly tried, being in the nature of an issue to inform the conscience

of the court. 2 Sellon's Practice, 313, 321, 325. And in mandamus, if the case were not governed by the return to the alternative writ, but a traverse of the return was allowed, issues were made up and a trial had. If the matter can be disposed of upon the rule to show cause, that course may be pursued, but the applicable principles are the same. The alleged want of jurisdiction depends upon questions of fact. It was purely discretionary whether this evidence should be admitted at the time it was presented; and in a proceeding involving the inquiry under consideration, it was plainly our duty to permit it to come in, the petitioner being afforded, as he was, the opportunity for explanation and the introduction of such other evidence as he chose to produce.

In *Ex parte Hitz, Petitioner*, 111 U. S. 766, which was an application for a writ of certiorari, commanding the Supreme Court of the District of Columbia to certify to this court an indictment and the proceedings thereunder, on the ground that, when the indictment was filed and when the offences therein charged were committed, he was the diplomatic representative of the Swiss Confederation, the court directed a preliminary inquiry, and, in doing so, Mr. Chief Justice Waite said: "As it is conceded that the petitioner is not now in the diplomatic service of Switzerland, and was not when all the proceedings in the Supreme Court of the District of Columbia subsequent to the indictment were had, counsel are directed to request the Secretary of State to certify whether John Hitz was at any time accredited to and recognized by the government of the United States as public or political agent or chargé d'affaires of the Republic of Switzerland, and if so, for what period of time, and up to and including what date." The counsel having complied with that request, the court upon receiving the information as to what the records of the department showed, dismissed the petition.

Regarding the matter in hand as, in its general nature, one of delicacy and importance, we have not thought it desirable to discuss the suggestions of counsel in relation to the remedy, but have preferred to examine into and pass upon the merits.

We ought to add that while we have not cared to dispose

of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.

Our conclusion is, as already stated, that the District Court had jurisdiction, and we accordingly discharge the rule and

Deny the writs.

NEW YORK ELEVATED RAILROAD COMPANY *v.* FIFTH NATIONAL BANK.

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

No. 106. Argued November 13, 1889. — Decided May 5, 1890.

A party cannot take exception to a ruling under which a trial has been conducted by his procurement or with his acquiescence.

In an action by the owner of a building and land abutting on a street in the city of New York, against a company which had constructed an elevated railroad and station-house over and along the street, the plaintiff claimed damages for the injury to the use and enjoyment of his property by obstructing the passage of light and air and diminishing the rents, and also for the permanent injury to the market and rental value of the property. Evidence, offered by the plaintiff, of the value of the building, before and after the construction of the railroad, was excluded by the court upon the defendant's objection. The defendant contended that the plaintiff's damages should be limited to the date of bringing the action. But the court ruled that they might be recovered to the time of the trial; and evidence was introduced in accordance with that ruling without objection or exception by the defendant to the admission of the evidence, or to the ruling under which it came in. *Held*, that the defendant could not except to a subsequent refusal of the court to admit evidence that the value of the plaintiff's property had been increased by the construction of the railroad; nor to an instruction allowing damages to be recovered to the time of trial; nor to the refusal of an instruction, requested by the defendant after the charge, that the recovery could be had only for the permanent injury to the plaintiff's property.

Statement of the Case.

An abutter on a street in the city of New York may recover against a company constructing an elevated railroad and station-house in front of his building, damages for the discomforts and inconveniences in the occupation of the building, caused by the erection of the defendant's structure, independently of the running of trains thereon.

THIS was an action brought March 5, 1880, by a national bank against an elevated railroad company to recover damages for the construction of the defendant's track and station-house in front of the plaintiff's banking-house at the southwesterly corner of Third Avenue and Twenty-third Street in the city of New York.

The complaint claimed damages for the interference with the use, enjoyment and value of the plaintiff's building, and the obstruction of light and air, by the construction of the defendant's track and station; and for the interference with the use, comfort and enjoyment of the building by the plaintiff, its officers, servants and tenants, caused by the noise, steam, smoke and noxious smells attending the running of the trains, and for the consequent lessening of the rents and profits of the building; and also for the permanent injury to the use of the building and to its market and rental value, by the construction of the track and station, and by the jarring and concussion attending the running of the trains.

The answer denied that the plaintiff had any interest in Third Avenue and Twenty-third Street, except as shared with the public at large; denied the other allegations of the complaint, except that it admitted the erection of the elevated railway and station; and alleged that these structures were authorized by and in conformity with the statutes of New York of 1850, c. 140; 1866, c. 697; 1867, c. 489; 1868, c. 855; 1875, cc. 595, 606.

A verdict recovered by the plaintiff at a trial in February, 1885, was set aside and a new trial ordered. 24 Fed. Rep. 114.

At the second trial, in June, 1886, it appeared that Third Avenue and Twenty-third Street were laid out many years ago under the statute of New York of 1813, c. 86, § 178, by which the city acquired the title in fee of public streets,

avenues, places and squares, "in trust, nevertheless, that the same be appropriated and kept open for and as part of a public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city are, and of right ought to be;" that the plaintiff bought its land and erected its building in 1874; that the building was four stories high, with business offices in the basement, the plaintiff's banking-house in the first story, and apartments let to tenants in the stories above; and that the defendant, under and in conformity with the authority conferred upon it by the statutes of New York, constructed in 1878, and had since maintained, a railway track over and along Third Avenue, fifteen feet above the surface of the street, and fifteen feet wide, supported by iron columns, and the west side of the track being about thirty-five feet from the west side of Third Avenue; and also a station-house, with stairs leading to and from it, at the intersection of Third Avenue and Twenty-third Street; and that locomotive engines and trains constantly passed over the track in front of the plaintiff's building.

The plaintiff's cashier, called as a witness in its behalf, testified, without objection by the defendant, that the track and station obstructed the access of light to and the circulation of air in the bank on the first story and the apartments on the second story, and compelled the plaintiff to use gas by day in the bank; and that this effect continued to the time of the trial.

He also testified, without objection, that "the structure, as it existed there, the elevated railway station and the platform and the bed of the road," reduced the rents of the building. He was then asked: "How much a year?" The defendant's counsel interposed, and asked for "an election on the part of the counsel for the plaintiff as to whether in this action they are claiming for loss of rents, or for injury in consequence of the erection of the road." The court declined to require the plaintiff's counsel to make an election, but directed them to confine themselves to proving in any proper way that the structure as a permanent thing, without regard to the running of trains upon it, injured the plaintiff's building. The cashier there-

upon testified, without objection by the defendant, that there had been a loss in rents of $1000 a year since the structure had been there, and down to the time of trial.

The plaintiff offered to prove the value of the building, before and after the defendant's elevated railroad was built. This evidence was objected to by the defendant, and excluded by the court. Thereupon the following colloquy took place:

Defendant's counsel: "You only come down to the commencement of this action, I suppose? I will ask counsel to make a determination of what he is going for. I suppose I have a right to ask for an election at this point."

The court: "For what length of time do you claim to recover?"

Plaintiff's counsel: "We claim for permanent injury."

The court: "If you are entitled to recover, you claim damages should be assessed by the jury until now?"

Plaintiff's counsel: "No, sir; but until as long as grass grows and water runs."

The court: "May be they will take it down; if they should, then you would not want to pay back anything. But you claim the right to recover prospectively. Counsel is entitled to know what you claim. I think the common law is, as I stated it, that where there is a consequential injury resulting from damages the damages may be recovered up to the time of the trial, and if they continue the right of recovery continues also. I think I will go by the common law, unless I see to the contrary before the trial closes."

Other witnesses were afterwards called and examined by both parties, without objection, as to the diminution of the light, air and rental of the building, from the time of the erection of the defendant's structures to the time of the trial; and as to the causes of such diminution.

Evidence that the value of the plaintiff's property had increased since the erection of this railroad structure, was offered by the defendant, and objected to by the plaintiff. The court sustained the objection and excluded the evidence, and the defendant excepted.

At the close of the evidence, the court denied successive

motions of the defendant to direct a verdict for the defendant because no facts had been shown sufficient to constitute a cause of action, and to direct the jury to render a verdict for the plaintiff for nominal damages only; and the defendant excepted to the denial of each of these motions.

The court instructed the jury that the plaintiff, having erected its building after Third Avenue and Twenty-third Street had been laid out as public streets, had the right to have those streets remain forever as open streets; and that if the structure erected by the defendant was such a permanent thing in the way of either street as an open street, as to make it cease to be an open street, or cease in a measure to be an open street, and so to subvert it from an open street into something else at that place, the plaintiff was entitled to recover "such damages as it has sustained by reason of the erection of this structure, which has subverted the street, from the time it was put up until now," taking into consideration the injury to the part of the building occupied as a bank, by hindering access to and egress from it, and by obstructing the admission of light and the circulation of air; and including not only an allowance for the expense caused by being compelled to use gas, but a fair compensation for other discomforts and inconveniences in its occupation in consequence of the defendant's structure; and also any diminution of the rents of the rest of the building, by reason of the defendant's permanent structure standing there in the two streets; but that no damages were "to be given on account of any inconvenience occasioned by the noise of the running of trains, or smoke, or cinders, or steam, or gas, or any of those things connected with the running of the trains."

The defendant excepted to the instruction that the plaintiff should be allowed such damages as it had sustained by the reason of the defendant's structure up to the present time; and also to that part of the charge which allowed a recovery for discomforts and inconveniences, other than being compelled to use gas, in so much of the building as was occupied by the bank.

The defendant, at the end of the charge to the jury, re-

quested the court to instruct them as follows: "The plaintiff is not entitled to recover in this action for loss of rents or of rental value. The recovery in this action, if at all, must be for permanent injury to the plaintiff's property by the defendant's interference with the easement of light and air." The court refused so to instruct the jury, and the defendant excepted to the refusal.

The jury returned a verdict for the plaintiff in the sum of $5000. A motion by the defendant for a new trial was overruled by the court. 24 Blatchford, 89; 28 Fed. Rep. 231. Judgment was thereupon entered for the plaintiff for the sum of $5068.33, being the amount of the verdict and interest; and the defendant sued out this writ of error, which the plaintiff unsuccessfully moved to dismiss for want of a sufficient amount in dispute to give this court jurisdiction. 118 U. S. 608.

Mr. Julien T. Davies and *Mr. Edward S. Rapallo* for plaintiff in error.

I. Regarding this as an action upon the case for a continuing interference with certain easements, appurtenant to the premises of the defendant in error, it was error for the court to admit evidence and permit a recovery of damage to the defendant in error, accruing after the commencement of the action.

The action must be regarded as brought upon one or the other of two distinct and conflicting theories; either as an action to recover damages consisting of a permanent depreciation in the value of the premises, due to the destruction, once for all time, of certain rights or attributes, of value to the premises in question, due to the erection in the street of a structure confessedly permanent; or, on the other hand, as an action on the case to recover, for a continuing interference with such rights, damages thereby accruing from day to day, up to the commencement of the action, by the continued maintenance of a structure, which, because temporary, had not destroyed the rights.

Argument for Plaintiff in Error.

In contemplation of law the trespass is a fresh offence each day of its continuance, and each trespass constitutes a fresh cause of action. The plaintiff can bring suit each day upon the preceding day's trespass, and in no one suit is it possible to make compensation for all possible trespasses in the future. From this it follows that the plaintiff is restricted in his recovery, in any one suit, to the amount of damage suffered by him up to the time of beginning that suit. This is the doctrine of the Federal Courts. *Wightman* v. *Providence*, 1 Cliff. 524; *Bradley* v. *Washington, Alexandria and Georgetown Steam Packet Co.*, 9 Pet. 107; *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 108 U. S. 317, 322. It is also the doctrine of the courts of the State of New York. *Uline* v. *New York Central and Hudson River Railroad*, 101 N. Y. 98; *Blunt* v. *McCormick*, 3 Denio, 283; *Beckwith* v. *Griswold*, 29 Barb. 291; *Fettrech* v. *Leamy*, 9 Bosworth, 510, 524; *Whitmore* v. *Bischoff*, 5 Hun, 176; *Plate* v. *New York Central Railroad*, 37 N. Y. 472, 475, 476; *Beach* v. *Crain*, 2 N. Y. 86, 92; *S. C.* 49 Am. Dec. 369; *Mahon* v. *N. Y. Central Railroad*, 24 N. Y. 658; *Hussner* v. *Brooklyn City Railroad*, 114 N. Y. 433.

The doctrine of the Courts of England and of the other States of the Union is the same. See in addition to *Uline* v. *N. Y. Central*, &c., *supra*, *Battishill* v. *Reed*, 18 C. B. 696; *Robinson* v. *Bland*, 2 Burrow, 1077; *Delaware and Raritan Canal Co.* v. *Wright*, 1 Zabr. (21 N. J. Law) 469; *Powers* v. *Ware*, 4 Pick. 106.

II. The Court erred in failing to instruct the jury that the damages which they should assess must be the permanent injury, if any, to the plaintiff's premises by reason of the defendant's interference with the easements appurtenant to the same. *Story* v. *New York Elevated Railroad*, 90 N. Y. 122.

The law recognizes the existence of such a cause of action as is set forth in this complaint. There is recognized by law such a claim as a claim for permanent depreciation in the value of real estate, due to the destruction of a right appurtenant to the same, as will appear by the following English and American cases: *Nicklin* v. *Williams*, 10 Exch. 259; *Bonomi*

v. *Backhouse*, 1 El. Bl. & El. 622; *S. C.* 1 El. Bl. & El. 646; *S. C.* 9 H. L. Cas. 503; *Lamb* v. *Walker*, 3 Q. B. D. 389; *Mitchell* v. *Darley Main Colliery Co.*, 14 Q. B. D. 125; *Van Zant* v. *The Mayor*, 8 Bosworth, 375; *Langdon* v. *The Mayor*, 93 N. Y. 129; *Baltimore and Potomac Railroad* v. *Reany*, 42 Maryland, 117; *Troy* v. *Cheshire Railroad*, 23 N. H. 83; *S. C.* 55 Am. Dec. 177; *Fowle* v. *New Haven and Northampton Railroad*, 107 Mass. 352; *Chicago and Pacific Railroad* v. *Stein*, 75 Illinois, 41; *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.) 766; *Uline* v. *New York Cen. Railroad*, 101 N. Y. 98.

The theory for which we contend is, that the structure, as matter of fact, is presumably permanent; that any damage therefore inflicted upon abutting premises by such permanent obstruction of easements, consists of a depreciation in the value of the premises; that this can be measured and recovered in an action at law; that such recovery is a full adjustment of the rights of the parties as to any particular parcel.

But whether or not this prove true, independently of any *assent* of the *parties* to the proposition that the road is permanent, it would appear that the recovery should be measured by the permanent depreciation in the value of the premises in any action where such *assent is given.*

In such case the recovery is had, once for all, and the judgment a bar to any further action. The New York Court of Appeals has expressly so decided in reference to this railroad in an action at law by an abutter in which the recovery was measured by the permanent depreciation in the value of the abutting premises, and also decided that such assent of the parties was evidenced by the form of action brought by plaintiff, and by the request of defendant corporation to instruct the jury that the recovery should be measured by the depreciation in value of the premises. *Lahr* v. *Metropolitan Elevated Railroad*, 104 N. Y. 268.

So far as the record goes, it may well be that although a temporary loss may have occurred at first, due to the interference with the use and occupation, yet that the railroad company might have shown, had it been permitted, that the value of the premises had been enhanced, not reduced.

It proved true in many instances that the elevated railways in New York caused a temporary loss of rents for a period of a few years, and yet produced in such cases either no permanent depreciation or far less than that anticipated by the owner.

Here in the case at bar we have the assent of both parties to this proposition of the permanency of the structure. The complaint states the permanency, and contains allegations of permanent depreciation, which would be false if the structure were not permanent. The railroad company assents by expressly requesting the court to charge that the recovery must be measured by the depreciation and not by the loss of rents or interference with the enjoyment.

III. The court erred in permitting the jury to include in the verdict any damages for loss of rent or interference with the enjoyment of that portion of the premises occupied by the bank itself for banking purposes.

Mr. W. F. McRae for defendant in error.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

The law of the State of New York, as declared by the Court of Appeals, appears to be as follows: An elevated railroad erected in and over a street pursuant to the statutes of the State, and with due compensation to the owners of property taken for the purpose, is a lawful structure. The owners of lands abutting on a street in the city of New York have an easement of way, and of light and air, over it; and, through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for the permanent injury to this easement; but, in an action at law, cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action. *In re New York Elevated Railroad*, 70 N. Y. 327; *In re Gilbert Elevated Rail-*

way, 70 N. Y. 361; *Story* v. *New York Elevated Railroad*, 90 N. Y. 122; *Lahr* v. *Metropolitan Elevated Railway*, 104 N. Y. 268; *Pond* v. *Metropolitan Elevated Railway*, 112 N. Y. 186. This rule of damages at law has not prevailed in analogous cases decided in other jurisdictions, and collected in the briefs of counsel; and in the case last above cited the court observed that "it might be productive of less inconvenience on the whole, if an opposite rule could be adopted." 112 N. Y. 190.

But we are relieved from the necessity of laying down a general rule on the subject, because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them. *Lahr* v. *Metropolitan Elevated Railway*, 104 N. Y. 268, 294; *Drucker* v. *Manhattan Railway*, 106 N. Y. 157; *Hussner* v. *Brooklyn Railroad*, 114 N. Y. 433; *Shaw* v. *Stone*, 1 Cush. 228, 243.

The complaint was framed in the double aspect of claiming damages for the injury accruing to the use and enjoyment of the plaintiff's property by the obstruction of light and air and the diminution of rents, as well as damages for the permanent injury to the market and rental value of the property.

The plaintiff began by introducing evidence, to the admission of which the defendant took no objection or exception, of the injury to the use and enjoyment of the property by obstructing the access of light and air, and by diminishing the rents, down to the time of trial.

When the plaintiff afterwards offered evidence of the value of the building, before and after the erection of the defendant's structure, the defendant objected to this evidence, and it was excluded by the court.

The defendant's counsel thereupon suggested that the plaintiff's damages should come down to the commencement of the action only; and the plaintiff's counsel replied that they claimed damages for the permanent injury. The court declined to adopt either of these views, and refused to allow damages to be recovered for the permanent injury, but ruled that damages might be recovered to the time of trial. Neither

party having excepted to this ruling at the time, both parties must be presumed to have assented to it.

In accordance with that ruling, the trial proceeded upon the theory that damages were not to be awarded for permanent injury, but were to be assessed down to the time of trial; and in accordance with that theory further evidence was introduced by both parties, without any objection or exception by either party to the admission of the evidence or to the rulings under which it came in.

The defendant having, by his objection sustained by the court, prevented the plaintiff from introducing evidence of permanent injury to the building, and having permitted the trial to proceed in accordance with the ruling of the court admitting evidence of injury to the time of the trial, without excepting either to that ruling or to the evidence admitted in accordance with it, could not afterwards be permitted to change front, and to insist either that the damages must be assessed for the permanent injury, or that the damages must be limited to the time of the commencement of the action.

The court therefore rightly declined to permit the defendant to introduce evidence (competent only upon the issue of injury to the permanent value of the property, which by the defendant's procurement had been excluded from the consideration of the jury) that the value of the property had been increased by the erection of the defendant's structure; and rightly refused the instruction, requested by the defendant after the charge, that the recovery could be only for the permanent injury to the plaintiff's property. For the same reason, the defendant's exception to so much of the charge as allowed damages to be recovered to the time of the trial cannot be sustained.

There can be no doubt that the court rightly declined to order a verdict for the defendant, or a verdict for the plaintiff with nominal damages; and that the instruction which allowed the jury to award a fair compensation for the discomforts and inconveniences in the occupation of the plaintiff's building, caused by the existence of the defendant's structure in front of it, independently of the running of trains thereon, was suffi-

ciently favorable to the defendant. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 108 U. S. 317; *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418.

As the damages recovered appear by the bill of exceptions, made part of the record, to have been assessed to the time of trial, the judgment in this case may be a bar to any subsequent action, at least for damages suffered before that time. *Hussner* v. *Brooklyn Railroad*, 114 N. Y. 433, 438; *Warner* v. *Bacon*, 8 Gray, 397, 402; *Goslin* v. *Corry*, 7 Man. & Gr. 342, 345; *S. C.* 8 Scott N. R. 21, 24. But that point is not now presented for adjudication. *Judgment affirmed.*

Mr. Justice Brewer, not having been a member of the court when this case was argued, took no part in the decision.

IN RE LANE, Petitioner.

ORIGINAL.

No. 12. Original. Argued April 15, 1890. — Decided April 28, 1890.

This court can issue a writ of *habeas corpus* in the exercise of its original jurisdiction only when the inferior court has acted without jurisdiction, or when it has exceeded its powers to the prejudice of the party seeking relief.

At the time when the indictment in this case was found Oklahoma was not a territory with an organized system of government, in the sense in which the word "territories" is used in the act of February 9, 1889, 25 Stat. 658, § 120.

An indictment was so framed as to permit it to be construed as charging the common law offence of rape, (as it alleged the carnal knowledge to have been without the consent of the woman,) or the statutory offence, (Act of Feb. 9, 1889, 25 Stat. 658, c. 120) of carnally and unlawfully knowing a female under sixteen years of age, (as it alleged that the woman was under sixteen years of age). It was not signed by the District Attorney of the United States. No motion was made to compel the prosecuting attorney to elect on which charge he would try the prisoner. The court instructed the jury that the allegations respecting the will of the woman might be rejected as surplusage, and the rest of the indictment be good under the statute. The jury found the prisoner guilty of the statutory offence, and judgment was entered accordingly; *Held*,

Opinion of the Court.

(1) That there was no error in the ruling of the court;
(2) That this conviction could be set up against a pending indictment for the same offence, charged to have been committed in violation of the statute;
(3) That the signature of the District Attorney to the indictment was not necessary;
(4) That it was immaterial whether there was or was not error in any of these matters, as none went to the jurisdiction.

THIS was a petition for a writ of *habeas corpus*. The case is stated in the opinion.

Mr. H. J. May for the petitioner. *Mr. William M. Randolph* and *Mr. A. H. Garland* were with him on the brief.

Mr. Solicitor General opposing.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a petition by Charles Mason Lane, addressed to the original jurisdiction of this court, for a writ of *habeas corpus*. Upon the filing of the petition a rule was issued upon Charles H. Case, warden of the penitentiary of the State of Kansas, who, it was alleged, held the petitioner in unlawful imprisonment. Case made a return to this rule, in which he said that the prisoner was held under a *mittimus* issued from the office of the clerk of the District Court of the United States in and for the District of Kansas, and accompanying the return was a certified copy of the proceedings in that court under which Lane was held. From this it appears that the following indictment was found in that court at its September term, 1889:

"The United States of America, District of Kansas, *ss:*
"In the District Court of the said United States in and for the said district, September term, 1889.

"The United States of America
vs.
"Charles Lane whose more full christian name is unknown.
} Indictment for rape.

"At the term of the District Court of the United States of America in and for the said District of Kansas, begun and held

at Wichita, in said district, on the 2d day September, in the year of our Lord one thousand eight hundred and eighty-nine, the grand jurors of the United States of America duly empanelled and sworn and charged to inquire of offences committed within that part of the said district lying north of the Canadian River and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, upon their oaths do find and present that Charles Lane, whose more full christian name is to the grand jurors aforesaid unknown, late of that part of the public domain acquired by the United States of America by the act of Congress approved March 2, 1889, commonly known as Oklahoma and being a part of the district of Kansas aforesaid, on or about the 4th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force of arms in and upon one Frances M. Skeed, a female under the age of sixteen years, then and there being, violently and feloniously did make an assault, and her, the said Frances M. Skeed, then and there, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided.

"E. Hagan, *Ass't U. S. Att'y.*

"[Endorsed:] No. —; The United States *v.* Charles Lane; rape, sec. 5345; J. Hoopes, foreman; a true bill, J. Hoopes, foreman; witnesses, Wm. H. Skeed (Oklahoma City, I. T.), Frances M. Skeed, Dr. I. W. Benipe, N. T. Ross, Rosa Skeed, Dr. H. C. Hunter (Dodd City, Texas); filed September 6, 1889; J. C. Wilson, clerk."

Under the plea of not guilty, a trial was had on this indictment, in which the jury rendered the following verdict: "We, the jury in the above-entitled cause duly empanelled and sworn,

upon our oaths find the defendant guilty of carnal and unlawful knowledge of Frances M. Skeed, a female under the age of sixteen years, as charged in the indictment." A motion for a new trial and in arrest of judgment was made, heard and overruled, and the following sentence pronounced by the court: "Thereupon it is now by the court here considered, ordered and adjudged that said defendant be imprisoned in the Kansas penitentiary for the period of five years. It is further ordered that the marshal deliver, or cause to be delivered, the body of said Charles Lane to the warden of said penitentiary within ten days from this date."

Some kind of certificate appears to have been made after this to transfer the case to the Circuit Court of the United States, where it came before Brewer, Circuit Judge, who delivered an opinion in it concurring informally with the judgment of the District Court, which is found as an appendix to the brief of the counsel for the government.

The counsel for petitioner has argued the case before us as if every error that may possibly be found in the ruling of the District Court in the progress of the case was a sufficient ground to release the prisoner on this writ of *habeas corpus*. It has been often reiterated in this court that the writ of *habeas corpus* cannot be converted into a writ of error, and that this court, when asked to issue a writ of *habeas corpus* as of its original jurisdiction, can do so only when the inferior court has acted without jurisdiction, or has exceeded its powers to the prejudice of the party seeking relief.

There is really but one question out of the several grounds of relief sought in this case that is a proper subject for this court. By the act of Congress approved February 9, 1889, c. 120, 25 Stat. 658, under which defendant is indicted and convicted, it is provided: "That every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact, in the District of Columbia or other place, *except the territories*, over which the United States has exclusive jurisdiction; or on any vessel within the admiralty or maritime jurisdiction of the United States, and out of the

jurisdiction of any State or Territory, shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offence for not more than fifteen years, and for each subsequent offence not more than thirty years."

The offence with which the petitioner is here charged is alleged in the indictment to have been committed within that part of the Indian Territory commonly known as Oklahoma, and it is alleged in the indictment that this is a district of country under the exclusive jurisdiction of the United States and within the jurisdiction of the District Court of Kansas. The counsel for prisoner contend that this is a territory within the exception of the act of Congress of 1889; that therefore this act does not apply to the case; and that, there being no other act of Congress punishing a party for carnal and unlawful knowledge of a female under the age of sixteen years, the court was without jurisdiction to try or to sentence the prisoner. But we think the words "except the territories" have reference exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not in any sense independent governments; they have no Senators in Congress and no representatives in the lower house of that body, except what are called delegates, with limited functions. Yet they exercise nearly all the powers of government, under what are generally called organic acts passed by Congress conferring such powers on them. It is this class of governments, long known by the name of Territories, that the act of Congress excepts from the operation of this statute, while it extends it to all other places over which the United States have exclusive jurisdiction.

Oklahoma was not of this class of Territories. It had no legislative body. It had no government. It had no estab-

lished or organized system of government for the control of the people within its limits, as the Territories of the United States have and have always had. We are therefore of opinion that the objection taken on this point by the counsel for prisoner is unsound.

It is next objected that the indictment is bad, inasmuch as it contains the double charge of a rape at common law and of the statutory offence under the act of February 9, 1889; and it is quite obvious that both these offences can be made out from the language of the indictment, which is in a single count. The allegation that the offence was by violence and against the will of the woman, with the other allegations in the indictment, describe the offence of rape. The allegation that the defendant had carnal knowledge of a female under sixteen years of age makes out the offence under the statute of 1889. But the view of the court was, that the allegation that the carnal knowledge was against the will of the woman may be rejected as surplusage, and the rest of the indictment be good under the statute referred to. And, as the court instructed the jury in accordance with that view of the subject, and as the jury found the prisoner guilty not of the crime of rape but of the smaller crime of carnal knowledge of a female under sixteen years of age, the action of the court on that subject was probably correct. At all events, the court had jurisdiction of the prisoner, and it had jurisdiction both of the offence of rape and of carnal knowledge of a female under sixteen years of age. It was its duty to decide whether there was a sufficient indictment to subject the party to trial for either or for both of these offences. As no motion was made to compel the prosecuting attorney to elect on which of the charges he would try the prisoner, we think that there was no error in its rulings on this subject. If there were, it was not an error which went to the jurisdiction of the court to try and sentence the prisoner.

It is urged that there is an indictment now pending against the prisoner for the same offence, charged only as carnal knowledge of a female under sixteen years of age, and that the present indictment is so ambiguous that the trial and conviction

under it would be no bar to the proceeding under the second indictment. We do not think the proposition is a sound one, as the prisoner was clearly convicted of the same offence which is charged in the second indictment.

An objection is made to the indictment that it was not signed by the district attorney of the United States; but, as the indictment was found by the grand jury, and endorsed as a true bill by the foreman, and filed in open court according to law, we do not see that there is any error on that subject, certainly none which goes to the jurisdiction of the court. See *Commonwealth* v. *Stone*, 105 Mass. 469.

It is said that the indictment was fatally defective because it did not sufficiently apprise the prisoner of the nature of the offence for which he was to be tried. But he was tried and convicted for carnally and unlawfully knowing a female under the age of sixteen years. This was succinctly and clearly set out in the indictment as the charge, or one of the charges, against him, which he must have known he was to meet, and we do not think the objection has any merit.

There may be other objections made by counsel, to the proceedings under which the prisoner was convicted, but none of them rise to the dignity of questioning the jurisdiction of the court. The rule upon the warden of the penitentiary is, therefore, discharged and a writ of *habeas corpus*

Denied.

BURNS *v.* ROSENSTEIN.

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

No. 207. Argued March 18, 1890. — Decided March 31, 1890.

The plaintiffs filed a bill in equity to dissolve a copartnership with the defendants on the ground of violation of the contract of partnership and mismanagement, and to wind up its affairs in equity, and commenced the proceedings by attaching the defendants' property. A receiver was appointed by consent, and defendants answered, assenting to the dissolu-

tion on the ground of violations of the contract by the plaintiffs. It was referred to a master to hear and report on the issues of fact, to take an account of the dealings between the parties, and of all claims for damages arising out of the transactions, and to report. A copy of the report was furnished both parties before filing. The defendants took no exceptions. The report found that no misconduct or negligence was established on either side, and that the dealings between the parties resulted in a balance due the plaintiffs. A decree was entered accordingly. In taxing the costs, the plaintiffs were allowed their proportionate part of the costs of preserving the personal property attached; *Held*,

(1) That the defendants' assent to the dissolution of the partnership, and the winding up of its affairs in chancery, made it unnecessary to make proof of the special grounds for dissolution set forth in the bill, or for the court to decree a dissolution;

(2) That it was not open to the defendants to object for the first time in this court to the report of the master that it proceeded upon erroneous views of the contract of partnership;

(3) That there was nothing in this case to take it out of the operation of the rule that this court will not ordinarily review a decree for costs, merely, in equity.

In equity. The case as stated by the court was as follows:

Rosenstein Bros. (composed of the appellees Julius W. Rosenstein and Leo Rosenstein) and Henry Sellman, of New York, and J. J. Burns & Co., (composed of Joseph J. Burns and Robert Tarr,) formed a partnership in the business of canning fish, more particularly mackerel, and manufacturing pomace, or fish guano, to be conducted under the name of the Union Fish Company, on premises owned and occupied by Burns & Co., at Gloucester, Massachusetts. It was provided, among other things, in the written agreement of partnership, that Rosenstein Bros. should furnish the capital to carry on the business, also all material at cost, and sell all the goods manufactured at the best obtainable prices; that Burns & Co., should have charge of and superintend the factory, and devote all necessary time to the business at Gloucester; that interest on the capital invested by Rosenstein Bros. should be computed at the rate of six per cent per annum; that Rosenstein Bros. and Henry Sellman, jointly, should be entitled to five-eighths and J. J. Burns & Co. to three-eighths, of the net profits of the business, Art. 21; that "all losses, if any,

sustained by reason of bad debts shall be charged to profit and loss account, and are to be borne by the parties jointly, in the ratio of their stipulated interest," Art. 22; that Burns & Co. might take from the business fifty dollars per week for individual use and account, and draw on Rosenstein Bros. for funds required in the business in sums of not over fifteen hundred dollars in any one draft; and that the contract of partnership should remain in force for the term of five years, commencing May 1, 1881, and ending April 30, 1886.

The present suit was commenced November 7, 1881, in the Supreme Judicial Court for the county of Essex, Massachusetts. An attachment was sued out against the property of Burns & Co., and levied upon all their right, title and interest in certain personal property, consisting of fish product, and in two schooners, and also upon a steam engine and other property in the buildings occupied by the Union Fish Company.

An amended bill of complaint was filed showing that the object of the suit was to obtain a decree for the dissolution of the partnership, and a settlement of its affairs under the direction of the court. The dissolution was asked mainly upon the ground that the defendants had violated the terms of partnership, and were improperly managing the business committed to their charge. The plaintiffs asked the appointment of a receiver to take charge of the goods and assets of the partnership, as well as an injunction restraining the defendants from disposing of its property or from collecting the proceeds of any that had been sold.

By agreement of the parties an order was entered appointing a receiver of all the personal property of the partnership, with power to put the same in proper condition and sell it for the best interests of all concerned, and to collect the amounts due from the trustees or garnishees named in the writ of attachment, depositing all amounts received in the registry of the court subject to its orders.

The defendants demurred to the bill on the ground of multifariousness, for want of equity, and because it contained causes of action in respect to which there was a full and complete remedy at law. The suit was removed into the Circuit

Court of the United States upon the petition and bond of the defendants. In that court the demurrer to the bill was overruled, Judge Nelson saying: "The bill states a plain case for equitable relief. A partner is under no obligation to continue a member of a partnership when his copartner persistently and wilfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm and resorting to his action at law upon the partnership contract for redress. He is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his copartner or from a failure of the business itself; so, if he has been induced to enter into the partnership contract through the deceit of his copartner, he may withdraw whenever the fraud practiced upon him becomes known. In neither case is he required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership. The bill is not multifarious. It has a simple purpose — the dissolution and winding up of the concern. Though several grounds for relief are stated, yet they arise out of the same series of transactions, relate to the same subject-matter, and can be conveniently settled in one suit. They are all properly joined in one bill."

The defendants thereafter filed an answer controverting all the material allegations of the petition, particularly those charging them with dereliction of duty in the conduct of the business. But they averred "that said plaintiffs without cause published a notice that they would no further carry on the business under said contract, and that they by public notice dissolved, violated, and put an end, so far as they could, to the same; and the defendants are entirely willing and desirous that all business connections between them and the plaintiffs should be dissolved and forever ended, because of the dishonest, fraudulent and unjust conduct and violations of said contract by the plaintiffs."

On the 21st of April, 1883, the court below made the follow-

ing order: "On reading the pleadings in the above-entitled cause and hearing the counsel of the respective parties, and on consideration thereof, it is ordered that it be referred to George P. Sanger, Esq., as a master of this court, to hear the parties and their evidence and report as to all issues of fact made by the pleadings in said cause, and to take an account of the dealings and transactions between said parties and all claims for damages arising out of said transactions."

The special master on the 16th of October, 1885, made his report, from which it appears that when, in the course of the hearing before him, an examination of the books was reached, it was agreed by the parties that the book-keeper of the plaintiffs, and an expert book-keeper and accountant who had examined the books on both sides for the defendants, should together go over the books of both plaintiffs and defendants and draw from them a statement of the condition of the Union Fish Company at the time the suit was brought, showing the indebtedness or otherwise of the parties to that company, giving the undisputed and disputed items of account in separate columns. Statements of that character were prepared and furnished to the special master who made them a part of his report. After the testimony before him was concluded, but before arguments were heard, each party, at his request, presented a statement of the damages sustained by the alleged misconduct of the other party.

A copy of the master's report was furnished the parties before it was filed. He received no communication from the defendants or their counsel, but from the plaintiffs he received a statement of the objections upon their part to his draft of report. These objections were considered and overruled by him, and the report was filed October 16, 1885. On the 7th of December, 1885, no exceptions to it having been filed, it was confirmed under equity rule 83. And on the 6th of May, 1886, when the cause came on for further hearing, and after argument by counsel, it was adjudged by the court that the plaintiffs be paid the amount to the credit of the cause in the registry of the court, namely, $3733.40, and the further sum of $1679.14, with interest thereon from the date of the writ,

that is, $2131.94, and the costs of this suit to be taxed, with interest thereon from the date of the decree. It is suggested that the above result was reached in this wise: According to the report of the master the total liabilities of the Union Fish Company were $18,168.09 — to Burns & Co., $3733.87, and to Rosenstein Bros., $14,434.22. From this sum of $18,168.09 deduct the assets, that is, the money in court, $3733.40, and the balance of such liabilities was $14,434.69, which was the net loss of the partnership. Charge three-eighths of this net loss to Burns & Co., and deduct from such amount the liabilities of the company to them, there remained the sum of $1679.14.

From the above decree the defendants prayed and were allowed an appeal to this court.

Mr. Eugene J. Hadley and *Mr. Benjamin F. Butler* for appellants.

Mr. William F. Slocum for appellees.

Mr. Justice Harlan delivered the opinion of the court.

The special master reported that there was no sufficient evidence to establish misconduct or negligence upon the part either of the plaintiffs or of the defendants. This report having been confirmed, it is assigned for error that the court below did not dismiss the bill; and, that if a case was made for the dissolution of the partnership, it was error to proceed in the distribution of the assets without decreeing such dissolution. The consent of the defendants to a dissolution of the partnership, as shown by their answer, made it unnecessary for the plaintiffs to make proof of the special grounds set out in their bill for such dissolution, and authorized the court to proceed in the settlement of the accounts of the partners, and the distribution of the assets. And the fact that there was no formal decree of dissolution is immaterial in view of the pleadings, and the assent of the parties to a decree winding up the affairs of the partnership, and distributing its property.

It is also assigned for error that the court below erred in

acting upon the master's interpretation of certain articles of the partnership contract as a valid part of his report; in construing the partnership contract as requiring losses of capital to be borne by the partners in the same proportion in which the contract provided for the distribution of net profits; in decreeing that any part of the capital put in by the appellees and not paid back by the assets should be paid by the appellants, and that the appellants should be paid back neither from the assets nor by the appellees for any part of the capital put in by them; and in not decreeing priority of payment, in respect of advances found by the master to have been made by J. J. Burns & Co., to the Union Fish Company, next after payment of the debts and liabilities due from that company to outside creditors.

These questions are not open to appellants in this court. The decree below followed the report of the special master. And that report was based, in part, upon statements drawn from the books of the parties by the accountants selected by them respectively. Those statements contained the undisputed and disputed items in separate columns. The defendants did not file with the master or in court any exceptions to the report. If the statements by the accountants, or the report of the special master, were based upon any particular interpretation of the articles of partnership that was prejudicial to the defendants, it was their right to file exceptions to the report. The master was directed to report all issues of fact made by the pleadings, and to take an account of the dealings and transactions between the parties, and all claims for damages arising out of said transactions. He could not intelligently discharge that duty without adopting some theory as to the scope and effect of the partnership agreement. If he went beyond the order of reference, or if the account taken by him involved a misconception of the provisions of that agreement, the defendants should have brought those matters to the attention of the court by exceptions to the report. Having failed to do this, they cannot, in this court, for the first time, object that the master proceeded upon erroneous views as to the contract between the parties. Equity Rule 83; *Brockett* v.

Brockett, 3 How. 692; *McMicken* v. *Perrin*, 18 How. 504, 506; *Story* v. *Livingston*, 13 Pet. 359, 366; *Medsker* v. *Bonebrake*, 108 U. S. 66, 71.

After the decree below there was a report by the clerk as to the taxation of costs. The parties having been heard in respect thereto, an order was made allowing costs to the plaintiffs to the amount of $973.34. The report shows that the plaintiffs claimed a certain amount for expenses connected with the preservation and keeping of the personal property (not including the vessels) attached on the writ. The court disallowed five-eighths of that sum. The only objection urged in this court to the taxation of costs was the allowance of any sum whatever to plaintiffs for the preservation of the attached property. This objection cannot be sustained. It was said in *Trustees* v. *Greenough*, 105 U. S. 527, that "ordinarily a decree will not be reviewed in this court for costs merely in a suit in equity, although the court has entire control of costs as well as the merits where it has possession of the case on appeal from final decree." There is nothing in the record to take the present case out of the general rule. The allegations of the original bill justified the issuing of the attachment. It was right that the property taken under it should be cared for, and as the court found that the plaintiffs were entitled to a decree against the defendants, a judgment for costs properly followed; and we perceive no reason why the plaintiffs should not have been allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property, and for which they became primarily liable to the officer keeping it. We cannot say, upon the record before us, that the court below exceeded its discretion in apportioning the expenses thus incurred.

Decree affirmed.

RANDOLPH'S EXECUTOR *v.* QUIDNICK COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 213. Argued March 13, 14, 1890. — Decided April 14, 1890.

A court of equity will not lend its aid to enforce a sale of property under execution where the disproportion between the value of the property sold and the sum paid for it is so great as to shock the conscience.

Where a debtor, having large and scattered properties and being much embarrassed, transfers his property for the benefit of his creditors equally, equity requires that any creditor who is not satisfied with the provisions of such transfer should act promptly in challenge thereof, or else be adjudged to have waived any right of challenge.

When the highest courts of two States arrive at different conclusions respecting the validity of an assignment by an insolvent debtor of all his property for the benefit of creditors, this court is inclined in matters of doubt, to give the preference to the ruling of the court of the State in which the insolvent resided, where the conveyance was executed, and where the bulk of the property is situated.

S., a citizen of Rhode Island engaged in business there, with large properties in that State and with property in Connecticut, being embarrassed, made an assignment in 1873 of all his property for the benefit of his creditors; which assignment, being assailed in the courts of each State, was upheld by the Supreme Court of Rhode Island as to the property there, and invalidated by the Supreme Court of Connecticut as to the property there. Meanwhile in the execution of its provisions, large transactions took place and extensive rights were created, In 1875 a creditor commenced suit against S., and in 1882, attached in that action property of the value of $500,000 which had belonged to S. before the assignment, and having obtained execution, levied upon it and sold it under execution for the sum of $275. The purchaser filed a bill in equity to enforce the purchase; *Held*,

(1) That the disproportion between the sum paid and the value of the property purchased was too great to warrant a court of equity in enforcing the purchase;

(2) That the long delay in attacking a transfer under which great rights had been acquired by other creditors, justified a court of equity in refusing to lend its aid to the attack;

(3) That if it were necessary, (which it was not,) to decide whether the assignment was or was not valid beyond challenge, the court would incline to give preference in matter of doubt to the ruling of the Supreme Court of Rhode Island, where S. resided, when the conveyance was executed, and where the bulk of the property was situated.

Opinion of the Court.

In equity. Decree dismissing the bill. The plaintiff appealed. The case is stated in the opinion.

Mr. Benjamin F. Butler and *Mr. O. D. Barrett* (with whom was *Mr. A. B. Patton* on the brief) for appellants.

Mr. William L. Putnam and *Mr. Joseph C. Ely* (with whom were *Mr. C. Frank Parkhurst*, *Mr. Arthur L. Brown* and *Mr. Augustus S. Miller* on the brief) for appellees.

Mr. Justice Brewer delivered the opinion of the court.

On August 2, 1883, Evan Randolph, the testator of complainants, filed his bill in equity in the Circuit Court of the United States for the District of Rhode Island, for the purpose of establishing his title to 4022 shares of the capital stock of the Quidnick Company, claiming to have purchased these shares on execution sales in March, 1883, for $275. The Quidnick Company was a corporation organized under the laws of Rhode Island, in May, 1862, with a capital stock of $500,000, divided into 5000 shares. Prior to December 1, 1873, the corporation had purchased some of its own stock, so that there was then outstanding only 4349 shares, of which 327 were held by the estate of Edward Hoyt, deceased; and the remainder, being the 4022 shares in controversy, by Amasa, William, Fanny and Mary Sprague, and the A. & W. Sprague Manufacturing Company. At this time the Spragues, who were largely engaged in manufacturing and other business, became embarrassed, and executed the transfers hereinafter referred to, and which have become the source of much litigation. Notwithstanding the embarrassments of the Spragues, the Quidnick Company was entirely solvent, out of debt, and the owner of large properties. Its stock was valued, by a committee of the creditors of the Spragues at the time, at $374 a share; and the dividends which, in the winter after the filing of this bill, the stock was entitled to as the proceeds of the sale of property and otherwise, amounting to over half a million of dollars. In other words, these complainants are asking the

interposition of a court of equity to establish their title to property worth over half a million of dollars, obtained by purchase at execution sales for $275. The immense disproportion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. Some rights must have suffered and some wrong must have been done by such a transaction, and a court of equity properly says that it will not lend its aid to further such an unconscionable speculation. The case of *Mississippi & Missouri Railroad* v. *Cromwell*, 91 U. S. 643, forcibly illustrates this rule. In that case, Harrison recovered a judgment in the Circuit Court of the United States for the District of Iowa, against Muscatine County for $6500. Under an execution on that judgment, the marshal assumed to levy on seventeen hundred and fourteen shares of the capital stock of the Mississippi and Missouri Railroad Company, belonging to Muscatine County, and sold the same at public auction to Cromwell, for the sum of $50. The latter filed his bill against the railroad company and the county to compel a transfer of this stock. The case was presented to this court in two aspects: By one, the stock in the company was worthless, and in reference to that the court observed: "The property of the company was gone; its franchises were gone; the amount which the stockholders had arranged to realize was gone; and consequently the stock could have been nothing but an empty name, and the attempt to keep it afloat for speculative purposes is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law. A court of equity should have no sympathy with any such contrivances to gain a contingent or speculative advantage, if any such is to be gained." By the other, it appeared that through certain arrangements between this railroad company and another there was a possibility of realizing sixteen per cent on the par value of the stock, which, with interest to the time of the bringing of the suit, amounted to over $32,000. And with reference to that, the court said: "He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in posses-

sion of thirty thousand dollars' worth of stock for which he paid only fifty dollars. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law." No language could be more appropriate to the case before us. Either this stock had been so appropriated by prior transfers and transactions as to be absolutely worthless in the hands of the Spragues, or else it represented more than half a million of dollars.

It is doubtless true that property of large value, both real and personal, may be incumbered with mortgages or other liens to an amount something like its value, so that there remains in the owner but an equity of redemption of trifling value; and a creditor may, at execution sale, or otherwise, buy at a small price such equity, with a view to redemption from the liens; and a court of equity will then lend its aid to put him in a position where he may safely redeem. But, as will appear from facts to be narrated subsequently, this is not such a case. The purchase was purely speculative. If the transfers theretofore made by the Spragues for the benefit of their creditors are sustained, the purchaser takes nothing. If they are not to be sustained they fail *in toto*, and the entire value of the property belongs to this purchaser. So his purchase is one simply to speculate upon the chances of successfully attacking transfers of large property, made for the benefit of creditors, and with the view of depriving them of the benefits of such transfers. It is a case where equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken.

Again, beyond the question of amount, is the matter of time. The transfers by the Spragues were in 1873. These execution purchases were in 1883. The transfers in 1873 were not made hastily, upon the judgment of the debtors alone, or without consultation with creditors. On the contrary, all creditors were invited, committees were appointed by them,

conferences had, and after weeks of examination and deliberation the substantial features of the arrangements were agreed upon between the creditors and debtors. The interests involved were immense. The committee of creditors appointed to examine into the assets and liabilities reported the former at $19,495,247, and the latter at $11,475,443. These assets were various in character — manufacturing stocks, real estate, stock in banks and other corporations, bonds, etc. They were widely scattered — in Rhode Island, Maine, Connecticut and other States and Territories. These various properties were placed in the hands of a trustee, to be managed and disposed of for the benefit of creditors; and the provisions of the arrangements were accepted by nearly all the creditors. By these arrangements it was provided that the trustee might continue the manufacturing business; and, in pursuance of the authority thus conferred, he did continue it, and before August, 1881, the amount of manufacturing business done by him was $29,802,286.10.

The executions under which the stock was purchased, as alleged, were issued upon two judgments — one in favor of Evan Randolph, and the other in favor of Horatio N. Waterman, each a creditor at the time of the transfers in 1873. Randolph commenced his action in October, 1875, as a personal action against the Spragues. After service of summons, nothing seems to have been done until the 14th of August, 1882, at which time an attachment was issued, and an attempted levy made upon the stock. Judgment was rendered March 7, 1883. Waterman commenced his action in October, 1882, and immediately thereafter placed an attachment on the stock. It will thus be perceived that these creditors made no attack upon the validity of the transfers until 1882, nearly nine years after they had been executed, when nearly all of the creditors had accepted the provisions of the transfers; and the trustee, in consequence of the duties imposed upon him by the transfers, had done nearly $30,000,000 of manufacturing business, besides managing and disposing of other properties transferred. The transfers contemplated no preference between creditors, and were for the benefit of all alike who

assented to its provisions. Indeed, if preferences had been contemplated, the bankrupt law of the United States was then in force, and might have been invoked to prevent any inequality between creditors. In fact, in the spring of 1874 bankrupt proceedings were commenced, but were withdrawn on the execution by the Spragues of additional conveyances, deemed necessary to perfect full title in the trustee. Under the circumstances, the long delay is sufficient to justify a court of equity in refusing any assistance to this attack upon the validity or sufficiency of the transfers. True, Randolph and Waterman did not become parties to the proceedings by which the property of the Spragues was placed in the hands of the trustee, and therefore are not estopped by any affirmative action in support thereof; but their inaction for such a length of time equitably forbids their present attack. They knew of the transfers at the time they were made; that they contemplated equality between the creditors; that nearly all the creditors assented thereto; that the trustee, relying thereon, was carrying on a vast and extensive business; that the doors of the bankrupt court were open; and that, if they were dissatisfied with the arrangements, they could invoke the aid of that court, whose rulings and proceedings would assure absolute equality between all creditors, and the appropriation of all the property of the Spragues for the equal benefit of such creditors. Yet they did nothing; they waited until the bankrupt law was repealed, until the result of the arrangements between the Spragues and their creditors, voluntarily entered into, was fully developed; and then, at the end of nine years, attempt to place a legal levy on a part of the transferred property, and say that the arrangements were illegal and wrong, and now invoke the aid of a court of equity to give them, for a trifling amount, a valuable portion of the property. If they were not satisfied with the legality and equity of the proceedings, they should have antagonized them sooner. Equity loves equality; and if they did not believe that these proceedings were legal and equitable, they should promptly have invoked the aid of the bankrupt court or made other assertion of legal rights. They might not equitably wait the outcome of the proceedings, expecting to

approve if they worked out full payment of all creditors, and ready to attack if the scheme proved a failure. Good faith to other creditors required that they act promptly. We do not rest this upon any mere statute of limitations. Equity, administering its remedies in accordance with its own rules, affirms that the best of rights may be lost by unreasonable delay in their assertion, and, when coupled with long delay is a scheme for great personal gain at the expense of equally deserving creditors, it refuses to lend its aid to the accomplishment thereof.

But we need not rest upon these considerations alone. The Circuit Court dismissed the bill, on the ground that the Supreme Court of the State of Rhode Island had decided that the first and principal conveyance by the Spragues to their trustee was valid under the state statute. *Austin* v. *Sprague Manufacturing Co.*, 14 Rhode Island, 464. This ruling it had followed in an earlier case, *Moulton* v. *Chafee*, 22 Fed. Rep. 26. Unquestionably, if that conveyance and the transfers immediately following were valid, the complainant's testator took nothing by his purchase.

It is unnecessary to place our judgment solely upon the decision of the Supreme Court of Rhode Island, in the case cited; and yet it is worthy of most respectful consideration, both because it is a decision of the highest court of the State in which the transactions took place, and also because it reviews all the objections made to the conveyance with clearness and ability. As to the construction of a state statute, we generally follow the rulings of the highest court of the State, *Bacon* v. *Northwestern Life Insurance Co.*, 131 U. S. 258, and cases cited in opinion; and as to other matters, we lean towards an agreement of views with the state courts, *Burgess* v. *Seligman*, 107 U. S. 20, 34. So, when the highest court of a State affirms that a conveyance, made by a debtor to a trustee for the benefit of creditors, is valid under the statutes of that State, we should ordinarily, in any case involving the validity of such conveyance, follow that ruling, even though that statute was common to many States, and in others a different ruling had obtained.

Now, in 1873, as heretofore stated, the Spragues became embarrassed, all creditors were invited to a consultation, a committee was appointed by them, frequent consultations were had, this committee reported the assets and liabilities, and a plan to meet the emergency was devised and agreed upon. This contemplated a conveyance by the Spragues to three trustees selected; the creditors were to grant an extension, taking notes due in three years; and the debtors were to convey to the trustees all their property, except shares of capital stock in corporations. These the trustees were unwilling to accept, for fear of personal liability consequent upon such acceptance; but a provision was inserted by which these shares were to be transferred to the trustees upon a request by them, by way of pledge or collateral security. After all this had been arranged, and the conveyance signed and executed, the trustees named before delivery of the instrument declined to act; and Zechariah Chafee was, without consultation with the creditors, named as trustee, and the instrument delivered. The committee representing the creditors, however, subsequently approved his selection. Chafee assumed the trust, and thereafter extension notes were issued to the various creditors and accepted by 449, these being all except the holders of about $114,000 of direct indebtedness. A question is made here as to whether this conveyance was re-executed by the grantors, after the substitution of Chafee as trustee in place of the three selected by the creditors. Upon this question the testimony is contradictory. The disinterested testimony, and therefore the most reliable, is in favor of the re-execution; and this testimony is strongly supported by the issue and acceptance of the notes, and by the fact that many years passed without challenge by debtor or creditor of the validity of the conveyance, or the rights and powers of the trustee. If the case turned upon this question of fact, we should have little hesitation in finding that there was a due re-execution of the conveyance. A due execution being established, another question is as to the validity of the conveyance under the statute of frauds. Here we turn to the decision of the Supreme Court of Rhode Island, cited *supra;* and that

decision is very persuasive. It would be unfortunate, to say the least, to have this conveyance sustained as to home creditors, and avoided as to foreign. So that, if this case stood alone upon the question of the validity of that conveyance under the laws of the State of Rhode Island, we should be reluctant to depart from the rulings of the Supreme Court of that State; and should do so only upon a clear conviction that the decision of that court was wrong, and that thereby the rights of foreign creditors were sacrificed. While this conveyance has received a different construction, and its invalidity been declared, by the Supreme Court of the State of Connecticut, *DeWolf* v. *Sprague Manufacturing Company*, 49 Connecticut, 282, so that it must be conceded that its validity is a matter of doubt, yet preference should be given in matter of doubt to the ruling of the Supreme Court of the State in which the parties resided, where the conveyance was executed, and in which was the bulk of the property. We do not feel called upon to decide, as a question of absolute law, whether the conveyance was or was not valid and beyond challenge. It is enough for the purposes of this case, that it was with the general acquiescence of the creditors; that its purpose was equality between them; that it was not challenged for many years; that the trustee, on the faith of its validity, carried on business to an enormous extent and assumed large liabilities; and that the creditors accepted payments made out of the proceeds of that business, and the trust created by this conveyance. Equity will not reach out its hand to disturb that which all parties have considered settled for so many years.

Another matter requires notice: The conveyance excepted shares of stock belonging to the grantors; but gave to the trustee a right to insist upon the transfer thereof, by way of pledge and collateral security. This exception was introduced into the instrument for fear that the trustees by accepting the stock would assume personal liability for the debts of the various corporations. Immediately after accepting this trust the trustee demanded a transfer of the stock in the Quidnick Company; and on December 2, 1873, the various grantors in this conveyance transferred on the stock transfer book of the

Quidnick Company, to the trustee, their shares of stock. These transfers, as expressed, were "by way of pledge and collateral security, to secure the performance of the conditions of the trust mortgage." Some question is made as to the meaning of these transfers; but obviously they were all collateral security for the payment of the debts of the transferrers, as provided for in the trust deed. Such was the conclusion reached by the Supreme Court of Rhode Island in the case cited; for they say, "with reference to the stock in question, it was transferred to be applied to creditors, according to the terms of the mortgage." So that we have the validity of the original conveyance by the Spragues, and the immediately subsequent transfers of the stock in question, affirmed by the Supreme Court of the State in which the grantors and transferrers resided, and where the corporation was situate whose stock was thus transferred. This affirmance of the legal validity stands behind, and gives large support to the views which we have hitherto expressed. The law as declared by that court harmonizes with and endorses the equitable considerations which in this case impress us.

We deem it unnecessary to proceed further, or to consider the effect of the equitable suit instituted by the trustee, in the state courts, prior to these attachments, and the possession taken by those courts of the property of the Quidnick corporations, or the sales of that property in pursuance of proceedings had therein. Indeed, we have referred to all these proceedings in the state courts as in support of the equitable considerations upon which we affirm the ruling of the Circuit Court. In conclusion, it may be said that, generally, where a debtor, having large and scattered properties, and being much embarrassed, transfers his property for the benefit of his creditors equally, equity requires that any creditor who is not satisfied with the provisions of such transfer shall act promptly in challenge thereof, or else be adjudged to have waived any right of challenge.

The decree of the Circuit Court is *Affirmed.*

Mr. Justice Blatchford did not take any part in the decision of this case.

UPSHUR COUNTY *v.* RICH.

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

No. 81. Submitted November 7, 1889.— Decided April 14, 1890.

An appeal, under a state law, from an assessment of taxes to "a county court," which, in respect to such proceedings, acts, not as a judicial body, but as a board of commissioners, without judicial powers, only authorized to determine questions of quantity, proportion and value, is not a "suit" which can be removed from the county court into a Circuit Court of the United States, and be heard and determined there.

THE case is stated in the opinion.

Mr. Alfred Caldwell, for appellant, submitted on his brief.

No appearance for appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Rich and others, the appellees, owned a tract of wild land in Upshur County, West Virginia, the exterior boundaries of which are supposed to contain 100,000 acres, and it was assessed for taxation for the year 1883 as containing 100,000 acres, at four dollars per acre. The owners, considering this assessment too high, applied to the county court of Upshur county for a reduction, and after giving notice to the prosecuting attorney for the county, on the 6th of November, 1883, filed the following petition:

"To the honorable the county court of the county of Upshur, in the State of West Virginia:

"The petition of Benjamin Rich, William F. Reynolds and George W. Jackson respectfully shows unto your honors that your petitioners are the owners in fee-simple of a certain tract of land lying partly in said county of Upshur and in the adjoining counties of Randolph and Braxton, but mostly in Upshur county, the exterior boundaries of which tract are

said to contain 100,000 acres; that said tract of land has been charged and assessed on the land books of the proper district of the said county of Upshur for taxation for the year 1883 as containing 100,000 acres, whereas there are various parcels of land lying within said exterior boundaries which are properly to be deducted from the area therein, and thereby reduce the quantity to be charged to your petitioners for taxation.

"And your petitioners further show that the assessment of said tract of land on said land books is at a valuation of $400,000, which they charge is unjust, extravagant, excessive and illegal, and, as compared with the valuation of lands of like character in said county, wild and unimproved, the said valuation of said tract of 100,000 acres is grossly above and beyond that of adjacent lands.

"Your petitioners therefore pray that the State of West Virginia and the county of Upshur may be made parties defendant to this their petition, and that the said erroneous and illegal assessment be corrected and the quantity charged them, as aforesaid, reduced; and they will ever pray, etc."

On the same day they filed a petition for the removal of the case to the Circuit Court of the United States for the District of West Virginia, alleging themselves to be citizens of Pennsylvania, and that the State of West Virginia and County of Upshur, in the said State, were necessary parties to the said controversy. The petition was grounded upon an affidavit of one of the parties that, from prejudice and local influence, the petitioners would not be able to obtain justice in the state court. The county court refused to order a removal; but on a petition being presented to the Circuit Court of the United States, with a transcript of the proceedings, that court took cognizance of the case, and denied a motion to remand it to the county court.

Thereupon the county court of Upshur County, by two of its members, (being a majority of the court,) filed a plea to the jurisdiction, alleging for cause, that the application of the petitioners for relief in the county court was not a suit, and did not involve a controversy between a citizen of West Virginia and a citizen of any other State; and that, as to the taxes

belonging to the State, the county court was merely the organ, under the law of West Virginia, to act upon the matter of relief asked for; and the same as to the taxes belonging to the county; and that neither the county nor the State was a party, by process or otherwise, to the said application.

This plea was rejected on motion of the petitioner.

Afterwards the case was heard, and the Circuit Court made the following decree:

"Benjamin Rich, W. F. Reynolds, and George W. Jackson

v.

County of Upshur.

"Upon application to correct an erroneous assessment of lands in the county of Upshur, West Virginia, removed into this court December, 1883.

"This cause having been regularly docketed in this court, this day came the said Benjamin Rich, Wm. F. Reynolds, and George W. Jackson, by their attorneys, and the said county of Upshur, in the State of West Virginia, by Messrs. John Brannon and A. M. Poundstone, who represent the county of Upshur and the prosecuting attorney for said county, and it appearing to the court that the application for correction of the assessment herein complained of was made within the time prescribed by law, to wit, on the 16th day of April, 1883, and that the prosecuting attorney had due notice thereof, and the court, having heard the evidence and seen and inspected the papers and records in the cause, and heard the arguments of counsel thereon, upon mature consideration, doth find ——" The court then finds the assessment erroneous; that it should have been for only 25,000 acres of land instead of 100,000, and should have been at $2\frac{1}{4}$ per acre instead of $4; and ordered it to be corrected accordingly; and decreed further as follows:

"That said Benjamin Rich, Wm. F. Reynolds, and George W. Jackson be, and they are hereby, relieved from the payment of so much and such part of the taxes and levies extended for said years 1883 and 1884 as may and do exceed the amount of taxes and levies proper to be assessed upon

said lands, as herein and hereby reduced in quantity and value.

"And it is further ordered that copies of this order be certified by the clerk of this court to the county court of Upshur County, the sheriff of said county, the assessor of the first district thereof, and the auditor of West Virginia; and it is further ordered that no costs be taxed for or against either party."

This is the decree appealed from; and the principal objection taken to it is, that the case was not properly removable from the state court to the Circuit Court of the United States. This objection is sought to be sustained on two distinct grounds:

1. That the case is not a suit within the meaning of the removal act;

2. That if it is a suit, within the said act, the State of West Virginia is a necessary party to it.

The act under which the case was removed was the third clause of section 639 of the Revised Statutes, which declares:

"Third: When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, . . . if . . . he makes and files . . . an affidavit, stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such State Court."

It must be "a suit" between citizens of different States. Is this such a suit? We do not see how it can be called such. The original petition made the State of West Virginia and the county of Upshur parties defendant; and the petition of removal alleged that the State and county were necessary parties to the controversy. If, therefore, the proceeding could be called a suit at all, it was a suit against the State as well as the county, and such a suit is not within the category of removable cases. A State is not a citizen, if a county is.

But is an appeal from an assessment of property for taxation a *suit* within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most of the States,

tax-payers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of commissioners of appeal; sometimes one thing and sometimes another. But whatever called, it is not usually a court, nor is the proceeding a suit between parties; it is a matter of administration, and the duties of the tribunal are administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of quasi-judicial functions. Such appeals are not embraced in the removal act.

In this respect the law of West Virginia does not differ from that of most other States. It is true that the tribunal of appeal is called the "county court," but it has no judicial powers except in matters of probate. In all other matters it is an administrative board, charged with the management of county affairs. It formerly had general judicial powers, but by an amendment to the constitution of West Virginia adopted in 1880, in place of the VIIIth article of the Constitution of 1872, it was provided as follows:

"22. There shall be in each county of the State a county court, composed of three commissioners, and two of said commissioners shall be a quorum for the transaction of business. It shall hold four regular sessions in each year, at such times as may be fixed upon and entered of record by the said court. Provisions may be made by law for holding special sections of said court."

To this court (so called) was given the custody of the county records, and it was further declared that —

"They shall have jurisdiction in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, curators, and the settlement of their accounts, and in all matters relating to apprentices. They shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies. . . . They shall, in all cases of contest,

judge of the election, qualification and returns of their own members, and of all county and district officers, subject to such regulations, by appeal or otherwise, as may be prescribed by law. Such courts may exercise such other powers and perform such other duties, *not of a judicial nature*, as may be prescribed by law."

Under the power given by the last clause, the legislature of the State on the 23d of February, 1883, passed an act by which, amongst other things, it was declared as follows:

"(7.) Any person feeling himself aggrieved by the assessment of his real estate, made under provisions of this act, may, within one year after the filing of a copy of such assessment with the clerk of the county court, apply, by himself or his agent, to the said court for redress, first giving reasonable notice in writing of his intention to the prosecuting attorney, and stating in such notice the character of the correction he desires. It shall be the duty of the prosecuting attorney, upon being so notified, to attend to the interests of the State, at the trial of such application. If, upon hearing the evidence offered, the county court shall be of opinion that there is error in the assessment complained of, or that the valuation fixed by the commissioners is excessive, the said court shall make such order correcting the said assessment as is just and proper." Acts of W. Va., 1883, c. 72, p. 104.

It was under this law that the appeal from the assessment in the present case was taken. In our judgment it was not a suit within the meaning of the removal act — though approaching very near to the line of demarcation. We cannot believe that every assessment of property belonging to the citizen of another State can be removed into the federal courts. Certainly the original assessment, made by the township or county assessors, could not be called a suit, and could not be thus removed; and there is, justly, no more reason for placing an assessment on appeal within that category. It is nothing but an assessment in either case, which is an administrative act. The fact that the board of appeal may swear witnesses does not make the proceeding a suit. Assessors are often empowered to do this without altering the character of their functions.

Opinion of the Court.

This view is in accord with that of the Supreme Court of Appeals of West Virginia. In the case of *A. A. Low et al.* v. *County Court of Lincoln County*, 27 W. Va. 785, they held that no appeal lies from a judgment of the county court rendered under the section above quoted, refusing to correct the assessed valuation on land; and that such judgment can be reviewed, if at all, only by *certiorari*. In *Pittsburg, Cincinnati etc. Railway Co.* v. *Board of Public Works*, 28 W. Va. 264, 270, they held that where the board of public works fixed the valuation of the property of a railroad company under the statutes, it simply acted as a county assessor does in assessing the property of individuals; and that the acts of both are merely ministerial, and not judicial in any proper sense of the term. After referring to a number of authorities on the subject, the court says: "These authorities establish, beyond the propriety of controversy, that the action and decision of a designated officer or board, whether the same be a court or other body, in reviewing and correcting an assessment of corporate or other property for taxation, are no more judicial acts than the acts of the officer or authority making the original assessment. They also show that the decision or finding of such officer or board, even if the same be a court or other judicial tribunal, is not such a judicial act or judgment as can be reviewed by a supreme or appellate court possessing judicial powers only."

In these views we concur. At the same time we do not lose sight of the fact, presented by every day's experience, that the legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways, — by an action against the collecting officer, by a bill for injunction, by *certiorari*, and by other modes of proceeding. Then, indeed, a suit arises which may come within the cognizance of the federal courts, either by removal thereto, or by writ of error from this court, according to the nature and circumstances of the case. Even an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded in according to judicial methods, may become a suit within the act of Congress. But the ordinary acts and doings of assessors, or of

appellate boards of assessors, in passing upon matters of mere valuation, appraisement or proportionate distribution of expense, belong to a different class of governmental functions, executive and administrative in their character, and not appertaining to the judicial department. If an illegal principle of valuation be adopted, or an unconstitutional assessment or tax be made or imposed, or fraud be practised, it may be examined by one of the judicial methods referred to, and thus become the subject of a suit.

The question what is a "suit" in the sense of the judiciary laws of the United States has been frequently considered by this court. Reference may be made particularly to the following cases: *Weston* v. *City of Charleston*, 2 Pet. 449, 464; *Kendall* v. *United States*, 12 Pet. 524; *Holmes* v. *Jennison*, 14 Pet. 540, 566; *Ex parte Milligan*, 4 Wall. 2, 112; *Kohl* v. *United States*, 91 U. S. 367, 375; *Gaines* v. *Fuentes*, 92 U. S. 10, 21, 22; *Boom Company* v. *Patterson*, 98 U. S. 403, 406; *Ellis* v. *Davis*, 109 U. S. 485, 497; *Hess* v. *Reynolds*, 113 U. S. 73, 78; *Pacific Railroad Removal Cases*, 115 U. S. 1, 18; *Searl* v. *School District*, 124 U. S. 197, 199; *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 486, 487.

In the four cases first cited this court determined that writs of prohibition, mandamus and *habeas corpus*, prosecuted for the attainment of the parties' rights, are suits within the meaning of the law, the judgments upon which, in proper cases, may be removed into this court by writ of error. In *Weston* v. *City of Charleston* Chief Justice Marshall said: "Is a writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit." This definition is quoted with approbation by Chief Justice Taney in *Holmes* v. *Jennison*, which was a case of *habeas corpus*, and by other judges in subsequent cases.

Boom Company v. *Patterson*, *Pacific Railroad Removal*

Cases, and *Searl* v. *School District* were cases of the assessment of the value of lands condemned for public use under the power of eminent domain. The general rule with regard to cases of this sort is, that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this act of Congress. In *Boom Company* v. *Patterson* the company was authorized by the state laws of Minnesota to take land for the purpose of its business, and to have commissioners appointed to appraise its value. If their award was not satisfactory, either to the company or to the owner of the land, an appeal lay to the district court, where it was to be entered by the clerk "as a case upon the docket," the land owner being designated as plaintiff and the company as defendant. The court was then required to proceed to hear and determine the case in the same manner that other cases were heard and determined. Issues of fact were to be tried by a jury, unless a jury was waived. The value of the land being assessed by the jury or the court, as the case might be, the amount of the assessment was to be entered as a judgment against the company, subject to review by the supreme court of the state on writ of error. This mode of proceeding was followed. The Boom Company and the land owner both appealed from the award of the commissioners. When the case was brought before the District Court, the owner, being a citizen of another state, applied for and obtained its removal to the Circuit Court of the United States, where it was tried before a jury and a judgment was rendered upon their award. We held that the appeal in that case was a suit within the meaning of the act of Congress authorizing the removal of causes from the state to the federal courts. Mr. Justice Field, speaking for the court, said: "The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the

state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

In *Delaware County* v. *Diebold Safe Co.* it was held that where a claim against a county is heard before county commissioners, though the proceedings are, in some respects, assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, but are merely the allowance or disallowance, by county officers, of a claim against the county, upon their own knowledge, or upon any proof that may be presented to them; but that an appeal from their decision, tried and determined by the Circuit Court of the county, is a suit removable to the Circuit Court of the United States.

In *Kohl* v. *United States* the whole proceeding for condemnation of land as a site for a post-office was held to be a suit. Mr. Justice Strong, delivering the opinion of the court, said: "It is difficult to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court." This view of the proceeding as a whole, instituted and concluded in a court, and analogous to the proceeding of *ad quod damnum* at common law, perhaps, distinguished this case from the other cases before referred to.

Two of the other cases cited, *Gaines* v. *Fuentes* and *Ellis* v. *Davis*, arose out of proceedings to set aside the probate of wills; and although the granting of probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit. As observed by Mr. Justice Matthews, speaking for the court in *Ellis* v. *Davis*, "Jurisdiction as to wills, and their probate as such, is neither included in, nor excepted out of, the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties." Similar views were expressed by Mr. Justice Miller in *Hess* v.

Reynolds, which was the case of a creditor instituting proceedings in a probate court against the estate of his deceased debtor, and then removing them into the Circuit Court of the United States.

The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.

Applying this principle to the facts of the present case, it does not seem difficult to come to a decision. We have seen that, although the appeal from the assessment was made to the "county court" *eo nomine*, yet that this is not a judicial body, invested with judicial functions, except in matters of probate; but is the executive or administrative board of the county, charged with the management of its financial and executive affairs. According to the principles laid down by the state court, the acts of this board, in matters of taxation, are as purely administrative as are those of the county assessors in making the original assessment. Although we are not concluded by this decision, it is so much in harmony with our own decisions on the same subject that we accept it as correct.

According to these views the proceeding below was not properly removable to the circuit court of the United States, and ought to have been remanded to the state court.

The decree of the circuit court is

Reversed and the cause remanded with instructions to remand the same to the state court from which it was removed.

FREIBURG *v.* DREYFUS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 228. Argued March 24, 25, 1890. — Decided April 14, 1890.

D., a resident at New Orleans, being at the time insolvent, transferred to M. certain goods in a warehouse as a *dation en paiement.* M. pledged these goods to E. to secure $15,000, of which $5000 was loaned in cash, and $10,000 in two notes for $5000 each, which notes were executed in all respects in the manner required by the Civil Code of Louisiana, §§ 3157, 3158, in order to secure a privilege and preference under those sections. A creditor of D. commenced an action at law against him and caused these goods to be sequestered, and subsequently filed a bill in equity to set aside the whole transaction as fraudulent. Pending the proceedings the two notes matured and were paid by E.; *Held,*

(1) That these instruments were sufficient under the laws of Louisiana;

(2) That they were not simulated, but that the transaction was *bona fide.*

The case is stated in the opinion.

Mr. D. C. Labatt for appellant.

Mr. R. H. Browne (with whom was *Mr. C. B. Singleton* on the brief) for appellees.

Mr. Justice Brewer delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for the Eastern District of Louisiana. *Weiler* v. *Dreyfus*, 26 Fed. Rep. 824. The facts are these: On October 30, 1883, appellants, creditors of Joseph Dreyfus, commenced an action at law against their debtor, to recover the sum of $19,000; and sequestered certain goods in the warehouse of Meyer, Weill & Co. These goods had been transferred by Dreyfus to Lehman Meyer, on October 27, as a "*dation en paiement.*" On November 6, Abraham Ermann, one of the appellees filed in said suit what is known under the Louisiana Code of Practice as a petition of intervention and third opposition, wherein he

claimed that on October 29 he had loaned to said Lehman Meyer $15,000, evidenced by three notes of Meyer's, each for $5000, and had received in security therefor a pledge of the sequestered goods. The appellants answered this petition, alleging in substance that no pledge existed; that if it did exist it was fraudulent and of no force against the creditors of Dreyfus; that Meyer's title and possession were fraudulent, and intended to shield the property from the claims of creditors of Dreyfus; and that therefore this transfer of the property in pledge to appellee conferred no privilege or lien under the Louisiana law. When this action came on for trial, the Circuit Court ruled that at law the only inquiry could be as to the reality of the pledge, and not as to its fraudulent character. Thereafter a bill in equity was filed by appellants against Dreyfus, Meyer and Ermann alleging the fraudulent nature of the pledge. Upon final hearing, a decree was entered in favor of the defendants.

Passing all mere matters of practice, we address ourselves to the two substantial questions: First, whether there was a real pledge, and not a simulated transaction; and, second, whether, if sufficient in form and real, it was in fact fraudulent and void. At the time of these transactions Dreyfus was insolvent, and under the circumstances, which it is unnecessary to state in detail, the transfer of the property from him to Meyer, though good between the parties and vesting title in Meyer, was subject to be set aside at the instance of Dreyfus' creditors. Until so set aside, the title being in Meyer, he could create a valid pledge in favor of a *bona fide* party. Meyer held warehouse receipts from Meyer, Weill & Co., with whom the goods had been stored, and the loan from Ermann and the pledge to him were evidenced by three notes of $5000 each, alike excepting time of payment, of one of which the following is a copy:

"$5000.00. NEW ORLEANS, *Oct. 29th*, 1883.

"Forty days after date I promise to pay to the order of A. Ermann, Esqr., five thousand dollars, for value received, with interest at the rate of eight per cent per annum from maturity

until paid. Payable at the People's Bank of New Orleans. This note is secured by a pledge of the securities mentioned on the reverse hereof, and in case of its non-payment the holder is hereby authorized to sell the said securities at public or private sale, without recourse to legal proceedings, and to make any transfers that may be required, applying proceeds of sale towards payment of this note. Margins to be kept good.

"L. MEYER."

Endorsement: "Five warehouse receipts, dated Oct. 28th, 1883, numbered 1, 2, 3, 4, & 5, issued by Meyer, Weill & Co. to L. Meyer, and by him endorsed to A. Ermann, payee. L. Meyer."

With the notes were transferred the warehouse receipts mentioned in the endorsement. These receipts were alike in form, though covering different properties, and the following is a copy of one:

"Received from L. Meyer, in apparent good order, on storeage in our warehouse subject to the following conditions: goods deliverable on production of this receipt or on the written order of parties in whose favor it is given; goods when transferred deliverable only on return of this receipt:

"$\frac{5}{4}$ pipes B., D. & Co. cognac.
"9 barrels Smith Blair.
"$\frac{2}{8}$ pipes Cr. Gavi cognac.
"$\frac{2}{8}$ pipes Boston cognac.
"$\frac{3}{8}$ pipes kirschwasser.

"MEYER, WEILL & Co."

Endorsed: "L. Meyer."

That these instruments were sufficient in form under the laws of the State of Louisiana, where this pledge was created, and that the transaction was real aud not simulated, is clear. By title twenty of the Civil Code, which treats of pledges, the right to pledge or pawn is given. (Voorhies' Revised Civil Code of Louisiana, pages 553 and following.) Articles 3157 and 3158 read as follows:

"ART. 3157. The pawn invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of his debtor, out of the product of the movable, corporeal or incorporeal, which has been thus burdened.

"ART. 3158. But this privilege shall take place against third persons, only in case the pawn is proved by an act made either in a public form or under private signature: *Provided*, Such act has been recorded in the manner required by law: *Provided also*, That whatever may be in the form of the act, it mentions the amount of the debt, as well as the species and nature of the thing given in pledge, or has a statement annexed thereto of its number, weight and measure.

"When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith.

"All pledges of movable property may be made by private writing, accompanied by actual delivery; and the delivery of property or deposit in a warehouse shall pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith."

The notes disclosed the amount of the debt, as well as the fact of the pledge, and the property which was pledged; and the delivery of the warehouse receipts, as stated in the last clause of Article 3158, was a delivery of the property; so that the pledgee had possession of the property as security for an indebtedness whose amount, time and payment were stated in writing. In *Cater* v. *Merrell*, 14 La. Ann. 375, 378, it is said that "the word pledge is used in the statutes of 1852 and 1855 in the sense of the definition of Article 3100 of the Civil Code, which defines the contract of pledge, and as the second section of these acts requires the contract to be in writing, the private

act between parties must contain what is declared to be essential by this article, to constitute a pledge, that is, a declaration of the thing given in pledge, and of the particular debt for which the thing is pledged." And in *Martin* v. *Creditors*, 15 La. Ann. 165, the court observed: "The assignment of a warehouse receipt, in the absence of a stipulation that the property is given in pledge to secure the payment of a principal obligation, amount of which is specified, does not confer a privilege upon the transferee. *H. W. Cater, use of*, v. *H. B. Merrell & Co.*, 14 An. 375. Privileges are of strict right; and parties claiming them must conform to the requirements of the law. It is required, in order to create a pledge, not only that delivery should accompany the private deed, but that the instrument itself should exhibit the nature and extent of the rights and obligations of the contracting parties reciprocally."

The transaction at bar comes within the requirements of these authorities. The transfer of the warehouse receipts was a delivery of the property; and the full terms of the contract of the pledge were stated on the face of the notes. And as Ermann gave to the pledgor $5000 in cash, as well as his two notes for $5000 each, there is no room to doubt that the transaction was a real and not a simulated one; as well as that the pledge was made in conformity to the laws of the State of Louisiana. The first question therefore must be answered in favor of the appellees.

A like answer must also be given to the second. That Ermann gave the $5000 and executed his two notes, and thereafter paid those notes, so that he is out the $15,000 of the loan, is not disputed. That he had no other security, and must rely for repayment solely on the pledge, is clear. That he was a man of means, and able to make such a loan, though before he had never made a single loan of that magnitude; that he had theretofore accommodated Meyer with loans; that his relations with Meyer were such as to justify him in loaning upon what seemed to be sufficient security; that he had no knowledge of whence the goods in question were obtained; that the attendant circumstances were not such as to arouse suspicion in the mind of a reasonably prudent man; and that

the loan and pledge have all the appearance of an ordinary business transaction, are conclusions which the testimony satisfactorily establishes. It is objected that after notice by the action at law and sequestration he paid the notes which he had given to Meyer; in other words, that he unnecessarily paid a portion of this loan, after notice of the fraudulent character of the transactions by which Meyer acquired title, and after, by suit, his own rights under the pledge had been challenged. But the only attack by this litigation, up to the time of payment, was upon the reality of the pledge, and of that there was no question. While doubtless the failure of Dreyfus, the suits commenced against him, and the facts concerning Meyer's and Dreyfus' condition, as developed in litigation and otherwise, disclosed that the property which he had in pledge had come to him through a devious channel, yet, until some assertion of personal wrong was made against him, he was under no obligations to let his own paper go to protest, and thereby tacitly, at least, admit that his own conduct and good faith were objects of suspicion and inquiry.

We think that the conclusion of the Circuit Court on the question of *bona fides* was correct, and the decree is

Affirmed.

ANDERSON *v.* CARKINS.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 322. Argued May 1, 2, 1890. — Decided May 19, 1890.

In decreeing specific performance of a contract for the conveyance of a tract of land in a suit where the defence was that the contract was against public policy and void under the homestead laws of the United States, a state court necessarily passes upon a federal question, although it may put its decision upon other grounds.

A contract by a homesteader to convey a portion of the tract when he shall acquire title from the United States is against public policy and void; and it cannot be enforced, although a valuable consideration may have passed to the homesteader from the other party.

Opinion of the Court.

THE case is stated in the opinion.

Mr. John A. Casto (with whom was *Mr. James M. Woolworth* on the brief) cited to the merits: *Mellison* v. *Allen*, 30 Kansas, 382; *Brake* v. *Ballou*, 19 Kansas, 397; *Dawson* v. *Merrille*, 2 Nebraska, 119; *Oaks* v. *Heaton*, 44 Iowa, 116; *Nichols* v. *Council*, 9 S. W. Rep. 305; *Cox* v. *Donnelly*, 34 Arkansas, 762; *Sorrels* v. *Self*, 43 Arkansas, 451; *Sherman* v. *Eakin*, 47 Arkansas, 351; *Marshall* v. *Cowles*, 48 Arkansas, 362; *Coppell* v. *Hall*, 7 Wall. 542; *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314; *Scudder* v. *Andrews*, 2 McLean, 464; *Leavitt* v. *Palmer*, 3 N. Y. (3 Comstock) 19; *S. C.* 51 Am. Dec. 333; *Aldrich* v. *Anderson*, 2 Land Dec. 71.

Mr. A. H. Bowen (with whom was *Mr. C. Hoeppner* on the brief) for defendant in error cited to the merits: *Smith* v. *Bromley*, 2 Doug. 696 *n*; *Jaques* v. *Golightly*, 2 Wm. Bl. 1073; *Browning* v. *Morris*, 2 Cowp. 790; *Williams* v. *Headly*, 8 East, 378; *Worcester* v. *Eaton*, 11 Mass. 368; *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24; *White* v. *Franklin Bank*, 22 Pick. 181; *Schermerhorn* v. *Tolman*, 14 N. Y. 93; *Blanchard* v. *Jamison*, 14 Nebraska, 244; *McBlair* v. *Gibbes*, 17 How. 232, 237; *Brooks* v. *Martin*, 2 Wall. 70; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *Wann* v. *Kelly*, 2 McCrary, 628; *Simmons* v. *Yurann*, 11 Nebraska, 516.

MR. JUSTICE BREWER delivered the opinion of the court.

On December 16, 1876, the parties hereto entered into the following contract:

"This agreement made and entered into on this 16th day of December, by and between Joseph Anderson and Hannah Anderson, his wife, of the county of Adams and the State of Nebraska parties of the first part, and Levi Carkins of Adams County, Nebraska, party of the second part, witnesseth:

"That the said parties of the first part have this day sold, for and in consideration of the sum of one hundred dollars, to them in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real estate, to

wit: The south one half of southeast corner of section ten (10), in town eight (8), range ten (10) west in Adams County, Nebraska.

"And the parties of the first part further agree with the party of the second part that they will make and execute to him on or before the 1st day of May, 1881, a good and sufficient warranty deed of said premises, clear of all incumbrance, and for the faithful performance of this contract they hereby bind themselves, their heirs, executors, administrators and assigns.

"In witness whereof they have hereunto set their hands and seals, this 16th day of December, 1876.

(Signed) "JOSEPH ANDERSON,
"HANNAH M. ANDERSON,
"*Parties of the First Part.*

"LEVI CARKINS,
"*Party of the Second Part.*

"In presence of L. P. HAWLEY."

In October, 1885, the defendant in error commenced his action in the District Court of Adams County, Nebraska, for a specific performance of this contract. The plaintiffs in error answered, pleading distinctly that the contract was against public policy and void, for the reason that at the time of its execution the land belonged to the general government; that it was made in contemplation of Joseph Anderson's taking the land as a homestead; that on the 7th day of March, 1877, he did enter the land as a homestead; and that he continued to reside upon and cultivate it until the 31st day of March, 1884, at which time he made final proof under the homestead law, and thus only obtained title. The case, after trial in the District Court, passed to the Supreme Court of the State, by which a final decree was entered for a specific performance. To reverse such decree this proceeding in error has been brought. Two questions are presented — one of jurisdiction, the other of error.

First, with respect to jurisdiction: It will be observed that the contract is *prima facie* good. The land is described, the

consideration stated and its receipt acknowledged, a sale affirmed, an agreement to convey recited, and the time for the conveyance specifically named. To a bill for the specific performance of this contract the defendants answered that the contract was void under the homestead laws of the United States. Notwithstanding this defence, so expressly stated, a decree for specific performance was entered against them. Obviously, this could not be so entered without adjudging such defence insufficient, and denying to them the protection claimed under the homestead laws. It is true that the Supreme Court of Nebraska, in its opinion, relied principally on two sections of the statutes of Nebraska; but it also, and as plainly, ruled that the defence that the contract was against public policy and void was not sustainable, and that the homestead laws carry with them no protection against such a contract. If under their provisions such a contract is void, then obviously no state statute can vitalize the contract, or deprive a party thereto of the protection afforded by the federal statutes. Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the homestead laws, and as the Supreme Court of Nebraska expressly declared that this invalidity under the homestead laws was not sustainable, it follows that the case is one in which a right was specifically set up and claimed under the statutes of the United States, and the decision and judgment of the state court were against that right. Hence the jurisdiction of this court cannot be doubted. *Murdock* v. *Memphis*, 20 Wall. 590. It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court.

Passing now to the question of error: It appears that prior to the date of the contract, Carkins had been in possession of the whole quarter section; that he had held it as a timber claim from 1873 to the time of the contract; that he had

broken and cultivated forty acres, and planted twenty acres of timber; that the improvements he had thus made were of the value of one thousand dollars; that Anderson was unable to pay cash for these improvements, and so the arrangement was made by which Carkins relinquished his possession to Anderson, and the latter was to enter into possession, to acquire title under the homestead act, and to convey one-half the land in payment for these improvements. The consideration was ample, and the only question is as to the validity of the contract to convey. The theory of the homestead law is, that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, "such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." And section 2291, which prescribes the time and manner of final proof, requires that the applicant make "affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight," which section provides for alienation for "church, cemetery, or school purposes, or for the right of way of railroads." The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contain no express prohibition of alienation, and no forfeiture in case of alienation; yet, under them the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by the homesteader. Section 2304 makes provisions for homesteading by soldiers and officers who served in the army of the United States during the recent war; but that section makes no substantial change, except in respect to the time of occupation. Under this section Anderson perfected his homestead right; but the question of the length of occupation required to perfect such right in no manner affects the controversy. The same affidavits in respect to alienation are required from federal soldiers as in other cases of homesteads.

This precise question was before the Supreme Court of Kansas, when the writer of this opinion was a member of that court; and speaking for that court he thus stated the arguments and conclusions: "Now, it is argued on the one hand that it is a matter of course for a court of equity to decree a specific performance of a contract for the conveyance of real estate, except in cases where it is shown to be unjust and inequitable to do so, *Waynick* v. *Richmond*, 11 Kansas, 488; that there is no express prohibition on alienation by a homesteader, or a forfeiture for such alienation; that the only thing which stands in the way of such an alienation is the perjury imposed upon the homesteader; that no man should be permitted to plead his own wrong in avoidance of his contract; that in this case there was no direct alienation, but only a contract to alienate in the future; that whatever of wrong the homesteader might be guilty of, the government alone could take advantage of, while he himself was estopped to plead it; and further, that the homestead is for the benefit of the homesteader, and that he should be permitted, by contract or otherwise, to make all the profit he can out of it. On the other hand, it is contended that the homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during such term; that the affidavit of non-alienation is as clear an expression of the legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on perjury is illegal; that both purchaser and vendor are parties to the wrong, and that courts refuse to enforce such a contract, not from any regard to the vendor, but from motives of public policy; and finally, that courts of equity have always exercised a discretion in enforcing the

specific performance of contracts to convey, and that it would be strange indeed if a court of equity lent its aid to enforce the performance of a contract founded upon perjury and entered into in defiance of a clearly expressed will of the government. We think the latter reasoning correct, and that, whether the contract be absolutely void or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it." *Mellison* v. *Allen*, 30 Kansas, 382, 384.

Similar views were expressed by the Supreme Court of Nebraska, in the case of *Dawson* v. *Merrille*, 2 Neb. 119, in which it was held that "the policy of the act of Congress granting homesteads on the public lands, as disclosed by its requirement of affidavit and other provisions, is adverse to the right of the party availing himself of it to convey, or agree to convey, the land, before he receives the patent therefor," and that "the court will not lend its aid to the enforcement of a contract which is against public policy." And the judgment of the trial court, denying specific performance of a contract for the sale of lands, made by the homesteader before he had acquired the legal title to the premises, was affirmed. See also *Oaks* v. *Heaton*, 44 Iowa, 116; *Nichols* v. *Council*, decided by the Supreme Court of Arkansas, October 20, 1888, 9 S. W. Rep. 305. This very contract was before the Department of the Interior, and its invalidity adjudged by the Secretary, in the case of *Aldrich* v. *Anderson*, 2 Land Dec. 71.

There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not be enforced in a court of equity. Such being the scope and purpose of the federal statutes, it is not within the power of a State directly or indirectly, to nullify or set them at naught. Suppose the State of Nebraska had passed an act, declaring that, notwithstanding the provisions of the federal statute, a homesteader might, before his homestead right was

perfected, make a contract to convey, could it be doubted that such an act would be void, as in conflict with paramount provisions of the federal statute? Can the policy of Congress, with respect to the disposition of public lands, be thwarted by any State? The question suggests its own answer. The law of Congress is paramount; it cannot be nullified by direct act of any State, nor the scope and effect of its provisions set at naught indirectly. But we do not think that the sections of the Nebraska statutes, cited by the Supreme Court, were intended to nullify the provisions of the acts of Congress, or have any such effect. Those sections, Nos. 1 and 2, Compiled Statutes of Nebraska, c. 38, 376, read: "All contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion, or circumvention, for sale, purchase, or payment of improvements made on the lands owned by the government of the United States, shall be deemed valid in law or equity, and may be sued for and recovered, as in other contracts." "All deeds of quitclaim or other conveyance of all improvements made upon public lands, shall be as binding and as effectual in law and equity between the parties for conveying of the title of the grantor in and to the same, as in cases when the grantor has the fee simple to the premises." But these refer simply to contracts for the sale and conveyances of improvements upon public lands. They are in terms limited to the matter of improvements, and do not touch in any way the land itself, whether in respect to conveyance or contract to convey. They may, if valid, establish the sufficiency of the consideration paid by Carkins, but they do not affect at all the question of the validity of Anderson's contract to sell the land. Suppose Carkins' transfer of possession and improvements on the land is, as affirmed under these sections, a good consideration, it is no better consideration than so much money; and Carkins' right to compel a conveyance by Anderson would have been no weaker if he had paid him a thousand dollars in money, than it is now when he simply transfers to him improvements on the land of the value of one thousand dollars.

Opinion of the Court.

We may agree with the Supreme Court of Nebraska, that the consideration passing from Carkins to Anderson was a good and valuable one; and yet that brings us no nearer the question of the validity of Anderson's contract to convey. The fact that Anderson has received full payment for the land only makes stronger the fact that perjury on his part was essential to his obtaining the title, for clearly it was not then to be obtained for him but for Carkins; and does not in the least militate against the public policy disclosed in the federal statutes, that the acquisition of title must be for the exclusive benefit of the homesteader. It may be that Carkins can recover from Anderson the value of these improvements, on the ground that Anderson has received that for which he has paid nothing; for in such an action Carkins will not be seeking to enforce an illegal contract. To that effect are the cases of *Simmons* v. *Yurann*, 11 Nebraska, 516, 518; *Bateman* v. *Robinson*, 12 Nebraska, 509, 511; but that is very different from the enforcement of a contract which is illegal, because against public policy. The Supreme Court of Nebraska, recognizing the general rule as to the invalidity of contracts against public policy, seemed to think that the parties were not *in pari delicto;* but we are unable to see any distinction in moral status between the man who contracts for the perjury of another and the one who contracts to commit such perjury. The fact that the former party may have parted with money or valuable property does not change the quality of his action, or give him higher claim to the consideration of a court of equity. So it results that the federal question in this case was not rightly decided by the state court; and no other question appears, which, rightly decided, upholds its decree. The case, therefore, must be

Reversed, and remanded to the Supreme Court of the State of Nebraska for further proceedings in accordance with this opinion; and it is so ordered.

DETROIT *v.* OSBORNE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 295. Argued April 28, 29, 1890. — Decided May 19, 1890.

It is settled law in Michigan that the failure of a municipal corporation to keep in repair a sidewalk in a public street, when the duty to do so is imposed upon it by statute, does not confer upon a person injured by reason of a defect in such sidewalk caused by neglect of the corporation to perform that duty, a right of action against the corporation to recover for the injury caused thereby.

The local law of a State concerning the right to recover from a municipal corporation for injuries caused by defects in its highways and streets is binding upon courts of the United States within the State.

This was an action commenced in the Circuit Court of the United States for the Eastern District of Michigan, against the city of Detroit, to recover for injuries suffered by the plaintiff by reason of a defect in a sidewalk within the city limits. The defendant pleaded a general demurrer. This being overruled the general issue was pleaded, and a trial was had which resulted in a verdict for the plaintiff for $10,000, and judgment on the verdict. The defendant sued out this writ of error. The case came here with exceptions to the rulings of the court upon questions of evidence and exceptions to the charge; but, in the view taken by this court it is unnecessary to refer to them. The issues raised by the demurrer and argued by counsel were: (1) Whether the city was, by the local law of Michigan, answerable in damages for such injuries: (2) Whether the Circuit Court of the United States was bound by the local law, if the general law was to the contrary.

Mr. Henry M. Duffield for plaintiff in error.

Mr. F. H. Canfield for defendant in error.

The rule that municipal corporations in a case like this are liable for injuries resulting from defective streets or sidewalks,

has been firmly established both by the decisions of this court, and by decisions of the courts of most of the States of the Union. *Weightman* v. *Washington*, 1 Black, 39; *Chicago* v. *Robbins*, 2 Black, 418; *Nebraska* v. *Campbell*, 2 Black, 590; *Robbins* v. *Chicago*, 4 Wall. 657; *Evanston* v. *Gunn*, 99 U. S. 660, 667; *Mayor* v. *Sheffield*, 4 Wall. 189, 194; *Manchester* v. *Ericsson*, 105 U. S. 347; *Barnes* v. *District of Columbia*, 91 U. S. 540.

I submit that this court is not, in this case, obliged to depart from its own rulings, or to repudiate a doctrine which it has declared to be settled law upon this subject, because of the decision of the Supreme Court of Michigan in *Detroit* v. *Blackeby*, 21 Michigan, 84, upon which plaintiff in error may rely.

(1) The point is not presented by the record. If the defendant wished to raise the question of the common law liability of the city the point should have been presented to the court below.

(2) The plaintiff in error cannot now in this court claim the benefit of the demurrer to the declaration which was overruled by the Circuit Court.

By pleading over issuably the defendant waived the benefit of the demurrer. *Cicotte* v. *Wayne County*, 44 Michigan, 173, 174; *Wales* v. *Lyon*, 2 Michigan, 276; *Delahay* v. *Clement*, 2 Scammon, 575; *Early* v. *Patterson*, 4 Blackford, 449; *Funk* v. *The State*, 6 Arkansas, 141, 146. At all events, if the defendant wished to preserve the point, or the benefit of the demurrer, its counsel should have done so either by a proper objection to testimony at the trial or by a proper request to charge the jury.

(3) The decision in the *Blackeby Case* is not binding upon the federal courts, because it is not, nor does it profess to be based upon any statute of the State, or any *local law* of the State. It does not construe any statute or any clause of the state constitution, nor is it a rule of property. The case simply holds as a matter of general law, and upon principles of general jurisprudence, that incorporated cities are not liable for accidents resulting from a neglect to keep the streets in proper and safe repair. The result arrived at was simply a

determination of private rights, "by the application of common law rules alone." *Chicago* v. *Robbins*, 2 Black, 418, 428.

That decision could have been made as well in any other State of the Union, and the reasoning of the court applies as well to the cities in New York, or Illinois, or Alabama, as to the city of Detroit. The decision, therefore, does not constitute the local law of the State, within the true meaning of the term "local" law, nor is it conclusive evidence of what the local law of the State is; and therefore this court is not bound to follow it. *Town of Venice* v. *Murdock*, 92 U. S. 494, 501; *Boyce* v. *Tabb*, 18 Wall. 546; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Delmas* v. *Ins. Co.*, 14 Wall. 661, 668; *Pana* v. *Bowler*, 107 U. S. 529, 540; *Oliver* v. *Rumford Chemical Works*, 109 U. S. 75, 83; *Swift* v. *Tyson*, 16 Pet. 1; *Hough* v. *Railway Co.*, 100 U. S. 213, 226; *Railroad Co.* v. *National Bank*, 102 U. S. 14.

And in the *Blackeby Case*, Judge Cooley, dissenting, said: "The decisions which are in point are numerous; they have been made in many different jurisdictions, and by many able jurists, and there has been a general concurrence in declaring the law to be in fact what we have already said in point of sound policy it ought to be. We are asked, nevertheless, to disregard these decisions, and to establish for this State a rule of law different from that which prevails elsewhere, and different from that which, I think, has been understood and accepted as sound law in this State prior to the present litigation."

The Circuit Court in Michigan has uniformly refused to follow the *Blackeby Case*.

What is a matter of local law, upon which the courts will follow the state decisions, and what are matters of general law in regard to which the federal courts will exercise their own independent judgment, is always to be considered.

A statute or a constitutional provision of course is to be regarded as local law. And so where decisions of state courts have become rules of property, they will be adopted as a part of the local law. But where a decision has not become a rule of property, where it is based wholly upon general principles,

where the result is arrived at by reasoning upon general propositions, without regard to any statute, or established rule, or custom, or usage, peculiar to the State, such a decision cannot be regarded as an announcement of the local law of the State. A decision based upon general legal principles, and upon general rules of jurisprudence, can only be regarded as an announcement of what the court making the decision considers the general law to be.

When a case involving only general principles and general rules comes before the federal court, whether it be one of contract or tort, the federal court must decide it according to its own judgment, and is not bound to follow a state decision, if such decision is contrary to well-settled law.

Mr. Justice Brewer delivered the opinion of the court.

On November 19, 1883, the defendant in error, while walking on Church Street, in the city of Detroit, was thrown to the ground and received severe personal injuries in consequence of a defect in the sidewalk. For these injuries she, as a citizen of Ohio, brought her action in the Circuit Court of the United States against the city, and recovered a verdict and judgment for ten thousand dollars. 32 Fed. Rep. 37. The city alleges error, and its principal contention is that under the rulings of the Supreme Court of Michigan municipal corporations are not liable in damages for personal injuries of this nature, and that such being the settled law of the State, it is binding upon the federal courts.

This contention suggests two inquiries: First, What is the settled law of Michigan? and second, If it be as claimed, is it binding upon the federal courts? The answer to the first inquiry is easy and clear. The precise question was presented in 1870, to the Supreme Court of Michigan, in the case of *Detroit* v. *Blackeby*, 21 Michigan, 84. In that case the injury resulted from a defect in the streets, and from failure to keep them in proper repair. Under the laws then in force, both the power and the duty of keeping streets in repair were vested in the city; but the Supreme Court held that this duty was to

the public, and not to private individuals, the mere neglect of which was a non-feasance only, for which no private action in damages arose. The power of the legislature to create a liability to private suit was conceded; but it was decided that, in the absence of express action of the legislature creating such liability, the mere grant of the power and the imposition of the duty to keep streets in repair were not sufficient to sustain a private action for injuries resulting from a failure to keep such streets in repair. This doctrine has never been departed from by the Supreme Court of that State; and no action had ever been taken by the legislature, up to the time of this accident, to change the rule of liability thus announced. In 1879 an act of the legislature was passed, Laws of 1879, c. 244, p. 223, for the collection of damages sustained by reason of defective public highways, streets, bridges, cross-walks and culverts. That statute came before the Supreme Court for examination in the case of *Detroit* v. *Putnam*, 45 Michigan, 263; and it was held, first, that "a statutory liability created in derogation to common law cannot be enlarged by construction;" and, secondly, that the act, omitting sidewalks, left the law in respect to sidewalks not in repair as it was before; and that no private action against the city, for damages springing from a defective sidewalk, could be maintained. In *Church* v. *Detroit*, 64 Michigan, 571, an act purporting to extend the liability of municipal corporations to the case of damages resulting from defective sidewalks was declared unconstitutional. Thus, by the concurrent action and judgment of the legislature and the Supreme Court of the State of Michigan there was, up to and beyond the time of the injury complained of in this action, no liability on the part of a municipality for such injuries. The case of *Detroit* v. *Chaffee*, 70 Michigan, 80, in no manner conflicts with this established rule. In that case a judgment had been obtained against the city in the United States Circuit Court for personal injuries caused by a defective sidewalk in front of a lot owned by Chaffee. The city had no right of appeal to this court — the judgment being under five thousand dollars — and brought its action against Chaffee, the owner of the lot, under section 57,

page 614, Stat. Mich. 1883, which provides that "the common council shall have power to provide and ordain by ordinance that whenever any sidewalk requires to be built or repaired the said council may direct the board of public works to notify the owner, agent, or occupant of any lot or parcel of land in front of or adjacent to which such walk is required to be built or repaired to build or repair the same, and that if such agent, owner, or occupant shall neglect, for a time to be specified in the ordinance, to do such building or repairing, it shall be the duty of the said board to at once do or cause the same to be done, and in such case the expense thereof shall be assessed upon such lot or parcel of land, and shall be a lien thereon until collected and paid in a manner to be prescribed in such ordinance; and the owner so neglecting to build or repair shall be liable to the city for all damages which shall be recovered against the city for any accident or injuries occurring by reason of such neglect, and also to prosecution in the recorder's court, and, on conviction, to be fined not to exceed five hundred dollars and the penalties in the city charter elsewhere provided." A judgment in favor of the city was ordered. But this section of the statute was similar to one in force at the time of the decision in *Detroit* v. *Blackeby*, Laws of Michigan, 1865, p. 679, c. 325, § 1. There being no change in the statute in this respect, it cannot be held that any change was contemplated in the rule of liability by the legislation of 1883; and the decision in *Detroit* v. *Chaffee* was simply the enforcement of a right given by both the statutes of 1865 and 1883, springing out of a judgment not subject to the supervising control of the Supreme Court of the State. In answer to the first inquiry, it must therefore be affirmed that the law of Michigan is against any liability on the part of the city for injuries like those in this action.

The second inquiry must be answered in the affirmative. If it is a matter of local law, that law is obligatory upon the federal courts. It must be conceded that this adjudication as to the liability of a city for injuries caused by a defect in the sidewalks, the repair of which it has both the power and duty

to provide for, is not in harmony with the general rule in this country, 2 Dillon on Mun. Corp. 3d ed. §§ 1017, 1018; nor in accord with the views expressed by this court. In *Barnes* v. *The District of Columbia*, 91 U. S. 540, this court, after referring to the case from 21 Michigan, *supra*, and the doctrine stated therein, observed that "the authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them," citing in support a long list of authorities. The authorities which support a different view are collected in *Hill* v. *Boston*, 122 Mass. 344. But even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan may be entitled under the federal Constitution to all the privileges and immunities of citizens of that State; but under that Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens.

This question is not a new one in this court. In the case of *Claiborne County* v. *Brooks*, 111 U. S. 400, 410, it was held that, "when the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States;" and in the opinion it was observed: "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation. The city of Detroit, in the discharge of its public duty in respect to keeping the streets and sidewalks in repair, is under no higher or different obligation to a citizen of Ohio than to one of the State of Michigan, and the measure of its liability under the statutes, as stated, is to be determined by the judgment of the Supreme Court of that State, and not by what our opinions might be as to the proper construction of those statutes. Reference may also be made to the recent case of *Bucher* v. *Railroad Company*, 125 U. S. 555, 584, in which this court followed, against its own judgment of the law, the rulings of the Supreme Court of Massachusetts, and held that a party travelling on Sunday, and not for necessity or charity, in the cars of a railroad company, could not recover for injuries sustained by the negligence of the company, because he was himself thus violating the law of the State. Concluding the opinion of the court in that case, it is observed: "It may be said generally that whenever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed

in the case of *Burgess* v. *Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State, it becomes also the law governing the courts of the United States sitting in that State."

Nothing more need be added to express the views of this court on the question here presented. The judgment of the Circuit Court must be

Reversed and the case remanded, with instructions to sustain the demurrer to the amended declaration.

NORMAN *v.* BUCKNER.

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

No. 275. Argued April 16, 17, 1890. — Decided May 19, 1890.

In Louisiana, where the heirs of an intestate may take the property and pay the debts, such an heir cannot, after taking a part of the property, hold the administrator and his sureties responsible for loss in respect to it resulting subsequently thereto; and this rule is not affected by the fact that the administrator, in his individual capacity, afterwards obtained title to and possession of the property thus removed from his custody.

The proceedings attacked in this case were conducted in good faith, and without fraud or collusion.

The facts that the same person was administrator of one estate, and executor of another, and that the testate and the intestate were partners in business, do not affect the right of the creditor of the intestate to have his separate estate applied to the payment of his individual debts, and do not make the sureties on the administrator's bond answerable for waste committed by the executor.

THE case is stated in the opinion.

Mr. Wade R. Young for appellants.

Mr. C. J. J. S. Boatner for Montgomery, appellee.

Mr. John T. Ludeling, for Buckner, appellee, submitted on his brief.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Western District of Louisiana, dismissing the bill filed by appellants, complainants below. The facts are these:

Complainants are the heirs at law of W. D. King, who died intestate in the State of Louisiana, September 5, 1877. Upon his death and on October 6, 1877, Ben. E. Hall was appointed administrator, and qualified with the defendants and Leonora E. Hall as sureties on his bond. Leonora E. Hall, the surety, was the wife of Ben. E. Hall, the administrator. At the time of his death, King owned an undivided one-half of the "Mounds" plantation, with the personal property attached thereto, and also several hundred acres of wild and overflow lands. Mrs. Hall was the owner of the other undivided half of the Mounds plantation; and she and King were partners in carrying on the plantation, and running a store thereon. On February 19, 1878, the complainants, as heirs of King, sold and transferred to Mrs. Hall the decedent's undivided half of the Mounds plantation, with all the personal property belonging thereto, for the consideration of five thousand dollars and the agreement of the purchaser to pay all the debts of the estate. If Mrs. Hall had carried out her agreement, and paid the debts of the estate, the complainants would have received the overflow lands free from all incumbrances. For the five thousand dollars Mrs. Hall gave two notes, one of two thousand and the other of three thousand dollars, due respectively January 1, 1880, and January 1, 1881, and secured by mortgage on the Mounds plantation. This mortgage was subordinate to a prior mortgage to Aivey & Co., for $17,504.49. Complainants subsequently sold these notes to one of the defendants, John A. Buckner. On September 2, 1879, Mrs. Hall died, leaving a will, giving all her property in Louisiana to her husband, and appointing him her executor. He qualified as such, and gave bond as required by the order of the court. On March 30, 1880, Aivey & Co. commenced suit to foreclose their mortgage; and on November 20, 1880, Buckner, pur-

chaser from complainants of their notes and mortgage, also commenced suit to foreclose. Under the first suit the Mounds plantation was offered for sale on June 19, 1880. At that sale, after some competition, a bid from a reliable person, of thirty thousand dollars, was made. Thereafter, Ben. E. Hall bid thirty-one thousand dollars, and the property was struck off to him. He failed to make good his bid, and the sale was thereupon adjourned; and, subsequently, stayed by injunction proceedings. After those injunction proceedings had been got out of the way, and on June 21, 1884, the property was again offered for sale, and sold to Buckner for twenty-two thousand dollars, an amount not sufficient to discharge the mortgage claims. Pending these proceedings, and on December 11, 1880, Hall, the administrator of King, filed a petition for the sale of the overflow lands, in order to pay debts of the estate. An order for sale was made on this petition, and on February 5, 1881, the property was sold. At the instance of complainants this sale was set aside — they being compelled to advance $1200 to reimburse the purchasers. Thereafter, and on November 16, 1883, another order for sale, on a similar petition, was made, and the property sold to one Isadore Newman, for the sum of $1677.74. The value of this overflow land is alleged by complainants to have been $10,000; and the prayer of the bill is for a recovery against the defendants, the sureties on the administrator's bond, of the sum of $11,200 — being $10,000 as the value of the overflow land and $1200 advanced by complainants on account of the first sale; and failing that, a decree setting aside the sale of the undivided one-half of the Mounds plantation made by them to Mrs. Hall, and requiring the purchaser, John A. Buckner, to return said property to them, with the rents, issues and profits during the time of its possession by him.

The bill has thus a double aspect. The alternative reliefs prayed for are essentially different, one being of an equitable and the other of a legal nature. We will consider that of an equitable nature first.

The prayer of the complainants is, that the contract of sale between them and Mrs. Hall be set aside; and that John A.

Buckner be decreed to return the undivided one-half of the Mounds plantation, which they had sold to Mrs. Hall, and which he had subsequently purchased at mortgage sale. But there is nothing in the record which would justify such relief. Under the laws of Louisiana, the heirs of an intestate may take the property and pay the debts. In pursuance of this right, complainants, the heirs of the intestate King, withdrew the Mounds plantation from the possession of the administrator and sold it. By that act the responsibility of the administrator and the sureties on his bond, as to that property, ceased. The heirs cannot take property from the custody of an administrator, and then hold him or his sureties liable for loss in respect to such property resulting subsequently thereto. Dispossessing him, they relieve both him and his sureties from further responsibility; and this release is in no manner abridged by the fact that the administrator may thereafter, in his individual or in some other representative capacity, obtain the title or possession of the property thus removed from his custody as administrator. The guaranty of an administrator's bond is not against general wrong-doing on the part of the administrator, but simply against his misconduct while in charge of the property of the estate. When that property passes out of his custody, his liability and that of his sureties cease. So when these complainants withdrew the Mounds plantation from the custody of the administrator and sold it on their own account to Mrs. Hall, they released the sureties on his bond from any further liability in respect to it. Neither the administrator nor his sureties owed any duty to the heirs thereafter to look after such property or protect their interests in it. *Hebert* v. *Hebert & Levey*, 22 La. Ann. 308.

Again, there is no pretence that in the sale made by complainants to Mrs. Hall there was any fraud, mistake, or deception. It is not even suggested that there was any wrong in respect to it. How then can they ask to have it set aside? They allege a failure on her part to pay all the consideration. But such failure is no ground for rescission, and they, having parted with the notes received as part payment, cannot return them. Further, while it is alleged that in the fore-

closure sale there was collusion between Buckner the surety, and Hall the administrator, yet the testimony wholly fails to substantiate the claim. The specific charge is, that when the property was offered for sale, a bid from a reliable party was made of thirty thousand dollars, a sum which would have paid off the mortgage debts, and left money enough in the estate of Mrs. Hall to have paid all the debts of her estate, including the obligation, assumed by her as part of the consideration for the Mounds plantation, to pay the debts of the estate of King; that notwithstanding this advantageous bid, Hall bid thirty-one thousand dollars without having the means of making good such bid, and in collusion with Buckner, for the purpose of preventing a sale; that, failing to make good his bid, the sale was first postponed by order of Buckner's attorney, and thereafter stayed by an injunction suit brought by Montgomery and Delony, the other sureties on the bond, and all for the purpose of enabling Buckner to finally acquire title to the plantation at less than its real value. The facts are, as developed by the testimony, that there was no collusion between Buckner and Hall, and no understanding between them in reference to the property; that the foreclosure suits of Aivey & Co. and Buckner were perfectly proper proceedings for the collection of their debts, commenced only after default in payment of interest and principal, and prosecuted in the ordinary way, without undue haste. At the first sale, and that was before Buckner had commenced his foreclosure suit, it is true that the bidding was as alleged; yet Hall's bid was made on his own responsibility, without suggestion from Buckner, and upon what proved to be an unjustifiable expectation that he could arrange with Aivey & Co., or some other parties, for securing the money on the property. When the second sale took place, Buckner was the highest bidder; and this sale was made after the ordinary advertisement, and under no circumstances of oppression or wrong. So far as respects the delay in the sale, caused by the injunction proceedings, it is enough to say that Buckner had nothing to do with that; and, of course, cannot be held responsible for anything that resulted therefrom. The party who had made the

bid of thirty thousand dollars at the first sale, on further examination of the property, and in view of the change of circumstances, did not care to enter into competition at the second sale; and so the property was sold for only twenty-two thousand dollars, an amount which was all absorbed in the mortgage debts. It must also be borne in mind that the foreclosure proceedings were public and judicial; that no party to those proceedings owed any duty in respect thereto to the complainants; and if the mortgage property was worth more than the mortgage debts, and if they had any interest in having it realize its full value, it was their right and duty to attend the sale, and either bid themselves the full value or secure others to make such bid. So, concluding this branch of the case, it is clear that the complainants, as heirs, by withdrawing this property from the custody of the administrator, released him and his sureties from further responsibility in respect to it; that the subsequent taking possession of this property by the administrator, as executor and devisee of Mrs. Hall, the purchaser from the heirs, did not restore the liability of the sureties on his bond; that any wrong practised by him in reference to the property thereafter, was a personal wrong, and one for which his sureties were not responsible; that the foreclosure proceedings were fairly conducted; and that the ill result which followed from Hall's excessive and unfulfilled bid was not the result of any collusion or agreement between him and the surety Buckner, and therefore was not an ill result for which Buckner, as purchaser at the last sale, can be held responsible. In respect to this branch of the case, therefore, the ruling was properly against the complainants.

Passing to the other, it is nothing but an action at law on an administrator's bond, to recover the value of property unnecessarily and improperly sold by him, and damages which resulted from such sale. It is, in no proper sense, a bill for an accounting. It distinctly charges that the administrator twice wrongfully sold the overflow lands; that the complainants succeeded in having the first sale set aside, on the payment of $1200 to the purchasers; that they had no notice of the

second sale, and hence were unable to contest it; and they, therefore, seek to recover the value of the land thus improperly and finally sold, and the $1200 which they had to pay on account of the first sale. But, waiving any question as to whether this branch of the case was improperly joined with that in which a trust was sought to be established in respect to the Mounds plantation, we are of the opinion that the ruling of the Circuit Court was correct on it also, by itself considered. It is indisputable that Mrs. Hall did not pay, as she agreed, the debts of the estate of King; and that the foreclosure sale swept away her entire estate. There remained, therefore, debts due from the estate of King not paid by the heirs, or the purchaser from them of the Mounds plantation. Those creditors had a right to demand the sale of the overflow lands, the remaining property of the estate, for the payment of their claims. The fact that these claims were debts of the partnership of King and Hall, and therefore claims against both their estates; or the additional fact, if it be a fact, that Mrs. Hall's estate if properly managed could have paid these claims, and did not pay them through the mismanagement of her executor; in no manner relieved the estate of King from its liability, or prevented the creditors from having the overflow lands sold to satisfy them. The mismanagement, if conceded by Hall as executor of his wife's estate, in no manner affected the question of the liability of the sureties of Hall, as administrator of the estate of King, for a sale of its property. Whatever personal liability Hall may have incurred by the mismanagement of Mrs. Hall's estate, it is no burden resting upon these defendants as sureties on Hall's bond as administrator of King's estate. No liability arises against them, if there were, in fact, unpaid debts against the estate of King, and the property was sold to pay those debts.

Now, the real contention of complainants is not that there were no unpaid debts of the estate of King, on account of which these lands were sold, but that Mrs. Hall's estate was also liable for these debts; that Hall, as executor, properly managing that estate, could and should have paid those debts out of that estate; and that Montgomery and Delony, two of

the sureties on the administrator's bond, who held these claims, were, by reason of their suretyship, under an equitable obligation to enforce their collection out of Mrs. Hall's estate. But we do not understand that any such obligation was imposed by their suretyship. They did not guarantee Hall's faithful performance of his duty as executor, or become in any manner responsible for what he did as executor. They assumed no obligations in respect to their own claims against the estate of King, either as to the time or manner of their payment. They did not thereby bind themselves to pursue every other joint debtor before asking payment from the King estate. If, by reason of Hall's mismanagement as executor, nothing was left to Mrs. Hall's estate, their claims against the King estate, as one of two joint debtors, were in no manner impaired; and the sale of the overflow lands belonging to the King estate, in satisfaction of their claims, was neither illegal nor improper; and that, in its worst aspect, is all that the testimony develops in respect to this branch of the case.

It should also be noticed that Hall's action in respect to these sales was, in fact, compelled by the complainants themselves. They proceeded against him for contempt in not closing up the estate, and it was only in response to such proceedings that he filed his petitions and made the sales with a view of paying the as yet unpaid debts of the King estate.

Further comment is unnecessary. The decree of the Circuit Court is correct, and it is

Affirmed.

WEST *v.* CAMDEN.

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

No. 278. Argued April 17, 18, 1890. — Decided May 19, 1890.

An agreement by a director of a corporation to keep another person permanently in place as an officer of the corporation, is void as against public policy, even though there was not to be any direct private gain to the promisor.

Statement of the Case.

A judgment will not be reversed because of an erroneous instruction to the jury, excepted to by the plaintiff, if the plaintiff could not recover in any event.

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

This is an action at law, brought in the Circuit Court of the United States for the District of Maryland, by William C. West against Johnson N. Camden. The principal count of the declaration alleges that, in December, 1877, the defendant engaged the plaintiff to serve as vice-president of the Baltimore United Oil Company of Baltimore County, a Maryland corporation, in which the defendant was largely interested, and promised, in consideration of the plaintiff's agreement to serve as such officer, and of the conveyance and transfer to the company of the property used by the partnership firm of C. West & Sons, (of which, at the time, the plaintiff was a member,) in its business of refining petroleum and dealing in the same and its products, and the consolidation of the business of that firm with the business of the company, which was greatly beneficial to the company and the defendant, that the plaintiff should be retained permanently in his position as such officer, at the salary of at least $5000 per annum, the expected fulfilment of such promise on the part of the defendant being a material part of the consideration of such transfer and consolidation, and additional to the money consideration for the same; that the transfer and consolidation were carried out shortly thereafter by the plaintiff and the other members of the firm, according to the terms of such agreement; that the plaintiff faithfully discharged the duties of such office, and was duly paid therefor, from the time when his services were so engaged until the 15th of January, 1883, when he was removed from his position, without any sufficient reason, in violation of such promise of the defendant, and notwithstanding he tendered himself to the company and to the defendant as ready and willing to continue the performance of such duties. The damages claimed are $50,000. The defendant pleaded *nil debet* and *non assumpsit*.

The plaintiff then amended his declaration, by averring that,

at the time of the making of such promise and of the acceptance of the same, and of the performance by the plaintiff of his part of the agreement, the defendant was able, and proposed and continued to be able, and represented and guaranteed to the plaintiff that he was and would continue to be able, lawfully and properly to procure for, and continue to, the plaintiff such office and employment in the service of the company on the said terms, which office and employment it was for the interest and benefit of the company the plaintiff should have and continue to fill at said salary ; that the defendant, down to and at the time of the removal of the plaintiff from said office, was, and always continued to be able, lawfully and properly, and to the interest and advantage of the company, and with its consent and approval and that of its stockholders, to retain the plaintiff, or cause to procure him to be retained, at said salary, and in the employment of the company; but that the defendant refused so to do, and procured the plaintiff to be removed from said office and from all employment in the service of the company, and to be deprived of all salary and emolument therefrom.

The case was tried by a jury, which found a verdict for the defendant, on which a judgment was entered for him, with costs, to review which the plaintiff has brought a writ of error.

The Baltimore United Oil Company was incorporated under the general corporation law of the State of Maryland, on the 13th of December, 1877. The plaintiff and the defendant were both of them incorporators of the company, and both of them named as among the first directors, in the certificate of incorporation. On the 15th of December, 1877, the members of the firm of C. West & Sons, including the plaintiff, executed an instrument in writing, by which, for the expressed consideration of $137,500, they conveyed to the company certain land in Canton, Baltimore County, Maryland, used and occupied by them as a refinery, and all the property owned and used by them in the business of refining petroleum, with the good will of such business and the good will of their business at their store in the city of Baltimore. At a meeting of

the board of directors of the company, the defendant, who, as trustee, subscribed for 5059 shares out of the 6000 shares which constituted the capital stock, was elected president, and the plaintiff, who subscribed for 458 shares, was elected vice-president at a salary of $5000 a year. The subscription made by the defendant for the 5059 shares, as trustee, was made for the Standard Oil Company, which furnished the money that was paid for such shares, and they were immediately transferred to the Standard Oil Company by the defendant. The plaintiff held the said office, his compensation having been gradually increased by the Standard Oil Company to $15,000 a year, until January 15, 1883, when that company which still held that amount of stock, having decided to reduce the expenses and to change the management, a new board of directors was chosen, not embracing the plaintiff, and another person, who agreed to serve without salary, was elected vice-president in his place. At the stockholders' meeting at which the new board of directors was chosen the stock belonging to the Standard Oil Company was voted upon by trustees who then held it for that company, the defendant not being one of them. To the consideration of $137,500 expressed in the conveyance above mentioned, Messrs. Archbold and Vilas, two of the officers of the Standard Oil Company, who took part in negotiating the arrangement with C. West & Sons, agreed, on behalf of their company, to add $12,500, bringing up the consideration paid to C. West & Sons to the sum of $150,000; which agreement was carried out.

All the obligations ever entered into by the Baltimore United Oil Company, or by the Standard Oil Company, with the plaintiff or with the firm of C. West & Sons, have been fully complied with. This suit is not brought against either of those companies, nor is it brought by C. West & Sons, but by the plaintiff individually against the defendant individually. The instrument of conveyance says nothing about any office or salary for the plaintiff in the Baltimore United Oil Company. The plaintiff knew, prior to the consummation of the sale by C. West & Sons, that the defendant was acting in

the negotiations as the agent of the Standard Oil Company, and knew also, prior to the organization of the Baltimore United Oil Company, that the control of it, and the disposition of its offices, rested with the Standard Oil Company, and knew that the defendant represented that company, in subscribing, as trustee, for the 5059 shares of stock. He admits, in his testimony, that he believed that the defendant was acting for the Standard Oil Company in the transaction which resulted in the purchase from C. West & Sons, and in the agreement alleged to have been made. The case claimed by the plaintiff is that, in addition to the money consideration for the sale of the property, there was, under the circumstances above mentioned, a further consideration in the individual promise of the defendant to the effect alleged. The defendant denies the existence in fact of any such agreement on his part.

The plaintiff prayed the court to give to the jury the following instructions, each of which was refused, and the plaintiff excepted: 1. "Although the jury may find, from the evidence, that, in negotiating with Messrs. C. West & Sons for the transfer of their property and business to the Baltimore United Oil Company of Baltimore County, the defendant acted as the agent of the Standard Oil Company and was known to the plaintiff to be so acting, yet if the jury believe that the defendant was himself largely interested in the Standard Oil Company as a stockholder, and in the organization of the Baltimore United Oil Company as a means of enlarging its business and profits and promoting his own consequent interest, and believed it necessary or important to the successful organization of the Baltimore United Oil Company and the promotion of his own interests, that Messrs. C. West & Sons should sell to it their property and business and withdraw from competition with said company, and, so believing and in order to induce the plaintiff to consent to such sale and withdrawal, the defendant made with the plaintiff, on his own individual behalf, as the plaintiff has testified, the contract to which likewise the plaintiff has testified, then the defendant's agency of the Standard Oil Company and plaintiff's knowledge of it,

as hereinbefore stated, are no bar to plaintiff's recovery in this action." 2. "If the jury believe, from the evidence, that the defendant was himself largely interested in the Standard Oil Company, as a stockholder, and in the organization of the Baltimore United Oil Company of Baltimore County as a means of enlarging its business and profits and promoting his own consequent interests, and believed it necessary or important to the successful organization of the Baltimore United Oil Company and the promotion of his own interests, that Messrs. C. West & Sons should sell to it their property and business and withdraw from competition with said company, and that the plaintiff was unwilling to unite with his copartners in the sale and transfer of their said property and business to the said company, and the defendant, to induce the plaintiff to unite with his copartners in selling and transferring their said business and property to the said company, contracted and agreed with the plaintiff individually, that, if he would so unite in said sale and transfer, he should have a permanent position in said company, as testified to by the plaintiff, and that, by reason of said contract and promise and relying thereon, the plaintiff did, with the knowledge and consent of his copartners as to said contract and agreement made with the plaintiff individually, unite with his copartners in the sale and transfer of the said property and business, and did withdraw said business from competition with the said company; and shall further find that the defendant, in pursuance of said contract with the plaintiff, procured the appointment of the plaintiff to the position of vice-president of the said company, and that the plaintiff accepted the same in accordance with said contract, and entered upon his duties as such officer, and continued in the discharge of the same for the term of five years, and until he was removed therefrom, and that such removal was made at the instance of or by the procurement of the defendant, without cause; and shall further find, that the plaintiff was willing, and tendered himself willing, to fulfil the duties of the said office and to continue permanently to do so, then their verdict must be for the plaintiff, for so much as they may find he has been damaged by the failure of

the defendant to comply with his said promise and agreement."

The court instructed the jury as follows: "If they find that the alleged contract between the plaintiff and the defendant, that the said plaintiff should have permanent employment as an officer of the Baltimore United Oil Company, at a salary of not less than $5000 a year, or as much as any other officer of said company received, was made in contemplation that the defendant was to be an officer of said company and to control a majority of its stock, and that, by the use of his official position and of the control of said ownership of stock, he was to retain said plaintiff in office and fix his salary, as admitted by the said plaintiff, then their verdict must be for the defendant upon the issues joined in this case." The plaintiff excepted to such instruction.

That instruction was based upon the view that, on the facts stated in it, the alleged contract was void as against public policy. On this point the court said: "There is no allegation or proof that there was at any time such a contract for permanent employment directly with the company, or that the existence of such a contract with defendant was known to all the stockholders of the company; so that it resulted, if the contract be upheld, that whenever the question of retaining the plaintiff in the company's service at $5000 a year came to be voted on, the defendant's vote was to be influenced by the fact that he was to be liable to the plaintiff in large damages unless the company retained him. Either the company must pay him $5000 a year, or the defendant must make it good to him out of his own pocket. This state of facts serves clearly to bring the case within the principle of the ruling in *Fuller* v. *Dame*, 18 Pick. 472, and *Guernsey* v. *Cook*, 120 Mass. 501, that is to say, it was a contract the purpose and effect of which was to influence the defendant as a stockholder and officer of the company, 'in the decision of a question affecting the private rights of others, by considerations foreign to those rights,' and the defendant, by the contract, was placed under direct and very powerful 'inducement to disregard his duties to other members of the corporation, who had a right to

demand his disinterested action in the selection of suitable officers.' He was to be in a relation of trust and confidence, which would require him to look only to the best interests of the whole, uninfluenced by private contracts. We think this salutary rule is applicable in this case, notwithstanding the alleged contract was not corruptly made for private gain on the part of the defendant. There were other stockholders in the company. The defendant and the Standard Oil Company, for whose benefit it is alleged the contract was made, were not all the stockholders, and it seems to us that it was certainly the right of those other stockholders to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company."

The court also instructed the jury as follows: "Even if they find that the defendant verbally promised the plaintiff, as part of the consideration for the execution by him of the contract offered in evidence, dated December 15, 1877, that plaintiff should have permanent employment as an officer of the United Oil Company of Baltimore, at a salary of not less than $5000 a year, or as much as any other officer of said company, and that plaintiff agreed that he would accept such employment and serve said company on those terms, the plaintiff cannot recover on such verbal contract and their verdict must be for the defendant." The plaintiff excepted to that instruction.

The court also instructed the jury as follows: "The plaintiff has offered no evidence legally sufficient to sustain the allegations contained in his amended declaration, and is not entitled to recover in this action." The plaintiff excepted to that instruction, the court having remarked in regard to it: "The alleged contract being, for the reasons we have already stated, presumably void on grounds of public policy, there must be affirmative proof to sustain the allegation of the amendment that the defendant 'was and continued able, lawfully and properly, and to the interest and advantage of said company, and with and by its full consent and approval and that of its stockholders, to retain the plaintiff in the employment of said company.' We do not find any evidence to this

effect which, in our judgment, could be properly submitted to the jury."

Mr. S. T. Wallis and *Mr. E. Calvin Williams* for plaintiff in error.

In its reasoning, sustaining the first prayer of the defendant in error, the court held that the alleged contract was "presumably against public policy." The prayer itself bases the invalidity of the contract exclusively upon the hypothesis that it was made in contemplation that the defendant "was to be an officer of the Baltimore United Oil Company, and to control a majority of its stock, and that by the use of his official position and of the control of said ownership he was to retain the plaintiff in office and fix his salary." It will be observed that the prayer does not require the jury to find that the agreement was secret, corrupt or collusive, or that the defendant was to exercise his control, or use his position, in carrying out the contract, without the knowledge of his co-stockholders, or against, or without reference to their interests, or those of the corporation. It is respectfully submitted that the proposition thus stated cannot be maintained. The court rests its opinion in favor of the prayer, upon the two cases of *Fuller* v. *Dame*, 18 Pick. 472, and *Guernsey* v. *Cook*, 120 Mass. 501, neither of which is believed to justify the conclusion drawn from them.

In *Fuller* v. *Dame*, the plaintiff, Dame, who was the owner of a large tract of waste land, was desirous to enhance the value of his property, by having a principal place of deposit of a certain railway located at a particular point. To this end it was necessary to form an association, which would furnish the railroad company with a quantity of land and pay it a large sum of money to induce it to make the location desired, and this new corporation was to purchase Dame's property as joint stock. Dame accordingly agreed with Fuller, that the latter should aid him in getting up the proposed company and in causing the railroad corporation in question to fix its terminals and its principal place of deposit at the point where

Dame desired to have them. In consideration of this service to be rendered to Dame, he executed to Fuller his note for $9600 and placed it in "certain parties' hands" to be delivered to Fuller so soon as the terms of the agreement should be complied with as to the location of the railroad depot. This was consummated, and the note having been handed to Fuller, was the cause of action sued on. Fuller, at the time of the contract, was a stockholder of the railroad company concerned and was also a member of the legislature, and took stock in the new company on its incorporation. He was likewise himself largely interested in adjacent land, which was benefited by the railroad location provided for, and sold it for a great advance in consequence.

The court held the contract void, as a secret arrangement by which a large sum of money was to be paid to a stockholder and influential citizen, for his own use, on condition that he would use his influence to secure such action on the part of his corporation as would promote the private interests of a party who was to pay him, and his own, instead of the interests of the public and the railroad company, which were alone to be consulted in the location of the proposed depot. The court held the transaction an attempt to create and exert an "undue influence," with "all the injurious effects of a fraud upon the public."

In *Guernsey* v. *Cook*, two shareholders of a corporation, in consideration of A's agreeing to purchase a part of their stock at a price named, secretly contracted to procure for A the treasurership of the corporation, and secure to him, also, a sum named as his annual salary. In case of his removal, they were to buy the stock back from him at par. The court held the contract void, as contrary to public policy and as a fraud on the other stockholders, who were entitled to a disinterested exercise of judgment by their associates in regard to the selection of officers, "uninfluenced by private gain." In the absence of proof that the transaction was not for the private benefit of the contracting shareholders, or that it was consented to by the other members of the corporation, the contract could not be enforced.

Argument for Plaintiff in Error.

The propriety of these decisions is not, for a moment, questioned — their applicability to the case at bar is, however, earnestly disputed.

The distinction between this case and *Dame* v. *Fuller* is believed to be manifest from the statement of the facts on which the Massachusetts decision was predicated. The latter belongs to a well-defined class of cases, in which a party occupying a public, or fiduciary, or quasi fiduciary position, is not permitted to sell or trade away the performance of his duties, for money or other private and secret advantage to himself. The case is rightly classified, with others, by Mr. Greenhood, under the head of "Private Dishonesty" as well as "Public Policy." Greenhood on Public Policy, 138, 139; *Woodstock Co.* v. *Richmond Co.*, 129 U. S. 643, 659, 662.

In *Guernsey* v. *Cook*, the transaction was simply the secret sale of a corporate office and its emoluments by stockholders in consideration of money to be paid to them by the proper officer for their stock. It was a secret sale of their votes, pure and simple, and it is part of the case that the corrupt bargain was set forth in terms in the agreement.

In the case at bar there is no pretence of any such facts or circumstances as are the basis of these decisions. There was nothing secret, whatever, about the appointment of West or the intention to appoint him. On the contrary, it was the declared purpose of the Standard Oil Company, in the formation of the United Oil Company, to give employment in the service of that company to all the Baltimore refiners who sold out to it and took stock in it, and all of them, as Camden states, "received positions of one kind or another as officers of the company." There was no element in the contract, nor in the circumstances surrounding and relating to it which brought it within the widest reach of the principle of public policy enforced in those cases.

It is scarcely necessary, though it may be permitted to add, that this court has always adhered to the doctrine that when a contract is capable of two constructions, the one lawful and the other unlawful, the former must be adopted. *Hobbs* v.

McLean, 117 U. S. 569–576; *United States* v. *Central Pacific Railroad*, 118 U. S. 235, 240.

This rule, enforced in the case of *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 70, where a question of public policy arose, is fully recognized by the Supreme Court of Massachusetts in *Guernsey* v. *Cook*. See, also, Greenhood on Public Policy, Rule 99, p. 123, and cases cited.

The defence of public policy set up by a party to a contract which, as between the parties, is fair and honest, is characterized by the Master of the Rolls in a recent case, *Swaine* v. *Wilson*, as a "mean defence," and Lord Justice Lindley repeats that it is "not a creditable defence," though, as he adds, "the court must consider it, and, if well founded in point of law, must give effect to it." This court, with all others, has been compelled to enforce the latter rule, but never except where there was no alternative. It has never departed from the principle laid down in *Railroad Co.* v. *Richmond*, 19 Wall. 584, 590, where it classes among matters of "the highest moment and importance to the public welfare," even where public policy is in question, "the observance of good faith among parties and the upholding of private contracts and enforcing their obligations." And see, pointedly, to the same effect, the striking language of the late Sir George Jessel, in *Printing Co.* v. *Sampson*, L. R. 19 Eq., 462.

If we have shown that the court below erred in granting defendant's first prayer, we submit that the theory on which his seventh prayer was granted is equally unsound. Assuming that the contract set up was presumably void, the court held that the case could not be maintained without "affirmative proof" of certain averments in the amendment of the declaration, to remove that presumption. Their Honors then went on to determine that they found no evidence to that effect which could properly be submitted to the jury and they consequently granted the prayer.

The prayer itself is manifestly bad, it is submitted, on its face, because instead of assuming that there was no legally sufficient evidence *in the case* to maintain the averments in

question, it confined itself exclusively to evidence *offered by the plaintiff*, excluding altogether from the jury such deductions as they might legitimately draw from the defendant's own testimony and his other proof on which the plaintiff might and would have relied with great confidence.

But even if the prayer was not thus fatally objectionable it was otherwise inadmissible. It will be observed that the court's ruling involved the decision of two points — 1st, that the contract was *prima facie* void, and 2d, that *because of this* and only because of it, the averments of the amendment were required to be established by affirmative proof. "Affirmative proof" is, in itself, a misleading phrase; for, if it means to convey the idea that any legally competent evidence whatsoever from which the jury might reasonably find the truth of the averments in question would not suffice to maintain them, it is believed to be inconsistent with the fixed rules of evidence. But, be that as it may, the necessity of proving those averments is made by the court to depend upon the previous ruling, that the contract was at least *prima facie* void, and the supposed necessity of the proof, of course, falls to the ground if the contract "presumably" labored under no such infirmity.

It is submitted that there was legally competent evidence to go to the jury, upon the issue of the amended declaration that the holders of stock other than that represented by Camden would have consented to and approved the retention of West, if Camden had urged, instead of opposing it, and that the Standard Oil Company would have done the same thing.

Mr. Thomas W. Hall and *Mr. Charles Marshall* for defendant in error.

Mr. Justice Blatchford, having stated the case as above reported, delivered the opinion of the court.

The first instruction virtually took the case from the jury, although it appears that, on a prayer by the defendant to the

court to instruct the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover, and that their verdict must be for the defendant, the court refused to grant that prayer.

We think that under no circumstances could the plaintiff recover in this action, for the reason that the alleged contract was void as against public policy, and that the first instruction to the jury was correct. From the plaintiff's own testimony it appears that his only reliance was on the use of the defendant's influence as an officer of the Baltimore United Oil Company, and on his control over the stock in that company held by the Standard Oil Company. The plaintiff says of the defendant: "He was to be president of the company, and I supposed he would remain there and continue me and keep me in the position as vice-president and general manager. If he was to be president and hold five-sixths of the stock and continue to hold it, it was a surety that I should remain in the position."

The agreement alleged to have been made was one on the part of the defendant whereby he might be required to act contrary to the duty which, as an officer of the Baltimore United Oil Company, he owed to that company and to the stockholders other than the plaintiff. The same rule which is applicable to the case of a public office applies to the present case, although it does not appear that the defendant was to receive direct personal pecuniary compensation or gain for what he was to do. The plaintiff, on his own showing, dealt with the defendant in reference to the fiduciary relation which the latter bore to the stockholders, both of the Standard Oil Company and of the Baltimore United Oil Company. The agreement alleged was an agreement which bound the defendant as to his future action as a director of the Baltimore United Oil Company, and an agreement to keep the plaintiff permanently in the position of vice-president of that company, irrespective of its interests. It amounted to a stipulation on the part of the defendant that no contingency should happen which should require a change of management and a reduction of expenses.

The principle involved is well settled in regard to public employments. *Meguire* v. *Corwine*, 101 U. S. 108, 111; *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 272, 273. The same doctrine has been applied to the directors of a private corporation, charged with duties of a fiduciary character to private parties, on the view that it is public policy to secure fidelity in the discharge of such duties. *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658; *Woodstock Iron Co.* v. *Extension Co.*, 129 U. S. 643, and cases there cited, especially *Fuller* v. *Dame*, 18 Pick. 472, 483. See, also, *Guernsey* v. *Cook*, 120 Mass. 501; and *Woodruff* v. *Wentworth*, 133 Mass. 309, 314.

We think this principle is equally applicable, on the ground of public policy, although there was not to be any direct private gain to the defendant; for, as was said by the Circuit Court in this case, it was the right of the other stockholders in the Baltimore United Oil Company "to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company." A personal liability for damages on the part of the defendant, in case the plaintiff should be removed after an agreement of the character alleged, was calculated to be a strong incentive to the defendant to act contrary to the true interests of the company and of its other stockholders. *Bliss* v. *Matteson*, 45 N. Y. 22; 1 Morawetz Corp. §§ 516, 519.

These views cover also the last instruction to the jury; and it becomes unnecessary to examine the question raised as to the second instruction, which was to the effect that, as the alleged contract was not in writing, the plaintiff could not recover upon it, because it was invalid under the fifth clause of the fourth section of the statute of frauds of Maryland, as being an agreement not to be performed within the space of one year from the making thereof; for, even though that might have been an erroneous instruction, it did no harm to the plaintiff, because he could not recover in any event. *Deery* v. *Cray*, 5 Wall. 795, 807; *The Schools* v. *Risley*, 10 Wall. 91, 115; *Deery* v. *Cray*, 10 Wall. 263, 272; *Brobst* v. *Brock*, 10 Wall. 519, 528; *Barth* v. *Clise*, 12 Wall. 400, 403; *Tweed's Case*, 16 Wall. 504, 517; *Walbrun*

v. *Babbitt*, 16 Wall. 577, 580, 581; *Decatur Bank* v. *St. Louis Bank*, 21 Wall. 294, 301; *McLemore* v. *Louisiana State Bank*, 91 U. S. 27, 28; *Mobile & Montgomery R'y. Co.* v. *Jurey*, 111 U. S. 584, 593; *Lancaster* v. *Collins*, 115 U. S. 222, 227, and cases there cited; *Evans* v. *Pike*, 118 U. S. 241, 250.

Judgment affirmed.

ROBINSON *v.* IRON RAILWAY CO.

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

No. 324. Submitted May 1, 1890. — Decided May 19, 1890.

A bill in equity was filed by the holder of second mortgage bonds of a railroad company, to rescind the sale of the road, made under a decree of foreclosure, to a committee of the first mortgage bondholders, or to have the sale declared to be in trust for both classes of bondholders, and for other relief. The bill was demurred to. No actual fraud was alleged. No offer was made to redeem. It was not averred that there was any consideration for an alleged agreement that the second mortgage bondholders should share in the purchase; or that the property was sold for less than its actual value. It appeared that the second mortgage bondholders had such notice of the foreclosure suit that they might have intervened in it. A trust company was the trustee under both mortgages, but no collusion by, or unfaithfulness of, the trustee was alleged. It did not appear that the second mortgage bondholders could have prevented the decree of foreclosure, and the suit was one to foreclose both mortgages. The members of the committee of the first mortgage bondholders, who were alleged to have made the agreement, were not made parties to this suit; *Held*, that the bill could not be sustained.

IN EQUITY. The case is stated in the opinion.

Mr. George W. Morse for appellant.

Mr. John C. Coombs and *Mr. Charles H. Hanson* 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 Southern District of Ohio, by William

Robinson, in behalf of himself and all the other holders of the second mortgage or income bonds of The Iron Railroad Company, who desire to come in and aid in the prosecution of the suit, and to contribute to the expenses thereof, against The Toledo, Cincinnati and St. Louis Railroad Company, the said Iron Railroad Company, The Iron Railway Company, (all three of them being corporations of Ohio,) The Central Trust Company of New York, a New York corporation, and John C. Coombs.

The substance of the material allegations of the bill is as follows:

On the 5th of August, 1881, The Iron Railroad Company executed to The Central Trust Company of New York, hereinafter called "the Trust Company," a first mortgage, covering its line of railroad and other property between the Ohio River, in Lawrence County, and the south line of Jackson County, Ohio, including sundry other lines in Lawrence County, to secure $500,000 of six per cent gold bonds. On the 1st of August, 1881, the company executed to the same Trust Company its second mortgage on the same railroad property and lines, to secure $500,000 of six per cent income bonds. This mortgage was made expressly subject to the other one. The interest to be paid on the income bonds was to be such amount, not exceeding six per cent per annum, as the company should annually declare to be the year's instalment of interest payable out of the net earnings of the lines of railroad of the company, interest not to be accumulative, and none to be considered due and payable except out of net earnings applicable to the purpose, and when the amount should have been ascertained and declared by the board of directors. The plaintiff is the holder and owner of twenty-five of such income bonds, of $1000 each. The interest on the first mortgage bonds was payable absolutely, semi-annually, on the first days of January and July, on the presentation of coupons annexed to the bonds.

Afterwards, The Iron Railroad Company was consolidated with The Toledo, Delphos and Burlington Railroad Company, an Ohio corporation, and the latter was afterwards consoli-

dated with The Toledo, Cincinnati and St. Louis Railroad Company, another Ohio corporation. In August, 1883, the latter corporation was put into the hands of a receiver. The earnings of the road of The Iron Railroad Company were at all times sufficient to pay interest on the first mortgage bonds, and to pay a large interest on the second mortgage bonds. The holders of the second mortgage bonds had no voice in either of the consolidations, and the Trust Company never assented to them. Both consolidations were illegal, collusive, fraudulent and void. No dividend was ever declared payable to the holders of the second mortgage bonds, though it was fairly earned. So the holders of such bonds had no opportunity to enter for a breach of the conditions of the mortgage and to operate the road. The earnings of The Iron Railroad, which ought to have been applied to keep down the interest on its bonds, were largely diverted, in consequence of its consolidation with the other roads, and applied to pay their expenses: and the holders of the second mortgage bonds have an equitable lien on the property of the companies with which The Iron Railroad Company was consolidated, to have refunded the amount of such diverted earnings, and to have them applied to pay the interest on the two classes of bonds.

By the terms of the first mortgage, the Trust Company could have entered at any time after the failure to appropriate the earnings to pay the interest, and could have had the earnings of The Iron Railroad kept separate; and there would have been a surplus to be devoted to paying the interest on the second mortgage bonds. The Trust Company, being a trustee under both mortgages, was bound to execute its trust for the benefit of the holders of both classes of securities; but, by reason of the apparently inconsistent positions occupied by the trustee, the holders of the second mortgage bonds had no fair notice of the proceedings to foreclose and sell the property, and the trustee gave no notice to any of the holders of the second mortgage bonds, of such proceedings, and they were unrepresented therein and had no opportunity to present to the court the facts set forth in the bill.

In July, 1883, the Trust Company filed a bill in equity, in

the Circuit Court of the United States for the Southern District of Ohio, against The Toledo, Cincinnati and St. Louis Railroad Company, to foreclose the mortgages, and the defendant company appeared and submitted to a default and a decree of foreclosure. A receiver and a special master were appointed, and the receiver was ordered to keep a separate account of the earnings of each division, which he proceeded to do, on November 1, 1883. The special master found that the net earnings of The Iron Railroad for the five months from November 1, 1883, to April 1, 1884, were $33,716.37. On the 15th of July, 1884, five persons, whose names are given, holders to a greater or less amount of the first mortgage bonds, became a committee of the first mortgage bondholders, under a contract whereby they were to purchase The Iron Railroad, with all its property, under the decree of sale. All, or substantially all, of the first mortgage bondholders signed the contract with the committee; but the second mortgage bondholders had no notice thereof, and were not invited to participate in the appointment of the committee. A copy of the agreement is annexed to the bill. It contained a provision authorizing the committee to negotiate for a participation by the second mortgage bondholders in the benefits of the trust created by the agreement. On the 10th of June, 1884, the holders of the second mortgage bonds were called together in Boston, and a committee of five of them, of whom the plaintiff was one, was appointed to confer with the committee of the first mortgage bondholders, in regard to a participation in the reorganization of the company, and to take such other steps as might be necessary to protect the interests of the second mortgage bondholders. On the 19th of June, 1884, the two committees met, and it was agreed between them that the second mortgage bondholders should participate in the reorganization, and should rank therein substantially as they ranked previously, subject to a fair division of expenses, it being understood that a plan of reorganization should be submitted, and that the committee of the first mortgage bondholders should purchase the property at the sale. The railroad and property were sold on the 28th of June, 1884, in

pursuance of the decree, and the defendant Coombs, acting for the committee of the first mortgage bondholders, purchased the same for $500,000, and, as the plaintiff assumed and had reason to believe, for the benefit of both classes of security holders. The sale was confirmed on the 18th of July, 1884, and on the 31st of July, 1884, the committee of the second mortgage bondholders submitted to the committee of the first mortgage bondholders a plan for reorganization, a copy of which is annexed to the bill with a copy of a letter from the committee of the second mortgage bondholders, accompanying it. Meantime, immediately after the sale, the committee of the first mortgage bondholders proceeded to organize, under the laws of Ohio, the defendant corporation The Iron Railway Company, with the intention of transferring the property to it when the sale should be confirmed. The Iron Railway Company is capitalized at $600,000, with the purpose of issuing its stock, dollar for dollar, to the first mortgage bondholders for their bonds, and for two years' unpaid interest, and for expenses, without recognizing the rights of the second mortgage bondholders. Coombs has transferred the railroad and property to The Iron Railway Company, which is composed of the parties who made up the first mortgage bondholders, and no new or innocent party holds the stock thereof; and the corporation and the holders of its stock had full notice from the beginning of the rights of the second mortgage bondholders. In August, 1884, notice of the claims of the second mortgage bondholders was published in certain newspapers in Boston, where both classes of securities are largely or entirely held. On the 5th of August, 1884, the committee of the second mortgage bondholders served upon each member of the committee of the first mortgage bondholders a notice asserting the rights of the second mortgage bondholders, and a like notice upon The Iron Railway Company, and also published a like notice in two Boston newspapers; all of which was done before The Iron Railway Company issued the stock. In the various statements which appear as a matter of public record, the Trust Company and The Toledo, Cincinnati and St. Louis Railroad Company have

alleged that the earnings of The Iron Railroad Company have been sufficient, if kept separate, to pay the interest on the first mortgage bonds, such statements being made in the papers filed in the various foreclosure proceedings to foreclose the various divisions of The Toledo, Cincinnati and St. Louis Railroad Company. The committee of the first mortgage bondholders have stated repeatedly in a public way that their road was earning sufficient to pay the interest on the first mortgage bonds, and such claim was made by them, and by all that class of bondholders, when The Toledo, Cincinnati and St. Louis Railroad Company first ceased to pay interest on the first mortgage bonds.

No demand was ever duly made by the holders of the first mortgage bonds for their interest, in accordance with the terms of their mortgage, nor by the Trust Company as trustee. A portion of the property alleged to have been purchased under the decree of foreclosure and sale is covered by the second mortgage and not by the first, although it is claimed by the purchasing committee and asserted to have been conveyed to The Iron Railway Company. The Iron Railway Company claims that, by virtue of its title from the committee of the first mortgage bondholders, it has acquired a right to the entire income, from whatever source, of The Iron Railroad Company and all its property and franchises, although the same may exceed the sum sufficient to pay the interest on such first mortgage bonds. There can be no valid decree of foreclosure and sale which will deprive the second mortgage bondholders from participating in the net profits and income, after paying the interest on the first mortgage bonds. By the terms of both mortgages, the property, if sold, was to be sold in the city of Ironton, Ohio, and the same place should have been adopted when sold under decree of the court. The net earnings of The Iron Railroad Company should have been applied, from the time of the appointment of the receiver, to pay the interest on the first mortgage bonds, and the balance should have been left for the subject of an account between the receiver and the second mortgage bondholders, in accordance with the terms of the mortgage.

The bill prays for an answer under oath, and also for a notice to the second mortgage bondholders to come in and aid in the prosecution of the suit; that the sale to the committee of the first mortgage bondholders be rescinded, or so far qualified as to be declared to be in trust for both classes of bondholders; that the sale to The Iron Railway Company be rescinded or be declared to be for the benefit of both classes of bondholders; that an account be taken of the amount of the earnings of The Iron Railroad Company, applicable to the payment of interest on its first and second mortgage bonds, received since the road was placed in the hands of a receiver, and also an account of the amount of earnings diverted by the consolidation, prior to the appointment of a receiver, and an account of the amount of property under the control of the court, which ought to be applied upon the bonds in lieu of such diverted earnings; for the application of the same, first, in payment of the interest overdue on the first mortgage bonds, and the balance, if any, after that, in payment of interest up to the specified rate on the second mortgage bonds; and for general relief.

The Iron Railway Company and Coombs put in separate demurrers to the bill. The demurrer of The Iron Railway Company alleges want of equity, and also multifariousness, in that the bill seeks both to have the foreclosure proceedings avoided and the sale set aside, and to obtain a participation in the benefits of the purchase of the property at the sale; and also alleges that it appears that the plaintiff has not been injured by the foreclosure proceedings, and that he might, with diligence, have prevented or remedied any injury by intervening in the proceedings; that for all such injury there was a plain, adequate and complete remedy at law, in a suit against the Trust Company; that it is admitted by the bill that default was made in paying the interest due to the holders of the first mortgage bonds, which continued up to the time of the sale of the road and still continues, but it contains no offer to pay the bonds or the interest due on them, or to redeem the property from the first mortgage; that it does not allege any privity with, or duty or liability to, the

second mortgage bondholders, on the part of the first mortgage bondholders, nor any common interest between them; that as to so much of the bill as rests upon any alleged agreement or undertaking on the part of the committee of the first mortgage bondholders, whose names are given in the bill, it appears that all of them are necessary parties and none of them are made parties; that all of them and the plaintiff are citizens of Massachusetts, and that this court has no jurisdiction to enforce the alleged agreement; that the agreement is not sufficient in form or certainty to permit its enforcement or to warrant any recovery of damages on account of any breach of it; that no consideration is alleged for it, nor is it alleged to be in such form as imports consideration; that the committee were not authorized to make any such agreement with the second mortgage bondholders; that such agreement and this suit admit the competency of the organization of The Iron Railway Company, and such agreement and the alleged authority therefor do not appear to be competent to create any privity with, or duty or liability to, the plaintiff, on the part of The Iron Railway Company and its stockholders; that it does not appear that Coombs was in privity with, or incurred any obligation or liability to, the plaintiff or any of the second mortgage bondholders, or was served with any notice, or had any knowledge, of any undertaking in behalf of any second mortgage bondholders, or of any violation thereof, and no fraud, or knowledge of or complicity in any fraud, on the part of Coombs, is sufficiently alleged in the bill; that it is alleged in the bill that no foreclosure proceedings such as are set forth can bar the second mortgage bondholders from the net profits and income, after the payment of the interest on the first mortgage bonds; and that for the recovery of any property formerly of The Iron Railroad Company which may not have been covered by the first mortgage but may have been covered by the second mortgage, it appears that the parties in interest have a plain, adequate and complete remedy at law.

The demurrer of Coombs is to the same effect as that of The Iron Railway Company.

Opinion of the Court.

On a hearing on the bill and demurrers, a decree was entered dismissing the bill, with costs. An application for a rehearing was made, on an allegation of surprise and accident, by reason whereof the case was not properly presented on the part of the plaintiff. On a hearing on the application, a decree was made which states that the plaintiff was heard in support of his application, as well upon all matters which he had to advance on the insufficiency of the prior hearing, as upon any alleged error in the judgment thereupon rendered, and the defendants were not only heard in support of the sufficiency of the hearing and the correctness of the judgment, but "also offered in open court, for the purpose of preventing any amendment hereafter to said bill by incorporating therein an offer to redeem said Iron Railroad either from the lien of the first mortgage, or from the purchaser, if and whenever in the future the circumstances and parties may have become changed, and said property may have increased in value, to waive all objection to said bill, if said complainant would amend the same forthwith by making such an offer to redeem, and accept a decree of this court limiting the time therefor, and, on default in making such redemption, to be forever barred and foreclosed of all right, title and interest in said property; and said complainant declined said offer. And thereupon, upon consideration thereof, and for other sufficient reasons, as well as said offer by said defendants, said motion for a rehearing is denied, and said judgment sustaining said demurrer and dismissing said bill, with costs, stands confirmed." The plaintiff has appealed from the decree dismissing the bill.

It is impossible to sustain this bill as against the demurrers. There is no allegation of any actual fraud. There is no offer to redeem. There is no averment of any consideration or mutuality in the alleged agreement between the two committees. There is no allegation that the property was sold for less than its actual value. The bill admits that the claim of the first mortgage bondholders is superior to that of the second mortgage bondholders; and the failure of the plaintiff to offer to redeem is evidence that he does not think the property was worth more than it brought at the sale.

If the plaintiff or the second mortgage bondholders had exercised due diligence, they might have intervened in the foreclosure suit. No fraud being alleged, the proper remedy, if any legal injury was sustained by them, was to apply to the court in which the foreclosure took place to set aside the decree or the sale. The bill does not allege any fraud as having been committed by any party to the foreclosure suit, or that the decree was any part of a fraudulent arrangement. There is no allegation of any fraudulent practice whereby any second mortgage bondholders lost any right to bid at the sale; nor can it be gathered from the bill that they ever had any idea of bidding or of contributing to the purchase.

As to the allegation in respect of the inconsistent positions of the Trust Company as a trustee under both of the mortgages, no collusion on the part of that company is averred; nor is it alleged that the company, so far as it did or could represent the second mortgage bondholders, was unfaithful to its trust. There having been an admitted default on the first mortgage, and the foreclosure proceedings having been properly instituted, there is an absence of any allegation in the bill that the second mortgage bondholders, if they had been parties to the suit otherwise than through the trustee, could have taken any steps which would have prevented the decree of foreclosure. The Trust Company was a trustee under the first mortgage, which was prior in right to the second. It discharged no more than its duty to the first mortgage bondholders; and it appears by the bill that the second mortgage bondholders had a meeting and appointed a committee eighteen days prior to the sale, and thus had full knowledge of the situation of affairs, and full opportunity to apply to intervene as parties to the suit. Moreover, the bill alleges that the foreclosure suit was a suit to foreclose both of the mortgages, and, of course, according to their respective priorities. The bondholders were represented by their trustee, as is established by numerous decisions.

As to the other allegations in the bill, which question the proceedings which took place in the foreclosure suit prior to the sale, they were matters proper for adjudication in that

suit, and they cannot, under the circumstances of the case, be questioned in this suit. We have considered all of them, and pass them without further observation.

As to the alleged agreement that the second mortgage bondholders should participate in the reorganization, the claim made in regard to it may be dismissed with a few words. If there was any such agreement which could be binding, it was an agreement with the members of the committee of the first mortgage bondholders as individuals, and they are not made parties to the suit, though their names are given. Nor does the plaintiff represent the committee of the second mortgage bondholders, with whom the agreement is alleged to have been made. Nor does The Iron Railway Company represent the committee of the first mortgage bondholders. Independently of this, the alleged agreement is too vague and indefinite to furnish a foundation for its enforcement. On the showing of the bill, the parties never entered into any contract, and the court would have to make one for them. There was no mutuality in the agreement alleged, and no adequate consideration for it is stated or can be imported. These same considerations show that the agreement cannot be adjudged to create a trust for the benefit of the second mortgage bondholders. If the plaintiff or the other second mortgage bondholders have any right of action in respect of any such agreement, it must be one at law.

We have considered the various questions raised by the bill and the demurrers, and are of opinion that they do not need any further remark.

Decree affirmed.

GLENN *v.* LIGGETT.

GLENN *v.* TAUSSIG.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Nos. 306, 307. Argued April 29, 1890.—Decided May 19, 1890.

A writ of error, the citation and the bond, all of them were dated the day before the judgment sought to be reviewed was rendered, and the writ and the citation were filed on that day in the office of the clerk of the court below: *Held*, on what appeared in the record, that it must be concluded that the allowance of the writ, the signing of the citation, the approval of the bond, and their filing took place after the rendering of the judgment; that any discrepancy must be attributed to clerical errors; and that this court had jurisdiction of the writ.

The rulings in *Hawkins* v. *Glenn*, 131 U. S. 319, confirmed, and applied to these cases.

The statute of limitations of Missouri did not bar the present actions.

By the statute of Virginia the balance of unpaid subscriptions to the stock of a Virginia corporation was payable as called for by the president and directors: *Held*, that the president and directors stand for the corporation; and that, as the corporation was a party to a suit in a court of Virginia, making a call, it sufficiently represented the president and directors and the stockholders.

The rights of a stockholder must, in a suit to recover on the call, be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contract of the stockholder was made.

As the suit in the court of Virginia was properly brought, and it had jurisdiction as to subject matter and parties, its adjudication cannot be reviewed or impeached in the collateral suit on the call, except for actual fraud.

The making by the court of one call, leaving a balance uncalled, did not prevent the making of a further call by the same court, or by one of competent jurisdiction, to which the cause was transferred.

THESE were two actions at law brought in the Circuit Court of the United States for the Eastern District of Missouri, on the 12th of July, 1886, by John Glenn, trustee of the National Express and Transportation Company, one against John E. Liggett, and the other against Charles Taussig and Morris

Taussig. The cases were disposed of in the Circuit Court on a demurrer in each case to an amended petition. The demurrer was sustained in each case and judgment entered for the defendants, with costs, to review which the plaintiff has in each case brought a writ of error.

In the suit against Liggett the plaintiff claims to recover $1890, with interest from December 14, 1880, and $3150, with interest from March 26, 1886; and in the suit against the Taussigs, $3000, with interest from December 14, 1880, and $5000, with interest from March 26, 1886.

The first cause of action, as set out in the amended petition against Liggett, is as follows: Liggett subscribed for 63 shares of the capital stock of the National Express and Transportation Company, a Virginia corporation, created by an act of the General Assembly of that State, approved December 12, 1865, and thereby promised to pay to that company for each share, $100, in such instalments and at such times as he might be lawfully required to pay the same according to the legal tenor and effect of the laws under which the company was so incorporated, and his subscription to said stock, whereby, and by force of such subscription, he became a stockholder in the company and agreed to sue and be sued, plead and be impleaded, contract and be contracted with, in said corporate name, as to all matters touching the property, rights and obligations of the corporation. On the 20th of September, 1866, the corporation, having become insolvent, by its deed of that date, duly executed, acknowledged and recorded, assigned to John Blair Hoge and C. Oliver O'Donnell, both citizens of Maryland, and John J. Kelly, a citizen of New York, in trust for the benefit of the creditors of the company, all its property, in trust to collect all the debts, claims and moneys payable, to reduce the same to money, and to apply the proceeds to the trusts declared by the deed, including the trust therein declared for the payment of the debts of the company in the order of priority therein provided, and shortly thereafter ceased to do business. The defendant assented to said deed, and thereby promised to pay to said trustees for each share of stock so subscribed for by him the balance of

the $100 due on each share of stock, uncalled for at the time of the making of the deed, whenever he might be lawfully called upon to pay the same, according to the legal tenor and effect of the laws under which the company was incorporated and the subscription made. At the time of the execution and delivery of the deed, the company had called for 20 per cent of the par value of the stock. The trustees appointed by the deed neglected to perform the trusts thereby created, and the validity and effect of the deed were drawn in question in the courts of various States in which the stockholders resided, and the enforcement thereof was hindered. In November, 1871, William W. Glenn, of Baltimore, being a judgment creditor of the company, filed a bill in the Chancery Court of the city of Richmond, it being a court of competent jurisdiction in such cases, in his own behalf and in behalf of all other creditors of the corporation, against it and certain of its officers and the trustees named in the deed of trust, as defendants; by which bill it was sought to obtain from that court a judicial determination of the validity of the deed, and a judicial construction of it, and the establishment of the legal effect and obligation of it upon all property, rights and persons affected thereby, and also to enforce the trusts thereby declared in favor of the creditors of the corporation. Pending that bill, William W. Glenn died, and in the year 1879 the suit was revived in the name of John W. Wright, sheriff of the city of Richmond, and as such duly constituted official administrator of said Glenn. After such revivor, an amended bill was filed, to which bill the corporation, certain of its officers, and Hoge and Kelly were made defendants (O'Donnell having died). By that bill it was sought to obtain, in addition to the relief prayed for in the original bill, an account and establishment of the debts due by the company and secured by the deed of trust, and an account of the property and estate subject to the terms of the deed, including the amount of capital stock yet remaining unpaid and uncalled by the company and subject to be applied to the payment of its debts, the removal of the surviving trustees, the appointment of a new trustee or trustees in their room, an assessment or call to be made by the court

on the uncalled and unpaid capital stock and the persons liable to pay the same, for the purpose of providing means to pay the debts of the corporation, and other appropriate relief. The company was duly served with process in the cause, in accordance with the laws and practice of the State of Virginia, certain of its officers were summoned, and the surviving trustees appeared voluntarily to the suit and answered the original and amended bills, whereby the court acquired full jurisdiction to decree as to all the matters and things involved in the suit.

Such proceedings were had in the cause that, on the 14th of December, 1880, the court decreed as follows: (1) That the deed of trust of September 20, 1866, was valid under the laws of Virginia and binding upon the corporation; (2) that, at the time of the execution of the deed, the corporation had called for 20 per cent of the amount payable by the subscribers to its capital stock, and that 80 per cent of that amount, being $80 on each share, remained unpaid and uncalled for at the date of the decree, and subject to be applied to the payment of the debts of the corporation secured by the deed of trust; (3) that the right to receive such 80 per cent from the persons liable to pay it, as and when it should become payable by the terms of the contract between the company and the subscribers to the stock, was vested by the deed in the trustees and their survivors, to be applied, when so collected, to the payment of the debts secured by the deed; (4) that the unpaid $80 per share was, by the terms of the contract between the company and the persons liable to pay the same, payable only in such amounts and at such times as the same might be required to be paid by the company through its president and board of directors; that no power or authority to sue for any part thereof was vested in the company or in the trustees under the deed, unless and until such call should first be made by the corporation, and that the trustees acquired no power to make such call by force of the deed of trust or otherwise; (5) that there was no property of the company wherewith to pay its debts, except the amount so remaining uncalled of its capital stock, and it was the duty of the proper officers of the corporation to call upon the persons liable therefor, to pay a

sufficient amount of the unpaid $80 per share to carry out the trusts of the deed and pay the creditors secured thereby, but that the corporation and its proper officers had for many years wrongfully neglected to make such call; (6) that the unpaid and uncalled $80 per share remaining in the hands of the holders of the capital stock constituted a trust fund for the payment of the creditors of the company under the deed of trust; and that, by reason of the neglect and failure of the corporation to call for the payment of a sufficient amount thereof to satisfy its debts under the deed of trust, and thereby enable the trustees to sue for and recover the amount so called, the court possessed and would exercise such power, and would call for so much of the said uncalled amount as would be necessary to perform the trusts declared by the deed and pay the debts secured thereby; (7) the surviving trustees were removed by the decree and the plaintiff was appointed by it in their stead, to execute the trusts of the deed; (8) there were debts owing by the company, entitled to be paid under the deed of trust, amounting to $509,392.41, each of which debts was particularly ascertained and ordered by the decree to be paid. The decree further adjudged that it was necessary and proper that 30 per cent of the par value of each share of the stock should be called for and required to be paid by the subscribers therefor and their assigns, for the purpose of paying the debts of the company under the provisions of the deed of trust; and that a call and assessment be and the same was thereby made upon the stock and stockholders of the company, and their assigns, of 30 per cent of the par value of the stock, being $30 on each share thereof, the same, when paid, to be paid to and received by the plaintiff as trustee under the deed, in the stead of the original trustees therein named.

The plaintiff accepted the appointment so made, and complied with its terms and conditions, and was and is duly qualified to act as such substituted trustee, and to have the rights, and perform the duties, conferred upon and required of him by the decree. By force thereof, and of the statute of Virginia in such case made and provided, he, upon accepting such appointment, and qualifying as such trustee, as required

by the decree, became and still is substituted to all the rights, powers, duties and responsibilities of the trustees named in the deed of trust, and became and is lawfully entitled to receive and collect the assessment or call of $30 per share on each share of stock of the company, from the persons liable to pay the same. By virtue of the premises the defendant became indebted to him in the sum of $1890, being $30 on each of the 63 shares of stock. In the year 1884, the plaintiff instituted suit in the Circuit Court of the United States for the Eastern District of Missouri against the defendant to enforce such liability, and on the 15th of July, 1885, suffered a non-suit in the case.

For a second cause of action, the amended petition stated that the suit so instituted in the Chancery Court of the city of Richmond was, after the 14th of December, 1880, transferred to the Circuit Court of the county of Henrico, in the State of Virginia, a court of competent jurisdiction; that such further steps were taken therein that, on the 26th of March, 1886, a further decree was entered in the cause, adjudging that, for the payment of a large balance of the indebtedness of the company, so established, it was necessary and proper to make a call for the residue of 50 per cent remaining uncalled for and unpaid on the capital stock of the company, and ordering and decreeing that a call and assessment be made, and the same was thereby made, on the capital stock and the stockholders of the company, of $50 on each share thereof, and requiring the stockholders of the company and each of them, and their legal representatives and assigns, to pay to the plaintiff the several amounts thereby called for, and authorizing and requiring him to collect and receive said call and assessment; and, by virtue of the premises, the plaintiff claimed to recover $3150, being $50 on each of the 63 shares of stock.

The demurrer of the defendant Liggett set forth as grounds of demurrer that the amended petition did not state facts sufficient to constitute any cause of action; that it appeared from its face, that no cause of action accrued to the plaintiff by reason of any of the matters set forth in either the first or the

second count, at any time within ten years next before commencement of this suit, or at any time within five years next before its commencement, or at any time within ten years next before the commencement of the suit in which the plaintiff alleged that he suffered a non-suit; that both of the causes of action are barred by the statute of limitations of Missouri; and that the Chancery Court of the city of Richmond had no jurisdiction to make the assessment alleged, and it and the further assessment were and are void.

The suit against Liggett was commenced on the 12th of July, 1886, by the filing of a petition. A writ of summons was issued on that day and served on him on the 19th of July, 1886. A demurrer to the petition was filed on the 21st of September, 1886. The petition and the demurrer amounted in substance to the same as the amended petition and the demurrer thereto. On the 16th of October, 1886, the court sustained the demurrer. 28 Fed. Rep. 907. The decision of the court was based on views which it had previously expressed on demurrers to petitions at law and bills in equity for like causes of action, in 23 Fed. Rep. 695, and 24 Fed. Rep. 536. The ground of decision was, in all of the cases, that the suits were barred by the statute of limitations of Missouri.

On the 3d of November, 1886, a judgment was entered in the present suit against Liggett, for the defendant, and for his costs. On the 14th of December, 1886, by consent of parties, the judgment of November 3, 1886, was set aside. The plaintiff then, by consent, filed the amended petition, the contents of which are before set forth. The defendant filed his demurrer thereto, the court sustained the demurrer, and, the plaintiff electing to abide by his amended petition, judgment was entered for the defendant upon the demurrer, and for his costs. The judgment then proceeds, under date of December 14, 1886: "And thereupon the plaintiff, by attorney, presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States, on the first day of the next term thereof, to be begun and held at Washington, D. C.,

on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge; and said plaintiff also presents to the court his bond, in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein."

Mr. Enoch Totten (with whom was *Mr. Mason G. Smith* on the brief) first argued a motion to dismiss No. 306 for want of jurisdiction. The following were the grounds for the motion:

(1) There was never any writ of error issued to the said Circuit Court to bring up the judgment complained of;

(2) There never was any writ of error returned to or filed in this court, which had been previously directed to the Circuit Court, to bring up to this court for review the judgment complained of;

(3) This court is without jurisdiction to hear and determine this cause, there having been no writ of error issued or allowed, to bring into this court for review the judgment of the said Circuit Court herein.

This court can obtain jurisdiction to review a final judgment at law, rendered by a Circuit Court of the United States, only upon a writ of error. Rev. Stat. § 691; *Sarchet* v. *United States*, 12 Pet. 143; *Bayard* v. *Lombard*, 9 How. 530; *Saltmarsh* v. *Tuthill*, 12 How. 387; *Washington County* v. *Durant*, 7 Wall. 694.

The only writ of error in this record was "brought" on the 13th of December, 1886, the day before this judgment was rendered. A writ of error is "brought" when it is filed in the court which rendered the judgment. *Brooks* v. *Norris*, 11 How. 203; *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258.

The writ of error of December 13th was *functus officio:* it had operated on the judgment of November 3d, and was dead when that judgment was set aside. No other writ having been sued out, and no other citation having been signed or served in this case, it follows that there was and is no writ of error bringing up this last judgment for review.

A writ of error must be returned to this court during the term to which it is made returnable. If not so returned it becomes inoperative. *Grigsby* v. *Purcell*, 99 U. S. 505; *Radford* v. *Folsom*, 123 U. S. 725; *Blair* v. *Miller*, 4 Dall. 21; *Castro* v. *United States*, 3 Wall. 46; *Edmonson* v. *Bloomshire*, 7 Wall. 306; *Fayolle* v. *Texas & Pacific Railroad*, 124 U. S. 519; *Richardson* v. *Green*, 130 U. S. 104; *Hill* v. *Chicago &c. Railroad Co.*, 129 U. S. 170; *Norton* v. *Brownsville*, 129 U. S. 505.

In *Edmonson* v. *Bloomshire*, 7 Wall. 306, 310, Mr. Justice Miller, delivering the opinion of the court, said on this subject: "The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court."

That a writ of error cannot be issued until there is a *judgment*, see *Cohens* v. *Virginia*, 6 Wheat. 264, 409; and the language, form and directions of the *writ of error* are prescribed under Rev. Stat. § 1004.

Mr. John Howard opposing the motion.

Mr. John Howard (with whom was *Mr. Charles Marshall* on the brief) for plaintiff in error, on the merits.

Mr. Mason G. Smith (with whom was *Mr. Enoch Totten* on the brief) and *Mr. George W. Taussig* for defendants in error, on the merits.

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

The writ of error is dated the 13th of December, 1886, and was allowed by the district judge, but the allowance bears no date. The writ bears the mark of having been filed in the office of the clerk of the Circuit Court on the 13th of December, 1886. The citation bears date the 13th of December, 1886, and is marked as having been filed on that day in the office of the clerk of the Circuit Court, and appears to have

been served on the attorneys for the defendant on the 22d of December, 1886. The bond bears date the 13th of December, 1886, and was approved by the District Judge, the approval bearing no date, and is marked as filed in the office of the clerk of the Circuit Court on the 14th of December, 1886.

It is objected by the defendant Liggett, that this court has no jurisdiction of the writ of error, because the writ, the citation and the bond, all of them bear date the 13th of December, 1886, and because the writ and the citation were filed in the office of the clerk of the Circuit Court on that day, while the judgment sought to be reviewed was not rendered until the 14th of December, 1886. But the record distinctly states, that, after such judgment was rendered, the plaintiff presented to the court a writ of error, a citation and a bond, and that the court allowed the writ of error, and the citation was signed by the judge, and the bond was approved and ordered to be filed as part of the record; and the writ of error, the citation and the bond are set forth at length. We must, therefore, conclude that all these things, including the filing, took place after the judgment of the 14th of December, 1886, was rendered and entered; that whatever discrepancy appears must be attributed to clerical errors; and that the matter is not open to the objection made, that the writ of error was brought, the citation signed and the bond given, before the judgment was entered, even if that fact would have been available as an objection, if it existed. The case is like that of *O'Dowd* v. *Russell*, 14 Wall. 402.

Upon the merits, we are of opinion that the judgment in favor of Liggett must be reversed. The decisions of the Circuit Court were made before the case of *Hawkins* v. *Glenn*, 131 U. S. 319, was decided by this court, on the 13th of May, 1889. All the points urged on the part of the defendant in the present case were fully argued, considered and decided by this court in *Hawkins* v. *Glenn*. The syllabus of that case correctly embodies the rulings of this court, in these words: "In the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack. Statutes of lim-

itation do not commence to run as against subscriptions to stock, payable as called for, until a call or its equivalent has been had, and subscribers cannot object, when an assessment to pay debts has been made, that the corporate duty in this regard had not been earlier discharged. Rules applicable to a going corporation remain applicable notwithstanding it may have become insolvent and ceased to carry on its operations, where, as in this case, it continues in the possession and exercise of all corporate powers essential to the collection of debts, the enforcement of liabilities and the application of assets to the payment of creditors."

The facts set forth in the amended petition in the present case appeared in the case of *Hawkins* v. *Glenn*. That was a suit at law, brought in the Circuit Court of the United States for the Eastern District of North Carolina, to recover the amount of the assessment or call of 30 per cent, made by the decree of the Chancery Court of the city of Richmond, on December 14, 1880. The statute of limitations of North Carolina, of three years, was pleaded as a defence. The suit having been brought within three years from December 14, 1880, it was contended in this court, for the defendant, that the cause of action did not accrue within three years before the suit was brought; that the case was essentially unlike that of a call made by the authorities of a corporation which was still doing business; that during the whole of the three years, the provision in the subscription, as affected by the statute of Virginia, which submitted the subscriber to the discretion of the president and directors, as to the time at which calls might be made, had become null; and that, inasmuch as, after the corporation stopped business, the time of making a call was no longer a matter of discretion, but was subject to the direction of the law, the lapse of time before bringing the suit in the Chancery Court of the city of Richmond was to be counted in reckoning, under the statute of limitations, whether the suit subsequently brought against the defendant, under the call made by that court, had been brought in good time.

It was also contended in that suit by the defendant, that the decree of the Chancery Court of the city of Richmond

was void as against him, because he was not a party to the suit. On the latter point, this court said: "We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member;" citing *Sanger* v. *Upton*, 91 U. S. 56, 58; *County of Morgan* v. *Allen*, 103 U. S. 498, 509; *Glenn* v. *Williams*, 60 Maryland, 93, 116; *Hambleton* v. *Glenn*, 13 Virginia Law Journal, 242, and 9 S. E. Rep. 129.

This court said that it concurred in the decision of the Court of Appeals of Virginia, in *Hambleton* v. *Glenn*, made as to the statute of Virginia, that "as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired;" and that it was the decision "of the highest tribunal of the State where the corporation dwelt, in reference to whose laws the stockholders contracted, and in whose courts the creditors were obliged to seek the remedy accorded;" citing *Canada Southern Railway* v. *Gebhard*, 109 U. S. 527; *Barclay* v. *Talman*, 4 Edw. Ch. 123; *Bank of Virginia* v. *Adams*, 1 Parsons Sel. Cas. 534; *Patterson* v. *Lynde*, 112 Illinois, 196.

This court further said: "We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members, in the absence of fraud, and that this is involved in the contract created in becoming a stockholder. The decree of the Richmond Chancery Court determined the validity of the assessment; and that the lapse of time between the failure of the company and the date of the decree did not

preclude relief, by creating a bar through statutes of limitation or the application of the doctrine of laches. And so it has been held in numerous cases referred to on the argument. The court may have erred in its conclusions, but its decree cannot be attacked collaterally, and, indeed, upon a direct attack, it has already been sustained by the Virginia Court of Appeals. *Hambleton* v. *Glenn*, *supra*. . . . Although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he cannot be allowed to insist that the amount required to discharge him became instantly payable, though unascertained, and though there was no request, or its equivalent, for payment. And here there was a deed of trust made by the debtor corporation for the benefit of its creditors, and it has been often ruled in Virginia, that the lien of such a trust deed is not barred by any period short of that sufficient to raise a presumption of payment. *Smith* v. *Virginia Midland Railroad*, 33 Grattan, 617; *Bowie* v. *The Poor School*, 75 Virginia, 300; *Hambleton* v. *Glenn*, 13 Virginia Law Journal, 242. This deed was not only upheld and enforced by the decree of December 14, 1880, but also the power of the substituted trustee to collect the assessment by suit in his own name was declared by the Court of Appeals of Virginia, in *Lewis's Administrator* v. *Glenn*, 6 S. E. Rep. 866. See, also, *Baltimore & Ohio Railroad* v. *Glenn*, 28 Maryland, 287. By the deed the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment, and as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the statute of limitations could not commence to run until after the call was made."

This court then cited the rule laid down in *Scovill* v. *Thayer*, 105 U. S. 143, 155, as applying to the case before it, and said: "In that case it was said by Mr. Justice Woods, speaking for the court: 'There was no obligation resting on the stockholder

to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.' And it was held, 'that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. . . . But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment; and it is clear the statute of limitations does not begin to run in his favor until such order or demand.' Constituting, as unpaid subscriptions do, a fund for the payment of corporate debts, when a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment, and the stockholder cannot then object that no call has been made. As between creditor and stockholder, 'it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents.' *Hatch* v. *Dana*, 101 U. S. 205, 214. The condition that a call shall be made is, under such circumstances, as Mr. Justice Bradley remarks in the matter of *Glen Iron Works*, 20 Fed. Rep. 674, 681, 'but a spider's web, which the first breath of the law blows away.' And as between the stockholder and the corporation, it does not lie in the mouth of the stockholder

to say, in response to the attempt to collect his subscription, for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier. *County of Morgan* v. *Allen*, 103 U. S. 498. These considerations dispose of the alleged error in not sustaining the defence of the statutory bar."

We regard these rulings in *Hawkins* v. *Glenn* as disposing of the points urged by the defendant as to the statutes of limitation of Missouri, and as to the want of jurisdiction in the Chancery Court of the city of Richmond to make the call.

Under the statute of Missouri applicable to the present case, if an action was commenced within the statutory limitation of time, and the plaintiff suffered a non-suit, he was allowed to commence a new action within one year after the non-suit was suffered. The shortest period of limitation insisted on in the present case, under the statute of Missouri, is five years. The first call was made by the decree of December 14, 1880. The first suit was brought in 1884. The plaintiff suffered a non-suit on the 15th of July, 1885. He brought the present suit on the 12th of July, 1886. The statute of Missouri, so far as it applies to the present case, was, therefore, complied with.

The point is taken by the defendant that, under the statute of Virginia, the balance remaining unpaid on subscriptions to the stock was payable as called for or required by the president and directors of the company; that it appears by the amended petition that the contract between the company and the subscribers was, that the $80 per share was payable "only in such amounts and at such times as the same might be required to be paid by said company, through its president and board of directors;" and that it is not averred in the amended petition that either the president or any of the directors was a party to the suit in the Chancery Court of the city of Richmond.

But the president and directors stand for the corporation, and it is alleged in the amended petition that the corporation was a party to the amended bill, and that it was duly served with process in the cause, in accordance with the laws and

practice of the State of Virginia. The corporation sufficiently represented the president and directors in their official capacity, in which alone they were to act in making a call, and it also, as held in *Hawkins* v. *Glenn*, sufficiently represented the defendant.

The rights of the parties in the present case must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made. The legislation of Missouri, which is invoked to the effect that, for the purposes of the statute of limitations of that State, the liability of a stockholder in a corporation to a creditor becomes fixed by the insolvency and dissolution of the corporation, and then becomes a primary and unconditional obligation, and the statute commences to run at once, can have no application to the present case. Nor can the adjudication of a court of Virginia, in a suit properly brought, and where it had jurisdiction as to subject matter and parties, be reviewed or impeached in a collateral suit like the present, except for actual fraud.

The further point is urged by the defendant, in regard to the decree of March 26, 1886, and the call for 50 per cent made thereby, that the Circuit Court of the county of Henrico was without jurisdiction to make a valid decree, and that such call or assessment was void. The view urged is, that the decree of December 14, 1880, was a final decree, without any reservation of any right to ask for a further call or assessment; and that the transfer of the cause to the Circuit Court of Henrico County was unauthorized. But we see nothing in the terms of the decree of December 14, 1880, to exclude the authority of the same court, or of any court to which the cause should be properly transferred, to make the further assessment of $50 per share; and the allegation in the amended petition as to the transfer of the suit is, that the Circuit Court of the county of Henrico was "a court of competent jurisdiction." This means that it was a court of competent jurisdiction to accept the transfer and to take jurisdiction of the suit.

Opinion of the Court.

In the case against the Taussigs, Charles Taussig died after the writ of error was taken, and the suit was ordered by this court to proceed against John J. Taussig and George W. Taussig, executors of Charles Taussig, deceased, and Morris Taussig, as defendants in error. The claim against the Taussigs is on 100 shares of stock, and the amended complaint in the suit against them is like that in the suit against Liggett. The facts and the principles of law involved are the same as in the case against Liggett, the only differences being immaterial ones, namely, that the writ of error in the Taussig case was filed in the Circuit Court on the 14th of December, 1886, and the citation was dated and filed on the 14th of December, 1886; that the defendants state, as grounds of demurrer, only that the causes of action accrued more than five years and more than ten years prior to the commencement of the suit and to the time when the nonsuit mentioned in the amended petition was suffered by the plaintiff; and, as a further ground of demurrer, that the assessment of 30 per cent on the stock of the company, made by the Chancery Court of the city of Richmond, and the subsequent assessment of 50 per cent, made by the Circuit Court of Henrico County, were void and of no force or effect as against the defendants, because those courts acquired no jurisdiction over the defendants, or any jurisdiction to make any assessment which should furnish any right of action to the plaintiff against the stockholders of the company.

The judgment in each case is reversed, and each case is remanded to the Circuit Court, with a direction to overrule the demurrer to the amended petition, and to take such further proceedings as shall not be inconsistent with this opinion.

Mr. Justice Brewer dissented.

UNITED STATES *v.* VOORHEES.

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

No. 282. Argued April 18, 1890. — Decided May 19, 1890.

An extra allowance to a contractor for carrying the mails, under the provisions of Rev. Stat. § 3961, for an increase of expedition in carrying them, is not invalidated by reason of the fact that, prior to its allowance, the contractor was voluntarily carrying them over the route, with the increased expedition, and at the contract rate of pay.

United States v. *Barlow*, 132 U. S. 271, distinguished from this case.

The case is stated in the opinion.

Mr. Assistant Attorney General Maury for the plaintiff in error.

Mr. John L. Webster for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

This was an action at law brought in the court below by the United States against Luke Voorhees, to recover the sum of $14,342.52, alleged to have been illegally paid him for carrying the mails.

The amended petition, filed on the 13th of July, 1886, alleged substantially as follows: In the year 1878, a contract was entered into between the Postmaster General and the defendant, by the terms of which the latter agreed to carry the mails of the United States over route No. 35,040, from Fargo to Pembina, Dakota, and back, six times a week, on a schedule of 62 hours a trip, for the sum of $17,000 a year. On the 30th of July, 1878, by reason of certain requests and a petition obtained by the defendant and his agents and employés acting for him, representing that the business interests of the country along the route demanded the expediting of the schedule time to 40 hours, which were forwarded to the

Postmaster General by or at the solicitation of the defendant, an order was made by that officer, to take effect August 1, 1878, expediting the schedule and reducing the running time upon which the mail was required to be carried over that route to 43 hours in summer and 50 hours in winter, and allowing an additional sum therefor of $8500. So much of the aforesaid order as allowed the defendant the additional pay (which he afterwards received, from time to time) was made upon the basis of his sworn statement, as follows: "I hereby certify that it will take fifty per cent more men and horses to perform mail service on route 35,040 from Fargo to Pembina, on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter."

The petition then alleged that from the beginning of the mail service on the aforesaid route, under the defendant's contract, the mail was in fact carried over the route on a schedule of less than 43 hours, and was so being carried at the time the order expediting the service was made; that the defendant was engaged in running a line of stage coaches over the route and carried the mail upon his stages, upon a schedule of less than 43 hours, for his own convenience and advantage; and that no additional stock and carriers were employed or rendered necessary, over and above the number actually employed and used by the defendant in performing the service under the original contract, by reason of the order expediting the service as aforesaid, nor was the actual speed increased, but the defendant continued to carry the mails upon an actual schedule of less than 43 hours, just as he had done before.

It was then alleged that the extra allowance of $8500, made by the Postmaster General as aforesaid, was without authority of law, and was paid to defendant and received by him in violation of section 3961 of the Revised Statutes; and that the whole amount so paid to him, from time to time, between the first day of August, 1878, and the 9th day of July, 1881, was $14,342.52, for which sum, with interest at 6 per cent per annum from said last date, and also for costs, the plaintiff prayed judgment.

The defendant interposed a general demurrer, which was

sustained by the court in a judgment rendered November 1, 1886, and the United States thereupon sued out this writ of error.

The assignment of error is a general one, and is merely to the effect that the demurrer should have been overruled and judgment entered for the United States.

The statutes relied upon to support a reversal of the judgment are sections 3961 and 4057 of the Revised Statutes.

They are as follows:

"Sec. 3961. No extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

"Sec. 4057. In all cases where money has been paid out of the funds of the Post-Office Department under the pretence that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

The case relied upon in support of the contention of the plaintiff in error is *United States* v. *Barlow*, 132 U. S. 271. That case is not in any of its features analogous to the one at bar. It was an action brought by the United States to recover from the defendants, sub-contractors for carrying the mails, moneys paid to them under a mistake caused by their false representations as to the service.

The court held that the action was maintainable upon two

grounds: (1) That the moneys sued for, at least that portion which could be recovered back, consisted of an additional allowance to the defendant of $15,994.77 each year, for an expedited service ordered by the Department upon a false estimate of the additional necessary expenses, which had been adopted and acted on, upon the false representations of the defendant, as to the additional number of men and animals required for such expedited service; (2) That the moneys so allowed had been paid out of the funds of the Post-Office Department, under the pretence that service had been performed therefor, when, in fact, such service had not been performed. After referring to sections 3961 and 4057 of the Revised Statutes, Mr. Justice Field, delivering the opinion of the court, said: "These sections would seem to cover the present case. It cannot be pretended that the allowance for expediting the service over the new route was not made upon erroneous representations. It is admitted that such was their character." p. 279. In another part of the opinion he said: "It appears that the sums thus allowed and paid to the sub-contractors for stock and carriers, which were never required and never employed, aggregated $59,592.98, constituting the principal item in the amount claimed in this action." p. 275. The whole line of argument in the opinion, upon the facts there stated, is readily observed to be inapplicable to the facts alleged in the petition in this case. In that case there was a pure mistake of fact upon which the post-office authorities acted, and there was also fraud upon the part of the contractor, in making the false statement that additional men and horses were necessary to perform the service on the expedited schedule.

In this case there is no allegation in the petition that the money sued for was allowed and paid under a mistake of fact on the part of the post-office authorities, in making the change of schedule. Nor does the petition allege that any false statement or any erroneous representations were made on the part of the contractor, or that any sum was allowed and paid to the defendant, for men and horses never required and never employed. His original contract was for a 62-hour schedule. The fact that he did perform the service on a schedule of 43

hours, as a matter of private enterprise for transporting express matter and passengers, as an accommodation to the people along the line, is not inconsistent with his sworn certificate "that it will take fifty per cent more men and horses to perform mail service . . . on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter." He was at liberty at any time to abandon his 43-hour schedule and adopt the 62-hour schedule named in his contract.

By the terms of section 3961 of the Revised Statutes increased compensation, for expedited service, is to be calculated upon the basis of the *necessary* men and stock required to perform the service under the original contract. It is not alleged that the defendant did not use 50 per cent more men and horses under the expedited schedule than was necessary in carrying the mails on a 62-hour schedule; nor is it alleged that the cost of the expedited service was excessive. We see no such false representations by the defendant, nor such mistake by the post-office, set forth in this petition, as would justify a recovery in this case, and the judgment of the court below sustaining the demurrer is, therefore,

Affirmed.

Mr. Justice Field did not sit in this case or take any part in its decision.

WASHINGTON & GEORGETOWN RAILROAD COMPANY *v.* McDADE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 137. Argued December 2, 3, 1889. — Decided May 19, 1890

An employer of labor in connection with machinery is not bound to insure the absolute safety of the machinery or mechanical appliances which he provides for the use of his employés, nor is he bound to supply for their use the best and safest or newest of such appliances; but he is bound to use all reasonable care and prudence for the safety of those in his

Statement of the Case.

service, by providing them with machinery reasonably safe and suitable for use, and if he fails in this duty, he is responsible to them for any injury which may happen to them through a defect of machinery which was, or ought to have been known to him, and which was not known to the employés; but if an employé, who is injured by reason of a defect in such machinery, knew of the defect which caused it, and remained in the service of his employer, and continued to use the defective machinery without giving notice thereof to him, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use.

When a person employed by another to labor in connection with machinery, is wanting in such reasonable care and prudence as would have prevented the happening of an accident and is injured by the machinery, he is guilty of contributory negligence, and his employer is thereby absolved from responsibility for the injury, although it was occasioned by defect in the machinery and through the negligence of the employer.

The question of contributory negligence is, as a general rule, one for the jury, under proper instructions by the court; especially where the facts are in dispute, and the evidence in relation to them is such that fair-minded men may draw different conclusions from it.

A court may refuse to give a requested instruction when it has already given substantially the same instruction in its own language.

This was an action on the case brought in the Supreme Court of the District of Columbia by Lewis H. McDade against the Washington and Georgetown Railroad Company, a District corporation, to recover damages for personal injuries sustained while employed by the company, as a blacksmith, in its shops in Georgetown. The injury consisted in the loss of his left arm, which was caught in a belt used to propel a part of the machinery in the company's shop, and thereby so broken and mangled that it had to be amputated near the shoulder immediately after the accident.

The declaration alleged that the defendant was a corporation and owned and operated a horse railway in the city of Washington and District of Columbia, and certain machinery for the construction and repair of the tracks, cars and other appliances and implements used in connection therewith; that on the 5th of February, 1883, the plaintiff was in the employ of the defendant, as a blacksmith, and was required by defendant, from time to time, to put and place a certain belt upon a pulley attached to a counter-shaft, when the same was in motion, to communicate power and motion from the machin-

ery in the machine shop of the defendant to the fan and drill press used by plaintiff in the blacksmith shop; that the said machinery and appliances were defective and dangerous, in that there was no loose pulley and lever or shifter for the purpose of putting the belt on and removing it from the first named pulley, but that plaintiff had no notice or knowledge thereof, being unused to and unskilled in such machinery and appliances; that the defendant, its servants and agents knew that the same were defective and dangerous, but failed to notify the plaintiff thereof; that on the 5th of February, 1883, the plaintiff, while ignorant of such defect and danger as aforesaid, was, at the defendant's request, engaged in the act of putting said belt on the first-named pulley, and by reason of such defect and dangerous condition of the machinery, and, without any fault or negligence on his part, was caught in or struck by said belt with great force, and his left arm was severed thereby, by means of which he was made very sick, sore and lame for a long space of time, and suffered great anguish of body and mind, and was crippled and disabled for life from the performance of his usual trade and labor as a blacksmith; that he was put to great expense and trouble in trying to be healed and cured of said wound and sickness; and that he paid large sums of money for medical attendance, medicines and nursing, to his damage the sum of twenty thousand dollars.

The defendant pleaded the general issue, and defended, mainly, upon the ground that the plaintiff was guilty of such contributory negligence as precluded a recovery for the injuries sustained.

The case coming on for trial before the court and a jury, the plaintiff, to maintain the issue on his part, testified, in substance, as follows: He entered the service of the defendant as a blacksmith, at its shops in Georgetown, on the 1st of May, 1881, and continued there until the time of the accident on February 5, 1883. When he first went there he worked at the same forge with a man named Eckrit, who was head blacksmith, but at a different fire, they making and repairing the irons used in the manufacture of street cars. In the same

room, which was about forty feet square, at a separate forge, a man named Morgan made horseshoe nails. Eckrit left the service of the defendant a few months afterwards, and one Parsons was then employed as an assistant to the plaintiff, who had been made chief blacksmith.

The blast of air used at their forge was supplied by a fan propelled by an engine which ran all the machinery in the shops by means of shafts, pulleys and belts, and was situated in an adjoining room connected with the blacksmith shop by a door in the partition wall. The main shaft was in the engine-room. In the blacksmith shop there was a counter-shaft, three and one-half to four inches in diameter, about twelve feet from the ground and thirty inches from the wall, to which motion was communicated by means of a belt running on a fixed pulley attached thereto, and on another fixed pulley on the main shaft, and passing through a small opening in the partition wall for that purpose. The belt which directly gave motion to the fan was about three or four inches wide, and ran on a small fixed pulley attached to the fan, and on a fixed pulley about thirty inches in diameter attached to the counter-shaft by means of a screw projecting about an inch and a half above the hub of the pulley. The latter pulley, when the machinery was in motion, revolved about 180 times per minute. Another fan in the blacksmith shop, propelled in like manner, furnished a blast of air for the forge at which Morgan worked; and a drill press in the same room was propelled by means of a belt running on a pulley affixed thereto, and on a fixed pulley on the counter-shaft.

Perhaps on an average once a week the engine and a portion of the machinery was run in the evening or at night, after work in the blacksmith shop had ceased for the day, and the belt used to propel the fan was then thrown off the pulley on the counter-shaft, sometimes by the plaintiff, but generally by some one else in the employ of the defendant. During the time that Eckrit and the plaintiff were both in the employ of the defendant, Eckrit always put the belt on when it had been taken off, except when it was taken off for repairs; and whenever such repairs were needed, one Moore, who kept in repair

all the belting in the shop, would take it off and put it on again, but never at any other time. After Eckrit left, the plaintiff was directed to take the place of Eckrit at the forge, and all the time until the injury, a period of sixteen or eighteen months, he habitually put on the belt whenever he found it off, except when it was taken off for repairs, supposing it to be a part of his duty. The first time it was off after Eckrit left, he called the attention of the engineer, Mr. Kline, to the fact that the belt was off, who said, "Can't you put it on?" to which plaintiff replied, "I suppose so," and then put it on. Hawk, the foreman of the shops, from whom plaintiff received his orders, never gave him any instructions what to do, except that he should take Eckrit's place, and both he and Saylor, the superintendent of the company, often saw the plaintiff put the belt on, but never gave him any instructions about it, or informed him that it was Moore's duty to put the belt on when it had been taken off, and not to do it himself. Plaintiff knew that it was Moore's duty to repair the belts, and put them on the first time after they had been repaired, but never knew that it was Moore's duty to put them on at any other time, and Moore never did put on this belt at any other time.

He further testified that he was 53 years of age, and had been a blacksmith since he was 17, having worked in Washington and Baltimore, the latter city being where he had learned his trade, but that he was ignorant of machinery, never before having been employed in a shop where the blast of air for the forge was created by machinery but once, and in that instance the fan was two hundred feet off, and not in the shop; and that the belt connected with the fan in the defendant's shop was the only belt he ever put on.

In order to put the belt on the large pulley on the counter-shaft it was necessary to use a movable ladder about twelve feet long, placed against the partition wall. In going up this ladder his back might touch the shaft, and the face of the pulley was nearer the wall than his own face; and in placing the belt on the pulley he would turn his face towards the pulley. On the morning of the accident the plaintiff went to the shop a few minutes before 7 o'clock to commence work,

Parsons and the engineer, Kline, both being there when he arrived. Observing the belt off and the machinery in motion, plaintiff ascended the ladder and attempted to put on the belt, but it came off immediately. He then came down the ladder and went into the engine-room, saying to Kline that there was something wrong with the belt, as it would not stay on. Kline then ascended the ladder and attempted to put the belt on, but it immediately came off as before. Kline then came down the ladder and said to the plaintiff that he would go and slow up the engine, and that plaintiff should then put on the belt. He says that he waited a sufficient length of time, as he supposed, for Kline to reach the engine and slow it up, and after the pulley had slacked somewhat in its revolutions, he again ascended the ladder and attempted to put the belt on, but it was thrown off towards and against him, and formed a loop, which caught on the set screw in the hub of the pulley, wound around the counter-shaft, and drew his left arm in between the belt and the counter-shaft, crushing and tearing it to such an extent that it was necessary to amputate it near the shoulder, immediately. When his arm was caught he screamed, and the engineer immediately stopped the engine.

The accident occurred on a Monday morning. On the preceding Friday or Saturday the belt had been repaired by Moore, who placed it on the pulley after it was repaired. It worked all right afterwards, and was still on the pulley when plaintiff quit work on Saturday evening.

The plaintiff further testified that he had suffered great physical and mental pain from the accident, having been confined to his room for six weeks, and most of the time to his bed; that his nervous system had been shocked to such an extent that for eighteen months thereafter he could not do any work; and that since that time, although better and stronger, he had suffered considerably, and was permanently disabled from working at his trade.

He further said that he never had had any experience with machinery, and he did not know that it was any more dangerous to put a belt on a pulley while it was in motion than it was

to strike a piece of iron with a hammer; that no one ever informed him that it was dangerous to put a belt on a pulley while it was in motion; that Eckrit, Moore and Kline always put the belts on while the machinery was in motion; that if he had known that it was dangerous to put a belt on a pulley while it was in motion he would not have done so; that he had never seen any one put a belt on a pulley until he saw it in the defendant's shops; that in other parts of the shops, both before and at the time of the accident, the defendant had a loose pulley for the purpose of shifting belts, of which fact he was ignorant until afterwards; and that there were no loose pulleys in the blacksmith shop, and he did not know there were such things until after the injury, having afterwards seen one for the first time in Springman's blacksmith shop in Washington.

On cross-examination the plaintiff testified that "on the occasion of his injury, when Kline left him to go to the engine-room, he said he would go and slow up the engine, not stop it, and for plaintiff to put on the belt; that he stood at the foot of the ladder for about a minute after Kline left him, and until the speed of the machinery was somewhat slackened, and then went up the ladder, which took him about half a minute, and attempted to put on the belt; that when he was caught in the belt he screamed, and Kline came to the door of the blacksmith shop and then went back and stopped the engine."

Dr. Ritchie testified on behalf of the plaintiff that he attended him when he was injured, and amputated his arm; that his suffering was acute and the shock so great as to cause permanent nervous impairment and mental depression; and that the physical injury was permanent.

John T. Springman, a witness for the plaintiff, testified that about a year and a half before that time, having had occasion to do some very heavy work in his foundry, he bought a large blower, and supplied the air by means of a fan propelled by machinery; that he had placed a loose pulley at the fan, and another on the counter-shaft, both next to the fixed pulleys, shifting the belt, when necessary, on to those loose pulleys by means of a lever near the floor; that he had never seen such

a contrivance anywhere else, although he had been a blacksmith twenty-five years; and that such a contrivance for shifting belts was considered safe, while to put them on and take them off by hand was considered dangerous.

Robert Thompson, a witness for the plaintiff, testified that he had had a large experience in machinery and belting, having worked for twenty-five years in planing mills and sash factories, and that loose pulleys for placing and removing belts on and off fixed pulleys had been in common and general use for over twenty-five years; that they can be used wherever there is room to place them, and are generally placed on the counter-shaft immediately adjoining the fixed pulley, the fixed pulley at the machine being as wide as both pulleys on the counter-shaft; that the belt is removed from one pulley to the other by means of a lever called a shifter, which can be operated very easily with one hand without any danger, thus stopping and starting the particular part of the machine while the rest of the machinery is in motion: and that it is dangerous to put belts on pulleys by hand while they are in motion, and he would not do it without the shifter, which renders such work perfectly safe.

Smith Pettit and John B. Randolph, witnesses for the plaintiff, — the former a machinist of 30 years' experience, and the latter the machinist at the State, War and Navy Department for a number of years, — both testified substantially to the same effect as the preceding witness, in respect to the long use of loose pulleys, and a shifter for the purpose of removing belts, in all well-regulated machine-shops, and to the danger of putting them on in any other manner.

John W. Eckrit, who had worked with the plaintiff in the shop at one time, as before testified to, a witness for the plaintiff, stated that he put the belt on the pulley three or four times after the plaintiff came there, but that no one directed him to do so, and he did not know whether or not Hawk was aware of such fact; and that he had put on belts before by hand.

The plaintiff thereupon rested his case, and the defendant moved the court to instruct the jury to return a verdict in its

favor upon the aforesaid evidence, which the court declined to do, and the defendant thereupon excepted.

The defendant then gave evidence tending to prove that the machinery in its car-shops was of the most approved character, there being none better or more suitable to be found in the country; that loose pulleys and a shifter were not used in blacksmith shops like its own, but were used only when the machine required the power to be quickly thrown off or put on, or where the work to be done was very heavy and the belt not easily managed by hand; that the belt in question could be shifted very easily by hand, without danger, by a person of ordinary intelligence who had seen it done a few times; that there was a loose pulley on the drill-press in the blacksmith shop; that Hawk, the foreman, a carpenter by trade, had charge of all the men in the shops, and gave orders and directions to all of them, being perfectly competent to fill the position which he held, no one else having any authority to give orders to any of the men employed in the shop, as regards the belting; that the engineer's duties were only such as pertained to running the engine, which fact was known to the plaintiff; that the duties of Moore extended not only to taking off and putting on the belts when they needed repairs, but consisted in his having general charge of the belts in the shops, putting them on and taking them off whenever such work was necessary, which fact was known to all the men in the shops, including the plaintiff, and that both Morgan, who worked in the blacksmith shop, and the predecessor of the plaintiff, always called on Moore whenever the belt was off.

Hawk, the foreman, testified that on the Saturday preceding the accident, at about 4 o'clock in the afternoon, when work in the blacksmith shop was about to cease, he went there, and, standing about twenty-five feet from the plaintiff and his helper, Parsons, since deceased, addressed them both, saying that the engine would be run after working hours and the belt would be thrown off, and that Monday, when the bell rang to go to work, Moore should be called to put the belt on. He said that he gave that order because the belt had been repaired on the Friday preceding, but that he was not sure

that either the plaintiff or Parsons heard him, as the machinery was in motion and was making considerable noise, and neither made any response. He said he was a carpenter, and had no special knowledge of machinery; that the belt was not taken off more than 12 or 15 times while the plaintiff was there; that when the belt was repaired on the preceding Friday it was made a little too short, which probably caused it to slip off when the plaintiff attempted to put it on; and that he never gave the plaintiff any instructions about his work at any time.

George E. Noyes, a witness for the defendant, a machinist of experience, testified that he had never examined the machinery of the defendant carefully, but that it seemed to him that its general plan was good; that fast and loose pulleys are generally used where any part of the machinery is stopped periodically, and are sometimes, but not always, connected with forges; that it is always dangerous to put on a belt by hand when the machinery is in motion, and no one likes to do it, the only preventive being a loose pulley; but that in his shop he usually had boys to put on the belts by hand, and thought an ordinarily bright boy could learn to do such work in a day, by being shown how a few times.

Moore gave testimony to the effect that on two occasions he was sent for to put on the plaintiff's belt — once by the plaintiff, and the other time by Parsons; that it was his duty to attend to the belts generally; and that he always took the belt off and put it on again when he repaired it, but never at any other time unless he was sent for.

The engineer, Kline, a witness for the defendant, in describing the manner in which the plaintiff received his injury, stated that on the morning of the accident, after the machinery had been running four or five minutes, the plaintiff came into the engine-room and said, "I wish you would come and help me with my belt;" and that after they got into the blacksmith shop, the plaintiff said, "How am I to get that belt back on this side of the pulley?" He said he then ascended the ladder, and threw the belt back on the right side, but could not put it on, and then came down the ladder and said

to McDade, "Hold up until I shut down." He then went into the engine-room and shut off the steam, but the engine did not stop immediately, the momentum being sufficient to carry the fly-wheels around 8 or 12 times before the speed was checked. In the meantime, standing by his engine, he heard McDade scream, and went to see what the matter was. He stated that from the time he came down the ladder until the engine stopped was not greater than three-quarters of a minute.

The plaintiff, on his cross-examination in rebuttal, testified to the following effect: He didn't know whether putting on the belt was a part of his duty, but supposed it was, and acted accordingly. He again asserted that he had no idea of there being any serious danger in putting the belt on the pulley by hand — not any more than in picking up a hammer from the floor. Speaking of the accident, he said that when Kline had attempted to put the belt on and failed, he came down the ladder and said to him, "Go up and put it on whilst I slow up the engine," or, "Go up the ladder, put the belt on, and I will slow the engine." He further stated that he did not attempt to put the belt on until the engine was slowed — whether it was sufficiently slowed or not he did not know; but that he understood the engine was to be slowed up in order to enable him to put the belt on.

At the conclusion of the testimony the defendant renewed its motion for a verdict, which motion the court overruled, and an exception was duly taken. Counsel for the defendant asked the court to grant twenty separate prayers for instructions to the jury; three of which the court granted in the language in which they were presented, ten were slightly modified, and seven were denied. The court upon its own motion gave one instruction. Under these instructions verdict and judgment were rendered for the plaintiff for $6195. The Supreme Court in general term affirmed that judgment. 5 Mackey, 144. Hence this writ of error.

Mr. Enoch Totten and *Mr. Walter D. Davidge* for the plaintiff in error.

Argument for Plaintiff in Error.

The plaintiff's evidence given at the trial, with all the inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, and the court erred in refusing to direct the jury to return a verdict for the defendant. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478.

There was not a syllable of evidence to show negligence on the part of the defendant. It is submitted that upon all the proofs and all the fair inferences the plaintiff could not recover.

Upon this state of facts it is argued in behalf of the plaintiff below: 1. That some device extraneous or in addition to the devices used by the defendant would have been safer, and that the defendant is therefore chargeable with negligence because it did not supply such devices;

2. That the plaintiff *did not know* that it was dangerous to undertake to put this belt on the pulley under such circumstances.

The following cases are applicable to the first branch of this argument: *Schroeder* v. *Michigan Car Co.*, 56 Michigan, 132; *Sjogren* v. *Hall*, 56 Michigan, 274; *Gilbert* v. *Guild*, 144 Mass. 601; *Burke* v. *Witherbee*, 98 N. Y. 562; *Shaw* v. *Sheldon*, 103 N. Y. 667; *Kelley* v. *Silver Spring Co.*, 12 R. I. 112; *Sweeney* v. *Berlin Envelop Co.*, 101 N. Y. 520; *Sullivan* v. *India M'f'g Co.*, 113 Mass. 396; *Leary* v. *Boston & Albany Railroad*, 139 Mass. 580; *Iron Ship Building Co.* v. *Nuttall*, 119 Penn. St. 149; *Moulton* v. *Gage*, 138 Mass. 390; *Michigan Central Railroad* v. *Smithson*, 45 Michigan, 212; *Pennsylvania Railroad* v. *Wachter*, 60 Maryland, 395; *O'Rorke* v. *Union Pacific Railroad*, 22 Fed. Rep. 189.

As to the second branch of the argument. It is not sufficient for the purposes of a cause that an intelligent, experienced man, beyond middle life, with all his faculties unimpaired, should swear that he did not know that such a shaft and wheel revolving at a high rate of speed, was dangerous. Such a story, in the nature of things, cannot be true. "All machinery is dangerous to a greater or less extent, and particularly when operated by steam." *Richards* v. *Rough*, 53 Michigan,

212; *Artz* v. *Rock Island Railroad*, 34 Iowa, 154; *Baxter* v. *Troy & Boston Railroad*, 41 N. Y. 505.

The defendant had no means of obtaining information of imperfections or accidental breakages, except through the plaintiff. He was employed in immediate connection with this machinery and should have discovered any infirmities when they occurred, and was bound to inform his employer. Where the means of information of the employé are *equal* or *greater* than those of the employer as to imperfections in machinery, the employer will not be responsible for an injury resulting from such imperfections. *Mad River Railroad* v. *Barber*, 5 Ohio St. 541; *S. C.* 67 Am. Dec. 312; *Georgia Central Railroad* v. *Kenney*, 58 Georgia, 485; *Fones* v. *Phillips*, 39 Arkansas, 17.

When the servant discovers that the machinery, tools or the like, are unsafe or unfit, or that a fellow servant is careless or incompetent, and, nevertheless, continues in the employment without protest or complaint, he assumes the risk of the danger and waives all claims for damages. *O'Rorke* v. *Union Pacific Railroad*, 22 Fed. Rep. 189; *Kelley* v. *Silver Spring Co.*, 12 R. I. 112; *Richards* v. *Rough*, 53 Michigan, 212; *Sjogren* v. *Hall*, 53 Michigan, 274; *Dorsey* v. *Phillips Construction Co.*, 42 Wisconsin, 583; *Dillon* v. *Union Pacific Railroad*, 3 Dillon, 319; *Kielly* v. *Belcher Silver Mining Co.*, 3 Sawyer, 500; *Randall* v. *Balt. & Ohio Railroad*, 109 U. S. 478.

Even if this machinery had suddenly developed an infirmity, the defendant cannot be held guilty of negligence, without proof of notice or knowledge of the infirmity. To charge the defendant it is essential to show knowledge, or that knowledge might have been obtained, by the use of reasonable diligence, of the defect. Without this there can be no recovery. *Allen* v. *New Gas Co.*, 1 Ex. Div. 251; *Packing Co.* v. *Hightower*, 92 Illinois, 139; *Chicago & Alton Railroad* v. *Platt*, 89 Illinois, 141; *Dewey* v. *Chicago & Northwestern Railroad*, 31 Iowa, 373; *Tierney* v. *Minneapolis &c. Railroad Co.*, 33 Minnesota, 311; *Mad River Railroad* v. *Barber*, 5 Ohio St. 541, 564; *S. C.* 67 Am. Dec. 312; *Painton* v. *Northern Central Railroad*, 83 N. Y. 7; *DeGraff* v. *New York Central Railroad*, 76 N. Y. 125.

The trial court instructed the jury that the defendant had the right to use and employ only such machinery and devices as "the experience of trade and manufacture sanctioned as reasonably safe." This was error. No authority can be found for it. Such a test is unknown in the judicial writings on this subject. The rule applicable to machinery of this kind is elaborately laid down by the Supreme Court of Michigan, in *Richards* v. *Rough*, 53 Mich. 212, before cited, and the rule as there stated is sanctioned by this court in *Tuttle* v. *Milwaukee Railway*, 122 U. S. 194. The rule may be stated thus:

The master must furnish safe and reasonably good machinery to his servant and keep it in reasonably good order, *i.e.*, he must exercise ordinary care. He is not bound to make use of the safest appliances and instruments, nor to change his machinery with every new invention, nor to introduce every supposed improvement in his appliances. He must have *good* but not the *best* machinery. He is not bound to throw away his old machinery and buy new. *Wonder* v. *B. & O. Railroad*, 32 Maryland, 411; *Jones* v. *Granite Mills*, 126 Mass. 84; *Keith* v. *Granite Mills*, 126 Mass. 90; *Fort Wayne &c. Railroad* v. *Gildersleeve*, 33 Michigan, 133, 256; *Burke* v. *Witherbee*, 98 N. Y. 562; *Leonard* v. *Collins*, 70 N. Y. 90; *Ladd* v. *New Bedford Railroad*, 119 Mass. 412; *Kelley* v. *Silver Spring Co.*, 12 R. I. 112.

Mr. William A. Cook and *Mr. C. C. Cole* for defendant in error. *Mr. W. L. Cole* was with them on the brief.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

A motion was filed in this case to dismiss the writ of error on the ground that the general term of the court below never acquired jurisdiction of the case, and that, as a consequence thereof, this court is also without jurisdiction. In connection with the motion to dismiss there was also a motion to strike out the bill of exceptions.

The argument urged by the plaintiff in support of both motions is, that the rules and statutes prescribing the practice

and proceedings for the Supreme Court of the District of Columbia, in securing the review, in a general term of that court, of a judgment at a special term, have not been complied with in this case.

Neither of these motions can be sustained. We think the court in general term acquired jurisdiction of the case; and as it comes here regularly from that court we shall proceed to consider it upon its merits.

There are seven assignments of error which we will consider, not *seriatim*, but with reference to their relevancy to the issues presented by the record. These issues are, (1) Was the machinery with which the defendant worked defective and unsafe for the purpose for which it was used, and more particularly, was the putting the belt on the large pulley by hand dangerous? or should there have been a loose pulley upon which the belt could have been safely shifted by means of a lever? (2) Assuming that there was this defect in the machinery which made it dangerous, was the plaintiff ignorant of the defect or of the danger connected with it? (3) Did the defendant, in failing to notify the plaintiff of the danger, have reason to believe the plaintiff was ignorant either of the nature of the machinery, or of the danger incident to its use? (4) Was the plaintiff guilty of such contributory negligence as precluded a recovery?

The three instructions given by the court to the jury as requested by the counsel for the defendant were to the effect, that, if the jury believed from the evidence that any one of the three following conditions or state of facts existed, the plaintiff could not recover: (1) That the accident would not have occurred but for the negligence or want of ordinary care and caution on the part of the plaintiff; (2) That if the foreman of the shops, on the Saturday evening preceding the accident, ordered and directed the plaintiff to take the belt off the pulley, and to send on Monday morning for Moore to put it on, he was bound to obey the order directing him to send for Moore, and his not obeying it was such negligence as would prevent a recovery in this action; and (3) Assuming that putting on the belt was attended with danger, the question to be

determined by the jury was not whether the plaintiff knew of such danger, but whether a man of ordinary care and observation, in his situation, would have known it, as he must be presumed to possess that degree of intelligence; and that if with such observation and care he would have known the danger, then in putting on the belt he assumed all the risks incident thereto.

The instruction given by the court on its own motion was as follows: "If the jury find from the evidence that after he was employed by the defendant the plaintiff voluntarily, and without being required so to do, attended to the belt and habitually and with the knowledge of the defendant's officers placed the same in position without accident, and his course of conduct in relation thereto was such as to induce the defendant or its officers to believe that he had the requisite skill for that purpose, or that he had willingly assumed the duty of so placing the belt, the defendant was not in default for not having instructed him as to any danger incident to the operation."

Another instruction given by the court in lieu of the 16th one requested by the defendant was as follows: "But the jury are instructed that the defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe."

The other instructions given by the court were modifications to a degree of those asked by the defendant, and were mere amplifications of those above mentioned.

We do not think there was any error in any of these instructions of which the defendant had any right to complain. The propositions contained in them are in strict accord with the principles laid down by the decisions of this court. *Hough* v. *Railway Co.*, 100 U. S. 213, 217; *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642, 647, 648; *Kane* v. *Northern Central Railway*, 128 U. S. 91, 94; *Jones* v. *East Tennessee &c. Railroad Co.*, 128 U. S. 443.

The general principles of law by which the liability of an employer for injuries to an employé, growing out of defective machinery, is tested are well settled by those decisions. Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employé or servant. But if the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And further, if the employé himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer.

The state decisions in harmony with the principles laid down by this court on this subject are too numerous for citation.

We will now briefly notice the assignments of error, the first of which is that the court erred in refusing to direct the jury to return a verdict for the defendant, as requested by counsel.

It is argued, in support of this assignment, that there was not a scintilla of evidence to show negligence on the part of the defendant, as the employer of the plaintiff; that the part

of the machinery which caused the accident was not defective; that the evidence showed it to be of the most approved character, purchased without regard to cost, and such as was generally in use throughout the country; that loose pulleys and a shifter or lever for shifting the belt were not used in blacksmith shops; that the plaintiff had been in the shop for nearly eighteen months, and had become familiar by constant use with the operation of putting the belt on the pulley, and it was impossible for him not to know what danger attended its use; that the company had employed a man, competent and skilful, whose duty it was to put on all the belts in the establishment; that it was not in the line of the duty of the plaintiff to put on this belt, and whenever he did so he was acting outside the scope of his employment; and, lastly, that the manner in which the accident occurred, as described by the plaintiff himself, in failing to wait until Kline had slowed up the engine, shows that he was, by his own heedlessness and rash want of care, the author of his own misfortune. On the other hand, the evidence offered by the plaintiff certainly tended to show that the injury would not have occurred but for the defect of the fixed pulley and the projecting screw; that the machinery was unsafe, and not such as was generally used in shops of that kind, as testified to by experienced machinists introduced by the plaintiff, and the only one examined in behalf of the defendant; that he (the plaintiff) was unaware of the dangers attendant upon putting on the belt by hand; that he did not know that the belt in which he was caught had been recently, and, perhaps, imperfectly repaired; that there were in the other shops of the establishment shifters and levers which could put the belt on the pulley without danger; that he was wholly unaware of the danger attendant upon putting on the belt by hand; and that he supposed he was in the line of his duty when the injury happened.

If this evidence was worthy of belief it certainly could not be said to show such contributory negligence as would justify the court in directing a verdict for the defendant below. As a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially

where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences. *Railroad Company* v. *Stout*, 17 Wall. 657. Upon every question in the case — the safety or unsafety of the machinery, the ignorance on the part of the plaintiff of the danger of it, and the negligence of the plaintiff at the time of the accident — the evidence was controverted, and rendered the case just such a one as this court in *Jones* v. *East Tennessee &c. Railroad Co.*, *supra*, said that "a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury." In the language there used, "we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

There are two recent cases in Massachusetts which are so analogous, in many of their features, to the case under consideration, that we deem a special reference to them proper. *Daley* v. *American Printing Co.*, 150 Mass. 77, was an action by an employé for personal injuries sustained while in the performance of his duties in the defendant's mill, using an elevator operated by a belt passing over a pulley on a shaft. At the trial the evidence introduced by the plaintiff tended to show that the belt was frequently off the pulley; that there was no one in the employ of the defendant specially charged with putting it on when it came off; and that any one using the elevator put the belt on when he found it off. It further showed that the plaintiff, having occasion, in the course of his regular duties, to use the elevator, found the belt off and proceeded to put it on, but in so doing was caught in a set screw projecting from a collar on the shaft and whirled around the shaft, and received serious injuries. The defendant introduced testimony to show that there was another man whose duty it was to put on the belt. At the conclusion of the testimony, the trial court directed a verdict in favor of the defendant, and, the case being carried up on exceptions to the Supreme Judicial Court, that court reversed the judgment of the court below, and ordered a new trial. In its opinion the court said:

"The ground upon which the case was withdrawn from the jury is not stated. We cannot say, as matter of law, that no sufficient evidence was introduced or offered of negligence on the part of the defendant, or of freedom from negligence on the part of the plaintiff. . . . If the machinery was found to be unsuitable, and if the plaintiff was within the line of his duty in attempting to adjust the belt, we cannot say that he was not entitled to go to the jury on the question of whether he was in the exercise of due care."

Myers v. *Hudson Iron Co.*, 150 Mass. 125, was an action for personal injuries sustained by the plaintiffs while in the employ of the defendant. We extract from the syllabus the following: "A mine was reached through a vertical shaft by a bucket lowered by the unwinding of a rope from the uncoupled drum of a hoisting engine, and usually controlled in its descent by a brake operated by the engineer. Laborers employed in the mine entered the bucket to descend as usual, and, upon word being given, the engineer started to let it down, but soon found that the brake was not holding. The bucket fell rapidly for many feet, when it was suddenly stopped by planks across the shaft, and the laborers were hurt. In actions against the employer to recover for such injuries, there was evidence that the brake, besides a loss of initial efficiency, was in design and original construction insufficient; that there were safer contrivances for controlling such a descent, some of which the defendant used elsewhere about the mine; and that gearing used in hoisting had, through wear and a change made in it by the defendant, become less useful as a possible means of stopping the bucket if the brake failed to hold, and, in fact, proved ineffectual to stop the bucket at the time; also, that no person had previously been hurt in going down in the bucket: *Held*, that the cases were properly submitted to the jury, who were warranted in finding verdicts for the plaintiff."

In the course of the opinion the court said: "The risk of the safety of machinery is not assumed by an employé, unless he knows the danger, or unless it is so obvious that he will be presumed to know it." And in another part of the opinion it

was said: "The plaintiffs were allowed to show that other machinery or appliances than those used by the defendant would have been safer; for example, a strap-brake, a friction V, so-called, or a reversible engine. In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kinds of machinery or appliances were used elsewhere, and might have been used at shaft No. 1. *Wheeler* v. *Wason Manuf. Co.*, 135 Mass. 294, 298. It does not follow from the introduction of such evidence that the defendant was bound to use the very safest, or newest, or any particular, machinery or appliances; but, as 'reasonable care' is a relative term, the jury might properly consider what could be done to secure safety, and the evidence was competent."

As regards the instruction given by the court, on its own motion, above quoted, we think nothing contained therein is prejudicial to the defendant. Indeed it may be doubted if it did not favor the defendant more than the evidence in the case and the law applicable thereto would warrant.

The same remark is true of the instruction given by the court in lieu of the 16th one asked by the defendant. That instruction as requested was as follows: "The employer is bound to use ordinary care and prudence in providing proper machinery, but he is not a guarantor of its safety. If he uses ordinary care and prudence he is absolved from responsibility. The machinery need not be the safest of the kind, provided it is such as a person of reasonable care and prudence would provide." The one given by the court in lieu thereof was as follows: "But the jury are instructed that the defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe." The instruction here given is in a large part identical with the language used by this court in *Hough* v. *Railway Co.*, *supra*. The assignment of error is inexact in its statement that the court said in effect "that the

defendant was bound to use and employ such machinery *only* 'as the experience of trade and manufacture sanctioned as reasonable and safe.'" What the court said was, that the defendant "was *only bound* to use ordinary care and prudence in the selection and arrangement and care" of its machinery. In adding that the defendant had the right to use such machinery "as the experience of trade and manufacture sanctioned," the court imposed no additional obligation upon it, but relaxed the rigor of the rule in its favor. If there was any error in such relaxation the defendant could not complain of it. But taken in connection with the other instructions given by the court, on that question, we think the instruction as it stands was just and reasonable — at least not prejudicial to the defendant.

We repeat, we are of the opinion that all of the instructions sufficiently guarded the interests of the defendant, and that, in the language of the court below, "If there was any error, it was in too great an indulgence and relaxation of the law in its favor."

Nor do we see any error in the refusal of the court to grant all the instructions prayed for by the defendant. Such of them as were correct, as mere abstract propositions, had already been covered by the instructions which the court had given. The others, had they been granted, would, as conclusions of law, have bound the jury to render a verdict for the defendant.

For the foregoing reasons the judgment of the court below is

Affirmed.

Mr. Justice Brewer, not having been a member of the court at the time this case was considered, took no part in its decision.

DES MOINES AND FORT DODGE RAILROAD COMPANY *v.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 256. Argued April 11, 1890. — Decided May 19, 1890.

A contract by a railroad company, chartered to construct a railroad between two points, made with another railroad company for the use of the road of the latter for a part of the distance for a period of years, in order to complete the connection proposed by the charter, and providing that the contract and any damages accruing from a breach of it shall be a continuing lien upon the roads of the two contracting parties, their equipment and income, into whosesoever hands they may come, creates no lien on the property of the first company which will take precedence of a mortgage executed after a breach of the contract prior to the expiration of the term has taken place.

IN EQUITY. The case is stated in the opinion.

Mr. Charles E. Whitehead for appellant.

Mr. William Rush Taggart and *Mr. Wells H. Blodgett* for appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of Iowa, dismissing the intervention by appellant in a large and more important suit involving the sale of a railroad owned by the Des Moines and Northwestern Railway Company. As the petition of intervention is the first paper found in the record of the case before us, we are somewhat at a loss to understand the nature and character of the original suit in which the appellant sought to intervene. It is to be inferred, however, that the original suit was by the Central Trust Company of New York against the Des Moines and Northwestern Railway

Company, formerly the Des Moines, Adel and Western Railroad Company, to foreclose a mortgage in which that company was mortgagor and the Central Trust Company was trustee or mortgagee. The Wabash, St. Louis and Pacific Railway Company was also party to that suit, on the ground that it had a lease of the road of the Des Moines and Northwestern Railway Company, under which it asserted rights paramount to everybody except the Central Trust Company.

The Des Moines and Northwestern Railway Company was originally chartered as the Des Moines, Adel and Western Railroad Company, with the purpose of building a railroad from the city of Des Moines, in the State of Iowa, in a northwesterly direction, to Panora, in the county of Guthrie. The appellants' road from Des Moines to Fort Dodge pursued the same line in a northwesterly direction from Des Moines City to Waukee, which was the point of the departure of the Adel road in its more westerly direction. The Fort Dodge Company, having completed its road from the city of Des Moines almost entirely to Fort Dodge before the Adel Company had fairly commenced its work, the former had a part of its road running between Waukee and the city of Des Moines, which was a very considerable railroad centre.

As the Adel Company was limited in its means and desired to push its road westward from Waukee through Adel to Panora, it was natural that it should enter into arrangements with the Des Moines and Fort Dodge Company for the use of its road from Waukee to Des Moines, or for a traffic arrangement. It accordingly, on the 18th of November, 1879, entered into the following agreement in writing, which is the foundation of the claim in regard to which the Des Moines and Fort Dodge Railroad Company intervenes in the suit already mentioned:

"This agreement, made the 18th day of November, 1879, between the Des Moines and Fort Dodge Railroad Company, of the one part, called for convenience the Des Moines Company, and the Des Moines, Adel and Western Railroad Company, called for convenience the Adel Company, witnesseth:

"That the Des Moines Company, being desirous of obtain-

ing all the Des Moines business of the Adel Company for a long term of years, in consideration of the contract on the part of the Adel Company hereinafter contained, doth hereby agree and covenant with the Adel Company and grant and give unto it the following easements, rights and privileges, as follows:

"First. Out of the earnings on all through business from the Adel road delivered to the Des Moines road, and by it delivered to the Rock Island road, and on all west-bound business delivered to the Adel road at Waukee, the Adel road shall have five-sevenths ($\frac{5}{7}$), and the Des Moines road shall have and retain two-sevenths ($\frac{2}{7}$), the local freight for the Adel road on west-bound business being included, but these divisions not to apply to business from beyond Panora.

"Second. On the freight on all local business from Des Moines to any point on the Adel road, or from any point on the Adel road to Des Moines, the Adel road shall receive two-thirds ($\frac{2}{3}$), while the Des Moines road shall receive one-third ($\frac{1}{3}$), including the local freight on both roads, but freight from beyond Panora not to be included.

"Third. All car-loads of freight coming from or going to any point on the Adel road beyond Panora shall be hauled by the Des Moines road from Waukee to Des Moines, or from Des Moines to Waukee, at five dollars ($5.00) the car-load, standard-gauge cars, and the Adel road shall be entitled to receive all the freights and draw-backs earned thereon. In case through freights shall hereafter be reduced from what they are now, a proportionate reduction shall be made on the rate of hauling.

"Fourth. On all passenger business taken at the regular tariff rates from the Adel road to or from Des Moines the Des Moines road will pay over to the Adel road one-tenth ($\frac{1}{10}$) of its receipts therefrom.

"Fifth. The Des Moines road will allow the Adel road the joint use of all its station-houses and station facilities at Waukee on its paying its proportion for its maintenance, to be arranged by the superintendents of the two roads.

"Sixth. The Adel road to have equal privileges at Des

Moines and equal rates on all construction material with those enjoyed by the Des Moines road, and every facility or rate or increased rate obtained from the Rock Island road shall be enjoyed and shared by the Adel road, and the Des Moines road will haul its construction material at half its local rates from Des Moines to Waukee; this to apply to all material hauled since the first of July last.

"Seventh. Uniform rates shall be maintained by both roads at all competitive points and both roads shall join in requiring the Rock Island to do the same, as far as able, and if the Rock Island shall persistently and continuously refuse to maintain such uniform rates in accordance with Mr. Riddle's letter of this date, which is made a part of this contract, at such competitive points, then the Adel road may, by giving thirty (30) days' notice in writing of its intention so to do, terminate this contract.

"Eighth. If the Des Moines road accounts to the Adel road for forty per cent of the through earnings on through freight, although its share of the through earnings should hereafter be reduced to a less amount, this agreement to continue, and in the event of its failure to do so the Adel road to have the right to terminate this contract upon thirty days' notice in writing.

"Ninth. It is agreed that if the Des Moines road shall at any time lease or transfer its through business at Des Moines to any other than the Rock Island railroad the Adel road shall have the privilege then to terminate this contract by giving thirty days' notice in writing of its intention so to do.

"Tenth. The Des Moines agrees that in case any railroad shall be built or operated by it or by the Rock Island on the territory west of the Des Moines road, south of the Northwestern road, and east of the projected line of the Rock Island from Guthrie Centre to Guthrie, then the Adel road may terminate this contract on giving thirty days' notice in writing.

"Eleventh. Settlements and adjustments under this contract shall be made monthly on the first day of every month, unless otherwise agreed on.

"Twelfth. In consideration of the foregoing the Adel road hereby agrees to deliver to the cars of the Des Moines road at Waukee all its freight and passengers bound to Des Moines or to any place through Des Moines and beyond for the period of twenty years from this date.

"This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesover hands they may come, the lien on the Adel road being limited to so much thereof as lies between Waukee and Panora.

"The Des Moines and Fort Dodge
Railroad Company,
"By Charles E. Whitehead, *Pres't.*
"The Des Moines, Adel & Weston
Railroad Company,
"By T. J. Coldwell, *Pres't.*
J. S. Runnells, *Sec'y.*"

After the execution of this agreement, the Des Moines, Adel and Western Railroad Company pushed its road northwestward from Waukee to Panora, and then adopted a new route almost directly north from Panora, but which it never completed. It, however, subsequently entered into arrangements with the Wabash, St. Louis and Pacific Railway Company, by which that company, under the charter of the Adel Company, constructed the piece of road between Des Moines and Waukee, and leased that and the remainder of the Adel and Western Railroad Company, so that all the traffic provided for in the contract as coming from the Adel Company to the Des Moines and Fort Dodge Company was transferred in effect to the Wabash Company. The object of the present petition of intervention was not to recover any money actually earned by the intervening company or the other, for all of that carrying business was settled up and paid for as it progressed, but it was to recover the damages to which the interveners might be entitled during the remainder of the twenty years which the contract had to run by the failure on the part of the Adel Company to keep that contract. The appellant

was permitted to file its claim of intervention, which was amended once or twice, and was finally heard on demurrers on the part of the Des Moines and Northwestern Company, and the Central Trust Company, and the Wabash, St. Louis and Pacific Company, which demurrers were sustained, and the petition of intervention was dismissed.

The right of the Des Moines and Fort Dodge Company to intervene in this suit is based upon the last sentence in the contract which we have given in full. The language of this sentence is: "This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come, the lien on the Adel road being limited to so much thereof as lies between Waukee and Panora." The interveners allege that for the supposed gain and profits which they would make out of this contract if it were faithfully kept for the period of twenty years from its date, they have a lien on the railroad itself, and on its equipment and income, which attaches to it in whosesoever hands it might come after that contract was made.

The appellees resist this principle on two grounds. First, that the contract, so far as it disables the Adel Railroad Company from the free use of all the means of railroad carriage from any part of its road to the city of Des Moines, is void as against public policy, and is especially void as a contract which in its nature disables that road from performing the public obligations assumed by it in its charter, of making and using as a common carrier the road from Waukee to Des Moines or from Des Moines to Waukee. A second objection is, that whatever the language concerning the lien upon the two contracting companies may mean, it does not constitute a lien or obligation running with the land, though it may be a valid contract between the parties, personally enforceable by an action at law. Either of these objections, if well taken, is fatal to the claim of appellant, and we are of opinion, without inquiring into the former, that the latter objection is well taken.

It will be observed that this contract does not purport to be

a mortgage on the railroad of the Adel Company; that it does not convey in proper terms any title to the railroad itself or to its appurtenances, or any interest in them; and that it does not secure, as a lien upon the roads, any particular sum of money. It declares that the contract and any damages from a breach of the same shall be a continuing lien upon the roads of the two contracting companies. It is difficult to conceive how the contract, abstractly considered, could be a lien upon the roads of the companies, and not much easier to see what damages for the breach of such contract are made a lien upon the roads of the two companies. There is nothing in the language of this sentence, nor in the nature of the contract, which should make it one running with the land, or one chargeable upon the railroad, when by due course of law, or in any other mode, the property passed to other hands. And if, in point of fact, the one company had performed services under that contract for the other, for which it had received no compensation, and for which there was a sum of money due, and ascertained or readily ascertainable, this sum might be a lien on the income or property of the delinquent company, it can hardly be supposed that the conjectural damages and the speculative profits which might yet result to the company from the unperformed part of the contract, through eighteen or twenty years, are to be made a specific lien on the property, attached to it and passing into the hands of whoever might become its purchaser.

When the Adel Company, under its new name of the Des Moines and Northwestern Company, executed a mortgage on all its property and issued bonds under that mortgage, under which the Central Trust Company of New York, as trustee, issued a large amount of bonds, the title to the property passed to that corporation without having attached to it the lien of the contract for a traffic arrangement between the Adel Company and the appellant, and the same thing is true in regard to the lease of February 28th, 1881, between the Des Moines Northwestern Railway Company, formerly the Adel Company, and the Wabash, St. Louis and Pacific Company, by which the latter assumed to pay the damages under the

contract with appellant or to save the former harmless in regard to it. This was a mere personal obligation, and did not confer any right in the land, to enforce the performance of that contract. As the Wabash Company by virtue of this lease undertook to complete the connection between the Adel road, and its western extension from Panora to Waukee, and the city of Des Moines, by building the road between the two latter points, a duty which, by its charter, devolved upon the Adel Company, we think it might very well have contracted to save the company harmless in regard to the lease which in effect enabled it to complete its obligation to the public.

It seems to us that the obligation of the Adel Company to fulfil the duties of its charter by completing its connection between Waukee and Des Moines City was an obligation inconsistent with a perpetual contract to employ the Fort Dodge Railroad to do all its carrying business between those two points; that the building of this piece of road was inconsistent with a contract for a long period of time, such as twenty years, by which it bound itself to deliver all its freight and passengers to the Fort Dodge Company at Waukee. And, since the Fort Dodge Company has received compensation for all the services it rendered while this contract was in operation, we are of opinion that its claim for damages, which resulted from the determination of the Adel Company to build its own road from Waukee to Des Moines, and the actual building of that road, and the necessary abandonment of its contract with the Fort Dodge Company, do not constitute a lien upon the road of the company, and that the bill was rightfully dismissed.

Decree affirmed.

HAINES *v.* McLAUGHLIN.

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

No. 315. Argued May 1, 1890. — Decided May 19, 1890.

The invention covered by the claim in letters patent No. 107,611, granted to James W. Haines on the 20th September, 1870, for an improvement in chutes for delivering timber, covers chutes, whether constructed with lapped joints or abutted joints, and was anticipated by several constructions for similar purposes described in the opinion; and the letters patent therefor are void.

A claim in letters patent cannot be enlarged by construction beyond a fair interpretation of its terms.

Several alleged errors of the court in its rulings and instructions examined and found to contain no error.

This was an action at law brought to recover damages for an alleged infringement of letters patent No. 107,611, bearing date September 20, 1870, and granted to James W. Haines for an "improvement in chutes for delivering timber." The specification, claim and drawings are as follows:

"Be it known that I, James W. Haines, of Genoa, in the county of Douglas and State of Nevada, have invented a new and improved chute for delivering timber from high mountains; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification.

"Figure 1 represents a side view of my improved chute.

"Figure 2 is an end view of the same.

"Similar letters of reference indicate corresponding parts.

"This invention has for its object to furnish to the public an improved chute for facilitating the transportation of timber of all kinds from the tops or sides of mountains or other elevations, and consists in constructing a chute so as to present

a V form in cross-section, the same being arranged on an incline corresponding, more or less, to the surface of the ground over which it passes, and brought in connection with a spring, or other water-supply, to receive the water there-

Fig. 1.

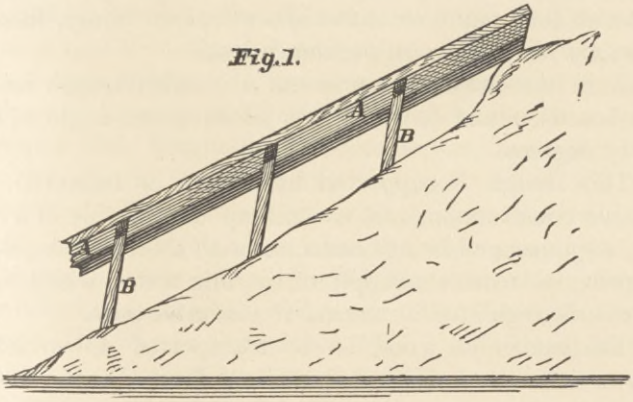
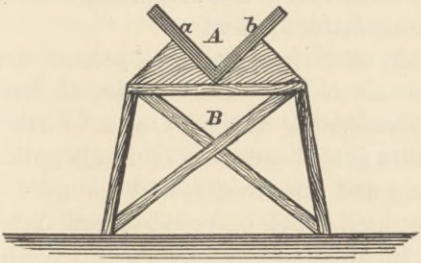


Fig. 2.



from, and thus form a smooth canal throughout its entire length.

"Heretofore chutes for this purpose have been constructed with flat, or nearly flat, bottoms, which, while sufficiently objectionable as requiring a greater quantity of water to ensure equal rapidity in the transit of the timber, are far more so for another reason, viz., the log or piece of timber, more especially at points where the inclination of the chute is slight, is liable to be checked in its descent by friction

against the bottom and one side of the chute, and, when thus situated, others may pass it, thus leaving it to be again set in motion by manual assistance, or other logs striking it; the whole may become wedged together, so as to form a total obstruction to the passage of succeeding logs, destroy the chute at that point, or cause other serious injury, inconvenience, and, in any event, pecuniary loss.

"A in the drawing represents a wooden trough made of two boards, *a* and *b*, which are joined at an angle of about ninety degrees.

"This trough is supported by trestles or frames B B, of suitable construction, and is built up on the side of a mountain, its upper end being connected with a brook, lake, stream, or spring, to receive a supply of running water, which may, if desired, be regulated by means of a suitable gate.

"The timber or wood to be transported downwardly is thrown into the trough, and carried down by the water in the same. A very rapid and convenient means of conveying wood is thus provided.

"Having thus described my invention, I claim as new and desire to secure by letters patent —

"The chute A, of V form, in cross-section, arranged on an incline in whole or in part, and adapted to receive a flow of water, for the conveyance of timber, as set forth."

The defendants denied each and every allegation of the complaint separately and specifically, and set up other defences. A jury trial was had, which occupied several days, and resulted in a verdict in favor of the defendants, upon which judgment was entered. A bill of exceptions was taken, and a writ of error sued out from this court.

The plaintiff's evidence tended to show that, in the fall of 1867 and the winter and spring of 1868, he cut a large amount of wood into lengths of four feet each on the eastern slope of the Sierra Nevada, with the design of floating it out of the mountains. These logs were rolled down the sides of the cañon upon which the trees had grown, and plaintiff built a square or rectangular flume, having bottom boards two feet wide and side boards eighteen inches wide. When he turned

the water into the flume and commenced putting in his wood, he found that the wood would run faster than the water, and that the lighter sticks would run faster than the heavier ones, jamming and choking up the flume. He then spread the upper edges of the side boards of the flume as far out as he could without breaking the nails at the bottom of the boards, and found that that afforded some relief. Then he took inch boards, twelve inches wide, nailed them together at an angle of 90°, so as to make a V chute, and set that in the flume. He lapped each length about three inches, by placing the lower end of one length upon the upper end of the next length below. This worked much better, but there was difficulty on account of the laps when the water was light. He then changed to the butted jointed flume, in which the ends of the different sections abutted against each other, instead of lapping. This was in September, 1868. It is admitted that the patent was applied for August 6, 1870.

The evidence also tended to show that one A. C. Cleveland built a flume a little over a mile in length, with lapped joints, for the transportation of wood, the contract for the construction of which he made on June 22, 1868, and which was completed on the 21st of July, 1868, and used continuously until the early part of August, 1868, when Cleveland disposed of it to other parties. Cleveland described the mode and manner in which it was constructed, of two boards nailed together in V shape and put on trestles wherever necessary, and it was conducted along the mountain a distance of 6700 feet in length. Evidence was also given on behalf of the defendants in respect to what the witnesses called a sluice at Case's tannery, at the town of Mariaville, Hancock County, in the State of Maine, in 1858, and which was still in existence at the time of the commencement of the suit. This sluice was described in substance as follows:

"At Case's tannery there was a mill-dam twelve feet high, measuring from the centre of the stream to the top of the dam. It was the custom to float logs down that stream in the spring of the year from points which lay several miles above Case's tannery to other places below the tannery. In order to pass

the logs over the mill-dam the said sluice was constructed. The sluice was about four feet across the top, and was built with two inclined sides, the planks of which were butted and the joints broken, which in cross-section stood at an angle of forty-five degrees, and were joined together at the bottom, and thus formed a trough in the form of a right-angled triangle, with the right angle at the bottom. This sluice or flume was some three or four hundred feet long and was four feet across the top. Its upper end was set into the mill-dam, so that the water from the dam would flow into and fill it sufficiently to convey the logs. It was built at a regular incline down the stream, and its lower end was a foot and a half or two feet above the water in a stream below the dam. The sluice or flume was built upon and sustained by suitable framework. The dam set the water back above it from a half to three-quarters of a mile. When the logs reached the lower end of the mill-pond each one as it floated was steered by the use of poles to the upper end of the sluice, through which it was carried by floating upon the water which ran through the sluice. A million feet of logs (lumber measurement) could be run through the sluice in a day, and two or three million feet were usually so run through the sluice each year. The sluice or flume was built on a regular incline. The water ran swiftly through it at a depth of about three feet, varying from day to day according to the supply in the dam."

Eight different witnesses testified to the existence of the said Mariaville sluice, and each one of these witnesses said that he had never seen a V chute for carrying wood or lumber down a mountain side, such as described in the plaintiff's patent. One of them, however, testified that he saw one of these chutes used in transporting lumber down the mountain side over uneven grades in California in 1873. Close, who constructed this sluice in Maine, was called as a witness, and produced a diagram, which he thus described:

"My exhibit represents a cross-section of my sluice or flume, except as to stringers A A, which are not shown in cross-section. The flume itself, shown by the planking P P, is composed of plank on the inside of a frame and set at a con-

venient angle of about forty-five degrees, and is supported on horses, one of which is shown in the part marked D D. The feet of the horses rest on cross-sills, one of which is shown in the parts marked B. From each end of the cross-sill B a brace C extends to the upper ends of horse D and the whole structure rests upon stringers A A. The planking is pinned or nailed to the inside of the frame. The stringers extend underneath the whole length of the flume, which can be extended to any desired length. The horse frames D D can be set at any desired distance apart, say from four to five feet, their only purpose being to support the planking P. This device gives a flume of V form in cross-section. The diamond piece V was placed in the throat of the horses D D for the purpose of saving water, and rested on the top of the planking. Piers were built over falls and gulches and over land, as the conformation of the ground required, and by the use of trestle work or posts. In one case that I know of such a sluice has been built on tops of trees, cut twenty feet from the ground. My flume was built on an incline to give a current or draft of water, and was used for the conveyance of logs or other lumber by means of the flow of the water. The way I happened to build this sluice was a case of necessity, as I will describe. The Messrs. Case, who owned the tannery at the place where I built the sluice at Mariaville, had a long race-way or penstock some three hundred feet in length on one side and in the bed of the stream below the dam for the purpose of carrying water from the dam to the flume in the tannery, and they called on me to come and help them out of their trouble. They said the log-driver wanted to cut a hole in their dam twelve feet by twelve feet and build a gate, and if that was done they said it would ruin them, as they had thirty thousand hides in their vats, which would spoil for the reason that the log-drivers would draw all the water from their pond and they could not run their hide nor the bark mills, as they had a limited supply of water to supply a gate of twelve feet by twelve. I made a contract with them to build a sluice to sluice by their tannery all the logs that were above their tannery or that ever would be, and in my contract I was not to lower

their pond one inch. I built the sluice, as I have already described, and it was a perfect success, and people came from distances to see this new and improved sluice. A part of this sluice is now in existence, which can be seen by any one who desires to see it.

"The length of this sluice or flume was some three hundred feet. The first logs that were put through the sluice were by me, and four men of us put through six hundred and forty logs in thirty-five minutes, and this was in April, 1858, and, as I have said before, millions of feet of logs have been put through it since that time.

"The side boards were of plank two and a half inches thick, fourteen inches wide, and three plank on a side. There was room on the horses to have planked up two or three plank higher if desirable, but it never was called for, it being about impossible for a log to get out over the sluice or flume."

The defendants read in evidence from a work called "Babbage on Economy of Machinery and Manufactures," which was published in London in 1841, a description of the slide at Alpnach in Switzerland, of which the following is a copy:

"The slide of Alpnach is formed entirely of about 25,000 large pine trees, deprived of their bark, and united together in a very ingenious manner without the aid of iron. It occupied about 160 workmen during eighteen months, and cost nearly 100,000 francs or £4250. It is about three leagues or 44,000 English feet long, and terminates in the lake of Lucerne. It has the form of a trough, about six feet broad and from three to six feet deep. Its bottom is formed of three trees, the middle one of which has a groove cut out in the direction of its length for receiving small rills of water, which are conducted into it from various places for the purpose of diminishing the friction. The whole of the slide is sustained by 2000 supports, and in many places it is attached in a very ingenious manner to the rugged precipices of granite.

"The direction of the slide is sometimes straight and sometimes zigzag, with an inclination of from 10° to 18°. It is often carried along the sides of hills and the flanks of precipitous rocks, and sometimes passes over their summits. Occa-

sionally it goes under ground, and at other times it is conducted over the deep gorges by scaffolding 120 feet in height."

The bill of exceptions states:

"The plaintiff's counsel, during the trial, constantly claimed that the plaintiff's invention was not a mere flume in V form nor a mere chute in V form, but he claimed that it was a combination of both, and he also claimed that the patentee was entitled to his patent because he had discovered that a chute made in V form in cross-section and built down a mountain's side of varying grades, so that its operation partook of the nature of both a flume and a chute, would do work which no other form of flume or chute would do. He also claimed that, because the plaintiff kept on improving such combined flume and chute until he found out by actual experiment and use that such combined flume and chute, when made without laps so as to form a smooth canal throughout its entire length, would do several times as much work as it would when it was made in any of the methods which had been used in constructing it prior to the month of September, 1868; that the invention was not to be considered, in law or fact, as a completed invention until it was so constructed; that it formed a smooth canal throughout its entire length, as mentioned in the specifications of the patent. All the way through the trial the plaintiff's counsel claimed that a 'flume' and a 'chute' were two different things. Plaintiff's counsel frequently, during the trial, spoke of plaintiff's said alleged invention as a 'flume.'"

Mr. M. A. Wheaton and *Mr. William M. Stewart* for plaintiff in error.

Mr. Z. Montgomery for defendant in error. The court declined to hear argument for defendant in error.

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

Nine exceptions were taken in the progress of the trial, and error is assigned in the giving of each one of the instructions which are shown in the first, second, third, fourth, fifth, sixth, seventh and eighth exceptions, and also in the refusal of the

court to give an instruction asked for by the plaintiff, as shown in the ninth exception. The first exception related to an observation by the court to the jury that counsel upon both sides had used the terms "flume" and "chute" synonymously, that the words of the patent were "an improved chute," but that in discussing it, the terms had been used as of the same signification. The bill of exceptions states that it was the fact that the plaintiff's counsel had frequently during the trial spoken of the alleged invention as a "flume." This is not only so stated as a conclusion from the evidence, but we find quite a number of questions put by plaintiff's counsel, which make use of the word "flume" in that way, as for instance: "What part of the flume does timber go fastest?" "As the chute is steepest the timber goes faster?" "How was the body of water in the lapped flume or chute, which you commenced using in 1868, as to quantity?" "To what extent has the V chute or flume gone into use, made as you made it, since 1868? since you made this in 1868?" "Do you recollect what time Mr. White finished that chute?" "What difficulties, if any, did you encounter in using that flume after Mr. White left it?" The remark of the court was fully justified and could not have affected plaintiff injuriously, as his claim was that his invention was a combination of a "flume" and a "chute," and the distinction contended for as existing between them was insisted on in that connection and made entirely clear throughout the case. And in the fifth instruction asked for by the plaintiff and given by the court, reference is made to Haines' patent as "a combination of flume and chute," although the patent does not cover any such combination.

The second exception was to the charge of the court in relation to the Alpnach flume or slide, to the effect, at first, that if the jury believed, from the evidence, that that slide substantially accomplished the object and purpose of the patented article, and that a party skilled in the business, reading that description, could easily and readily build a flume such as was patented here, then the description and publication would constitute a defence. But this part of the charge was withdrawn upon the defendants' counsel disclaiming the

slide as a complete anticipation, and the court then said: "It is not claimed by the defendant that this Alpnach slide, an account of which has been read to you, over in Switzerland, is a complete anticipation. It is only submitted to you as a possible suggestion of the idea of bringing timber down from the mountain sides." This disposes of this exception.

In the course of the charge, the court went over the facts in relation to the Cleveland flume, stating, among other things, that it was successfully operated until the 15th of August, 1868, and performed its functions and ends satisfactorily. Plaintiff's counsel specifically objected to the statement that the flume worked successfully, and a colloquy ensued as to what constituted successful operation, and the judge told the jury that that was the way he understood the testimony, as applicable to the issues, but said that he left the matter wholly to them to determine. In this, as the question arose, there was no error. *Transportation Line* v. *Hope*, 95 U. S. 297. Counsel for plaintiff objected to this part of the charge, also, upon grounds treated of under subsequent exceptions. The extract is quite long, and it is unnecessary to give it in full. It concluded as follows: "If, under all the evidence in the case, then, you believe that this flume built by Cleveland was in all its substantial elements the same as that afterwards patented by the plaintiff in this case, then your verdict must be for the defendants, because it is a conceded fact that that was a public use, or whether conceded or not, it was a public use, and it was in use more than two years before the plaintiff applied for his patent." This is the third exception, and may be considered with the fourth, fifth, sixth, seventh and eighth exceptions to the following portions of the charge:

4. "You have heard a good deal in this case, gentlemen, in regard to this matter of abutted joints or lapped joints. Now, I say to you, you may dismiss that particular quality of this flume from your consideration. There is nothing in the patent covering this matter of joining sections of the flume, and a party would be liable for infringement, I apprehend, if liable at all, who should use this flume with a lapped joint as well as if he used it with an abutted joint. As a matter of fact, the

evidence in this case, I believe, without contradiction, shows this in the Mariaville flume, made at Maine, a model of which is before you. The joints there were what mechanics call 'broken;' the boards ran over from one section half way over on the other, and were abutted.

"That would undoubtedly give strength to the flume, and where heavy materials were run through would probably be an advantage.

"On the other hand, where no very great strength is required, the ordinary abutted flume, as made by the plaintiff in this case, might have an advantage, and that perhaps for cheapness, and where other conditions obtained where it could be used, perhaps a lapped flume would cover all the requirements needed and be cheaper than either one of the others; but as a matter of law you may dismiss the whole matter of joints from your consideration one way or the other, because specifically it is not covered by the patent."

5 "If a wooden trough of 'V' form in cross-section, arranged on an incline, in whole or in part, and adapted to receive a flow of water for the conveyance of logs or timber or wood when thrown into said trough, and to transport the same downwardly along said trough by means of water flowing therein, was an old device at the time of plaintiff's alleged invention, the mere fact, if such be the fact, that plaintiff first applied this old device to the transportation of logs or timber or wood down the side of the mountain or of such a cañon or of an elevation, was no invention, and under such a state of facts, if you find them to exist, your verdict should be for defendants."

6. "The invention which is covered by the claim of plaintiff's patent is a chute of V form in cross-section, arranged on an incline, in whole or in part, and adapted to receive a flow of water for the conveyance of timber thrown into said trough and carried down by the water in the same. According to this description, the character of the incline is not stated, and therefore is not material, except that it should be steep enough to give the water strength of flow sufficient to transport the timber thrown into the trough."

7. "If the Cleveland chute was a chute of V form in cross-section, with its series of planks lapped at their ends, arranged on an incline in whole or in part and adapted to receive a flow of water for the conveyance of timber thrown into said chute and carried down by means of water in the same, and was finished on the 22d day of July, 1868, and was publicly and successfully used by Cleveland for the transportation of wood or timber in the manner aforesaid between the 22d day of July, 1868, and the 5th of August, 1868, then this was a public use of plaintiff's invention in the United States for more than two years before plaintiff's application for a patent, and constituted a constructive abandonment of plaintiff's invention, and under these facts, if you find them to exist, your verdict should be for defendants."

8. "If you believe that the wooden flume testified to by several of defendants' witnesses as having been constructed at Mariaville, Maine, was constructed and operated at that place in the year 1858 and thereafter, and was of 'V' form in cross-section, and was arranged from the top of a dam to a point 300 feet beyond said dam, and was adapted to receive a flow of water for the transportation of logs from the upper to the lower end of said flume and along the whole length thereof, and was set upon an incline steep enough to give the water in said flume strength of flow sufficient to swiftly transport the logs placed in the head of said flume to the lower end thereof and along the whole length thereof, and that this flume was successfully operated and many thousands of logs transported through it in the year 1858 and thereafter, previous to 1868, by means of a flow of water through said flume, then I instruct you that this was an anticipation of the invention claimed in plaintiff's patent, and that your verdict should be for the defendants."

The argument of plaintiff's counsel is that the lapped flume did not include Haines' completed invention; that it was one of Haines' experiments, which Cleveland saw and copied, but this could not affect Haines' right to go on and complete his invention by making further experiments and discoveries producing further new and useful results; that until it was a

completed invention the time had not arrived at which it was his duty to apply for a patent; and, therefore, that he forfeited nothing by delay.

Various instructions guarding this point were given by the court, and among them these:

"7. If an inventor applies for his patent within two years from the time that he first exhibits his completed invention in public no amount of public use within that two years either by the inventor or others will work any forfeiture of his right to a patent or constitute any evidence of abandonment."

"16. The jury will not consider any former flume or chute to be an anticipation unless they believe such former flume or chute developed the same mode of operation as the flume described in the plaintiff's patent."

Of course, if the patent for the completed chute described nothing which could be recognized as a patentable improvement differing from the prior lapped chute, then the objection has no basis to rest on.

The evidence leaves no doubt that the lapped chute was in public use with Haines' consent or allowance more than two years prior to the application for the patent.

Counsel further insists that the flumes referred to in the fifth and sixth exceptions did not include the plaintiff's invention and were not covered by his patent, and that whether this was so, and whether the "smooth canal" of the patent could be anticipated by the lapped chute, were questions of fact which the court should have left to the jury to decide.

A claim admitted by the Patent Office and acquiesced in by the patentee should not be enlarged by construction beyond the fair interpretation of its terms, and this patent says nothing about how the joints are constructed, nor whether the chute contained any joints at all or not; and this is admitted in the brief of the plaintiff's counsel.

The specification says: "This invention has for its object to furnish to the public an improved chute for facilitating the transportation of timber of all kinds from the tops or sides of mountains or other elevations, and consists in constructing a chute so as to present a V form in cross-section, the same

being arranged on an incline corresponding, more or less, to the surface of the ground over which it passes, and brought in connection with a spring or other water supply, to receive the water therefrom, and thus form a smooth canal throughout its entire length." This smooth canal is the result obtained by constructing the chute according to the description, and it covers lapped joints just as much as it does abutted joints. The Mariaville sluice was constructed on the same plan as the Haines' chute, and both were rectangular flumes. Haines himself testifies that his V chute was "a rectangular flume at an angle of 90°." It was intended to facilitate the transportation of timber of all kinds from other elevations as well as mountains, and was necessarily arranged on an incline adapted to the surface over which it passed; and the character of the incline was not stated.

The parts of the charge presented by exceptions five or six were correct, and, as to the other instructions, they described the working of the Haines flume as represented in the patent and in Haines' testimony, and by them the court charged the jury that if they believed from the evidence that the Cleveland and Mariaville chutes, or flumes, or sluices were constructed and successfully operated on the plan and in the manner described by the court, which was the plan and manner in which the Haines chute was operated, then this was an anticipation of the invention claimed by Haines. There was no error in this, for such was the conclusion of law, if the jury found the facts from the evidence to be as stated; and it is to be noted in this connection that the court in conclusion instructed the jury as follows:

"All questions of fact are exclusively for the jury to decide. The court does not decide nor instruct you as to whether the Mariaville sluice or any other sluice or flume or chute was or was not an anticipation of the plaintiff's patent. The question of anticipation is purely a question of fact, and is exclusively for the jury to determine."

The ninth exception was taken to the refusal of the court to give the following instruction: "The patent in this case is not merely for a V-shaped trough or sluice. Neither does it

cover a flume with a flat bottom and flaring sides. Neither does it cover a V-shaped flume or sluice so constructed on an even or nearly even grade, that it will carry throughout its length a full volume of water sufficient to float freely the wood or other material that is transported through it. None of these things would constitute any anticipation of the patented invention." This instruction was open to serious objection. It was not contended that either the Cleveland flume or the Mariaville sluice had a flat bottom, nor did the description of the patent require the chute to be so constructed as to have a given amount of fall. It is not error to refuse to instruct as to an abstract question, and instructions should never be given upon hypothetical statements of fact, of which there is no evidence. The charge of the court was as favorable to the plaintiff as he had any right to demand, and to have given the foregoing would have tended to confuse and mislead. It was properly refused. In fact, it appears to us that the evidence of anticipation was so conclusive, that, as contended by counsel for defendants in error, the Circuit Court would have been warranted in directing the jury to find for the defendants, inasmuch as, if there had been a verdict against them, the court would have been compelled to set it aside.

The judgment is affirmed.

Statement of the Case.

THE STEAMER ECLIPSE, BRAITHWAITE, Claimant.[1]

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 310. Argued April 29, 1890. — Decided May 19, 1890.

A court of admiralty has no equity power to wind up a trust concerning a licensed vessel, or to enforce an alleged contract of sale of it.

When an intervener in an admiralty suit *in rem* seeks a remedy concerning the vessel which is not maritime in its nature, the court is without jurisdiction over his claim, and the intervention should be dismissed.

A power was given to sell a vessel then lying in a dangerous position locked up in ice, in care of the master, who was part owner, for a specified sum: *Held*, to have been executed with reference to the then condition of the vessel, and not to apply to a sale purporting to be made under it after it had been brought by the master to a port of safety, and not to warrant a conditional sale after extrication, dependent upon the amount of damage which it might be found to have suffered.

A vessel was conveyed to two trustees, one of whom was the master, in equal shares, to hold as trustees for the benefit of all the owners, *cestuis que trust*. *Held*, that the master was half-owner of the legal title, and could not be removed under Rev. Stat. § 4250 on the application of *cestuis que trust*, claiming to be a majority of the equitable owners.

Robinson, Rea & Co., Kay, McKnight & Co., A. W. Cadman & Co., and Joseph McC. Biggert filed their libel in admiralty in the District Court of the Third Judicial District of the territory of Dakota, April 7, 1881, against the steamboat Eclipse, her tackle, apparel and furniture, and against all persons intervening for their interest therein, in a cause of possession, civil and maritime, alleging:

"First. That they are the majority of the owners of the steamboat Eclipse, her tackle, apparel and furniture; and,

[1] The docket title of this case is William Rea and Geo. F. Robinson, Copartners as Robinson, Rea & Co.; J. C. Kay and Woodruff McKnight, Copartners as Kay, McKnight & Co.; A. W. Cadman and ——— Cadman, Copartners as A. W. Cadman & Co.; Joseph McC. Biggert; and Joseph Leighton and Walter B. Jordan, Copartners as Leighton & Jordan, Appellants *v.* The Steamer "Eclipse," William Braithwaite, Claimant.

being such owners, on or about the 10th day of March, 1881, appointed one William Braithwaite master of said vessel, to navigate and sail her for them, at the wages agreed upon between him and the said owners, and the said William Braithwaite continued to be such master until the 4th day of April, 1881, when the libellants removed him as master and appointed another as master in his place.

"Second. That when the new master so appointed by libellants went on board said vessel by their orders, to enter upon his duties as such master, the said William Braithwaite refused to give up the possession or the papers of said vessel to the said master or to the libellants, who have demanded the same, to the great damage of the libellants."

Process was prayed against the vessel and Braithwaite, and was issued accordingly, returnable on the first Tuesday of June then next.

On the 15th of April, 1881, Braithwaite intervened as a claimant of the boat as "trustee, one of the owners, and master," averring that he was "managing owner and master of said steamer, and is entitled to the possession and command thereof, and that no other person is entitled to the possession or command thereof."

The libel was amended by stating that "the said Robinson, Rea & Co. owns a twenty-five hundred-dollar interest in said steamboat; the said Kay, McKnight & Co., four hundred and fifty dollars' interest in said steamboat; the said Joseph McC. Biggert, a twenty-five hundred-dollar interest in said steamboat; the said A. W. Cadman & Co., a one hundred-dollar interest in said steamboat; that the only other person having an interest in said steamboat is Wm. Braithwaite, who owns a twenty-five hundred-dollar interest in said steamboat."

Braithwaite filed an answer and exceptions on the 6th of May.

On the 4th of June the marshal returned that he had attached the boat under the process on the day it was issued, and that on the same day one Joseph Leighton put in a claim to the boat, and with the consent of the libellants, and upon Leighton's executing a stipulation of the value of $12,000, that

being the amount agreed upon between him and libellants, he had delivered the boat to Leighton. On the 25th of May, 1881, Leighton and Jordan filed their claim in intervention, as purchasers under a bill of sale, bearing date March 31, 1881, and prayed for a decree directing Braithwaite to execute a bill of sale of the Eclipse, and to deliver it and the papers of the steamboat to them, and on his refusal that all his interest in the boat be transferred to them, and for costs, and such other relief as a court of admiralty is competent to give.

The cause was heard upon the pleadings and proofs, and the District Court made its findings of fact and conclusion of law as follows:

"First. That the steamer Eclipse at the time of the commencement of this action was within the Third Judicial District of Dakota Territory.

"Second. That on February 4th, 1880, the claimant, William Braithwaite, and libellants, with the exception of Joseph McC. Biggert, made and entered into an agreement in writing as set forth in the fourth allegation in claimant's answer.

"Third. That subsequent to the execution of that agreement by the claimant a further clause was added substituting the name of Joseph McC. Biggert for that of John D. Biggert, which was signed by all parties to the agreement except the claimant.

"Fourth. That subsequent to the execution of the agreement the parties paid in eight thousand and fifty dollars and no more, in amounts as follows:

Capt. W. Braithwaite.	$2500 00
John D. Biggert.	2500 00
Robinson, Rea & Co.	2500 00
Cadman & Co.	100 00
Kay, McKnight & Co.	450 00

"Fifth. That in pursuance of that agreement the claimant went from Pittsburgh, Pa., to Bismarck, D. T., in February, 1880, to be present when the said steamer Eclipse should be offered for sale by the U. S. marshal, and on the 18th day of

February, 1880, the United States marshal sold said steamer at public auction at the port of Bismarck, and claimant bid her in under and in pursuance of the agreement between him and libellants for the sum of eight thousand five hundred and twenty-five dollars.

"Sixth. That claimant used in purchasing said steamer all of the money paid in by the parties to said agreement, viz., eight thousand and fifty dollars, and raised the balance of the purchase price, viz., four hundred and seventy-five dollars, on the credit of the said steamer, which was afterwards paid out of her earnings.

"Seventh. That the claimant, Wm. Braithwaite, and John D. Biggert, negotiated the purchase, and the marshal made the bill of sale to the claimant and John D. Biggert, as trustees.

"Eighth. That the claimant, William Braithwaite, took possession of said steamer Eclipse, as master, under and in pursuance of the said written agreement between him and libellants, and so continued in possession as master under said written agreement until he was removed by the United States marshal, by virtue of the writ issued in this case.

"Ninth. That immediately after the United States marshal took possession of the said steamer he removed the claimant and delivered the possession of the same to interveners, without any order to do so from this court.

"Tenth. That said steamer was run by claimant during the navigation season of 1880 under said written agreement and earned eight thousand dollars, which went into the hands of the financial agent under said agreement, and the same has not been apportioned or distributed.

"Eleventh. That on February 2d, 1881, libellants and claimant signed 'Exhibit A' of the intervention and petition of Joseph Leighton and Walter B. Jordan. At that time said steamer was lying in the Missouri River, a little below Fort Benton.

"Twelfth. That the committee named in said exhibit made a conditional agreement with Charles Batchelor, agent for Joseph Leighton, to sell said steamer for eleven thousand five hundred dollars, if she should not be damaged to exceed five hundred dollars.

Statement of the Case.

"Thirteenth. That on April 1st, 1881, a bill of sale was made for said steamer by libellants transferring her to interveners, but was not delivered, and the interveners had not paid any money thereon, and the claimant never signed said bill of sale, but refused to sign the same, and notified interveners and the committee that his interest in said steamer was not for sale, before any part of the purchase-money had been paid by the interveners, amounting to $2500.00, before the commencement of this action, — was paid after they were notified that the claimant would not sell his interest in said steamer.

"Fourteenth. That the interveners are not the sole owners of the said steamer, but the claimant, William Braithwaite, was at the time of the commencement of this action the owner of one-half interest therein, and part owner under and by virtue of the written agreement made with libellants.

"Fifteenth. That at the time of the commencement of this action libellants were not the owners of a majority interest in said steamer.

"Sixteenth. That there was due to the claimant, under the written agreement with the libellants, the sum of eight hundred dollars for wages at the time of the commencement of this action, and that no money whatever has been paid or tendered to him by any of the parties to this action.

"As a conclusion of law I find —

"1st. That the claimant, Wm. Braithwaite, is entitled to the possession of the steamer Eclipse."

The agreement referred to in the second finding is as follows:

"Articles of agreement made and concluded the 4th day of February, in the year of our Lord eighteen hundred and eighty, between W. Braithwaite and John D. Biggert, parties of the first part, and Robinson, Rea & Co., Kay, McKnight & Co., and Cadman & Co., of the city of Pittsburgh, county of Allegheny, State of Pennsylvania, parties of the second part, witnesseth: That whereas the steamboat 'Eclipse' is now hopelessly involved in debt, and the said parties of the second part being creditors of said steamboat, and the said

steamboat is about to be forced to marshal's sale, it being a well known and recognized fact the owners of said boat are unable to meet the indebtedness and prevent such sale, the parties hereto, fearing a sacrifice, to protect their several interests, prevent such a sacrifice, and form a fund for bidding up (in) said boat, and afterwards, if knocked down to them, to provide a working capital to manage and run said steamboat, covenant and agree as follows:

"First. That each of said parties shall contribute into a general fund the respective amounts set opposite their names, viz:

Capt. W. Braithwaite	$2500
John D. Biggert	2500
Robinson, Rea & Co.	2500
Cadman & Co.	100
Kay, McKnight & Co.	450

"Which several amounts are to be paid in cash by the respective parties to said parties of the first part in case said steamboat is purchased by them as herein provided, so much thereof as may be necessary to be used for paying such of the bid as may be necessary to be paid in cash and the remainder to be used as working capital.

"Second. That in addition to said cash fund the second parties are to contribute as capital the amounts of their respective claims against said steamboat, and in case said steamboat is bought by the parties hereto their claims are not to be paid at once, but to be receipted for by them and afterwards paid as hereinafter provided for.

"Third. When said steamboat is put up at marshal's sale the same is to be bid by said parties of the first part to such an amount as a majority in interest of said amount, $10,000.00, may determine, and be put in the name of W. Braithwaite and John D. Biggert, as trustees, and be held by them thereafter as such trustees for the following uses and purposes: First, that the same be managed and run in the interest of all the parties hereto, said William Braithwaite to act

Counsel for Parties.

as captain and John D. Biggert as financial agent; the said Braithwaite to receive a salary of $150 per month and said John D. Biggert to receive a salary of $100 per month during the time she is so run in the interest of the parties hereto.

"Fourth. Out of the earnings of said steamboat the respective claims of the said parties of the second part are first to be paid, and, secondly, the full amount of their respective portions of said $10,000 advancement is to be paid, and when said parties of the second part are fully paid then this trust shall cease and determine, and the said steamboat shall remain wholly to the use and benefit of the said Wm. Braithwaite and J. D. Biggert, their executors, administrators and assigns."

Exhibit "A," referred to in the eleventh finding, is as follows:

"PITTSBURGH, PENN., *February 2d*, 1881.

"We, the undersigned creditors and trustees of the steamer Eclipse, hereby appoint William Rea, John D. Biggert, and J. C. Kay our committee to effect sale of said steamer, granting unto them or a majority of them power to accept any offer which they may receive for the purchase of the steamer, it being expressly understood that they shall not accept any offer of less than eleven thousand five hundred dollars cash or equivalent in approved paper."

Thereupon judgment was rendered dismissing the libel, and also the intervening petition, with costs to be taxed against the libellants and interveners, respectively, and ordering the marshal to deliver the possession of the steamboat Eclipse, her tackle, apparel and furniture, to the claimant, William Braithwaite.

This judgment was affirmed by the Supreme Court of the Territory, and the cause brought to this court by appeal.

Mr. W. Hallett Phillips and *Mr. George W. Guthrie* for plaintiffs in error.

Mr. J. G. Bigelow for Braithwaite, claimant.

Opinion of the Court.

Mr. Chief Justice Fuller, after stating the case as above reported, delivered the opinion of the court.

Circuit Courts, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, are required to find the facts and the conclusions of law upon which their judgments and decrees are rendered, stating them separately; and we are limited, in reviewing such judgments and decrees, to a determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. 18 Stat. 315; *The Gazelle*, 128 U. S. 474, 484. And this judgment of the Supreme Court of Dakota Territory is subject to review in the same manner and under the same regulations. Rev. Stat. § 702.

By the purchase of the steamer on the 18th of February, 1880, under the agreement dated the fourth day of that month, Braithwaite and Biggert acquired the legal title to be held in trust for the payment to the "parties of the second part," Cadman & Co., Robinson, Rea & Co., and Kay, McKnight & Co., of their claims as creditors and their advances to assist Braithwaite and Biggert to make the purchase.

When this was accomplished, Braithwaite and Biggert were to remain equal owners of the boat freed from the encumbrance. Joseph McC. Biggert seems to have been substituted for John D. Biggert, but as our conclusion is reached without regard to that circumstance, they will be treated as one. The agreement provided that the steamer was to be commanded by Braithwaite, and she was accordingly run by him during the navigation season of 1880, and earned eight thousand dollars, which went into the hands of Biggert, who was financial agent under the agreement, but this money had not been apportioned and distributed when the libel was filed.

On the 2d of February, 1881, Braithwaite and Biggert, the trustees, and Robinson, Rea & Co., Cadman & Co. and Kay, McKnight & Co., the creditors, by a written memorandum signed at Pittsburgh, appointed Rea, Biggert and Kay a committee to effect the sale of the steamer, with power to accept

any offer of not less than eleven thousand five hundred dollars cash, or the equivalent in approved paper. At this time the steamer was lying in the Missouri River, a little below Fort Benton; but it appears from the interveners' petition, that on or about April 1 she had been released from the ice in which she had wintered, and been brought down to Bismarck by her master, Braithwaite. The court found that the committee made a conditional agreement with Leighton's agent to sell the steamer for eleven thousand five hundred dollars, if she should not be damaged to exceed five hundred dollars; that a bill of sale was made by libellants April 1, 1881, transferring the boat to the interveners, but it was not delivered or any money paid thereon; that Braithwaite refused to sign it and notified the interveners and the committee that his interest was not for sale, after which the interveners paid the sum of two thousand five hundred dollars; that Braithwaite was the owner of one-half interest in the steamer when the action was commenced; and that eight hundred dollars was due to him for wages under the written agreement with the libellants, no part of which had been paid or tendered to him by any of the parties.

The memorandum of February 2d was obviously entered into in view of the situation of the Eclipse as she lay locked up in the ice just below Fort Benton, and not as she was when safe in the port of Bismarck, and the authority vested in the committee to effect a sale was limited to the acceptance of an offer of not less than a certain amount in cash or its equivalent. A contract for a sale conditioned on how much the vessel might turn out to have been damaged by her environment and extrication therefrom was not within the power conferred, which contemplated only a sale for a sum certain at the risk of the buyer, and did not embrace an executory contract dependent on a contingency. We are of opinion, upon the facts found, that nothing had been done which operated to divest the legal title, and that when the libel was filed that title was in Braithwaite and Biggert, and the interest of the interveners and of Biggert's co-libellants was equitable merely. Braithwaite was the legal owner of one-half and was the

master in possession. Of that possession he could not be deprived on the ground set up in the libel, that the libellants were a majority of the owners, for such was not the fact; and, moreover, he was not only part owner and master, but by the written agreement, which was still subsisting, was entitled to such possession as master, and therefore not liable to removal under section 4250 of the Revised Statutes, which provides that "any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner," but that the section shall not apply "where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession."

So far as the creditors and interveners were concerned, if the former desired to wind up the trust, or the latter to enforce an alleged contract of sale, which is indeed what is asked by this intervention, they should have resorted to a different tribunal. While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews* v. *Essex Ins. Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title, *Ward* v. *Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 475; *Kellum* v. *Emerson*, 2 Curtis, 79; or exercise jurisdiction in matters of account merely, *Grant* v. *Poillon*, 20 How. 162; *Minturn* v. *Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart* v. *The John Jay*, 17 How. 399. The jurisdiction embraces all maritime contracts, torts, injuries or offences, and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. *People's Ferry Co.* v. *Beers*, 20 How. 393, 401. There was nothing maritime about the claims of the interveners, and the intervention was properly dismissed for want of jurisdiction over the subject matter.

Counsel for Parties.

The opinion of the Supreme Court of Dakota by Church, J., will be found reported in 30 N. W. Rep. 159, and deals with the facts in more detail than we have been at liberty to do.

We agree with the results arrived at by that court and its judgment is therefore *Affirmed.*

FARRAR *v.* CHURCHILL.

CHURCHILL *v.* FARRAR.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Nos. 266, 603. Argued April 16, 1890. — Decided May 19, 1890.

Cross-appeals in equity must be prosecuted like other appeals; and although they may be taken and allowed after removal of the cause, on appeal, to this court, yet that cannot be done after the lapse of two years from the date of the decree.

The court takes notice of the facts that in this case no assignment of errors was annexed to the transcript of the record as required by law, and that no specification of errors was made in the brief of counsel, as required by the rule, and expresses the hope that there will be no recurrence of such omissions.

If a purchaser of real estate, to whom representations of the character and value of the property are made by the vendor, visits the property itself prior to the sale, and makes a personal examination of it touching those representations, he will be presumed to rely on his own examination, in making the purchase, and not upon the representations of the vendor, and in the absence of fraud or concealment, cannot have the sale set aside: applying this rule to the present case, the bill must be dismissed.

In equity. Decrees dismissing the bill and the cross-bill. Each party appealed. The case is stated in the opinion.

Mr. Alexander Pope Humphrey (with whom was *Mr. George M. Davie* on the brief) for Farrar, administrator.

Mr. W. Hallett Phillips on behalf of Churchill submitted a motion to dismiss the cross-appeal on his brief. *Mr. W. Hallett Phillips* on behalf of *Mr. William L. Nugent* for Churchill and another, on the merits submitted on Mr. Nugent's brief.

Opinion of the Court.

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

John Churchill held title to certain lands in Mississippi, as trustee for Mary M. Clark, whose husband, M. L. Clark, in 1881, employed J. H. D. Bowmar, of Vicksburg, to sell the property, which he did, to A. B. Pittman, also a resident of that city, and on the 16th of March, 1882, Churchill as trustee, and Mr. and Mrs. Clark, all residing in Louisville, Kentucky, conveyed the lands and "the mules, implements and cattle on the plantation, save two horses, reserved by said two parties," to Pittman. This conveyance recites that it is "made this 9th day of January, 1882," but the attestation clause is that the signatures are appended the 16th day of March, 1882, "the date of the sale being of 9th January, 1882," and the acknowledgment by the grantors is March 16. The consideration of the conveyance was $5000 in cash, and four notes of Pittman for $5000 each, bearing interest at eight per cent and payable at one, two, three and four years from date.

In the latter part of January, 1882, certain other personalty on the premises was sold by Clark to Pittman for $1000 cash and three acceptances, one for $1000, due April 1, one for $1000, due May 1, and one for $1133.10, due June 1, 1882, with grace. Two of these acceptances were transferred by Clark to the trustee, who, when they matured, brought a separate suit upon each of them. The other acceptance passed into the hands of a *bona fide* holder without notice. When the first of the notes given as consideration for the conveyance became due, suit was brought upon it, and on the 7th of November, 1883, Pittman filed his bill in the Circuit Court of the United States for the Southern District of Mississippi against John Churchill, trustee, and Mr. and Mrs. Clark, alleging that fraudulent representations had been made to him in the sale of the plantation and accompanying personal property, and also in the matter of the personalty subsequently purchased from Clark, and asking that the three suits above mentioned be enjoined; for an account of damages suffered, and their application by way of recoupment, offering to pay

whatever might be found due on a proper accounting; and for general relief. It is admitted by counsel for appellants that the controversy over the latter purchase has been satisfactorily adjusted, and that so much of the transaction is only incidentally referred to in connection with the other fraud, circumvention and deceit alleged to have been practised. The bill claimed failure of title as to part of the land, but this was fully met by the answer, was not pressed below, and may be regarded as out of the case. The oath to the answers was not waived, and accordingly the answer of Mary M. Clark and John Churchill, trustee, was duly verified. Clark was not served and filed no answer, but his deposition in one of the law suits was put in evidence.

A cross-bill was subsequently filed by Churchill and Mrs. Clark, praying that an account be had and stated between the parties; that whatever was found to be due from Pittman on the notes for the purchase-money of the plantation should be decreed to be a lien thereon and the land sold to pay the same; that cross-complainants might have judgment for the amount found due on the two notes given for the personalty; and that a receiver be appointed, etc. It was ordered by the court that the cross-bill be treated and held as for a receiver only, and the complainant's bill as the answer thereto, as well upon the motion for a receiver as at the hearing; and that the cause be referred to an examiner and commissioner to take proof upon the issues set out in the bill, and "of the damages claimed by the complainant, and state an account between the parties, recouping against the purchase-money due the defendant the damages suffered and sustained by the complainant, if any, because of the alleged frauds and misrepresentations set out in the bill, should they be established to his satisfaction." Proofs were accordingly taken and a report made by the special commissioner, and a final decree rendered November 5, 1885, in favor of Churchill, trustee, for the recovery from the complainant of the sum of $19,129.50, to bear interest at the rate of eight per cent per annum from the second day of September, 1885, until paid; and that said sum of money with interest and costs should be a first and prior lien

on the lands in question, which should be sold, in satisfaction, in default of payment, as provided. From this decree an appeal was prayed by the complainant, an appeal bond duly given and approved December 1, 1885, with Thomas Rigby as surety, and the record was filed in this court November 13, 1886. The opinion of the District Judge holding the Circuit Court was filed September 2, 1885, and appears in the record.

On October 31, 1887, the defendants Churchill and Clark presented a petition for a cross-appeal to a Justice of this court, and obtained an allowance thereof, an appeal bond being approved, and a citation issued on that day. This petition was filed in the Circuit Court on the 7th day of November, 1887. The citation bears this endorsement: "On this 5th day of November, in the year of our Lord one thousand eight hundred and eighty-seven, I, as administrator of the estate of Alfred B. Pittman, accept service of the within citation, and hereby enter my appearance as such administrator herein, Walton Farrar, Adm'r." This citation accompanied the transcript of the petition, order and bond on cross-appeal filed in this court November 21, 1887. It appeared from the petition that since the original appeal was taken, Alfred B. Pittman had died, and the cause had been revived in the name of Walton Farrar, as administrator.

No decree in any action in equity can be reviewed by this court on appeal, unless the appeal is taken within two years after the entry of such decree. Rev. Stat. § 1008. And appeals are subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error. Rev. Stat. § 1012. As it is the filing of the writ of error in the court which rendered the judgment that removes the record, the writ of error is not brought in the legal meaning of the term until it is so filed, *Brooks* v. *Norris*, 11 How. 204; nor is an appeal "taken" until it is in some way presented to the court which made the decree appealed from. *Credit Company* v. *Ark. Central Railway Company*, 128 U. S. 258.

Cross-appeals must be prosecuted like other appeals, and therefore the cross-appeal is not taken until brought to the

attention of the court whose decree it questions. Although the record may have been removed to this court upon appeal, yet the court below may allow a cross-appeal, sign a citation, and approve a bond, within the two years prescribed. And so, when a cross-appeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the cross-appeal under the statute. As in this case, the petition, order and bond were not filed in the Circuit Court until after two years had elapsed from the date of the entry of the decree, the cross-appeal must be dismissed.

The amount due to Churchill, trustee, upon the notes and acceptances, does not appear to have been questioned, and with interest from January 9, 1882, to the 2d day of September, 1885, reached the sum of $28,541.70. The court passed upon exceptions embracing the items of damages claimed by way of recoupment set forth in the commissioner's report, and allowed the sum of $7454, which, with interest to September 2, 1885, made an aggregate of $9412.20, and that amount being deducted from the $28,541.70, left a balance of $19,129.50 in favor of the defendant Churchill, trustee, for which the decree was rendered. The dismissal of the cross-appeal dispenses with any inquiry into these allowances so far as the cross-complainants are concerned.

By section 997 of the Revised Statutes, an assignment of errors is required to be annexed to and returned with a writ of error, and the rules, regulations and restrictions are, as remarked before, the same as to appeals as in cases of writs of error. By the twenty-first rule of this court, it is, among other things, provided that the brief of counsel for plaintiff in error or appellant shall contain "a specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. . . . When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of

the court upon it. . . . When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion."

There is no assignment of errors annexed to the transcript of the record in this case, nor does the brief of counsel contain any specification of errors, such as is required by our rule. We shall not in this instance decline to consider what we suppose to be the errors relied on, but we call attention to this disregard of the statute and the rule, in the hope that nothing more is needed to prevent its recurrence hereafter.

Appellants insist that the Circuit Court erred in not allowing complainants for the difference in value of eight hundred acres of the land in question, alleged by them to have been warranted to be above overflow, but to be subject to it; for rebuilding fences and cleaning ditches, and replacing foundations to houses, in consequence of overflow; and for loss occasioned by deficiency in cleared land. The charge is of fraudulent representations, by the defendants or their agent, as to the freedom of the lands from liability to overflow from the Mississippi River, and also as to the number of acres of cleared land in the tract conveyed.

It was held in *Andrus* v. *St. Louis Smelting and Refining Company*, 130 U. S. 643, 648, that "false and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages, when the representations relate to some matter collateral to the title of the property and the right of possession which follows its acquisition, such as the location, quantity, quality and condition of the land, the privileges connected with it, or the rents and profits derived therefrom."

In *Myers* v. *Estell*, 47 Mississippi, 4, 21, the Supreme Court of Mississippi said: "In an action for the price of land sold, the purchaser may set up in defence the fact that the vendor

defrauded him by false representations as to the quantity, quality, condition or boundaries of the land. An offer to rescind the contract is not necessary in order to entitle the purchaser to maintain an action for damages for the fraud, . . . nor to entitle him to defend to the extent that he has suffered by the fraud, that is, to the extent that he would be entitled to recover in an action for damages founded on the fraud. The question may as well be tried in an action for the price, and the rights of the parties be settled in one suit, as to allow the plaintiff to recover the whole stipulated price, and then permit the other party to recover back the whole or a part in an action for the fraud. It is the policy of the law to avoid a multiplicity of suits." In *Estell* v. *Myers*, 54 Mississippi, 174, and 56 Mississippi, 800, the vendor having filed his bill for the foreclosure of his mortgage for the purchase money, the defence of false representations was set up, and it was held that the vendee might recoup in damages (1) the difference in the value of the land, either party being at liberty to show that the actual value was more or less than the land would have been worth if it had answered the representations, the contract price to be taken as the value of the thing as represented, unless a higher or lower value was clearly established; (2) for the deficit or loss of crop by reason of overflow; (3) for the drowning of cattle and animals; and (4) for the expense of replacing fences, etc.

The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. *Southern Development Com-*

pany v. *Silva*, 125 U. S. 247. "If the party to whom the representations were made," remarked Lord Langdale, in *Clapham* v. *Shillito*, 7 Beavan, 146, 149, "himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."

In *Hall* v. *Thompson*, 1 Smedes & Marsh. 443, it was held that where T. sold a tract of land to H., and represented that it contained only fifty or sixty untillable acres, whereas, about three hundred acres were unfit for cultivation, but, prior to the sale H. examined all the land more than once, H. was not entitled to rescind the contract on the ground of misrepresentation; *sed aliter*, if fraud had been employed to conceal the defects. And the court ruled, Sharkey, C. J., delivering the opinion, that misrepresentation entitling to relief must be in reference to some material thing unknown to the purchaser, either from not having examined, or from want of opportunity to be informed, or from entire confidence reposed in the vendor; that a concealment of material facts known to the vendor and unknown to the vendee, which are calculated to influence the action or operate to the prejudice of the vendee, is fraudulent, but that where the facts lie equally open to both vendor and vendee, with equal opportunities of examination, and the vendee undertakes to examine for himself, without relying on the statements of the vendor, it is no evidence of fraud in such case that the vendor knows facts not known to the vendee and conceals them from him. *Cleaveland* v. *Richardson*, 132 U. S. 318, 329.

At the same time, silence may be under some circumstances equivalent to false representation, *Stewart* v. *Wyoming Ranche*

Company, 128 U. S. 383, 388, where it is stated: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth." Applying these rules to the case in hand, we find no adequate ground for disturbing the decree.

Mr. and Mrs. Clark and the trustee, Churchill, resided in Louisville, in the State of Kentucky. The land was situated in the State of Mississippi, of which the complainant was a citizen, residing at Vicksburg. The bill states that the defendants' agent was "one J. H. D. Bowmar, a real estate agent in Vicksburg, said district, of undoubted integrity and of the most excellent standing and reputation, who was well known to your orator and possessed his fullest confidence, as indeed he does that of the whole community;" and that Bowmar delivered to complainant a written memorandum in respect to the plantation he proposed to sell as follows:

"First-class plantation in Bolivar County, on Miss. River; 1550 acres in tract, 1060 acres under cultivation; dwelling, with 6 rooms, halls and galleries, and suitable outbuildings; stables for 70 mules; 2-story barn, with cribs to hold 7000 bushels of corn; clover and millet lots; new fencing; place well ditched and drained; 14 cabins, 4 rooms each; 11 cabins, 2 rooms each, all new; a fine garden attached to the dwelling; 26 acres of the above cleared land detached, but only half a mile away; 4 cabins; 40 mules; full supply of farming implements; price, $25,000. Have written for terms.

"J. H. D. B.

"Owner of the property says 800 acres above overflow; the levee engineer says 500, and all high lands opposite Arkansas City, on Miss. River."

Complainant testifies that he purchased the property on the faith of this statement, and informed Bowmar that he relied "on all of these representations therein contained as material inducements." He says he visited the plantation in the latter part of December, after he "had closed the purchase. I was there about the 30th or 31st of December, 1881, but was not able to judge to what extent the particulars in Dr. Bowmar's mem. were accurate, except of course as to the buildings and fences." In his bill, Mr. Pittman puts the acceptance of the proposition as after his return from visiting the plantation, and this is confirmed by the evidence of Taylor, Clark's manager, that when Pittman came there he "stated that he wanted to buy the place, and thought that he would, in case he bought the place, need all the supplies." The letter of acceptance is as follows:

"Vicksburg, Miss., *Dec.* 29, 1881.

"Dr. Jas. H. D. Bowmar.

"Dear Sir: I accept your offer made in behalf of the owners of the Timberlake plantation, based on the representations made as to the amount, character, etc., of the lands and personal property. A. B. Pittman."

Mr. Bowmar testifies that he was employed by Mr. Clark to sell the place, and for that purpose delivered the memorandum to complainant, "which memorandum was based on information received from Mr. Clark and Captain Anderson, the engineer of levees for the district in which said land is located; I knew nothing personally of the property, as I, at the time of delivering the memorandum, informed the complainant. My recollection is that we agreed that he should make a personal examination of the property before purchasing, so as to satisfy himself as to the correctness or incorrectness of the statements contained in said memorandum. I was especially solicitous on this point, as I myself knew nothing of the place and did not wish the complainant to be misled by any representations coming from me." This is not specifically denied by Pittman.

Taylor states that in the last of December, 1881, Pittman

and Gayle, "both strangers to me, came to the plantation and introduced themselves to me, and said they wanted to look at the plantation with a view to buying it. I had horses saddled and took them all over the plantation, from one end to the other, all around it and through it, and brought them back to the house." We can find nothing in the evidence of Gayle to the contrary. After complainant's acceptance, he gave bond for the cash payment and received an order from Dr. Bowmar for the possession, which was dated January 23, 1882, and is set out in the bill. The deed was executed on the 16th of March, 1882, and conveys by description eight hundred and twenty-seven and fifty-five hundredths acres of cleared land, and one thousand and seven and sixty-nine hundredths acres of wood land.

Gayle, Pittman's manager, says that there was an overflow in 1882, by which they were delayed until the latter part of March before they could begin to plough, and it made them very late. Dr. Bowmar testifies that he saw the front of the plantation under water in 1844, when it was owned by Martin of Louisville; that he had been told that it overflowed in 1862, and that he heard it was overflowed in 1882; that the overflow of 1882 was more general and disastrous in its effect than any previous one within his knowledge or information, and he had lived in the valley of the Mississippi for about fifty years, his occupation prior to the war being that of a planter; that lands previously recognized as being above overflow were generally inundated by the overflow of 1882; and that the words "above overflow" are usually understood to mean above any overflow previously known to persons familiar with the valley.

There is no evidence in the record to show that Clark knew that the place had ever overflowed. The defendants, Churchill and Mrs. Clark, in their answer state that they have always understood that the greater part of the cleared land was above the ordinary overflows of the Mississippi River. They deny that said lands were overflowed several times or at all before said complainant purchased the same; and say that if the lands or the greater part of them were ever overflowed,

they did not and do not now know it; and that they have been informed and believe that even in the extraordinary overflow of 1882 a considerable part of said lands was not overflowed; they deny making any representations to the plaintiff to induce him to purchase the plantation, or that they made any representations at all in regard to it; they deny that Bowmar was authorized in any manner to make any representations to the complainant; they specifically deny that they made any representations in regard to the quantity of cleared land or the number of acres exempt from overflow, or that any one acting for them was authorized to make, or did make, any such representations; and they deny that they represented that there was one thousand and sixty acres of cleared land on the tract, but say that they believe the tract did and does contain that number. Inasmuch as an answer under oath was not waived, the rule that these denials must be disproved by evidence of greater weight than that of one witness, or that of one witness with corroborating circumstances, applies; and, taking this evidence together, it falls far short of establishing such a case as would entitle complainant to recover for false representations, as claimed. The memorandum refers to one thousand and sixty acres under cultivation; but Mr. Bowmar's testimony (and his undoubted integrity is conceded by complainant) is that he told the complainant that he was personally unacquainted with the land, and that he was solicitous that complainant should make a personal examination so as to satisfy himself as to the correctness or incorrectness of the statements in the memorandum; and it appears that complainant went personally upon the ground, which ought to have enabled him to determine substantially how many acres were in fact under cultivation.

Turning to the deed, it only purports to convey, and that by specific description, eight hundred and twenty-seven and fifty-five hundredths acres of cleared land. This deed was given in the middle of March, 1882, and it would be entirely unwarranted for us to hold the contents of that instrument to be overthrown by the proof before us, particularly in view of the rule that all preliminary negotiations or agreements were

merged in it. The contract had ceased to be executory, and while fraud, if clearly made out, might still justify relief, *Boyce's Exrs.* v. *Grundy*, 3 Pet. 210, the deed cannot be brushed away as the result of the evidence in this record.

Upon the whole case, we see no reason for doubting the correctness of the conclusions at which the District Judge arrived.

The cross-appeal is dismissed and the decree is affirmed.

RIDDLE *v.* WHITEHILL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 314. Submitted May 1, 1890. — Decided May 19, 1890.

The right of one partner to have the affairs of the firm wound up at once, upon the assignment by the other partner before the expiration of the term of all his property for the benefit of his creditors, is subject to modification according to circumstances.

When one of two partners purchases real estate with partnership funds, but takes title in his own name, and takes possession, his possession is the possession of both, and a trust results in favor of his partner.

Statutes of limitation do not run against a *cestui que trust* where the trust is express and clearly established; but when the trustee openly disavows it, and sets up adverse title in himself, time begins to run.

Where partnership affairs are being wound up in due course, without antagonism between the parties, or cause for judicial interference; assets are being realized and debts extinguished; and no settlement has been made between the partners; the statute of limitations has not begun to run.

When the right of action accrues between partners after a dissolution of the partnership, so as to set the statute of limitations in motion, depends upon the circumstances of each case, and cannot be held as matter of law to arise at the date of the dissolution, or to be carried back by relation to that date.

On the 10th day of March, 1885, George R. Riddle and Wilson S. Packer as trustee for Electra Packer, filed their bill of complaint in the Circuit Court of the United States for the Eastern District of Arkansas against Joseph M. Whitehill, alleging that on the 7th day of March, 1870, and for more than twenty

years prior thereto, the complainants and one T. J. Coleman, deceased, were partners in business under the firm style of Riddle, Coleman & Co., with their principal office at the city of Pittsburgh, in the State of Pennsylvania, engaged in dealing in coal, purchasing and transporting the same to the markets on the lower Mississippi River and elsewhere, and selling the same for a profit; that on said 7th day of March, 1870, said firm of Riddle, Coleman & Co. entered into an agreement with the defendant, Joseph M. Whitehill, as follows:

"Memorandum of articles of agreement between J. M. Whitehill, of the first part, and Riddle, Coleman and Co., of the second part, as follows:

"They agree to start a coal depot at Island Eighty-two in copartnership, and the said Whitehill agrees on his part to give his whole attention to the management at the coal yard, and the said Riddle, Coleman and Co. on their part are to furnish coal, capital, or credit to start the yard and charge no interest for the extra capital, in lieu of the said Whitehill's services at the depot. The said Whitehill is entitled to one-half the profits or losses, and the said Riddle, Coleman and Co. the other half, to be allowed about Vicksburg and New Orleans prices for the coal delivered at the island. It is also agreed that the business shall be carried on under the name and style of J. M. Whitehill and Co., and the partnership is exclusively for the purpose of selling coal by retail and no other, and to continue for five years, providing the firm of Riddle, Coleman and Co. wish to continue in the coal business, but if they want to stop the coal business or wish to draw out of the business at Eighty-two, the firm of J. M. Whitehill and Co. is to wind up their affairs and sell the stock to the best advantage for all parties concerned.

"This the 7th day of March, A.D. 1870.

"J. M. WHITEHILL,
"RIDDLE, COLEMAN & Co."

That in accordance with said agreement, Riddle, Coleman & Co. furnished to said firm of J. M. Whitehill & Co. a com-

plete plant and outfit with which to start a coal yard and depot for the retailing of coal at Island Eighty-two, consisting, in part, of a wharf boat, with rooms for office, for residence of Whitehill's family, quarters for the crew and employés of the firm; box boats or flats for measuring out and selling coal from boxes; shovels, chains, lines, barrows, anchors, etc., and also coal in barges and coal boats; insured the same, and also furnished additional plant and stock from time to time, as needed for said business; and Whitehill & Co. established a depot and coal fleet at Island Eighty-two, and carried on the business of a retail dealer in coal for about the space of two years at that point, and with the knowledge and consent of Riddle, Coleman & Co. started a retail store there, partly for the purpose of supplying their labor and partly for profit, carried on with the capital of Riddle, Coleman & Co., and for the profit of J. M. Whitehill & Co.; that in the latter part of the year 1871, or early in 1872, to induce the firm of J. M. Whitehill & Co. to change and remove their place of business, depot and coal fleet from Island Eighty-two to Arkansas City, the proprietors of the last-mentioned place leased to that firm, free of rent, the landing and coaling privileges at Arkansas City for a term of years, and donated to them certain town lots in said town; and, with the knowledge and approbation of Riddle, Coleman & Co., the firm of J. M. Whitehill & Co. changed, during the year 1872, the location of their business from Island Eighty-two to Arkansas City, and their fleet, barges, boats, and all their outfit were moved by one of the tow-boats of Riddle, Coleman & Co. from Island Eighty-two to Arkansas City; and from that time until October, 1877, and afterwards, J. M. Whitehill & Co. carried on the business as dealers in coal at Arkansas City, and also kept a general store, and did a general merchandising business at that place; that in addition to the landing and coaling privilege and the lots donated to said firm by the proprietors of said town, as an inducement to said firm to locate their business at that point, the said J. M. Whitehill, for the use of the firm, purchased a large number of other town lots in the town and paid for the same with the money of the firm, and in like manner acquired

and purchased an undivided half interest in the entire river front of the town for a distance of about three thousand feet, and leased the other half interest in the river front for a period of twenty-five years from the 1st day of May, 1872, and paid for the same out of the money and with the property of the firm, and expended large sums of the money of the firm in building residence houses, store-houses, warehouses, high water platform, a large and expensive ice-house, a hotel, and other valuable improvements on the lots and lands so donated to and purchased with the money and property of said firm, and certain lots are enumerated as having been conveyed as an inducement to locate at said town.

The bill further averred that the river front was leased to the firm on the 1st day of May, 1872, for five years, and this was subsequently extended for the additional term of twenty years from the 1st day of May, 1877; that on the 21st of July, 1875, an undivided half of the river front was sold and conveyed to the firm; that the deeds to some of the land and town lots were taken in the name of J. M. Whitehill & Co., and the deeds to other parts of the land and town lots were taken in the name of J. M. Whitehill, but complainants charge that all the land and town lots not donated to the firm were purchased with its money and for its benefit and held as partnership assets of the firm; that the business of the firm of J. M. Whitehill & Co. was very profitable, and large profits were realized therefrom, all of which, and much of the capital furnished by Riddle, Coleman & Co., were used in the purchase and improvement of the lots and river front, and J. M. Whitehill & Co. became largely indebted to said Riddle, Coleman & Co. for plant and stock furnished by them.

It was further alleged that Riddle, Coleman & Co. became embarrassed and were forced to suspend business, and on the 15th day of October, 1877, made an assignment to James Lynn, as assignee, under the laws of the State of Pennsylvania, of all their real and personal property, including the indebtedness to them from J. M. Whitehill & Co., and all their interest in the business, profits and property of said J. M. Whitehill & Co., of every description, to be collected or sold and disposed

of for the benefit of their creditors; that T. J. Coleman, a member of the firm of Riddle, Coleman & Co., died in the year 1878; that the surviving members of that firm, to wit, the complainants in this cause, devoted themselves, with the aid of the assignee, to realize on the assets of the firm, and after several years' attention to that object, and the application of their individual means to the payment of the debts of the firm, they succeeded in settling up and discharging the debts, and upon a public sale, made in virtue of the powers contained in the deed of assignment, with the express assent of their creditors, all the uncollected assets of the firm, including the indebtedness of the defendant, J. M. Whitehill, and the firm of J. M. Whitehill & Co., were assigned and conveyed by said assignee to W. S. Packer, as trustee for Electra Packer, and George Riddle, by deed dated the 3d day of January, 1885, a copy of which was attached.

Complainants averred that no part of the indebtedness of J. M. Whitehill or J. M. Whitehill & Co., and no part of the assets of said J. M. Whitehill & Co., was ever paid to or collected by the said assignee, and the same and the right to sue for and collect the same is now vested in the complainants, who are also the sole surviving partners of said firm of Riddle, Coleman & Co.; that at the time of the assignment, the 15th day of October, 1877, the firm of J. M. Whitehill & Co. was indebted to the firm of Riddle, Coleman & Co. in the sum of $10,000 for plant, stock, boats, barges, flats, ferry-boats, tugs, anchors, etc., etc., and for coal furnished and supplied to J. M. Whitehill & Co. by Riddle, Coleman & Co.; that Riddle, Coleman & Co. were entitled to one-half of the profits realized by said firm, and also entitled to one-half of the assets of the firm of J. M. Whitehill & Co., which amounted in part to over $65,000, given in various items; that defendant Whitehill published a dissolution of the firm, and took and retained possession of all its assets, and on the 10th day of March, 1881, sold and delivered to Brown, Jones & Co. a part of the property of the firm of J. M. Whitehill & Co. for the sum of $16,000, and also leased to Brown, Jones & Co. the coal privilege at the landing for a term of ten years, at the price and

sum of $800 per annum, and has collected and received the same for three or four years, and is now in receipt of the same; that there is on said river front a large and valuable ice-house, warehouses, and other large and valuable improvements erected thereon with the money and for the benefit of J. M. Whitehill & Co., from which defendant Whitehill has collected rents and received the profits since the date of the assignment of Riddle, Coleman & Co.; that Whitehill has carried on the business of a receiving and forwarding merchant and ferryman, by reason of holding the river front, and derived large profits; that he has received annually large sums of money for the rent of houses and a hotel, built with the money of the firm of J. M. Whitehill & Co. and Riddle, Coleman & Co. are entitled to one-half of all these receipts; that defendant Whitehill has sold some of the lots embraced in the conveyances aforesaid and received the money therefor, and has exchanged some of the lots for other property situated in the town, and, as the title was in some instances taken in his own name, the purchasers or grantees of some of the lots may have taken the same for a valuable consideration without notice of the rights of Riddle, Coleman & Co., but defendant Whitehill should be held to account for the proceeds of such lots, to one-half of which complainants are entitled; and that, as complainants charge on information and belief, Whitehill purchased with the money of Whitehill & Co. a plantation, and took the title thereto in the name of his wife and his brother, and ought to be required to account for the same. The bill then prayed that an account be taken of the partnership business of the firm of J. M. Whitehill & Co.; that that firm may be dissolved; that a master may be appointed to state an account of the business and property, and the liabilities of the firm; the indebtedness of J. M. Whitehill & Co. to Riddle, Coleman & Co.; the interest of Riddle, Coleman & Co. in the assets of the business of J. M. Whitehill & Co.; the profits realized by Whitehill from the property and privileges of J. M. Whitehill & Co., etc., etc.; and that at the final hearing complainants may have a decree for the amount due from the defendant, and that the lots and

real estate purchased with the assets of the firm, remaining undisposed of to *bona fide* holders without notice, be appropriated to the satisfaction of the decree, and a judgment be rendered against the defendant for any balance due complainants on the business of said partnership; and that a receiver be appointed; and for general relief. The bill was verified by one of the complainants.

The defendant Whitehill demurred, and assigned for causes of demurrer:

"First. That said bill, in case the same were true, contains no matter of equity whereon this court can ground any decree or give complainants any relief as against this defendant.

"Second. That it appears by the bill that said James Lynn is a necessary party, inasmuch as it is stated that said Riddle, Coleman & Co. assigned to him all the real and personal property of said firm, and it does not appear that he has disposed of the same, and the bill seeks action in relation thereto.

"Third. That the right of action, if any existed, to sue for the settlement of the partnership matters, accrued at the time of the dissolution of said firm of J. M. Whitehill & Co., on October 15, 1877, and more than seven years next before the institution of this suit, and that the demand is stale and is barred as a cause of action against this defendant.

"Fourth. That it appears from the bill that the creditors of said Riddle, Coleman & Co. were paid before the pretended sale to complainants by said James Lynn, as assignee, on January 3, 1885, and that there is no privity between complainants and this defendant to enable them to call on him for a settlement of said partnership matters."

On the 14th of April, 1886, the court sustained the demurrer, and ordered the bill to be dismissed for want of equity, and complainants prayed an appeal to this court, which was allowed. On the 7th of October, 1886, one of the days of the same term, the complainant moved to set aside the decree dismissing the bill, and for leave to amend the same by inserting therein: That the defendant continued in the possession and control of the assets belonging to the firm of J. M. Whitehill

& Co. for the professed purpose of paying the debts of the firm, representing to the assignee, Lynn, that J. M. Whitehill & Co. were indebted in the sum of $20,000; that he, the defendant, had, in 1879, made arrangements to pay said indebtedness by instalments of $6000 per year, and that he was using the assets of the firm for that purpose; that defendant did not make any adverse claim to the assets belonging to J. M. Whitehill & Co., until long after the sale hereinbefore stated, in 1881; and that, after paying all the debts of J. M. Whitehill & Co., the defendant is indebted to the firm of Riddle, Coleman & Co., and subject to account, as hereinbefore stated. This motion to set aside the decree and for leave to amend was continued on the 23d day of October, 1886, to the next term, at which term the motion was overruled. The transcript of record was filed in this court on the 2d day of April, 1887.

The sections of the statute of limitations of Arkansas referred to are as follows:

"Sec. 4471. No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit, shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed. . . ."

"Sec. 4478. The following actions shall be commenced within three years after the cause of action shall accrue, and not after:

"First. All actions founded upon any contract or liability, express or implied, not in writing. . . ."

"Sec. 4483. Actions on promissory notes, and other instruments in writing not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward."

"Sec. 4488. All actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued." Dig. Stat. Ark. 1884, p. 886.

Argument for Appellee.

Mr. John Dalzell for appellants.

Mr. D. H. Reynolds for appellee.

The effect of the assignment was to dissolve the partnership of J. M. Whitehill & Co. *Jones* v. *Fletcher*, 42 Arkansas, 462; *Ogden* v. *Arnot*, 29 Hun, 146; *Bank* v. *Carrollton Railroad*, 11 Wall. 624.

The allegation in the bill that the business was continued, is in plain contradiction of the legal effect of the assignment, and of the statement of the bill that notice of dissolution was published by Whitehill, and the continuance was impossible from the nature of the business, as the failure of Riddle, Coleman & Co. to supply coal to sell closed the business, and the allegation of continuance must be treated as surplusage, and as not admitted by the demurrer. The contract exhibited with the bill must therefore be held to govern and limit any statement in the bill inconsistent therewith. *Dillon* v. *Barnard*, 21 Wall. 430, 437; *Bonnell* v. *Griswold*, 68 N. Y. 294.

By the assignment of Riddle, Coleman & Co., the assignee acquired only the right of Riddle, Coleman & Co. in the partnership of J. M. Whitehill & Co., that is to say, the right to a share of what might remain after payment of the debts of the firm and the settlement of its accounts. *Bank* v. *Carrollton Railroad*, 11 Wall. 624, 628; *Case* v. *Beauregard*, 99 U. S. 119.

After the assignment of Riddle, Coleman & Co. it was the duty of the assignee to act promptly and take charge of and gather up the assets and reduce the same to money and pay the debts of the assignors and turn over to the assignors any surplus, after saving any sum necessary to pay off the debts of J. M. Whitehill & Co., over and above the assets of said firm duly applied. *Raleigh* v. *Griffith*, 37 Arkansas, 150; *Teah* v. *Roth*, 39 Arkansas, 66.

The laws of Arkansas and the laws of Pennsylvania contemplate that the assignee shall, within a year after the assignment, convert the assets into money to pay the debts of the assignor, and immediately after the expiration of the year, to

file in court an account current of his business as assignee for settlement. It was the duty of the assignee, if there was anything that might go to Riddle, Coleman & Co. upon settlement of the partnership of Whitehill & Co., to sue for a settlement; and this suit should have been brought within the time given for such assignee to close his trust, viz.: one year.

If any one could maintain this kind of suit, it must be the assignee, as he was invested by the assignment with the rights of the assignors, and it does not appear that he has parted with these rights; for, if as alleged, the debts of Riddle, Coleman & Co. were paid before the pretended sale of January 3, 1885, the assignee had no power to sell, and complainants as purchasers, acquired no rights by the sale and transfer that will authorize them to sue for a settlement of the partnership matters of J. M. Whitehill & Co. without joining with the assignee, and with the legal representatives of T. J. Coleman, deceased.

And if all the right of action in the assignee was barred in January, 1885, he could transfer no right to any one by deed, sale or otherwise. The statute bar destroys the right that once existed, and confers title on claimant in possession. *Meeks* v. *Olpherts*, 100 U. S. 564; *Trimble* v. *Woodhead*, 102 U. S. 647.

It seems to be well settled, that in regard to real estate, the undisturbed possession of the wrong-doer for the time necessary to bar the action vests of itself a good title in the party holding such possession. It would be a curious application of this principle in the present case, which concerns real estate, to hold that this same lapse of time, instead of making good the defendant's title, or acting as a bar to the right to bring suit, transfers that right to another unimpaired by the lapse of time.

The right of action, if any existed, to sue for the settlement of the partnership matters of J. M. Whitehill & Co. accrued at the time of the dissolution of said firm on October 15, 1877, and more than seven years next before the institution of this suit, and therefore the demand is stale and is barred as a cause

of action against the defendant Whitehill, by the statute of limitations of three years, of five years and of seven years.

Constructive trusts and all trusts, save purely equitable or express trusts, are in equity subject to the statute of limitations. A clear distinction is made, recognized and acted on, between parties who are actual trustees of express trusts, and those who are placed in relations of trust and confidence — between actual trustees created by deed, and whose relations can only be established by the deed creating the trust, and such persons as are constructively trustees, and whose relations as trustees may be established by parol proof. As to the actual trustees the statute does not run, and as to constructive trustees it does run. *Adams* v. *Taylor*, 14 Ark. 62; *Baxter* v. *Moses*, 77 Maine, 465; *Knox* v. *Gye*, 4 English Rep. L. R. 5 H. L. 656; *Noyes* v. *Crawley*, 10 Ch. Div. 31; *Speidel* v. *Henrici*, 120 U. S. 377.

Between partners there is not such implied trust as will exclude the operations of the statute of limitations. *Adams* v. *Taylor*, 14 Arkansas, 62; *McClung* v. *Capehart*, 1 N. W. Rep. 123; *Knox* v. *Gye*, *ubi supra*; *Noyes* v. *Crawley*, *ubi supra*; *Clay* v. *Freeman*, 118 U. S. 97.

Courts of law and courts of equity have concurrent jurisdiction in the matter of accounts, and of accounting in the matters of partnership. *Cochrane* v. *Allen*, 58 N. H. 250; *Knox* v. *Gye*, *ubi supra*; *Noyes* v. *Crawley*, *ubi supra*.

The statute of limitations applies with equal force in courts of law and courts of equity in cases of concurrent jurisdiction (as in this case), courts of equity acting in obedience rather than in analogy to the statutes. *Adams* v. *Taylor*, 14 Arkansas, 62; *Wilson* v. *Anthony*, 19 Arkansas, 16; *Faulkner* v. *Thompson*, 14 Arkansas, 478; *Sullivan* v. *Hadley*, 16 Arkansas, 129; *Ringo* v. *Woodruff*, 43 Arkansas, 469; *Bank of U. S.* v. *Daniel*, 12 Pet. 30, 56; *Godden* v. *Kimmel*, 99 U. S. 201; *Speidel* v. *Henrici*, *ubi supra*; *Rhode Island* v. *Massachusetts*, 15 Pet. 233; *Lansdale* v. *Smith*, 106 U. S. 391; *Noyes* v. *Crawley*, *ubi supra*.

It is submitted that the authorities in Arkansas, in this country and in England, maintain the proposition that the

statute of limitations may be relied on as a defence in a suit between partners or their representatives, for a settlement of the partnership business; and that the Circuit Court did not err in sustaining the demurrer and dismissing the bill for want of equity.

Mr. Chief Justice Fuller, after stating the case as above reported, delivered the opinion of the court.

Upon the face of the bill, of which the transfer to the complainants formed a part, we think the latter could maintain the suit if a cause of action existed, and we assume that the demurrer was sustained and the bill dismissed as the result of the application of the statute of limitations or the doctrine of laches. Should this conclusion have been reached upon the facts admitted? By the terms of the agreement in question, the partnership was to continue for five years, provided Riddle, Coleman & Co. wished to remain in the coal business; but, if not, or if they desired to terminate this particular connection, J. M. Whitehill & Co. were "to wind up their affairs and sell the stock to the best advantage for all parties concerned." The five years ran out on the 7th day of March, 1875, but the firm went on in business. Many of the lots in question had been conveyed to Whitehill & Co. prior to 1875, and the term of the lease of the river front did not expire until May, 1877, when it was renewed for twenty years, an indication that the firm had then no intention of bringing its business to an end. The management at Arkansas City was confided to Whitehill, while Riddle, Coleman & Co. furnished the capital invested in the plant, and the coal from year to year, dealing in which was the specific object of the enterprise.

On the 15th day of October, 1877, the firm of Riddle, Coleman & Co., which had then been carrying on business at Pittsburg for more than twenty-seven years, was compelled to make an assignment. If a member of an ordinary partnership assigns, where the partnership is at will, the assignment dissolves it, and if it is not at will, the assignment may be treated by the other members of the concern as a cause for dissolu-

tion. The assignee of one partner cannot be made a member of a partnership against the will of the other partners, but the absolute right to have the affairs of the firm at once wound up, when the specified duration of the partnership has not expired, may be subject to modification according to circumstances. *Taft* v. *Buffum*, 14 Pick. 322; *Buford* v. *Neeley*, 2 Devereaux Eq. 48; *Monroe* v. *Hamilton*, 60 Alabama, 226; Lindley on Part. *364; *Helmore* v. *Smith*, 35 Ch. Div. 436. In the case at bar J. M. Whitehill & Co. continued in business after October, 1877, although the bill does not state for how long a time. The failure of Riddle, Coleman & Co. presumably prevented their furnishing coal, yet the averments of the bill show that the business of Whitehill & Co. had expanded far beyond the traffic to which it had been originally confined. But assuming that by the assignment the partnership of J. M. Whitehill & Co. was dissolved, it was the duty of Whitehill to proceed at once to wind up the business and sell the stock to the best advantage, not only for himself, but for Riddle, Coleman & Co., and this was in compliance with the express provisions of the agreement. It appears that a portion of the stock, to the amount of $16,000, was not sold until the 10th day of March, 1881, at which time the coal privilege at the landing was leased for ten years; and while some of the real estate had been disposed of, a large part remained yet to be divided, when the bill was filed. The proposed amendment showed that the firm's liabilities were not liquidated until 1883.

According to the allegations of the bill, on the 15th day of October, 1877, when Riddle, Coleman & Co. assigned, the firm of J. N. Whitehill & Co. was the owner of town lots, of river front, residences, store-houses, and a hotel, bought and paid for with the partnership funds. The title stood in the name either of J. M. Whitehill or of J. M. Whitehill & Co.; and part of the property was in use for partnership purposes and so employed, while a part was not, but represented the investment of partnership gains. A partnership, as such, could not hold the legal title to real estate, as it is not a person in fact or in law, and the situation in this case is well described in

Percifall v. *Pratt*, 36 Arkansas, 464, where it was held: "If the title be made to all the partners by name, they hold the legal title as tenants in common, without survivorship. If to one partner alone, the whole legal title vests in him, which is the case, also, where the title is to a partnership name, which, as in this case, expresses the name of one party only, with the addition of 'and company.' If the deed be to a name adopted as the firm style, which includes the name of no party, it passes nothing in law. The same occurs where the deed is to one already dead."

As to this real estate, whether the deeds ran to J. M. Whitehill & Co. or to J. M. Whitehill the latter held the title in trust, and it was so ruled in *McGuire* v. *Ramsey*, 9 Arkansas, 518. It is there said that "where real estate is purchased and paid for with partnership funds, but conveyed to one of the partners alone, a trust results in favor of the other partners;" and that lapse of time "cannot be allowed in favor of one partner in possession of real estate against the other, for the possession of one is the possession of both."

Lord Redesdale in *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 633, laid down the rule, that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the statute of limitations will run from the time that the circumstances of the fraud were discovered.

"As a general rule, doubtless," said Mr. Justice Gray, delivering the opinion of the court in *Speidel* v. *Henrici*, 120 U. S. 377, 386, "length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*. But this rule is, in accordance with the reason on which it is founded, and as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification, that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting

upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust;* as when, for instance, such transactions take place between the trustee and the *cestui que trust* as would in case of tenants in common amount to an ouster of one of them by the other. . . . In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law." Courts of equity sometimes act in obedience to the statute, and sometimes apply it by way of analogy. Where the cause of action is legal and the statute has barred the remedy at law, the defence is as complete in equity as at law, but where the case falls within the proper, peculiar and exclusive jurisdiction of a court of equity the statute is not necessarily applied.

Real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the partners; but the principle of equitable conversion has no further application. *Clagett* v. *Kilbourne*, 1 Black, U. S. 346, 349; *Shanks* v. *Klein*, 104 U. S. 18; *Allen* v. *Withrow*, 110 U. S. 119; *Buchan* v. *Sumner*, 2 Barb. Ch. 165; *Collumb* v. *Read*, 24 N. Y. 505. Whitehill here was in possession for the benefit of the parties lawfully entitled, and apparently occupied no position adverse to them.

In *Knox* v. *Gye*, L. R. 5 H. L. 656, the effect of the statute of limitations, 21 Jac. 1, c. 16, providing that all actions of account and upon the case should be commenced and sued within six years next after the cause of such action or suit, and not after, as repeated in the 9th section of the 19th & 20th Vict. c. 97, with this additional provision, namely, that "no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit," upon a bill for an account brought by the executor of a deceased partner against the survivor, more than six

years after the death, was considered. It was held that the matter, namely, the dissolution of the partnership, and, consequently, the possession of the partnership property by the surviving partner, arose more than six years before the commencement of the suit and was barred; that the right of action arose upon the death of the deceased partner, and the cause of action was the possession of the partnership estate by the surviving partner; that where, in the matter of the enforcement of a legal right, a court of common law would, under the provisions of the statute of limitations, refuse the enforcement after the lapse of six years from the accruing of the right of action, a court of equity would, where its power to grant relief was asked for under similar circumstances, adopt the principle of the statute, and decline to grant such relief.

Lords Westbury, Colonsay and Chelmsford concurred in the result, while the Lord Chancellor (Lord Hatherley) dissented. It was held by Lord Westbury that "there is no fiduciary relation between a surviving partner and the representatives of his deceased partner; there are legal obligations between them equally binding on both;" but the Lord Chancellor insisted with emphasis that "there is a fiduciary relation between them. The surviving partner alone having the legal interest in the partnership property, and being alone able to collect it, there arises a right in the representatives of the deceased partner to insist on the surviving partner holding the property, whenever received, subject to the rights of the deceased partner, and he cannot make use of the partnership assets without being liable to an account for them."

We are not prepared to decide that there is a definite rule of law that statutes of limitation commence to run immediately upon the dissolution of a partnership, irrespective of the circumstances of the particular case. Mr. Justice Lindley, in his excellent work on Partnership, says: "So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute of limitations has, it is conceived, no application at all; but as soon as the partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the stat-

ute begins to run." American ed. 1888, * 510. The learned author in his last edition cites *Knox* v. *Gye*, *supra*, and *Noyes* v. *Crawley*, 10 Ch. Div. 31, in which Vice Chancellor Malins quotes the above language with commendation, and dissents from *Miller* v. *Miller*, L. R. 8 Eq. 499. Where, however, partnership affairs are being wound up in due course, without antagonism between the parties, or cause for judicial interference; where assets are being realized upon and liabilities extinguished, and no settlement has been made, the cause of action has not accrued, and the statute has not begun to run. Of course, where the partnership expires in accordance with its terms, or is dissolved by agreement, each partner as a general rule has an equal right to the possession of the partnership property, and if they cannot agree as to the disposition and division of it, a court of equity will appoint a receiver to collect and apply the effects. Each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided, and each may insist on a sale, and that nothing shall be done except with a view to wind up the concern. But in case of dissolution by death, surviving partners are invested with the exclusive right of possession and management of the whole partnership property and business, for the purpose of paying the partnership debts and disposing of the effects of the concern for the benefit of themselves and the estate of the deceased. *Emerson* v. *Senter*, 118 U. S. 1. If they go on with the business under the credit, and risking the effects of the firm, and profits result, they will be bound to account for those profits as belonging to the firm, and they are liable to be charged with interest on the funds they use, though no profit, or even a loss, is made. And so, upon dissolution by an assignment, the solvent partners are in equity entitled to hold the effects and property in the way that surviving partners do, and if they continue the business it is at their own peril, in the absence of special provision.

When the right of action accrues, so as to set the statute of limitations in motion, depends, as we have said, upon circumstances, and cannot be held as matter of law to arise at the

date of the dissolution, or to be carried back by relation to that date. *Todd* v. *Rafferty's Administrator*, 30 N. J. Eq. (3 Stewart) 254; *Partridge* v. *Wells*, 30 N. J. Eq. 176; *Prentice* v. *Elliott*, 72 Georgia, 154; *Hammond* v. *Hammond*, 20 Georgia, 556; *Massey* v. *Tingle*, 29 Missouri, 437; *McClung* v. *Capehart*, 24 Minnesota, 17; *Hendy* v. *March*, 75 California, 566; *Foster* v. *Rison*, 17 Grattan, 321; *Boggs* v. *Johnson*, 26 W. Va. 821; *Atwater* v. *Fowler*, 1 Edw. Ch. 417. In *Causler* v. *Wharton*, 62 Alabama, 358, the court held that where one partner, by a written agreement with the other, left the partnership assets with him to dispose of, whenever he could do so at a fair price, a continuing trust was thereby created, and the bar of the statute of limitations would not begin to run against the right to an account of the partnership dealings, so long as the party to whom the assets were delivered acted under the trust or admitted that it was still continuing. Under the agreement here, it is obvious that it was Whitehill who was to close up the business at Arkansas City, which had been under his management; and under the averments of this bill such a trust was created as would not be barred by the statute of limitations until it was repudiated by Whitehill, which attitude on his part there is nothing here to disclose unless his defence to the bill may be construed as such.

In *Adams* v. *Taylor*, 14 Arkansas, 62, it was held that "the relation between copartners does not create such a trust as will exempt a bill for a mere account and settlement from the operation of the statute of limitations, or the analogous bar by lapse of time, or staleness of the demand." That was a case where a partner came into chancery eight years after the dissolution of the partnership, for an account and settlement, and no circumstances of fraud, accident or concealment were alleged to have prevented the settlement after the partnership affairs had been wound up. The question of when the right of action accrued did not arise, nor was that anything more than, as stated by the court, a bill for a mere account and settlement; whereas we have in this case the state of affairs which existed in *McGuire* v. *Ramsey*, 9 Arkansas, 518, where, with respect to real estate paid for with partnership funds, it was

held that the plea of the statute could not be allowed in favor of one partner in possession of such real estate as against the other.

The case of *Chouteau* v. *Barlow*, 110 U. S. 238, is very much in point. Sanford, Chouteau, Sarpy and Sire were copartners in business in St. Louis. During its existence the partnership purchased and paid for with the partnership funds, acre lands and town lots in Wisconsin and Minnesota, and held the same for the benefit of the copartnership. The firm was dissolved in 1852 by the retirement of Sanford, and some twenty-four years thereafter his executor and trustee filed a bill against the representatives of the other members of the firm, who had all died, to compel an accounting touching the property of the partnership and the proceeds of such property. The dispute between the parties was as to the terms of the agreement of dissolution of the partnership in 1852. The complainants alleged that Sanford released to Chouteau all his interest in the estate of the firm, except its lands and town lots in Minnesota, and that Chouteau agreed to relieve Sanford from the debts of the firm and assure to him his proportion of the lands and town lots free from any debt or liability growing out of the copartnership affairs. The answer alleged that Chouteau agreed to relieve Sanford from the debts of the firm, and that Sanford released to Chouteau all his interest in the assets of the firm, including his interest in any of the lands and town lots in Minnesota; and further averred, by way of defence, that more than six years had elapsed since the accruing of any of the alleged causes of action set out in the bill. The opinion of the court thus concludes: "On the whole case, we are of opinion, that, after the dissolution of the St. Louis firm, the members other than Sanford were entitled to collect and dispose of all its assets, including the Minnesota 'outfit' and the Minnesota lands, to liquidate its affairs, without the interference of Sanford; that all claim on their part against Sanford individually was relinquished, leaving recourse only to those assets; and that, if there should be any surplus of those assets, after paying the debts of the firm and the advances of any of the other partners therefor, Sanford's executors would be entitled

to his proper proportion of such surplus. No judicial accounting has been had on the basis of the rights of the parties as we have defined them. The bill prays that the defendants may account touching the affairs and property of the copartnership and touching the proceeds of any such property. We think the plaintiffs are entitled to such an accounting, and are not barred from it by laches or by the operation of any statute of limitations."

In the case at bar, the business of Riddle, Coleman & Co. was finally wound up by the payment of its debts in full, to do which, as we understand the bill, coupled with the terms of the deed to the complainants, a public sale was had with the consent of the creditors, and the complainants purchased the interest in and the rights and claims against certain companies and individuals in the South, along the Mississippi River, including the interest and claims against Whitehill and the late firm of J. M. Whitehill & Co. This was within four years after Whitehill had disposed of the enumerated assets and made the lease of the coaling privilege, and within three years after the payment of the outstanding indebtedness, according to the amendment. Certainly Whitehill ought not to be allowed to complain that he was permitted to take his time in selling the stock of the concern to the best advantage; and it is clear, as the case stands at present, that the statute did not run as against the trust in the real estate conveyed to him or to J. M. Whitehill & Co., and purchased with the money of the firm.

The decree is reversed and the cause remanded with directions to allow the complainants to amend their bill, and for further proceedings in conformity with this opinion.

CHEROKEE NATION *v.* SOUTHERN KANSAS RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

No. 664. Argued March 12, 1890. — Decided May 19, 1890.

The act of Congress of July 4, 1884, 23 Stat. 73, c. 179, granting a right of way through the Indian Territory to the Southern Kansas Railway Company, for a railroad, telegraph and telephone line, is a valid exercise of the power of Congress to regulate commerce among the several States and with the Indian tribes.

The Cherokee Nation filed in the court below a bill of complaint, seeking a decree enjoining the Southern Kansas Railway Company from entering upon the lands of that nation for the purpose of constructing its proposed railway, and, if that relief could not be granted, then that its bill might be treated as an original complaint and petition in appeal as provided in § 3, c. 179, act of July 4, 1884, 23 Stat. 73: *Held*,

(1) That these two causes of action, one of an equitable and the other of a legal nature, could not be joined in the same suit;

(2) That the court below erred in not treating the complaint as a petition of appeal which entitled the petitioners to have a trial *de novo* of the question of damages for the lands and rights proposed to be taken.

The Cherokee Nation is not sovereign in the sense that the United States or a State is sovereign, but is now, as heretofore, a dependent political community, subject to the paramount authority of the United States.

The United States may exercise the right of eminent domain in respect to lands in the Territories, as in any of the States, for purposes necessary to the execution of the powers belonging to the General Government, such an exercise being essential to their independent existence and perpetuity.

All lands held by private persons within the limits of the United States are held subject to the authority of the General Government to take them for such objects as are germane to the execution of the powers granted to it, provided only that they are not taken without just compensation being made to the owner.

In the execution of the power to regulate commerce Congress may employ, as instrumentalities, corporations created by it or by the States.

A railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and is subject to governmental control and regulation; and for these reasons the corporation owning

it may, under legislative sanction, take private property for a right of way, upon making just compensation to the owner.

The act granting a right of way to the Southern Kansas Railway Company through the Indian Territory authorized the company to enter upon the lands taken for right of way after it should have paid into court double the amount of the award of the referees appointed by the President: *Held*, that this was a sufficient provision to secure just compensation; that the Constitution does not require that compensation shall be made in advance of the appropriation of lands for a right of way; that it is sufficient if adequate provision be made to secure just compensation; that the title does not pass from the owner till such compensation is actually received; and that if the railway company fails to pay the amount ascertained it will thereafter be a trespasser, although before the termination of the proceedings instituted to fix the compensation, it may have rightfully entered upon the lands for the purpose of constructing its road.

In equity. The case is stated in the opinion.

Mr. J. E. McDonald and *Mr. John C. Fay* (with whom was *Mr. R. J. Bright* on the brief) for appellant.

Mr. George R. Peck and *Mr. A. B. Browne* (with whom was *Mr. A. T. Britton* on the brief) for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the Western District of Arkansas. The litigation between the parties arises out of an act of Congress, approved July 4, 1884, entitled "An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes." 23 Stat. 73. By the first section of that act the above company was authorized to locate, construct, operate and maintain a railway, telegraph and telephone line, through the Indian Territory, beginning at a point on the northern line of the Territory, where an extension of the Southern Kansas Railway from Winfield in a southerly direction would strike that line, running thence south in the direction of Dennison, Texas, on the most practicable route, to a point at or near where the Washita River empties into the Red River, with a branch constructed

from a point at or near where the main line crosses the northern line of the Territory, westwardly along or near that line to a point at or near where Medicine Lodge Creek crosses the northern line of the Territory, and from that point in a southwesterly direction, crossing Beaver Creek at or near Camp Supply, and reaching the west line of the Indian Territory at or near where Wolf Creek crosses the same, with the right to construct, use and maintain such tracks, turnouts and sidings as the company might deem it to their interest to construct along and upon the right of way and depot ground by that act granted. The second section grants to the company a right of way of a prescribed width through the Territory for its main line and branch road, stations and telegraph and telephone lines, subject to the condition that no part of the lands granted shall be used otherwise than for the company's railroad, telegraph and telephone lines, and that if any portion ceases to be so used, it shall revert to the nation or tribe of Indians from which it was taken.

The third section, upon which some of the principal questions in the case depend, is in these words:

"SEC. 3. That before said railway shall be constructed through any lands held by individual occupants, according to the laws, customs and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the President, who, before entering upon the duties of their appointment, shall take and subscribe, before competent authority, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award. In case the referees cannot agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right, within ninety days after the making of the award and notice of the same, to appeal by

original petition to the courts, where the case shall be tried *de novo*. When proceedings have been commenced in court, the railway company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned, and proceed with the construction of the railroad. Each of said referees shall receive for their services the sum of four dollars per day for each day they are engaged in the trial of any case submitted to them under this act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said nations, costs, including compensation of the referees, shall be made a part of the award, and be paid by such railroad company."

The 5th, 6th and 8th sections are as follows:

"SEC. 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands said main line and branch may be located, the sum of fifty dollars, in addition to compensation provided for in this act for property taken and damages done by the construction of the railway for each mile of railway that it may construct in said Territory, said payments to be made in instalments of five hundred dollars as each ten miles of road is graded. Said company shall also pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior the sum of fifteen dollars per annum for each mile of railway it shall construct in the said Territory. The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him, in accordance with the laws and treaties now in force among the different nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their lands: *Provided*, That Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit: *Provided further*, That if the general counsel [council] of either of the nations or tribes through whose lands said railway may be located shall within four months

after the filing of maps of definite location as set forth in section six of this act, dissent from the allowances provided for in this section, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands with the right of appeal to the courts upon the same terms, conditions and requirements as therein provided: *Provided further*, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the provisions of this section. Nothing in this act shall be construed to prohibit Congress from imposing taxes upon said railway, nor any Territory or State hereafter formed through which said railway shall have been established from exercising the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this act.

"SEC. 6. That said company shall cause maps showing the route of its located lines through said Territory to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company: *Provided*, That when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void, and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any such section shall be begun."

"Sec. 8. That the United States Circuit and District Courts for the Northern District of Texas, the Western District of

Arkansas, and the District of Kansas, and such other courts as may be authorized by Congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Southern Kansas Railway Company and the nations and tribes through whose territory said railway shall be constructed. Said courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this act."

The Cherokee Nation having dissented from the allowance provided for in the fifth section of the above act, commissioners were appointed by the President, as provided in the third section. They met at Topeka, Kansas, on the 26th of August, 1886, and, having duly qualified according to law, proceeded to the Indian Territory in the discharge of their duties. Their report to the President, made September 25, 1886, states that they inspected the located line of road as it traversed the territory of the Cherokee Nation, with its branch, and that upon an actual view of the lands proposed to be taken and appropriated for right of way, station grounds, etc., under the act of Congress, they found that said Nation was entitled to receive as adequate compensation for such lands and for damages done by the construction of the railway, for thirty-five and one-half miles of the main line, the sum of $93 for each mile, aggregating for the whole distance $3301.50. They also found and awarded as adequate compensation and damages in respect to the lands to be taken and appropriated for the branch line, one hundred and twelve and $\frac{54}{100}$ miles in length, the sum of $36 for each mile, aggregating for the whole distance the sum of $4051.44. The commissioners ordered that the railway company, within ten days after receiving notice from the Secretary of the Interior that their report was filed, should deposit with that officer the total amount of the awards made by them, for such disposition under the law

and the order of the Secretary as might be just and proper. This report having been filed in the office of the Secretary of the Interior, its contents were made known by that officer to the principal chief of the Cherokee Nation in a communication dated October 29, 1886.

The Cherokee Nation, by the act of its National Council, approved December 17, 1886, concurred in by its House, December 16, 1886, dissented from and rejected as unjust, inequitable and without authority of law, the award made by the commissioners.

The third, fourth, fifth and eighth sections of that act are as follows:

"Sec. 3. That the Cherokee Nation does not concede to the United States the rightful power, through its constituted authorities, to authorize any private individual or corporation to enter upon, appropriate and use any lands belonging to said Nation without first obtaining the consent of the constituted authorities of said Nation, and hereby protests against the action of said Southern Kansas Railway Company in entering upon and appropriating the lands of the Cherokee Nation as an arbitrary and unjust violation of the guaranteed rights of said Nation.

"Sec. 4. That the principal chief be, and he is hereby, authorized and empowered to proceed in pursuance of the provisions of the third and the eighth sections of said act of Congress, and bring suit in the Circuit Court of the United States in and for the Western District of Arkansas against said Southern Kansas Railway Company, the object of said suit being to vindicate the absolute title of the Cherokee Nation to all lands within her borders, and to obtain redress from said company for such damages, as may have been sustained by said Nation by means of the location and construction of said railroad: *Provided*, That nothing herein shall be construed as an acknowledgment by the Cherokee Nation of the right of the United States to appropriate the lands of the Cherokee Nation for the benefit of private corporations without its consent.

"Sec. 5. That the principal chief be, and he is hereby, further authorized and empowered to employ suitable counsel for the

bringing and management of said suit on the part of the Cherokee Nation."

"SEC. 8. That the principal chief be, and he is hereby, authorized and required to certify the provisions of this act to the Secretary of the Interior in pursuance of the provisions of the fifth section of act of Congress."

Subsequently, the Cherokee Nation, by its attorneys, sent a communication to the President of the United States, in which that Nation, with its principal chief — reserving to that Nation all rights and claims in and to the common property thereof as absolute owner of the same, and expressly denying the right and authority of the United States to grant to persons or corporations any easement, right of way, or property right whatever in, to and upon their common property, as specially set forth in their protest of December 12, 1884 — appealed to the Circuit Court of the United States of the Western District of Arkansas from the award and judgment of the referees, and prayed that a transcript of all the proceedings relating to the award, together with their appeal, be certified to that court.

In consequence of this communication and appeal, the Secretary of the Interior, January 22, 1887, transmitted to that court all of said proceedings on file in his department, as far as they related to the Cherokee lands, proposed to be taken by the railroad company.

The bill in the present case was filed in that court on the 26th day of January, 1887.

It alleges that the Cherokee Nation is a sovereign State, recognized as such by the various treaties made between it and the United States, beginning with that of Hopewell, November 22, 1785, and ending with that of Washington, July 10, 1866; and is entitled to exercise, and is exercising the powers, jurisdiction and functions of a sovereign State within the territory ceded to it and defined under the treaty of Fort Gibson, February 14, 1833.

It also alleges that by virtue of its inherent sovereignty, as recognized by those treaties, the right of eminent domain, with other rights of sovereignty in its country, remains exclu-

sively vested in it; that in addition to the cessions of territory by the above treaties, for which it gave a full and valuable consideration, the United States, by letters patent, conveyed said territory to it in fee simple; that all of such territory remains under the jurisdiction and sovereignty of the plaintiff, except certain tracts lying west of the 96th degree of west longitude and north of the 37th degree of north latitude, which have been conveyed back to the United States by the Cherokee Nation under the terms of the treaty of 1866; that the Southern Kansas Railway Company, without right and without consent or license from the plaintiff, entered its domain and territory and commenced the construction over it of a railway; that in the construction of such railway that company had commenced cutting down the natural surface of the land, building embankments thereon, and appropriating the stone, earth and lumber found on the line of the proposed road; had graded about ten miles of its road, and threatened and intended to carry on the same damage and destruction of the plaintiff's property throughout the whole of the proposed line of road, destroying the property and depriving the plaintiff, by reason of the construction of such road, of a large revenue arising from the rental of its property for grazing purposes under existing leases of the lands proposed to be occupied by the railway company, and causing thereby irreparable loss and damage to the plaintiff. Referring to the act of Congress, the plaintiff avers that no jurisdiction or authority remained in the United States to grant any right of way through its territory, and that the right of eminent domain over that territory remained, under the above treaties and patents, in the plaintiff. The bill then sets forth the facts already stated in relation to the proceedings taken by the commissioners appointed under the act of Congress, and proceeds:

"That, even though the said referees had been authorized to make the award referred to, the sum by them awarded is entirely insufficient and inadequate compensation for the said right of way; that the same is reasonably worth the sum of $500 per mile, and your complainant, protesting against the

said award and insisting that the United States have no power to grant a right of way through the territory of your complainant without its consent, and protesting and insisting that the said referees had no lawful authority to make an award for the lands so intended to be taken from your complainant or its domain, and that even on payment of the compensation so awarded the said corporation could acquire no right to build its road through the territory of your complainant without its consent, still insists that the compensation so proposed to be awarded and paid is inadequate, insufficient for the land proposed to be taken, and prays that this complaint may be taken and treated as an original complaint and petition in appeal from the action of the said referees, as provided by section 3 of the act of July 4, 1884, aforesaid.

"Your complainant avers that, by reason of the premises aforesaid, the referees aforesaid had no authority to condemn any of the land or territory of your complainant or to make any award therefor, and that no right accrued to the said Southern Kansas Railway Company to enter upon or build said proposed railway through the territory of your complainant."

The prayer of the bill is that the said awards be vacated and set aside; that the defendant be restrained and perpetually enjoined from locating or attempting to locate, construct, equip, operate, use, or maintain a railway, telegraph or telephone line through the land, domain or territory of the complainant; that pending this suit it be restrained as aforesaid; and that, in the event the court should decline to grant the injunction prayed, the complainant be awarded full, just and adequate compensation for the lands so proposed to be taken and the rights, easements and franchises so proposed to be granted to the defendant. The bill prays for such other and further relief as the nature of the case might require.

The defendant appeared, and by its attorney offered to pay into the registry of the court the sum of $14,705.98, being double the amount of the award of the referees appointed to assess the damages for the right of way for the railroad through the plaintiff's territory.

A demurrer to the bill was sustained. The prayer for an injunction was refused, a hearing on the question of damages was denied because of the misjoinder of equitable and legal causes of action, and the bill was dismissed for want of equity, without prejudice, and with judgment against the plaintiff for costs. 33 Fed. Rep. 900.

The plaintiff, as we have seen, seeks a decree setting aside and vacating the award of damages made by the referees, and perpetually enjoining the railway company from locating, operating and maintaining a railroad, telegraph and telephone line through its territory, as provided for in the act of July 4, 1884. Relief of that character is unquestionably of an equitable nature. But the plaintiff unites with this cause of action a prayer that if an injunction be refused, it may be awarded full, just and adequate compensation for the lands proposed to be taken by the railway company, and for the rights, easements and franchises assumed to be granted to it by Congress. The latter is a legal, as distinguished from an equitable, cause of action. "Whenever," this court said in *Van Norden* v. *Morton*, 99 U. S. 378, 380, "a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction it must be held to belong to the other." We do not doubt that a proceeding for an assessment of damages for the taking of private property for public use is one at law. It possesses none of the essential elements of a suit in equity, within the meaning of the statutes defining the jurisdiction of the courts of the United States. It was, therefore, properly held below that these two causes of action could not be united in the same suit in a court of the United States. *Hurt* v. *Hollingsworth*, 100 U. S. 100; *Buzard* v. *Houston*, 119 U. S. 347, 351.

But the court below ought not, for that reason, to have dismissed the plaintiff out of court, without making some pro-

vision, by appropriate orders, for the protection of its rights as against the railway company. Congress gave the Cherokee Nation, if dissatisfied with the allowances provided for in the above act, the right, within ninety days after the making of an award and notice of the same, "to appeal by original petition to the courts," and have a trial of the case *de novo*. It did not prescribe the form of the petition, nor indicate what it should contain. Yet, a petition of some kind was necessary in order to invest the court below with authority to take hold of the question of compensation to be made to the Cherokee Nation, and finally determine it without reference to the award of the commissioners. While, for the reasons above stated, the proceeding instituted by the plaintiff could not be regarded as technically a suit in equity, of which the court might take cognizance under the general statutes defining its jurisdiction, we perceive no reason why, in view of the broad terms of the act of Congress, and of the peculiar relations which the plaintiff sustains to the government and people of the United States — relations which forbid, if to be avoided, the application of strict rules of interpretation — the bill might not have been treated simply as an original petition of appeal by the plaintiff for a trial of the case between it and the railway company upon the issue as to damages. It was none the less a petition for appeal because relief of an equitable character was asked that could not be granted. The petition need not have been regarded as one to which the railway company must file a formal answer, but rather as the basis for such orders as would bring both parties into court for the determination of the question of damages. As the case is to be tried *de novo*, the court can properly make an order requiring the railway company to take the initiative by filing its written application or petition for an ascertainment of the compensation to be made for the property proposed to be taken or the damage that would be done by reason of the construction of the railway. To that petition when filed, the Cherokee Nation can demur, answer or plead, as they may be advised. Under issues thus made, or under some other mode of procedure devised by the court,

and appropriate for a regular trial of the issues, the case can be tried *de novo*, and all the questions of law and fact that either party chooses to raise be finally determined.

This mode of proceeding will result in a speedy determination of the matters really in dispute, and is conducive to the ends of justice. And we are the better satisfied with such a disposition of the controversy, because the equitable relief sought by the plaintiff cannot be granted. We have had some doubt as to whether, in the present attitude of the case, the reasons for this conclusion ought to be now given. But as the questions raised by the demurrer were elaborately examined by the court below, (33 Fed. Rep. 900,) and were fully discussed at the bar, and as the plaintiff ought not to be led to suppose that a new bill in equity, based upon the alleged invalidity of the act of July 4, 1884, would avail any good purpose, we have concluded to state the grounds upon which we hold that Congress, in the passage of that act, has not violated any rights belonging to the plaintiff.

No allegations are made in the bill that would justify a decree perpetually enjoining the railway company from proceeding under the act of Congress. The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the government to the present time, they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our terri-

tory and an act of hostility." It is true, as declared in *Worcester* v. *Georgia*, 6 Pet. 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nations as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583) that "in the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community." But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory. By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the government would secure to that nation "the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them;" and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court, rendered since the cases already cited. In *United States* v. *Rogers*, 4 How. 567, 572, the court, referring to the locality in which a particular crime had been committed, said: "It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. . . . We think it too firmly and clearly

established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority." In *United States* v. *Kagama*, 118 U. S. 375, 379, the court, after observing that the Indians were within the geographical limits of the United States, said: "The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. . . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." The latest utterance upon this general subject is in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, where the court, after stating that the United States is a sovereign nation limited only by its own Constitution, said: "On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power."

In view of these authorities, the contention that the lands

through which the defendant was authorized by Congress to construct its railway, are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain within its territory can only be exercised by it, and not by the United States, except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States, is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several States, for purposes necessary to the execution of the powers granted to the general government by the Constitution. Such an authority, as was said in *Kohl* v. *United States*, 91 U. S. 367, is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. *United States* v. *Fox*, 94 U. S. 315, 320; *United States* v. *Jones*, 109 U. S. 513; *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 154. As was said by Mr. Justice Bradley in *Stockton* v. *Baltimore &c. Railroad*, 35 Fed. Rep. 9, 19: "The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes." It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States, and could not exercise the same

power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner.

But it is said that the objects for which the act of 1884 was passed are not such as admit of the exercise of the right of eminent domain. This contention is without merit. Congress has power to regulate commerce, not only with foreign nations and among the several States, but with the Indian tribes. It is not necessary that an act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution. The railroad which the defendant was authorized to construct and maintain will have, if constructed and put into operation, direct relation to commerce with the Indian tribes, as well as with commerce among the States, especially with the States immediately north and south of the Indian Territory. It is true, that the company authorized to construct and maintain it is a corporation created by the laws of a State, but it is none the less a fit instrumentality to accomplish the public objects contemplated by the act of 1884. Other means might have been employed, but those designated in that act, although not indispensably necessary to accomplish the end in view, are appropriate and conducive to that end, and, therefore, within the power of Congress to adopt. The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private prop-

erty for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law. It is well said by Mr. Cooley, in his Treatise on Constitutional Limitations, section 537, that "while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolument, so that *to them* the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, if the legislature, reflecting the public sentiment, decide that this general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest." But this precise question was determined upon full consideration in *California* v. *Pacific Railroad Company*, 127 U. S. 1, 39, where this court said: "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. . . . Of course the authority of Congress over the Territories of the United States and its power to grant franchises exercisable 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." Upon this point nothing more need be said.

It is further suggested that the act of Congress violates the Constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its road over them.

This objection to the act cannot be sustained. The Constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty. In the present case, the requirements of the Constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award, to abide its judgment; and, that being done, the company may enter upon the property sought to be condemned, and proceed with the construction of its road. We are of the opinion that this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled.

The plaintiff asks, what will be its condition, as to compensation, if, upon the trial *de novo* of the question of damages, the amount assessed in its favor should exceed the sum which may be paid into court by the defendant? This question would be more embarrassing than it is, if, by the terms of the act of Congress, the title to the property appropriated passed from the owner to the defendant, when the latter — having made the required deposit in court — is authorized to enter upon the land, pending the appeal, and to proceed in the construction of its road. But, clearly, the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution, the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner. Such was the decision in *Kennedy*

v. *Indianapolis*, 103 U. S. 599, 604, where the court construed a clause of the constitution of Indiana, declaring that no man's property "shall be taken or applied to public use, . . . without a just compensation being made therefor" — substantially the provision found in the national Constitution. This court there said that "on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him." In the case now before us, the property in respect to which the referees made the award will be conditionally appropriated for the public use when the defendant makes a deposit in court of double the amount of such award, and it only remains to fix the just compensation to be made to the owner. But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial *de novo* provided for in the statute. So that, if the result of that trial should be a judgment in its favor in excess of the amount paid into court, the defendant must pay off the judgment before it can acquire the title to the property entered upon, and failing to pay it within a reasonable time after the compensation is finally determined, it will become a trespasser, and liable to be proceeded against as such. And, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter will be liable therefor. The apprehension, therefore, that the plaintiff may lose its property without receiving just compensation therefor, is without foundation.

Some stress is laid upon the possibility that the defendant may become insolvent before the proceedings below reach a conclusion, and become unable to pay any damages in excess of the amount it may pay into court. The possibility of such insolvency is not, in our opinion, a sufficient ground for holding that the provision made in the act of Congress for securing just compensation is inadequate. Absolute certainty in such matters is impracticable, and, therefore, cannot reasonably be

required. In determining the validity of the act of Congress, the presumption must be indulged that a deposit in court of double the amount awarded by three disinterested referees, appointed by the President, will amply secure the payment of any compensation that may be fixed at the trial in the court below. The record states that the defendant offered to pay into court double the amount of the award made by the referees. The offer to pay is not a compliance with the statute. The amount required to be deposited must be actually paid into court before the company can rightfully enter upon the lands sought to be condemned, or proceed with the construction of its road.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Syllabus.

McGAHEY *v.* VIRGINIA.
BRYAN *v.* VIRGINIA.
COOPER *v.* VIRGINIA.
ELLETT *v.* VIRGINIA.
CUTHBERT *v.* VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

IN RE BROWN.

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

HUCLESS *v.* CHILDREY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

VASHON *v.* GREENHOW.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Nos. 1057, 1055, 1056, 1058, 1142, 1217, 1216, 23. Argued January 21, 1890. — Decided May 19, 1890.

The decisions *Hartman* v. *Greenhow*, 102 U. S. 672; *Antoni* v. *Greenhow*, 107 U. S. 769; *Virginia Coupon Cases*, 114 U. S. 269; *Barry* v. *Edmunds*, 116 U. S. 550; *Chaffin* v. *Taylor*, 116 U. S. 567; *Royall* v. *Virginia*, 116 U. S. 572; *Sands* v. *Edmunds*, 116 U. S. 585; *Royall* v. *Virginia*, 121 U. S. 102; *In re Ayers*, *In re Scott* and *In re McCabe*, 123 U. S. 443, are reviewed; and, without committing the court to all that has been said, or even all that has been adjudged in those cases, on the subject of the act of the legislature of Virginia of March 30, 1871, to provide for the funding and payment of the public debt, and the issue of coupon bonds of the State under its provisions, it is now *Held*,

(1) That the provisions of the act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute;

(2) That the various acts of the assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use, and to the proceedings instituted for

establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect;

(3) That no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State;

(4) That any lawful holder of the tax-receivable coupons of the State issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress — by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him; that no conclusion short of this can be legitimately drawn from the series of decisions reviewed by the court without wholly overruling that rendered in the *Coupon Cases* and disregarding many of the rulings in other cases, which the court would be very reluctant to do; and that to this extent the court feels bound to yield to the authority of its prior decisions whatever may have been the former views of any member of the court.

In *McGahey* v. *Virginia*, *Bryan* v. *Virginia* and *Cooper* v. *Virginia* it is now *Held*,

(1) That the provision in the act of the General Assembly of Virginia of January 26, 1886, which imposes upon the taxpayer the duty of producing the bond from which the coupons tendered by him in payment of taxes were cut, at the time of offering the coupons in evidence in court, is an unreasonable condition, in many cases impossible to be performed, so onerous and impracticable as not only to affect, but to destroy the value of the instruments in the hands of the holder who had purchased them; and is repugnant to the Constitution of the United States;

(2) That the provision in the act of that Assembly of January 21, 1886, which prohibits expert testimony in establishing the genuineness of coupons so offered in evidence, is in like manner unconstitutional;

(3) That it is questionable whether the act of that assembly of May 8th, 1887, which authorizes and requires a suit to be brought against the taxpayer who tenders payment of his taxes in coupons, as well as the acts which require their rejection, are not laws impairing the obligation of the contract.

In *Ellett* v. *Virginia* it is *Held*; that in tendering coupons in payment of a

Statement of the Case.

judgment recovered by the State for taxes and costs of suit the taxpayer is entitled to tender coupons in payment of the costs as well as of the taxes.

In *Cuthbert* v. *Virginia* it is *Held;* that the special license required by the act of March 15, 1884, as amended by the act of May 23, 1887, for the right to offer tax-receivable coupons for sale was a material interference with their negotiability, and impaired the contract.

In *Brown's Case* it is *Held;* that whether the passage of a new statute of limitations, giving a shorter time for the bringing of actions than had existed before, as applied to actions which had accrued, so affected the remedy as to impair the obligations of the contract, within the meaning of the Constitution, depends upon whether a reasonable time is given for bringing such actions; that no one rule can be laid down for determining, as to all cases alike, whether the time allowed was or was not reasonable; that that fact must depend upon the circumstances in each case; and that under the circumstances of this case, and the peculiar condition of the securities in question, the limitation prescribed by § 415 of the Code of Virginia of 1887, with regard to the obligations of the State is unreasonable and impairs the obligation of the contract.

In *Hucless* v. *Childrey* it is *Held;* that the requirement by the laws of Virginia that the tax for a license to sell, by retail, wine, spirits and other intoxicating liquors shall be paid in lawful money of the United States does not impair the obligation of the contract made by the State with the holders of the coupons of its bonds, that they shall be received in payment of taxes.

In *Vashon* v. *Greenhow* it is *Held*, that the statute of Virginia requiring the school tax to be paid in lawful money of the United States was valid, notwithstanding the provision of the act of 1871, and was not repugnant to the Constitution of the United States.

These cases, all of which grew out of the legislation of the State of Virginia regarding its tax-receivable coupons, were argued together; and, although having distinguishing features, it has been found by the court more convenient to treat them together in its opinion.

Mr. Justice Bradley, on behalf of the court, prefaced the cases in detail, by a general review of the previous action of the court in this matter. He said:

These cases, like the *Virginia Coupon Cases*, decided in April, 1885, and reported in 114 U. S. 269, and like *Barry* v. *Edmunds* and other cases argued at the same time, decided in February, 1886, and reported in 116 U. S. 550, etc., arise upon certain tax-receivable coupons attached to bonds of the State

of Virginia issued in reduction and liquidation of the state debt under the acts of March 30, 1871, and March 28, 1879. The present appeals are a continuation of the controversy arising upon said coupons as receivable and tendered in payment of taxes and other state dues.

The origin of these bonds and coupons has been fully explained in former cases; but the proper disposition of the cases now to be considered will be greatly facilitated by presenting a connected *résumé* of the legislative acts relating to and affecting the said securities, and of the decisions heretofore made in reference to said acts.

The state debt of Virginia amounted, prior to the late civil war, to more than thirty millions of dollars. After the war it became a matter of great importance to arrange this debt in such manner as to bring it within the control and means of the State. West Virginia had recently been separated from the parent State and had participated in the advantages of the money raised by the issue of the state securities. It was supposed by those who were best qualified to know the facts that at least one-third of the state resources was lost by this excision of territory, and the legislature of Virginia deemed it nothing more than equitable that the new State should bear one-third of the state debt. A proposition was therefore made to the bondholders of the State to receive two-thirds of the amount due them in new bonds payable thirty-four years after date, with coupons attached thereto receivable, after becoming due, in payment of taxes and other claims and demands due to the State. This scheme was formulated by the act of March 30, 1871, entitled "An act to provide for the funding and payment of the public debt," and was acquiesced in by the public creditors, or the great majority of them, who accepted and received the bonds provided for in the act, which were looked upon as a favorite security in consequence of the value attached to the coupons as legal tender instruments in the payment of taxes and public dues. The act, amongst other things, provided as follows:

"SECTION 2. The owners of any of the bonds, stocks or interest certificates heretofore issued by this State which are recog-

nized by its constitution and laws as legal" [except certain specific securities named] " may fund two-thirds of the amount of the same, together with two-thirds of the interest due or to become due thereon to the first day of July, 1871, in six per centum coupon or registered bonds of this State . . . to become due and payable in thirty-four years after date, but redeemable . . . after ten years, the interest to be payable semi-annually on the first days of January and July in each year. The bonds shall be made payable to order or bearer and the coupons to bearer, and registered bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or *vice versa*, at the option of the holder. The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be expressed on their face. . . ."

Provision was made in the third section of the act for the issue of certificates for one-third part of the debt which was not funded in said bonds, the payment of which certificates it was declared would be provided for in accordance with such settlement as should thereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State existing at the time of its dismemberment.

By the fourth section the treasurer was authorized and directed to cause to be prepared engraved or lithographed, registered bonds and bonds with coupons, and certificates of the character mentioned in the second and third sections, and, when prepared, to commence the issuance of the same. It was further enacted that the bonds and certificates should be signed by the treasurer and countersigned by the auditor; that the coupons should be signed by the treasurer, or that a *fac simile* of his signature should be stamped or engraved thereon. The bonds were to be issued in series, and those of each series to be numbered from one upwards, as issued, and the coupons, in addition to the number of the bond to which they were attached, were to be numbered from one to sixty-seven. The surrendered bonds were to be cancelled and deposited in the office of the state treasurer.

Statement of the Case.

By section 5 certain assets belonging to the State, when realized or converted into money, were to be paid into the treasury to the credit of a sinking fund created for the purchase and redemption of the bonds issued under the act, and, after 1880, inclusive, a tax of two cents on a hundred dollars of the assessed valuation of all property in the State was to be applied in like manner. The treasurer, the auditor of public accounts and second auditor were appointed commissioners of the sinking fund.

It has always been contended on the part of the bondholders that this statute created a contract between them and the State, firm and inviolable, which the legislature had no constitutional right to violate or impair; and such was, for several years, the uniform holding of the Supreme Court of Appeals of Virginia. See *Antoni* v. *Wright*, 22 Grattan, 833, November term, 1872; *Wise* v. *Rogers*, 24 Grattan, 169; *Clarke* v. *Tyler*, 30 Grattan, 134. A different view, however, has since been taken by the Court of Appeals, which now holds that the act of 1871 was unconstitutional from its inception, being repugnant to certain provisions of the constitution of the State adopted in 1869. An elaborate argument to this effect is contained in the opinion of the court rendered in one of the cases now before us, *Vashon* v. *Greenhow*, decided January 14, 1886. In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire, and judge for itself, with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.

The decisions of this court, therefore, in reference to the question whether a valid contract was made by the statute in question between the State of Virginia and the holders of the bonds authorized by said act, are to be considered as binding

upon us, although a contrary view may have been taken by the courts of Virginia; and in view of this principle of constitutional law, and of the decisions made by this court, we have no hesitation in saying that the act of 1871 was a valid act, and that it did and does constitute a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the State, to use them in payment of state taxes and public dues. This was determined in *Hartman* v. *Greenhow*, 102 U. S. 672, decided in January, 1881; in *Antoni* v. *Greenhow*, 107 U. S. 769, decided in March, 1883; in the *Virginia Coupon Cases*, 114 U. S. 269, decided in April, 1885; and in all the cases on the subject that have come before this court for adjudication. This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues and demands due from him to the State. The only question of difficulty which can arise in any case is as to the mode of relief which the owner of such coupons is entitled to in case they are refused when properly tendered in making his payment, or, as to the cases which may be excepted from the operation of his right.

For, almost from the start, the legislature of Virginia has from time to time enacted various laws calculated to embarrass the holders of said coupons in the free use of them for the payment of taxes and other dues. As early as March, 1872, an act was passed prohibiting the officers charged by law with the collection of taxes from receiving in payment anything else than gold and silver coin, United States Treasury notes, and notes of the national banks, and repealing all other acts inconsistent therewith. This law was under consideration in the case of *Antoni* v. *Wright*, 22 Grattan, 833, before referred to, and the Supreme Court of Appeals of Virginia decided that in issuing these bonds the State entered into a valid contract with all persons taking the coupons to

receive them in payment of taxes and state dues, and that the act of 1872, so far as it conflicted with this contract, was void.

In *Clarke* v. *Tyler*, 30 Grattan, 134, decided in 1878, it was said that this decision in *Antoni* v. *Wright* "must be held to be the settled law of this State."

By an act passed March 25, 1873, it was declared that every officer charged with the collection of taxes should deduct from the matured coupons which might be tendered to him in payment of taxes or other dues to the State, the tax upon the bonds from which the coupons were cut, which tax was declared to be fifty cents on the hundred dollars market value of said bonds. This law was repeated in the act of 1876, and bore oppressively upon the holders of the coupons, inasmuch as it compelled them to pay the tax due on bonds of which they were not the owners, and of the owners of which they had no knowledge. It was a clear impairment of the obligation of the contract with the holders of the coupons. The validity of this act came before this court for consideration in the case of *Hartman* v. *Greenhow*, 102 U. S. 672, 685, and it was held to be unconstitutional. Mr. Justice Field, speaking for the court in that case, said: "We are clear that this act of Virginia of 1876, requiring the tax on her bonds issued under the funding act of March 30, 1871, to be deducted from the coupons originally attached to them, when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds and held by different owners, without impairing the contract with such bondholders contained in the funding act, and the contract with the bearer of the coupons."

By an act of the legislature of Virginia, approved on the 28th of March, 1879, another plan for the settlement of the public debt was promulgated. By the first section it was enacted, "That to provide for funding the debt of the State, the governor is hereby authorized to create bonds of the State, registered and coupon, dated the 1st day of January, 1879, the principal payable forty years thereafter, bearing interest at the rate of three *per cent per annum* for ten years, and at the

rate of four *per centum per annum* for twenty years, and at the rate of five *per centum per annum* for ten years, payable in the cities of Richmond, New York or London, as hereinafter provided, on the 1st days of July and January of each year, until the principal is redeemed." "The coupons on said bonds shall be receivable at and after maturity for all taxes, debts, dues and demands due the State, and this shall be expressed on their face. The holder of any registered bond shall be entitled to receive from the treasurer of the State a certificate for any interest thereon, due and unpaid, and such certificate shall be receivable, etc. All obligations created under this act shall be forever exempt from all taxation, direct or indirect, by the State or by any county or corporation therein, and this shall be expressed on the face of the bonds." "The bonds hereby authorized shall be issued only in exchange for the outstanding debt of the State, as hereinafter provided." Bonds were issued under this act in conformity with its requirements, and some of the coupons thereon are the subject of controversy in one or more of the suits now before us for consideration. The questions relating to their receivability for taxes and other public dues, and to the validity of subsequent laws passed in derogation or obstruction thereof, are the same as those which arise under like circumstances upon the coupons of the bonds issued under the act of 1871.

At the session of the General Assembly held in 1882 still another scheme for funding and reducing the state debt was formulated by an act approved February 14 of that year, which specified the amount of each class of indebtedness supposed to be obligatory upon the State of Virginia in relation to the corresponding obligation of the State of West Virginia, and the rate of percentage at which new bonds were proposed to be issued to the public creditors according to the different classes of the debts. These new bonds were to be dated July 1, 1882, and payable July 1, 1932, with interest at three per cent per annum. The commissioners of the sinking fund were authorized to issue them either as registered or coupon bonds, but no security was proposed for the payment of the bonds or coupons except the pledged faith of the State. This

act was called "the Riddleberger act," and was declared to be the final proposition which the State would make to its creditors. Of course it was not to be expected that those who held bonds issued under the acts of 1871 or 1879, with coupons invested with the quality of legal tender for the payment of taxes and other public dues, would willingly surrender their bonds in exchange for the bonds to be issued under the Riddleberger act; and for the purpose apparently of creating motives to induce such bondholders to make the exchange, several ancillary bills were passed at the same session, calculated to discourage and hamper the use of the tax-paying coupons of 1871 and 1879. One of these bills, approved the 14th of January, 1882, (recited in full in 107 U. S. 771–774,) required that whenever any taxpayer should tender to any person whose duty it was to collect or receive taxes, debts or demands due the Commonwealth, any papers purporting to be coupons detached from bonds of the Commonwealth issued under the act of 1871, in payment of any such taxes, debts and demands, the person to whom such papers were tendered should receive the same, giving the party tendering a receipt stating that he had received the same for the purpose of identification and verification, but that he should at the same time require such taxpayer to pay his taxes in coin, legal-tender notes or national bank bills, and give him a receipt therefor. In case of his refusal to pay, the taxes should be collected as all other delinquent taxes were collected. The act then provided for a proceeding in the county court or hustings court of the city to ascertain whether the coupons tendered were genuine legal coupons receivable for dues or not. This proceeding was to be instituted by the petition of the taxpayer, and defended by the Commonwealth's attorney, and the matter was to be tried by jury. If the decision should be in favor of the taxpayer, the judgment was to be certified to the treasurer, who thereupon was required to receive the coupons for taxes and refund the money paid by the taxpayer out of the first money in the treasury. The law further provided that, if any taxpayer should apply for a mandamus to compel the collector to receive his coupons for taxes, a similar proceeding should take

place, for the purpose of ascertaining the identity and validity of the coupons, and when found to be genuine a mandamus might issue. The suggestion upon which this law was based, as recited in the preamble thereof, was, that many spurious, stolen and forged bonds were in circulation, which made it imprudent to receive coupons in payment of taxes without an investigation first had with regard to their genuineness and validity. It is apparent that such a cumbrous mode of proceeding was a very awkward substitute, so far as the taxpayer was concerned, for the reception of his coupons as so much money when presented.

Another act, approved on the 26th of January, 1882, provided that in case of proceedings instituted against a taxpayer for the collection of his tax, notwithstanding his tender of coupons in payment thereof, he should be authorized to pay the tax under protest, in lawful money, and might within thirty days thereafter sue the officer for the amount, and if it should be determined that it was wrongfully collected, the amount should be returned, and it was declared that no writ of injunction, supersedeas, mandamus, prohibition or other writ whatever should be issued to hinder or delay the collection of tax.

Another act, approved on the 7th of April, in the same year, changed the general law of mandamus to coincide with the provisions of the act of January 26th.

The validity of these acts came before this court for consideration in the case of *Antoni* v. *Greenhow*, and the question in that case was whether they so far affected the remedy of the holder of coupons as to impair the obligation of the contract made by the State to receive them for taxes and other dues. This was the general question presented, although it is true that the particular question in that case was, whether the proceeding by mandamus to compel the acceptance of the coupons in payment of taxes and other dues was unconstitutionally obstructed. The case was instituted by Antoni, a taxpayer, by a petition to the Supreme Court of Appeals of Virginia for a mandamus against Greenhow, the treasurer of the city of Richmond, to compel him to accept a coupon ten-

dered by the petitioner in part payment of his taxes. The treasurer answered that he was ready to receive the coupon as soon as it had been legally ascertained to be genuine and by law receivable, referring, of course, to the law as it then stood, prescribing the special proceedings before mentioned for ascertaining the genuineness and validity of coupons. To this answer a demurrer was filed. Upon the hearing the court was equally divided on the questions involved, and denied the writ. The judgment was brought by writ of error to this court, and the precise question was, whether the acts of 1882 unconstitutionally impeded the remedy by mandamus. The court, in discussing the question, discussed the general effect of the said statutes, and came to the conclusion that they did not interpose any material obstructions to the proceeding, so as to be obnoxious to the charge of impairing the obligation of the contract.

Under all the obstacles with which the holders of coupons now had to contend in utilizing those instruments in the payment of taxes and public dues, (the only way in which any satisfaction thereof could be obtained,) they still succeeded in disposing of many of them, and more stringent legislation was finally resorted to for the evident purpose of suppressing their use altogether. In the session of 1884 several acts of the General Assembly were passed to this end. By an act approved March 12, 1884, it was made the duty of the attorneys for the Commonwealth to defend the suits brought by taxpayers, and, if decided against the Commonwealth, to carry the case to the higher courts by appeal; to defend all suits brought in the federal courts; and to carry judgments against the Commonwealth or the collector of taxes by appeal to the Supreme Court of the United States. An act approved March 13, 1884, declared that no action of trespass or on the case should be brought or maintained against any collecting officer, for levying upon the property of any taxpayer who had tendered in payment, in whole or in part, any coupons cut from bonds of the State for such taxes, and who should refuse to pay his taxes in gold, silver, United States treasury notes or national bank notes. Another act, approved on the 15th of

March, 1884, required all licenses to be paid in lawful money of the United States. Still another act, approved March 19, 1884, required that all coupons received for taxes, beyond what they would have been exchanged for under the Riddleberger act, should be charged to the bond from which they were clipped, as a payment on the principal of the bond. Finally, by the tax act, approved March 15, 1884, section 65, it was declared that no person should sell tax-receivable coupons from bonds of the State of Virginia without a special license, for which privilege he should pay one thousand dollars for each office or place of business kept for that purpose, and in addition thereto a tax of twenty *per centum* upon the face value of all tax-receivable coupons sold by him, and should give to the purchaser a certificate stating that he had sold such coupons to the purchaser, naming him and specifying the number and amount of the coupons and date of sale; and whenever such coupons should be tendered for taxes the broker's certificate should be delivered to the collector. This section was subsequently amended by an act passed May 23, 1887, so as to include in the prohibition not only the selling or offering to sell tax-receivable coupons, but the tendering, passing or offering to tender or pass for another any such coupons, without a special license therefor, and the license fee was made $1000 for the privilege of selling or offering to sell coupons in each county, city or town of over 10,000 inhabitants, and $500 for each county, city or town of under 10,000 inhabitants; and the privilege was confined to selling, tendering and passing such coupons to taxpayers residing, or owning property subject to tax, within the county, city or town in which the license was obtained, and it was declared that any person violating this provision should be deemed guilty of a misdemeanor, and upon conviction should be fined, at the discretion of a jury, not less than $500 nor more than $2000. Section 91 declared that every attorney-at-law should pay an annual license fee of fifteen dollars if under five years' practice, and twenty-five dollars if over five years' practice; but that no attorney thus licensed should be allowed to bring suit against the Commonwealth, or any treasurer or collector of

taxes, for the recovery of money for coupons tendered for taxes, unless he took out a special license therefor, for which privilege he should pay a specific license tax, in addition to the tax before required, of two hundred and fifty dollars.

In April, 1885, after the passage of these various acts, the *Virginia Coupon Cases* (so called) reported in 114 U. S. 269, etc., came before this court for consideration. There were eight of these cases. One of them, *Poindexter* v. *Greenhow*, the leading case in the report, was an action of detinue brought by Poindexter, a taxpayer, against Greenhow, treasurer of Richmond, for a desk of the plaintiff, of the value of thirty dollars, seized and taken by Greenhow on the 25th of April, 1883, for the purpose of raising the taxes due from the plaintiff after he had tendered coupons in payment thereof. Upon an agreed statement of facts, no dispute being raised as to the genuineness of the coupons, judgment was given in the hustings court of Richmond for the defendant, on the ground that the plaintiff should have paid his tax in lawful money and pursued the remedy pointed out in the acts of 1882. As this was the highest court in the State in which a decision in the case could be had, the judgment was brought by writ of error to the Supreme Court of the United States, and the question was now directly raised, whether the restraining acts passed by the legislature of Virginia were of such force and validity as to prevent the taxpayer from suing the collecting officer for taking his goods in satisfaction of taxes after a tender of coupons for the payment thereof, without adopting the proceedings required by the said acts. This court held that the acts were unconstitutional so far as they prohibited the collector or receiver of the taxes from accepting coupons issued under the act of 1871 in payment of taxes, according to the contract contained in said act, and imposed upon the taxpayer the circuitous and onerous proceeding of establishing the genuineness of his coupons in court; that the tender of the coupons was equivalent to the tender of legal money in payment of the tax, and exonerated the taxpayer from further molestation in respect thereof; and that, if he continued to hold himself in readiness to pay said tax in the coupons tendered, his

property could not lawfully be taken in satisfaction of the same.

The court distinguished this remedy of the taxpayer from that which was in question in the case of *Antoni* v. *Greenhow*, in that in the latter case the proceeding by mandamus alone was under consideration, and that form of proceeding for relief was held not to be materially obstructed by the acts of 1882; and it was held that nothing in the decision of that case concluded the rights of taxpayers and coupon holders in reference to other remedies which the law gave them for the unlawful seizure of their property in satisfaction of the tax, after having duly tendered coupons in payment thereof. Therefore, without expressly overruling the case of *Antoni* v. *Greenhow*, the court decided that the acts referred to were unconstitutional, so far as they had the effect of depriving the taxpayer of his remedy by detinue, or trespass, or case, or other proper action, for unlawful seizure of his goods after tendering tax-receivable coupons in payment of his taxes. The judgment of the hustings court was, therefore, reversed. The question was very fully and elaborately discussed by Mr. Justice Matthews in delivering the opinion of the court, although there was a dissenting opinion on the part of the Chief Justice and three of the Associate Justices.

Two other of the coupon cases, *White* v. *Greenhow* and *Chaffin* v. *Taylor*, were cases of trespass for taking the property of the taxpayers in payment of taxes after they had tendered coupons in payment thereof, and were in all substantial respects similar to the case of *Poindexter* v. *Greenhow*, and were decided in the same way. In one of them, *Chaffin* v. *Taylor*, the act of March 13, 1884, which expressly forbids an action of trespass or case against a collecting officer, was referred to and relied on by the defendant in the action.

A fourth case, that of *Baltimore & Ohio Railroad Co.* v. *Allen*, auditor of accounts of the State of Virginia, was a bill for injunction, filed in the Circuit Court of the United States, to prevent the defendant from seizing the cars and other personal property of the complainant in satisfaction of taxes alleged to be due, for the payment of which the railroad company had

tendered tax-paying coupons. An injunction was granted by the Circuit Court to prevent the seizure of the complainant's property, and the decree was affirmed by this court upon the same grounds which were taken in the case of *Poindexter* v. *Greenhow*.

The fifth case, *Carter* v. *Greenhow*, was an action brought in the Circuit Court of the United States, and founded upon section 1979 of the Revised Statutes of the United States, by which every person who, under color of any statute, etc., of any State or Territory, subjects a citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. The plaintiff in said action set forth that in May, 1883, he tendered certain tax-paying coupons of the State, in payment of taxes due from him, to the defendant Greenhow, treasurer of the city of Richmond, who refused to receive the same in payment, and unlawfully entered upon plaintiff's premises and seized and took certain property of the plaintiff to sell the same in payment of said taxes; that the plaintiff had a right under the Constitution of the United States to pay his said taxes in the coupons referred to, and the defendant refused to receive the same under the color of, and by the command of, the act of assembly of the State of Virginia, approved January 26, 1882, which forbids collectors of taxes due the State to receive in payment thereof, anything except gold, silver, etc.; and that he levied on said property under the command of the 18th section of another act of assembly, approved April 1, 1879, and of other statutes enacted by the General Assembly of the State of Virginia, which statutes he alleged to be repugnant to the Constitution of the United States and void. The amount of damages claimed in the action was less than five hundred dollars, and therefore it was not within the jurisdiction of the Circuit Court of the United States, unless it should be sustained by the section of the Revised Statutes referred to. Judgment was given for the defendant, and was affirmed by this court on the ground

that the case did not come within section 1979, because the right claimed was not one of the rights referred to in that section.

The sixth case, *Pleasants* v. *Greenhow*, was a bill for injunction, filed in the Circuit Court of the United States, to restrain the defendant Greenhow from levying on plaintiff's property for taxes after coupons were tendered therefor. The amount of taxes being less than five hundred dollars, relief was prayed for on the same ground of deprivation of rights, which was preferred as the cause of action in the case of *Carter* v. *Greenhow*. The bill was dismissed by the Circuit Court, and its decree was affirmed by this court for the same reason which prevailed in that case.

The seventh case was *Marye, Auditor of the State of Virginia* v. *Parsons*. Parsons, a citizen of New York, filed a bill in equity in the Circuit Court of the United States against Marye, Auditor of the Commonwealth of Virginia; Greenhow, Treasurer of the city of Richmond; Hill, Treasurer of the city of Norfolk; Dunnington, Treasurer of the city of Lynchburg; Munford, Commissioner of Revenue of Richmond; Price, Commissioner of Lynchburg; and Langley, Commissioner of Norfolk. He alleged that he was the owner of a large amount of coupons cut from bonds of Virginia, issued under the act of 1871, and receivable by that act in payment for taxes, debts and demands due the State, a list of which coupons was appended to the bill. He claimed that they constituted a contract with the State, and, after setting forth the laws which had been passed by the State of Virginia for preventing or interfering with the use of such coupons in the payment of taxes and other state dues, (which laws he alleged to be unconstitutional and void,) he prayed that the defendants, as officers of the State, might be compelled specifically to perform the contract of the State with regard to said coupons, and to receive them in payment of taxes and other dues, and that a mandatory injunction for that purpose might be issued. The defendant filed a demurrer, plea and answer to the bill, and a perpetual injunction, as prayed for, was awarded by the Circuit Court. The complainant did not allege that he owed

any taxes or other demands to the State of Virginia for which he had offered coupons in payment, but his ground of action was that the coupons held by him were valueless, so long as the officers of the State, in obedience to its laws, refused to receive such coupons in payment of taxes, and hence he sought the relief prayed for in his bill. This court reversed the decree of the Circuit Court, holding that the injury complained of was of an abstract nature, *damnum absque injuria*, and that the bill should have been dismissed on that ground; and that none but taxpayers, or those who are indebted to the State upon some other claim or demand, are in a position to complain of the refusal of the officers of the State to receive coupons in payment of such taxes and demands.

The remaining case was that of *Moore* v. *Greenhow*, being a petition for a mandamus to compel the defendant to receive coupons in payment of a license tax as a sample merchant, the petitioner not having pursued the course pointed out by the act of January 14, 1882, for establishing the genuineness of the coupons tendered by him. The petition was denied by the Circuit Court of Richmond, and its decision was affirmed in conformity with the conclusion arrived at in the case of *Antoni* v. *Greenhow*, that the act of January 14, 1882, as applicable to the remedy of mandamus, did not violate the Constitution of the United States.

Several other coupon cases came before this court in October term, 1885, and were decided in February, 1886. They were *Barry* v. *Edmunds*, 116 U. S. 550; *Chaffin* v. *Taylor*, 116 U. S. 567; *Royall* v. *Virginia*, 116 U. S. 572; and *Sands* v. *Edmunds*, 116 U. S. 585. These cases do little more than repeat the views of the court contained in the coupon cases decided in the previous year, except perhaps in deciding in the case of *Royall* v. *Virginia*, that the license tax of a practising lawyer was a tax within the meaning of the act of 1871, and payable in coupons attached to bonds issued under that act.

In another case, *Royall* v. *Virginia*, 121 U. S. 102, it appeared that an information was filed against Royall for practising as a lawyer without first having obtained a revenue license. He pleaded payment of the license fee, partly in a

coupon cut from a bond issued under the act of 1871 and partly in cash. The Commonwealth demurred to this plea, and it was held that the demurrer admitted that the coupon was genuine, and bore on its face the contract of the State to receive it in payment of taxes, etc., and that this showed a good tender, and brought the case within the ruling in *Royall* v. *Virginia*, 116 U. S. 572.

In the session of the General Assembly of Virginia of 1886, several additional acts were passed, all having for object the imposition of further obstructions and impediments in the way of using the tax-paying coupons. An enumeration of these acts, with a general indication of their purport, is all that is necessary to state. By the act of January 21, 1886, it was declared that expert evidence shall not be received of the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the party to be charged, or his agent. By the act of January 26, 1886, it was declared that in the trial of any issue involving the genuineness of a coupon purporting to have been cut from any bond authorized by law to be issued by the State, or by any city, county or corporation, the defendant may demand the production of the bond, and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom. On the same day another act was passed declaring that any person who shall solicit or induce any suit or action to be brought against the State of Virginia, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of the offence of champerty, and subject to fine and imprisonment. By the act of March 1, 1886, it was declared that any person licensed to practise law in Virginia who shall solicit or induce any suit or action to be brought against the State, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of barratry, and if found guilty it is made the duty of the court to revoke his license and disbar him forever from practising law in the Commonwealth. By an act of March 4, 1886, it was declared that all license fees required for the transaction of any business

in the State shall be paid in coin, legal-tender notes or national bank bills; and if coupons shall be tendered in payment thereof, they shall be received by the officer for identification by the proceedings prescribed in the act of 1882; but no license shall issue to the applicant, nor shall he have the right to conduct business or pursue his profession until said coupons have been verified in the manner prescribed by said act; and by another act, passed February 27, 1886, it was declared that after the 1st day of July, 1888, no petition shall be filed or other proceeding instituted to try the question whether any paper purporting to be a coupon detached from any bond of the State is genuine and legally receivable for taxes and other state dues, except within one year from said 1st day of July, 1888, if such coupon first became receivable prior to that time; and within one year from the time the coupon becomes receivable if it becomes receivable after that date. This law became incorporated in the code of 1887 as section 415. Finally as, according to the decisions of this court in 1885 and 1886, the collecting officers were liable to action for proceeding against the property of the taxpayers who had tendered coupons in payment of their taxes, on the 12th of May, 1887, an act was passed authorizing suits to be brought against such taxpayers for taxes due from them, which suits were to be in the name of the Commonwealth, and to be commenced by a notice served on the party liable for the tax, or on the agent of such party who may have tendered the coupons. If the defendant relies upon the tender of coupons as payment he shall plead the same specifically in writing, and file the coupons tendered with the clerk, and the burden of proving the tender and genuineness of the coupons shall be on the defendant. If established, the judgment shall be for the defendant on the plea of tender. If the defendant fail in his defence, there shall be judgment for the Commonwealth for the taxes due and interest and costs, and execution shall issue thereon as in other cases; and if judgment be against the defendant, a fee of ten dollars is allowed to the attorney for the Commonwealth as part of the costs in the case; but the Commonwealth is not to be liable for any fees or costs. The act is set forth in full in the case *In re Ayers*, 123 U. S. 451.

Statement of the Case.

Since the passage of this act the cases *In re Ayers*, *In re Scott* and *In re McCabe*, 123 U. S. 443, have come before this court for consideration. They were decided in December, 1887. These cases came before us on applications for *habeas corpus*, directed to the marshal of the United States for the Eastern District of Virginia, who held the applicants, one of them the attorney general of Virginia, another the auditor of the State, and the third the Commonwealth's attorney for Loudoun County, who had been committed for contempt by the Circuit Court of the United States for disobedience to a restraining order. The case in which said order was made was this: James P. Cooper and others, subjects of Great Britain, filed their bill of complaint in the Circuit Court of the United States for the district aforesaid against Marye, auditor of the State of Virginia, Ayers, attorney general thereof, and the treasurers of counties, cities and towns in the State, and the Commonwealth's attorneys of counties, cities and towns therein; in which bill it was alleged, amongst other things, that the complainants, on the faith of the decisions of this court, that the State of Virginia could not impair the value of the coupons issued under the acts of 1871 and 1879 as a tender for taxes, had bought a large quantity of said coupons in open market in London and elsewhere, amounting to more than one hundred thousand dollars, for the purpose of selling said coupons to the taxpayers of Virginia, believing that they would be able to sell them at considerable advance. The bill then set forth the act of assembly of May 12, 1887, authorizing and requiring suits to be brought in the name of the Commonwealth against taxpayers who should have tendered coupons in payment of their taxes. It further alleged that this act is repugnant to the Constitution of the United States, for the reason that, taken in connection with the act of January 26, 1882, it first commands the State's officers to refuse to receive those coupons, and then commands them to bring suits against those who have tendered them, as well as against those who have tendered spurious coupons; that it imposes upon the defendants heavy costs and fees, etc. It further set out the provisions of various other acts before referred to, tending to

embarrass the holders of coupons in the use of the same, and in the proceedings for establishing their genuineness. The bill prayed that the defendants might be restrained and enjoined from bringing or commencing any suit provided for by the said act of May 12, 1887, or from doing any other act to put said statute into force and effect, and that until the hearing of a motion for said injunction a restraining order might be made to that effect. A restraining order was accordingly made by the court in pursuance of the prayer of the bill, and it was for disobedience to this order that the parties in the cases of Ayers, Scott and McCabe were committed for contempt. This court, after a very full and careful examination of the questions arising in the cases, decided that the suit of Cooper and others against Marye, Ayers and others, in which the said restraining order and order of commitment for contempt were made, was virtually and in effect a suit against the State of Virginia, and, therefore, in violation of the Eleventh Amendment of the Constitution of the United States, which 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; and the judgment of the court was that the Circuit Court had no jurisdiction to entertain said suit, and that its acts and proceedings were void; and the petitioners, Ayers, Scott and McCabe were discharged. The cases in which the question has been considered in this court as to when a proceeding against the officers of a State may be considered as a proceeding against the State itself, or only as a proceeding against the officers for a violation of a clear duty imposed upon them by law, were carefully reviewed and distinguished in the elaborate opinion of the court delivered by Mr. Justice Matthews, and may be referred to as throwing much additional light upon that vexed and interesting question; but it is particularly referred to here, in connection with the other cases cited, for the purpose of showing the conditions, circumstances and aspects in which the questions arising on these tax-paying coupons have presented themselves to the court.

Without committing ourselves to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the court on the subject, we think it clear that the following propositions have been established:

First, that the provisions of the act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute;

Second, that the various acts of the assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect;

Third, that no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State;

Fourth, that any lawful holder of the tax-receivable coupons of the State issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress — by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him. No conclusion short of this can be legitimately drawn from the series of decisions which we have above reviewed, without wholly overruling that rendered in the *Coupon Cases* and disregarding many of the rulings

in other cases, which we should be very reluctant to do. To the extent here announced we feel bound to yield to the authority of the prior decisions of this court, whatever may have been the former views of any member of the court.

There may be exceptional cases of taxes, debts, dues and demands due to the State which cannot be brought within the operation of the rights secured to the holders of the bonds and coupons issued under the acts of 1871 and 1879. When such cases occur they will have to be disposed of according to their own circumstances and conditions.

It was earnestly contended in the dissenting opinion in the *Coupon Cases*, that the defence of a tender of coupons set up by a taxpayer when prosecuted for the payment of his taxes, was in the nature of a set-off and could not be enforced against a State any more than a suit could be prosecuted against it; in other words, that a set-off is in reality a cross-suit and as such subject to the prohibition of the Eleventh Amendment. But the majority of the court held, and perhaps with better reason, that where a set-off or counter-claim is made by virtue of an agreement or contract between the parties, it no longer has the character of a mere set-off, but becomes attached to the primary claim as *pro tanto* a defeasance thereof. At all events, such was the decision of the court, and it is not our purpose to question the authority of that decision so far as it may apply to the cases now before us.

It remains to apply the law as we conceive it to be to the several cases now under consideration.

BRYAN v. *VIRGINIA.*
COOPER v. *VIRGINIA.*
McGAHEY v. *VIRGINIA.*

The head-note for these cases will be found on page 663, *ante*.

Mr. Justice Bradley continued, stating the case made in these three causes as follows:

With regard to three of these cases, *Bryan* v. *The State of Virginia*, *Cooper* v. *The State of Virginia*, and *McGahey* v.

The State of Virginia, we have very little hesitation or difficulty in coming to a conclusion. They are suits brought by the Commonwealth of Virginia against the persons severally named, under the act of May 12, 1887, for the recovery of taxes due from them respectively. The proceedings in the last-named case may be described as a sample of them all. The case was instituted in the Circuit Court of Alexandria, Virginia, in the name of the Commonwealth, by the following notice:

"To John McGahey:

"Take notice that on the 23d day of March, 1888, in accordance with the statutes in such cases made and provided, I shall move the Circuit Court of Alexandria City for a judgment against you in favor of the Commonwealth of Virginia for the sum of $12.60, with interest on $6.40, part thereof, from the 15th day of December, 1886, till paid, and on $6.20, the residue, from December 15, 1887, till paid, that being the sum due by you to the said Commonwealth of Virginia for taxes, together with the penalty thereon, in payment of which papers or instruments purporting to be coupons detached from bonds of the State of Virginia have been tendered and not accepted as payment, and which taxes have not been otherwise paid due on certain real and personal property in the city of Alexandria, the said taxes being the same assessed according to law by the Commonwealth of Virginia for the years 1886 and 1887, upon the property aforesaid.

"Leonard Marbury.

"*For the Commonwealth of Virginia.*"

To this notice the defendant filed the following plea:

"For a plea in this behalf the defendant says that the plaintiff ought not to maintain its action, because he says that heretofore, viz., on the 1st day of December, 1886, and on the 1st day of December, 1887, when the taxes sued for became respectively due and payable, and prior to the commencement of this action in said city, he was willing and

ready to pay and then and there tendered and offered to pay to the plaintiff tax-receivable coupons, then due and payable, cut from bonds issued by the plaintiff under the act of the General Assembly of Virginia, approved March 30th, 1871, entitled 'An act to provide for the funding and payment of the public debt,' together with lawful money of the United States, as follows, viz.: For the said tax of $6.40, one (1) coupon, No. 23, cut from bond No. 5684, due January 1, 1883, for $3; one (1) coupon, No. 23, cut from bond No. 4213, due January 1, 1883, for $3; and forty cents (40c.) lawful money of the United States.

"And for the said tax of $6.20, one (1) coupon, No. 29, cut from bond No. 1048, due January 1, 1886, for $3; one (1) coupon, No. 28, cut from bond No. 2899, for $3, due July 1, 1885; and twenty cents (20c.) lawful money of the United States; to receive which the plaintiff then and there refused.

"And the defendant further says that always from the times when the said taxes became respectively due and payable, hitherto he has been ready and willing to pay and is still here ready and willing to pay to the plaintiff the said tax-receivable coupons and lawful money, and he now brings into court here said coupons and lawful money, ready to be paid to the plaintiff if it will accept the same; and this he is ready to verify; whereupon he prays judgment, etc."

Upon the issue thus joined a trial by jury was had and a verdict given for the Commonwealth for $13.96, and judgment entered thereon with costs. A bill of exceptions was taken at the trial, which shows that the defendant first moved to quash the notice of motion and dismiss the cause on the ground that the act of May 12, 1887, entitled "An act to provide for the recovery by motions of taxes and certain debts due the Commonwealth," etc., is repugnant to section 10, article 1 of the Constitution of the United States; which motion was overruled. The defendant, then, to maintain the issue on his part, proved that when said taxes became respectively due and payable he tendered in payment thereof to the proper collecting officer the coupons and lawful money described in and filed with his plea, which coupons on their face purported to have

been originally attached to bonds issued by the State of Virginia under the act of March 30, 1871, being then respectively due and payable, and having each upon its face the following language: "Receivable at and after maturity in payment for all taxes, debts and demands due the State," which said coupons and money the said officer refused to receive. The said coupons were then offered in evidence, and are in the form following, printed wholly from an engraved plate: "Receivable at and after maturity for all taxes, debts and demands due the State. The Commonwealth of Virginia will pay the bearer three dollars, interest due 1st January, 1883, on bond No. 4213. *George Rye*, Treasurer of the Commonwealth of Virginia." The other coupons offered were of similar form in all respects. The defendant further proved that he never owned the bonds from which the coupons were cut, and knew nothing whatever in respect to their ownership; that the coupons when purchased by him were already detached from the bonds; and that he bought them in open market as genuine coupons, and without any reason to doubt their genuineness. He further proved that prior to September 1, 1879, the State had issued bonds of the kind and in the form authorized by said act to the amount of many millions of dollars, the coupons thereon being wholly printed from engraved plates and not signed manually. He further offered to prove the denominations and numbers of the bonds issued under the act of March 30, 1871, and the act of March 28, 1879. He offered and read in evidence to the jury senate document XV, senate journal 1881–82, which contained a report of H. H. Dixon, second auditor of the Commonwealth of Virginia, directed to the president of the senate, in answer to certain questions which had been proposed to him by the senate for its information, in which report, amongst other things, the said second auditor stated: "I have the honor to report that I have no knowledge of any spurious or forged bonds or coupons issued or purporting to have been issued under either of the said acts. As to any bonds or coupons that may have been stolen I have heard of none issued under the act of March 28, 1879; nor have I any knowledge of any issued under the act of

March 30, 1871, except such information as may be contained in the report made to the legislature March 30, 1874, by the joint committee to investigate the sinking fund, in which a deficiency of $15,939.89 of bonds and of $1325.45 of interest is stated." Another report of said auditor was offered in evidence by the defendant, in which he stated as follows: "I have the honor to report that no counterfeit or forged obligations, bonds, coupons, or certificates of the State of Virginia have in any way come to my knowledge." The defendant then offered to prove by the testimony of an expert witness that the coupons issued were genuine coupons, but the court refused to receive such testimony or to allow it to go to the jury because of the act of the General Assembly approved January 21, 1886; to which ruling the defendant excepted on the ground that said act was repugnant to the Constitution of the United States. The defendant then rested, and thereupon the Commonwealth demanded of the defendant the production of the bond from which the coupons tendered purported to have been cut, with proof that said coupons were actually cut therefrom. The defendant moved the court to overrule and disallow such demand, on the ground that the act of assembly approved January 26, 1886, under which the demand was made, was repugnant to the Constitution of the United States and void. But the court overruled said motion and sustained the demand, to which the defendant excepted. The evidence being closed, the defendant prayed the court to instruct the jury that the production of the bonds from which the coupons in issue were cut, together with proof that the coupons were cut therefrom, was not necessary to establish the genuineness of the coupons, and that the act requiring this to be done is contrary to the Constitution of the United States. But the court refused this instruction, and instructed the jury that such production of bonds and proof, when demanded, was necessary to establish the genuineness of the coupons, to which ruling the defendant excepted. The defendant further prayed the court to instruct the jury that if the jury believe from the evidence that the State of Virginia issued her bonds with tax-receivable interest coupons thereto attached, which coupons

were made payable to bearer, and were printed from engraved plates and not signed manually by any officer of the State, and if they further believe that the defendant purchased the coupons filed with his plea of tender in open market, in good faith, as genuine coupons of said State, then the burden is upon the State to prove said coupons spurious, and that the act of March 12, 1887, placing upon the defendant the burden of proving them genuine is repugnant to the Constitution of the United States. This instruction was also refused by the court and the defendant excepted. The judgment in the case was removed by writ of error to the Supreme Court of Appeals of the State of Virginia, and was affirmed. The present writ of error brings this judgment before us for consideration.

Mr. Daniel H. Chamberlain and *Mr. William L. Royall* for plaintiffs in error.

Mr. R. A. Ayers, Attorney General of the State of Virginia, and *Mr. J. Randolph Tucker* for defendant in error.

The obligation to receive coupons extends only to genuine coupons. The taxpayer who has tendered coupons is bound to keep that tender good, and plead the fact, and prove it when put in issue. The question here is, has the State so altered the remedy as to impair the obligation of the contract?

While it is true, generally, that all laws in force applicable to the case at the time and place of making a contract form part of it, *Walker* v. *Whitehead*, 16 Wall. 314, 317, it is equally true that a law which only alters the remedy, but leaves one substantially equivalent, does not impair the obligation. *Antoni* v. *Greenhow*, 107 U. S. 769, 774, 775.

What remedy had the taxpayer before the passage of the act under examination? The State could summarily levy upon his property for the taxes when he was driven to an action of trespass. This court had decided that any levy by an officer after tender of genuine coupons and not accepted was illegal and made the officer a trespasser. The officer became a trespasser if he levied, and was liable to the State if he accepted

coupons which turned out to be spurious, against which she had a clear right to protect herself. These treasurers in the country were not experts, and she might well distrust their judgment in receiving all which were tendered. And when tendered and refused the taxpayer retained the coupons and brought trespass in the Circuit Court of the United States and recovered back in damages the tax paid by the levy. The State paying these judgments for her officers was without tax paid either in money or coupons: and the right of the State to these coupons so tendered and taken back had been denied and none had ever been delivered by such taxpayers. It is obvious that in this state of things the same coupon might serve as a tender for many taxpayers in fraud of the rights of the State to have her taxes paid in money or in these coupons. To avoid all this — to compel the taxpayer to pay in coupons what he refused to pay in money, to verify the genuineness of the coupons tendered, and to forbear the *ex parte* procedure by levy — the statute of May 12, 1887, was passed. The constitutionality of this act was passed upon by this court in *In re Ayers*, 123 U. S. 443, 494.

The next question arises under the act of January 21, 1886, forbidding expert evidence to prove the genuineness of the coupons tendered. The right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the State provides for its citizens; and generally, in legal contemplation, they neither enter into and constitute a part of any contract nor can be regarded as being of the essence of any right which a party may seek to enforce.

Like other rules affecting the remedy, they are subject at all times to modification and control by the legislature.

These changes may lawfully be made applicable to existing causes of action. The whole subject is under the control of the legislature, which may prescribe such rules for the trial and determination, as well of existing as of future rights, as in its judgment will most completely subserve the ends of justice. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, the authority of the legis-

lature is practically unrestricted so long as its regulations are impartial and uniform.

Whilst this is true, it is conceded that the legislature has no power to establish rules, which, under the pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Cooley's Con. Lim. 457, 458; *Ogden* v. *Saunders*, 12 Wheat. 213, 249; *Webb* v. *Den*, 17 How. 576; *Delaplaine* v. *Cook*, 7 Wisconsin, 44; *Kendall* v. *Kingston*, 5 Mass. 524; *Himmelman* v. *Carpentier*, 47 California, 42; *Rich* v. *Flanders*, 39 N. H. 304.

Tested by these principles, is the act under examination unconstitutional? Whatever may be alleged to the contrary, it clearly appears from the act that it prescribes a *general* rule of evidence, applicable alike to all cases investigated in the courts of the State, without reference as to who are the parties or what the subject matter of the controversy is. In applying it to the coupons of the State we must bear in mind that the coupons attached to bonds are not signed manually, but printed from engraved plates, capable of indefinitely multiplying the issue. The bonds are signed by the proper officer of the State, and are easily susceptible of proof as to their genuineness; but the coupons are not signed. Every coupon must, therefore, be the same, whether clipped from a bond which has actually been signed and issued, or from one which has not been signed or issued. It is manifest, therefore, that no expert testimony should be admitted in the trial of an issue as to the genuineness of a coupon, for the reason that it is impossible for him to say, in any given case, that the bond from which the coupon was clipped was ever executed and issued. The common rule, universally recognized, is that the best evidence which the nature of the case is susceptible of shall be adduced. The statute is only declaratory of this rule. This statute was under examination in a previous case by the Supreme Court of Appeals of Virginia. *Commonwealth* v. *Weller & Sons*, 82 Virginia, 623.

As to the objection against requiring the bond to be produced they are signed manually by the second auditor and treasurer of the State, and are easily susceptible of proof.

When produced, the certainty of the issue of the coupon is established, and by comparison of the coupons remaining upon the bond, an easy mode of identification is secured which is in strict compliance with the rules of the common law as interpreted by this court.

It is argued strenuously that the State, in issuing the bonds, contracted with the creditor that the taxpayer should not be required to produce the bond, and that the coupon might be proven by any other evidence which was available. When the funding act was passed, the rules of the common law were in force in Virginia, and one of its fundamental rules, as before stated, is, that the best evidence must be adduced. It is idle to say what the creditor supposed the State would do. The contract was made with reference to what she might lawfully do; and the fact that they did not consider the consequences which would result from exercise of the power reserved to require the production of the bond as the best evidence of its genuineness and the consequent genuineness of the coupon clipped from it, does not affect the lawful exercise of that power.

Mr. Justice Bradley, continuing, delivered the opinion of the court in these cases.

The question is presented to us whether the acts of assembly of the State of Virginia which required the production of the bond in order to establish the genuineness of the coupons and prohibiting expert testimony to prove the said coupons, are or are not repugnant to the Constitution of the United States. On this subject we think there can be little doubt. It is well settled by the adjudications of this court, that the obligation of a contract is impaired, in the sense of the Constitution, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious. *Bronson* v. *Kinzie*, 1 How. 311; *Woodruff* v. *Trapnall*, 10 How. 190; *Furman* v. *Nichol*, 8 Wall. 44; *Walker* v. *Whitehead*, 16 Wall.

314; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Tennessee* v. *Sneed*, 96 U. S. 69; *Memphis* v. *United States*, 97 U. S. 293; *Memphis* v. *Brown*, 97 U. S. 300; *Howard* v. *Bugbee*, 24 How. 461.

We have no hesitation in saying that the duty imposed upon the taxpayer of producing the bond from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, was an unreasonable condition, in many cases impossible to be performed. If enforced it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. It would deprive them of their negotiable character. It would make them fixed appendages to the bond itself. It would be directly contrary to the meaning and intent of the act of 1871 and the corresponding act of 1879. It would be so onerous and impracticable as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them. We think that the requirement was unconstitutional.

We also think that the prohibition of expert testimony in establishing the genuineness of coupons was in like manner unconstitutional. In the case of coupons made by impressions from metallic plates, (as these were,) no other mode of proving their genuineness is practicable; and that mode of proof is as satisfactory as the proof of handwriting by a witness acquainted with the writing of the party whose signature it purports to be. One who is expert in the inspection and examination of bank notes, engraved bonds and other instruments of that character, is able to detect almost at a glance whether an instrument is genuine or spurious, provided he has an acquaintance with the class of instruments to which his attention is directed. It is the kind of evidence resorted to in proving the genuineness of bank notes; it is the kind of evidence naturally resorted to to prove the genuineness of coupons and other instruments of that character. To prohibit it is to take from the holder of such instruments the only feasible means he has in his power to establish their validity.

In addition to these objections to the proceedings, we question very much whether the act of May 12, 1887, which authorizes and requires a suit to be brought against the taxpayer who tenders payment in coupons, as well as the other acts which require their rejection, are not themselves laws impairing the obligation of the contract. They make no discrimination between genuine and spurious coupons. A bank which should refuse to receive its bills in payment of a note due from one of its customers, but should sue him on his note, and leave him to establish the genuineness of the bills by suit against the bank, would not be regarded with much favor in a business community. It is the duty of its cashier or receiving teller to judge of the genuineness of the bills offered, and to refuse them as spurious on his peril, or rather, on the peril of the bank itself. So, in regard to these coupons, instead of relegating the taxpayer to a course of litigation, the officers of the State charged with the duty of collecting the taxes should themselves decide on the genuineness of the coupons offered. Penalties for knowingly offering spurious coupons, or using them in any way, for sale or otherwise, would probably be as effective in preventing their circulation as like penalties are in suppressing counterfeit bank bills, and other negotiable instruments.

In the case of *Bryan* v. *The State of Virginia*, the coupons that were tendered for the payment of the tax sued for purported to have been cut from bonds issued under the act of March 30, 1871, and the same obstacles to the proof of their genuineness were interposed as in the case of McGahey, by requiring the production of the bonds from which the coupons were cut, and by excluding expert testimony. The same also is true of the proceedings in the case of *Cooper* v. *The State of Virginia.*

We are of opinion, therefore, that

The judgments in these three cases must be reversed, and the records severally remanded, for the purpose of such proceedings as may be required in due course of law, according to this opinion.

ELLETT v. *VIRGINIA.*

The head-note for this case will be found on pages 663, 664, *ante.*

Mr. Justice Bradley continued, stating the case as follows:

The case of *Ellett* v. *The State of Virginia* was a suit brought to recover the amount of a judgment previously rendered against Ellett in the Circuit Court of Richmond for taxes and costs, the amount of taxes being $39.52, and the costs being $24.49. Execution having been issued upon this judgment, the defendant Ellett tendered to the sheriff, in payment thereof, coupons for the whole amount, lacking $1.49, which he tendered in lawful money. The coupons purported to be cut from a bond issued under the act of March 30, 1871, and were overdue, and each bore upon its face a contract of the State of Virginia that it should be received in payment of all taxes, debts and demands due to her. The defendant pleaded this tender and averred that the sheriff refused to receive the said coupons and money, alleging that he was forbidden to do so by the act of May 12, 1887, and that he, the defendant, has always been ready and willing since said tender to deliver said coupons and money to the sheriff in payment of said execution, and was still ready and willing to do so, and brought the same into court for that purpose. This plea was rejected by the court. A verdict was given for the plaintiff and judgment rendered thereon, which was affirmed by the Supreme Court of Appeals of the State of Virginia.

Mr. Daniel H. Chamberlain and *Mr. William L. Royall* for plaintiff in error.

Mr. R. A. Ayers, Attorney General of the State of Virginia and *Mr. J. Randolph Tucker* for defendant in error.

These fees are not payable out of the treasury, and are not recovered for the Commonwealth, but for the officer of the court. The Supreme Court of Appeals of Virginia, in the decision complained of here, said: "These fees were not for taxes, debts and demands due the Commonwealth, but were the prop-

erty of the officers of the court upon which the State had and could have no valid claim."

This court, when construing state statutes, will always adopt the construction given by state courts, if possible. *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Bell* v. *Morrison*, 1 Pet. 351; *Sumner* v. *Hicks*, 2 Black, 532; *Richmond* v. *Smith*, 15 Wall. 429. The court uniformly adopts the decisions of the state tribunals in the construction of their own statutes or on questions arising out of the common law of the State. *Green* v. *Neal*, 6 Pet. 291; *Beauregard* v. *New Orleans*, 18 How. 497. It will not be contended that a state statute which provided that there should be a separate judgment in favor of the officers against the defendant for their fees in every case where there was judgment in favor of the Commonwealth under a statute which forbids payment of such fees out of the treasury, would be unconstitutional. This is exactly the effect of the decision of the state court which decides that these fees are the property of the officers, — that this is the proper construction to place upon the act of May 12, 1887, in so far as it refers to such fees.

Mr. Justice Bradley continued, delivering the opinion of the court:

The point made in this case is, that the costs included in the judgment on which the present suit was brought were not a debt due to the State of Virginia in her own right, but were due to the officers in whose favor they were taxed and whose services they were to compensate. We think that this point is untenable. The costs were recovered by the State of Virginia in the original action, to compensate her for the fees which she had to pay to the officers for their services. The demand of the officers for their costs was a demand against the State of Virginia, and not against the defendant; and by reason of this demand against her, she was entitled to recover the amount against the defendant; so that in no legal sense can it be said that the costs included in the judgment belonged to the officers and not to the State. They were recovered by

her in form, and they belonged to her, when recovered, in substance. We are of opinion, therefore, that

This judgment must also be reversed, and the record remanded for the purpose of such proceedings as may be required in due course of law, in accordance with this opinion.

CUTHBERT v. *VIRGINIA.*

The head-note in this case will be found on page 664, *ante*.

Mr. Justice Bradley, continuing, stated the case as follows:

The next case to be considered is that of *Cuthbert* v. *The State of Virginia*. This was a presentment found against Cuthbert in the hustings court of the city of Petersburg, Virginia, charging that he did, on the first day of November, 1888, and had continuously from day to day since that time, in said city, unlawfully sold and offered to sell, and unlawfully tendered and passed to divers persons, naming them, tax-receivable coupons from the bonds of the State of Virginia, without having previously obtained a special license, as required by law, authorizing him, said Cuthbert, to sell and offer to sell and to tender and pass such coupons, he, in doing the same, acting as the agent and broker for another person or persons to said jurors unknown; contrary to the act of assembly in that behalf. The presentment contained two other counts, which were abandoned. The defendant tendered a special plea in writing, to which the Commonwealth demurred, and the court sustained the demurrer. The defendant then pleaded not guilty. The jury, under the rulings of the court, found him guilty and assessed a fine of $500. On the trial the case was submitted to the jury upon an agreed statement of facts. The principal facts shown by this statement were, that on the first day of November, 1888, the defendant sold and offered to sell, and tendered and passed, and offered to tender and pass for another, as charged in the presentment, tax-receivable coupons from bonds of the State of Virginia, which were overdue and bore upon their face the contract of said State that they should be received in payment

of all taxes, debts and demands due said State from taxpayers owing taxes to the said State, and that he did not have the special license therefor required by the act of May 23, 1887, and had not paid the license tax of $1000 provided by said act for the privilege of selling the same, nor the state tax of twenty per centum upon the face value of the same; also, that the defendant Cuthbert was a member of a firm doing business in Petersburg as insurance agents, representing various foreign insurance companies, all of which had paid to the State all license taxes assessed upon them; also, that the defendant was not engaged in any business upon which a license tax is charged by the State, except the business of selling tax-receivable coupons from bonds of the State, and had not been so engaged. Upon this agreed statement of facts, the defendant moved the court to instruct the jury that the act under which the presentment was found is repugnant to section 10 of article 1 of the Constitution of the United States, and therefore void, and that they must acquit the defendant. The court refused to give this instruction, but instructed the jury that the said act is not repugnant to the Constitution, and the defendant excepted. After the verdict was rendered, the defendant moved the court to set it aside upon the same grounds, which motion was overruled. The cause was carried to the Supreme Court of Appeals, and by that court the judgment was affirmed and its decision is now here for review. The question in this case is, whether the act requiring a license tax for the sale of coupons was or was not in violation of that clause of the Constitution of the United States which relates to impairing the obligation of contracts.

Mr. Daniel H. Chamberlain and *Mr. William L. Royall* for plaintiff in error.

Mr. R. A. Ayers, Attorney General of the State of Virginia, and *Mr. J. Randolph Tucker* for defendant in error.

The only question is, whether the business of a broker in these coupons is beyond the reach of a license tax by the

State, because coupons are receivable for taxes. Does the license tax impair the obligation of the contract to receive coupons for taxes? If it does not, the judgment is right.

The power of taxation is a part of the legislative sovereignty of the State. It existed when the bonds and coupons were issued, they having, in fact, been issued subject to this power of taxation, which was not in any way released or surrendered by their issuance, and being the *lex temporis*, is part and parcel of the bond and coupon contract. If this power of taxation was not expressly reserved, it matters not. For it need not be reserved; it exists and remains always, unless yielded up. See Cooley on Taxation, 54, note 2.

Then, what though the tax imposed on the business of selling the coupons be a tax on the coupons themselves. The State is entitled to tax all persons, property and business, within its jurisdiction. The business is done, or proposed to be done here, within the jurisdiction of the State; and that business is a legitimate subject of taxation. How, then, can it be said that the statute of 1883–4, which imposes a tax on the doing of the business of selling the coupons, is beyond the limits of the constitutional legislative powers of the State and void?

Mr. Justice Bradley, continuing, delivered the opinion of the court in this case.

It is manifest from the terms of the act of 1871, as well as that of 1879, under which tax-receivable coupons were authorized to be and were issued, that said coupons were intended to circulate from hand to hand, being expressly made payable to bearer, and being made receivable for taxes, debts, dues and demands due to the State. Any undue restraint upon the free negotiability of these instruments, therefore, would be a violation of the clear understanding and agreement of the parties. That the license required by the 65th section of the tax act of March 15, 1884, as amended by the act of May 23, 1887, was a very material interference with such negotiability, is most manifest. If sustained as a valid act of legislation, and carried

into effect, it would prevent the negotiation of such coupons by any holder thereof. The enormous license fee of one thousand dollars in towns of more than ten thousand inhabitants and of five hundred dollars in other counties and towns, with the exception of twenty per cent of the face value on every coupon sold, was absolutely prohibitory in its effect. A material quality of the coupons — their negotiability — was thereby destroyed. The point cannot be made any clearer by argument than it appears by the mere statement of it. This follows whether the law is construed as applicable to the sale by a coupon-holder of his own coupons, or to the sale or passing by any person of coupons for another. An owner of coupons residing in New York or London, under the operation of the law, if the coupons were not paid by the State when they became due, would be obliged to go in person to Virginia in order to dispose of them to those who might be able and willing to use them in the payment of taxes.

The judgment in this case must also be reversed, and the record remanded for the purpose of such proceedings to be had as law and justice may require in accordance with this opinion.

IN RE BROWN.

The head-note to this case will be found on page 664, *ante*.

Mr. Justice Bradley, continuing, stated the case as follows:

The next case to be considered is that of *Ex parte Brown*, which was an application of the petitioner, Brown, to the Circuit Court of the United States for the Eastern District of Virginia, to be discharged from imprisonment in the custody of R. A. Carter, the sergeant of said city and *ex officio* jailer thereof. The petition sets forth that the petitioner was sentenced by the hustings court of the city of Richmond to pay a fine of $25.00 and costs, amounting to $26.70, and to remain in the jail of the said city until the same should be paid, in the custody of the said sergeant; that on the 3d of July, 1889, he tendered W. P. Lawton, clerk of the hustings court, in pay-

ment of said fine, eighteen dollars in coupons and $8.70 in lawful money of the United States; that each of said coupons was cut from a bond issued by the State of Virginia under the act of March 30, 1871, and was overdue, and bore upon its face the contract of the State that it should be receivable in payment of all taxes, etc.; that the clerk refused to receive said coupons and money in payment of said fine and costs, because certain acts of the General Assembly of Virginia forbade him so to receive them; that thereafter, on the same day, he tendered the same coupons and current money to Carter, sergeant as aforesaid, and demanded his release from custody; that said sergeant also refused to receive said coupons and money in payment of said fine and costs, and he refused the same because the coupons so tendered by the petitioner became due prior to the 1st day of July, 1888, and because section 415 of the Code of Virginia of 1887 prohibits the receipt of any coupons of said State which became due prior to July 1st, 1888, as those tendered did; that said section 415 is repugnant to the Constitution of the United States; and that the petitioner is therefore detained in said jail and in custody of said sergeant in violation of the said Constitution. The petitioner therefore prayed a *habeas corpus* to be directed to the said Carter, sergeant as aforesaid, and that he be discharged from custody. The writ being issued, Carter made return thereto in substance as follows: He annexed to said return a copy of the judgment and order of the hustings court of Richmond committing the petitioner to the jail of the city until he should pay a certain fine imposed upon him, as stated in the petition. He admitted that on the 3d of July, 1889, the petitioner tendered the coupons and money set out and described in his petition, to the clerk, Lawton, who refused to receive the same; and that on the 3d of July, 1889, the petitioner tendered to him, Carter, $8.70 in current money of the United States, and eighteen dollars in coupons purporting to be detached from bonds of the State of Virginia; but he denied that they were genuine coupons legally receivable. He further stated in his return that, by section 415 of the Code of Virginia of 1887, it is provided that no petition shall

be filed or other proceeding had to try whether any paper printed, written, engraved or lithographed, purporting to be a coupon detached from any bond of said State, is a genuine coupon legally receivable for taxes, debts or demands of the said State, where said coupon became due prior to July 1, 1888, unless said petition was filed or proceeding had within one year from July 1, 1888; and he charged the fact to be that the coupon held by the petitioner became due prior to July 1, 1888. The court below refused to discharge the prisoner, holding that section 415 of the Code of 1887 is not repugnant to the Constitution of the United States. The petitioner thereupon appealed to this court, and the question is as to the constitutionality of the section referred to.

We have already set forth the provisions of this law in a former part of this opinion, it being the act passed February 27, 1886, and afterwards incorporated into the Code of 1887, as section 415. Under the operation of this act, after the 1st day of July, 1889, of course, all coupons that were then more than a year past due were absolutely precluded from being used in payment of dues to the State, as provided for in the act of 1871. Considering the obstacles which had been interposed in the way of their use for that purpose, it is not difficult to imagine that a very large proportion of the coupons attached to the bonds of 1871 had not been presented, or, if presented, had not been received for taxes prior to the date referred to.

Mr. Daniel H. Chamberlain and *Mr. William L. Royall* for plaintiff in error.

Mr. R. A. Ayers, Attorney General of the State of Virginia, and *Mr. J. Randolph Tucker* for defendant in error.

The real question involved and intended to be raised in the record is the constitutionality of section 415 of the Code of Virginia. The act which was incorporated into the Code, forming the said section, was approved February 26th, 1886 — more than three years before the tender in the present case.

The coupon holder was warned in advance that from and

after July 1, 1888, he would only have one year within which to institute proceedings to have his coupons declared genuine and received for taxes or other debts or demands due the Commonwealth. The statutes deprive the coupon holder of no right which he enjoys under his contract. His coupon, if genuine, is received in a proper proceeding to enforce its payment. The courts of the State are open for the prosecution of his claim. If the State does not pay his interest coupons at maturity, he may institute suit and recover judgment against her so as to prevent the bar of the statute of limitation. Chapter 32 of the Code of Virginia continues in force statutes which have been upon the books for more than fifty years, under which any claimant may sue the State in the Circuit Court of the city of Richmond, and have the validity of his claim adjudicated. This is in addition to the other modes provided by which he may have the genuineness of his claim established.

This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect; and it is difficult to see why if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. *Terry* v. *Anderson*, 95 U. S. 628; *Hawkins* v. *Barney*, 5 Pet. 457; *Bronson* v. *Kinzie*, 1 How. 311; *Christmas* v. *Russell*, 5 Wall. 290; *Jackson* v. *Lamphire*, 3 Pet. 280; *Sohn* v. *Waterson*, 17 Wall. 596. There has always been a statute of limitation in favor of the Commonwealth in Virginia. See section 751, Code, edition 1887; *Idem*, section 770; *Idem*, section 3432. The period within which suits are required to be instituted or claims presented has been shortened, but ample time is given by the statute under examination, within which to prosecute the claim. Cooley's Const. Lim. p. 365.

Mr. Justice Bradley, continuing, delivered the opinion of the court.

In Re Brown.

The passage of a new statute of limitations, giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the Constitution, provided a reasonable time is given for the bringing of such actions. This subject has been considered in a number of cases by this court, particularly in *Terry* v. *Anderson*, 95 U. S. 628, 632, and *Koshkonong* v. *Burton*, 104 U. S. 668, 675, where the prior cases are referred to. In *Terry* v. *Anderson*, Chief Justice Waite, speaking for the court, said: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins* v. *Barney*, 5 Pet. 457; *Jackson* v. *Lamphire*, 3 Pet. 280; *Sohn* v. *Waterson*, 17 Wall. 596; *Christmas* v. *Russell*, 5 Wall. 290; *Sturges* v. *Crowninshield*, 4 Wheat. 122. It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. . . . In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government unless a palpable error has been committed."

The court in that case held that the period of nine months and seventeen days given to sue upon a cause of action which had already been running nearly four years, was not unconstitutional. The liability in question was that of a stockholder under an act of incorporation for the ultimate redemption of the bills of a bank which had become insolvent by the disaster of the civil war. The legislature of Georgia, on the 16th of March, 1869, passed a statute requiring all actions against stockholders in such cases to be brought by or before the 1st of January, 1870.

In the case of *Koshkonong* v. *Burton*, the suit was brought upon bonds of the town of Koshkonong issued January 1, 1857, with interest coupons attached. The coupons matured at different dates from 1858 to 1877. The action was brought on the 12th of May, 1880, and the question was whether the action as to the coupons maturing more than six years before the commencement of the suit was barred by the statute of limitations of Wisconsin. In March, 1872, an act was passed to limit the time for the commencement of actions against towns, counties, cities and villages, on demands payable to bearer. It provided that no action brought to recover money on any bond, coupon, interest warrant, agreement or promise in writing made by any town, county, city or village, or upon any instalment of the principal or interest thereof, shall be maintained unless the action be commenced within six years from the time when such money has or shall become due, when the same has been made payable to bearer or to some person or bearer, or to the order of some person, or to some person or his order; provided, that any such action may be brought within one year after this act shall take effect. This court, speaking by Mr. Justice Harlan, said: "It was undoubtedly within the Constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. Whether the first proviso in the act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is, or not, in violation of that condition, is a question of too much practical importance and delicacy to justify us in considering it unless its determination be essential to the disposition of the case in hand; and we think it is not." The case was decided without determining the question referred to.

A question of the same nature frequently arises upon statutes which require the registry of conveyances and other instruments within a limited period prescribed, and making them void, either absolutely or in their operation as against third persons, if not recorded within such time. Such laws, as applied to conveyances and other instruments in existence at the time of their passage, are, of course, retrospective in their character, and may operate very oppressively if a reasonable time be not given for the registry required. This subject was discussed in the case of *Vance* v. *Vance*, 108 U. S. 514, Mr. Justice Miller delivering the opinion of the court, where the prior cases were adverted to and commented upon. The same rule applies in those cases as in reference to statutes of limitation, namely, that the time given for the act to be done must be a reasonable time, otherwise it would be unconstitutional and void.

It is evident from this statement of the question that no one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another.

It is necessary, therefore, to look at the nature and circumstances of the case before us, and of the class of cases to which it belongs. The primary obligation of the State with regard to the coupons attached to the bonds issued under the act of 1871 was to pay them when they became due; but if they were not paid at maturity the alternative right was given to the holder of them to use them in the payment of taxes, debts, dues and demands due to the State. The very nature of the case shows that such an application of the coupons could not be made immediately or in any very short period of time. If all the bonds were of the denomination of one thousand dollars each, it would require twenty thousand of them to make up the funded debt of twenty millions of dollars. These twenty thousand bonds would be likely to be scattered and dispersed through many States and countries, and it would be impracticable for the holders of them to use the coupons

which the State should fail to pay in cash, in the alternative manner stipulated for in the contract, unless they had a reasonable time to dispose of them to taxpayers. No limitation of time was fixed by the act within which the coupons should be presented or tendered in payment of taxes or other demands. The presumption would naturally be that they could be used within an indefinite period, like bank bills. Under this condition of things, a statute of limitations giving to the holders thereof but a single year for the presentation in payment of taxes of the coupons then in their possession, perhaps never severed from the bonds to which they were attached, and comprising all the coupons which had been originally attached thereto, seems, even at first blush, to be unreasonable and oppressive. Probably not one-tenth, if even so large a proportion, of the bondholders were taxpayers of the State of Virginia. The only way in which they could, within the year prescribed, utilize their coupons, the accumulation perhaps of years, would be to sell and dispose of them to the taxpayers. How this could be done, especially in view of the onerous laws which were passed with regard to the sale of coupons in the State, it is difficult to see. Under all the circumstances of the case, and the peculiar condition of the securities in question, we are compelled to say that in our opinion the law is an unreasonable law and that it does materially impair the obligation of the contract.

We have spoken of the act as limiting, indifferently, the time of tendering the coupons, and the time of commencing proceedings to ascertain their genuineness. Its terms relate only to the latter; and as this proceeding cannot be instituted until the coupons have been tendered, the effect is, to make a tender necessary before the expiration of one year, which can often be done only within a few days, or even hours; since the taxes may become due in that short period, and not become due again until a year afterwards. This puts the unconstitutionality of the act beyond question.

Without further discussion of the subject, we conclude that

The judgment of the Circuit Court must be reversed, and the same is reversed accordingly, and the cause remanded for the purpose of such proceedings as may be required by law and justice in conformity with this opinion.

HUCLESS v. *CHILDREY.*

The head-note for this case will be found on page 664, *ante*.

Mr. Justice Bradley, continuing, stated the case as follows:

The next case which we shall consider is that of *Hucless* v. *Childrey*, which was an action of trespass on the case, brought in the Circuit Court of the United States for the Eastern District of Virginia, by Hucless, a citizen of the State of Virginia, residing in Richmond, against Childrey, the treasurer of Richmond, and, as such, collector of taxes and license taxes due to the State, to recover damages for the refusal of the said Childrey to receive tax-receivable coupons in payment or part payment of a license tax payable for a license to sell by retail wine, spirits and other intoxicating liquors, whereby the plaintiff was prevented from pursuing the said business (which was a lawful business), and sustained damage by reason thereof to the extent of six thousand dollars. The declaration stated in substance that the plaintiff desired and intended to open and conduct the business aforesaid at 405 West Leigh Street, in said city of Richmond, for one year from the first of May, 1889; that he was a fit person, and intended to keep an orderly house, and that the place was suitable, convenient and appropriate for that purpose; that by the statute law of Virginia a person desiring and intending to conduct such business must apply to the commissioner of revenue for the city or county for a license therefor, who shall ascertain the amount to be paid and give the applicant a certificate specifying the same, and such person shall make a deposit therefor with the treasurer or collecting officer of the city or county, of the amount so ascertained, and shall take from him a receipt for such deposit endorsed on the certificate, or otherwise, he shall deposit with the treasurer the amount of tax assessed by law

for the license tax on said business. Thereupon he shall make application in writing for a license for such business to the commissioner of the revenue for such city or county, accompanied by said certificate, and the person so desiring to conduct said business is forbidden by said statutes to conduct the same until he has appeared before the judge of the corporation or county court, and has proved that he has made such deposit and is a fit person to conduct such business, etc.; that the license tax imposed by the laws of Virginia to be paid for the business of selling, by retail, for one year, wine, ardent spirits, malt liquors or any of them, in cities of more than one thousand inhabitants, is $125; that on the 3d of May, 1889, plaintiff applied to the commissioner of revenue of Richmond to ascertain the amount to be paid by him as his license tax for selling by retail as aforesaid, and the commissioner gave to him a certificate specifying the same as $125; that on the same day the plaintiff presented said certificate to Childrey, the defendant, treasurer, as aforesaid, and tendered to him, in payment of said license tax, $123 in coupons and two dollars in lawful money, and demanded a receipt stating that he had deposited with him $125 in said coupons and money; that Childrey refused to receive said coupons and money, and refused to give plaintiff said receipt; that each of said coupons was cut from a bond issued by the State of Virginia under the act of March 30, 1871, and each bore upon its face the contract of the State that it would be received in payment of all taxes, debts, dues and demands due to the State; that thereafter, on the 3d day of May, 1889, the plaintiff stated to said Childrey that he desired and intended to conduct the business aforesaid at 405 West Leigh Street, and then tendered to him in payment of the license tax due to the State on said business for one year $123 in coupons and $2.75 in lawful money, and demanded of him a certificate of such deposit, but Childrey refused to receive said coupons and money, and refused to give such certificate, and refused to receive said coupons and money in both cases, because sections 399, 536 and 538 of the Code of Virginia of 1887 forbade him to receive them; and the plaintiff averred that said sections are repugnant to section 10,

article 1 of the Constitution of the United States, which the said Childrey well knew; that he, Childrey, obeyed the command of said sections and declined to follow the mandate of the Constitution; that by force of the statute law of Virginia the plaintiff would have been liable to indictment and severe penalties if he had proceeded to open and conduct his said business before he had satisfied the judge of the corporation or the hustings court of the city of Richmond that he was a fit person to conduct said business, that he would keep an orderly house and that the place was a suitable one; and that the plaintiff could not apply to said court to enter on said inquiries until he presented to said court a receipt from said Childrey for said deposit endorsed on the certificate furnished by the commissioner of the revenue, or the certificate of the commissioner endorsed on the receipt of said Childrey.

To this declaration the defendant filed a demurrer, which was sustained by the Circuit Court and judgment rendered for the defendant, which judgment is brought here for review.

Mr. William L. Royall for plaintiff in error.

It is freely conceded that the State may, in her discretion, absolutely abolish the sale of spirituous liquors or prescribe on what terms they shall be sold. That is part of the police power intended for the protection of society. But the State of Virginia does not prohibit its sale. She encourages its sale. She evidently thinks the sale of liquor a practice beneficial to the health and morals of her citizens, and she endeavors to extract from its sale all the revenue that the business will bear.

Whilst she may do what she pleases looking to a regulation of its sale, yet, when she undertakes to raise revenue from its sale, that revenue is as much payable in her coupons as any other revenue, as they are to be received in payment of "all taxes, debts, demands and dues due the State."

Mr. R. A. Ayers, Attorney General of the State of Virginia, and *Mr. J. Randolph Tucker* for defendant in error.

Mr. Justice Bradley, continuing, delivered the opinion of the court.

The law under which the treasurer justified his action in refusing to receive the coupons tendered by the plaintiff is set forth in the declaration with sufficient accuracy and fulness for the disposal of the case, except that it should be added that the license fee to be deposited with the treasurer was required to be in lawful money of the United States as a condition precedent to the granting of the license.

We are of opinion that the requirement that the license fee shall be paid in lawful money of the United States does not, as contended, impair the obligation of the contract made by the State with the holders of the coupons referred to. Licenses for the sale of intoxicating liquors are not only imposed for the purpose of raising revenue, but also for the purpose of regulating the traffic and consumption of these articles, and hence the State may impose such conditions for conducting said traffic as it may deem most for the public good. Instead of a license fee of $125 it might have imposed a license fee of $250, or any other amount, or it might have prohibited the sale of intoxicating liquors altogether, as is admitted by the counsel for the plaintiff in their brief. They concede that the State might, in her discretion, absolutely abolish the sale of spirituous liquors, or prescribe on what terms they shall be sold. In this view, there does not seem to be any violation of the obligation of the State in requiring the tax which is imposed to be paid in any manner whatever — in gold, in silver, in bank notes or in diamonds. The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business sought to be followed was one of the ordinary pursuits of life, in which all persons are entitled to engage. License taxes imposed upon such pursuits and professions are imposed purely for the purpose of revenue, and not for the purpose of regulating the traffic or the pursuit. For these considerations we are clearly of opinion that

The judgment of the Circuit Court was right, and it is, therefore, affirmed.

VASHON v. *GREENHOW.*

The head-note for this case will be found on page 664, *ante.*

Mr. Justice Bradley, continuing, stated the case as follows:

The remaining case which we have to consider is that of *Vashon* v. *Greenhow.* This case arose upon the refusal of Greenhow, treasurer of the city of Richmond, to receive from Vashon tax-receivable coupons in payment, or part payment, of taxes due from him, including a certain amount due for school taxes for the maintenance of the public free schools of the State. Upon this refusal Vashon filed a petition for a mandamus in the hustings court of the city of Richmond, stating that he was a taxpayer of the said city, and was indebted to the State for state taxes of 1884 to the amount of $35.63, and tendered to Greenhow, the said treasurer, in payment therefor, certain coupons cut from the bonds of the State issued under the act of March 30, 1871 — one of the denomination of thirty dollars and one of the denomination of three dollars, said coupons being past due, and being presented to the court with the petition; that he, at the same time, offered to pay the treasurer the whole of said tax in legal-tender notes and coin, and demanded that the treasurer receive said coupons along with said legal-tender notes and coin for the purpose of identification and verification in manner and form as required by the act of January 14, 1882. The petition further alleged that by virtue of the State's contract to receive said coupons in payment of said taxes, and by virtue of the act of assembly aforesaid, he was entitled, upon the payment of his said tax in money, to have his said coupons received for identification and verification, and pay his tax therewith; wherefore he prayed a writ of mandamus commanding said Greenhow, treasurer of said city, to receive the said money and also the said coupons, and commanding him to forward said coupons to the court for identification and verification according to law. A rule to show cause having been granted, the treasurer filed his answer to the petition, in which he stated the truth to be that Vashon was indebted to the State for taxes for the

year 1884, as follows, to wit: for tax on property the sum of $35.63, being $9.66 for the maintenance of public free schools, as per exhibit attached to the answer. He further stated and admitted that the petitioner offered to pay the said tax in money at the same time that he demanded the respondent to receive the coupons mentioned in the petition for the purpose of identification and verification. The answer then proceeds as follows:

"Your respondent avers that he was willing to receive the payment of said tax in money, but refused to receive and receipt for so much of the coupons as were offered in payment of that portion of the tax set aside by law and dedicated to the maintenance of the public free schools of the State.

"Your respondent assigns the following reasons for such refusal:

"(1) The Constitution of Virginia provides, in section 7 of article VIII, what specific sums shall be set apart as a permanent and perpetual literary fund, and includes in it such other sums as the General Assembly may appropriate.

"(2) Section 8 of the same article provides that the General Assembly shall apply the annual interest on the literary fund and an annual tax upon the property of the State of not less than one mill nor more than five mills on the dollar, for the benefit of the public free schools.

"(3) In pursuance of this constitutional authority the General Assembly has provided, in acts of 1883–4, p. 561, that on tracts of lands and lots a tax of ten cents on every hundred dollars of the assessed value thereof shall be levied, which shall be applied to the support of the public free schools of the State.

"(4) Again, the last General Assembly, in acts of 1883–4, p. 603, have provided that all taxes assessed on property, real or personal, and dedicated to the maintenance of the public free schools of the State, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the free school fund, and shall be used for no other purpose whatsoever.

"Your respondent avers that to have forwarded such of the

coupons as were offered in payment of the tax dedicated to the public free schools would have been a violation of the Constitution and the laws above referred to.

"For these reasons your respondent insists that he ought not to have forwarded, for the purpose of identification and verification, so much of the coupons as were tendered in payment of that portion of the tax dedicated to the public free schools.

"He therefore prays that the writ of mandamus may be denied and the petition dismissed with costs."

To this answer the petitioner entered a demurrer, which was sustained by the court and a peremptory mandamus was awarded pursuant to the prayer of the petition. The case being carried to the Supreme Court of Appeals of Virginia the judgment was reversed, and this judgment of reversal is now before us for review.

Mr. William L. Royall for plaintiff in error.

The question to be determined is, which will this court follow — the series of decisions of the old court, holding the funding act to be consistent with the Constitution of the State, or the decision of the new court, holding that act to be void, as being in conflict with the Constitution of the State.

If the act is consistent with the Constitution of the State, then the act of March 15, 1884, which forbids payment of part of the tax in coupons, clearly impairs the obligation of the State's contract that they shall be received in payment of all taxes due to the State. It is the settled and familiar law of this court that when the question is whether a state law authorizing an issue of bonds is repugnant to the Constitution of that State, and there have been conflicting decisions of the highest court of that State, this court will follow the first decision of that State's court on that question, instead of the last. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Kenosha* v. *Lamson*, 9 Wall. 477; *Lee County* v. *Rogers*, 7 Wall. 181; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Mitchell* v. *Burlington*, 4 Wall. 270; *Olcott* v. *Supervisors*, 16 Wall. 678; *Taylor* v. *Ypsilanti*, 105 U. S. 60.

It is also the settled and familiar law of this court that when the question to be determined is whether a state statute, making a contract, is repugnant to the Constitution of that State, this court will determine that question for itself, without regard to what the highest court of that State may have decided in regard to it. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *University* v. *People*, 99 U. S. 309.

Now, it is hardly possible for this court, after the many times it has held these coupons to be binding contracts, to hold now that they are void. I suppose, as a matter of course, that it will adopt the reasoning of Virginia's court in *Antoni* v. *Wright*, 22 Grattan, 833; and *Clarke* v. *Tyler*, 30 Grattan, 134; and I shall therefore discuss the matter no further.

Mr. R. A. Ayers, Attorney General of the State of Virginia, and *Mr. J. Randolph Tucker* for defendant in error.

Mr. Justice Bradley, continuing, delivered the opinion of the court.

The Court of Appeals placed their judgment upon two distinct grounds. In the first place, they reviewed the former judgments of that court which had sustained the act of March 30, 1871, as a valid and constitutional enactment and binding upon the State as a contract with the bond and coupon holders under the same. The court were of opinion that these decisions were based upon a mistaken assumption that the State had received a consideration for the issuing of the bonds created by the act aforesaid. They argued and attempted to show that the State had not received any consideration whatever, but that the issuing of the bonds under the act of 1871 was a mere gratuity on the part of the State, and was not binding upon it so as to prevent the legislature from abrogating the conditions of that act. We have already indicated our views with regard to this position taken by the Supreme Court of Appeals, and have referred to the decisions made by this court sustaining the validity of the act of 1871, which decisions of this court we regard as binding upon us.

The other ground on which the Court of Appeals placed its decision was, that the act of 1871, as applied to the moneys due and payable to the "literary fund," or fund for the maintenance of public free schools, was contrary to the constitution of the State, adopted in 1869. The 7th and 8th sections of the eighth article of that constitution declare as follows:

"SEC. 7. The General Assembly shall set apart, as a permanent and perpetual literary fund the present literary funds of the State, the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeitures, and all fines collected for offences committed against the State, and such other sums as the General Assembly may appropriate.

"SEC. 8. The General Assembly shall apply the annual interest on the literary fund, the capitation tax provided for by this constitution for public free school purposes, and an annual tax upon the property of the State of not less than one mill nor more than five mills on the dollar, for the equal benefit of all the people of the State. . . ." 2 Constitution and Charters, 1968.

The court, in its opinion, held that in view of these constitutional provisions the legislature had no power to declare, or contract, that the moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871; and that such a payment would be repugnant to the very nature of the fund. It might well be added, that coupons thus paid into the fund would be of no value whatever to it, for as soon as paid into the treasury they would become valueless as if cancelled and destroyed, unless some provision were made for their reissue, and the putting of them into renewed circulation. This would be opposed to the whole tenor of the act, would be unjust to the coupon holders themselves, and would probably be contrary to the acts of Congress in reference to the creation of paper currency. We think that the position of the Court of Appeals in this case is well taken, that coupons could not be made receivable as a portion of the literary fund; and that, if they could not be received as a part

of the fund, they could not properly be made receivable for the taxes laid for the purpose of maintaining said fund. For several years after the constitution was adopted, and after the law of 1871 had been passed, the taxes for the benefit of free schools were mingled in the assessment and collection of taxes, and in the treasury when received, with the other taxes and funds raised for the support of the state government. As long as this state of things continued the collecting officers could not object to receiving coupons in payment of taxes, because the share due to the school fund could easily be paid from the treasury, to the credit of that fund, out of the lawful moneys received. But by the tax act of March 15, 1884, it was provided that all taxes assessed on property, real or personal, by that act, and dedicated by it to the maintenance of the public free schools of the State, should be paid and collected only in the lawful money of the United States, and should be paid into the treasury to the credit of the free school fund, and should be used for no other purpose whatsoever, and to this end the auditor of public accounts should have the books of the commissioner of the revenue prepared with reference to the separate assessment and collection of said school tax, and the several treasurers of the Commonwealth should have the tax bills in their counties and corporations so made out as to specify the amount of the tax due from each taxpayer to the public free school fund, including the capitation taxes of whatever kind or nature, and should keep said capitation tax and school tax separate and distinct from all other taxes or revenues so collected by him, and forward the same, thus separate and distinct, to the auditor of public accounts, which should be kept separate and distinct by him from all other taxes or revenues until paid to the public free schools. Since the passage of this act, and in pursuance thereof, the taxes and other revenues raised for the purpose of maintaining public schools, and belonging under the Constitution to the literary fund, have been kept separate and distinct from the other taxes raised for the general support of the state government. This was the practice when the case of *Vashon* v. *Greenhow* arose, and in our judgment the law requiring the school tax to be

paid in lawful money of the United States was a valid law, notwithstanding the provisions of the act of 1871; and that it was sustained by the sections of the Constitution referred to, which antedate the law of 1871, and override any provisions therein which are repugnant thereto.

In *Paup* v. *Drew*, 10 How. 218, a decision was made by this court in a case not very different in principle from the one now under consideration. It had been decided in *Woodruff* v. *Trapnall*, 10 How. 190, at about the same time, that the law of Arkansas which chartered the Bank of the State of Arkansas, (the whole capital of which belonged to the State,) and provided that the bills and notes of said institution should be received in all payments of debts due to the State, was valid and irrepealable, and that, although this provision was subsequently in terms repealed, the notes of the bank which were in circulation at the time of the repeal were not affected by it; and that the undertaking of the State to receive the notes of the bank constituted a contract between the State and the holders of these notes which the State was not at liberty to break or impair, although notes issued by the bank after the repeal were not within the contract and might be refused. After this decision the case of *Paup* v. *Drew* came up, in which it was held that, although the notes of the bank were receivable in payment of all debts due to the State in its own right, and could not be refused, yet where the State sold lands which were held by it in trust for the benefit of a seminary, and the terms of the sale were that the debtor should pay in specie or its equivalent, such debtor was not at liberty to tender the notes of the bank in payment. The question arose in this way: Congress in 1827 had passed an act "Concerning a seminary of learning in the Territory of Arkansas," by which two entire townships of land were directed to be set aside and reserved from sale, out of the public lands within the said territory, for the use and support of a university within the said territory. In 1836, Congress passed another act entitled "An act supplementary to the act entitled 'An act for the admission of the State of Arkansas into the Union, and to provide for the due execution of the laws of the United

States within the same, and for other purposes,'" by which last act the lands so reserved for the use and support of a university were vested in the State of Arkansas. On the 28th of December, 1840, the legislature of Arkansas passed an act entitled "An act to authorize the governor to dispose of the seminary lands;" and in 1842 the then governor of the State sold to John W. Paup the right to enter and locate 640 acres of said land, and received from him therefor bonds payable at different dates in specie or its equivalent. In 1847 the governor of the State brought a suit upon these bonds, and the defendants brought into court the sum of $6050 in notes of the Bank of the State of Arkansas, and pleaded a tender of the same in discharge of the debt. The plaintiff demurred on the ground that the proceeds of the bonds were part of a trust fund committed to the State by Congress for special purposes, over which the State had no power except to collect and disburse the same in pursuance of the objects of the grant, and the State had no power to apply said funds to the payment of ordinary liabilities, and was not bound to accept in payment of such bonds any depreciated bills, bank paper, or issues, even though she might be ultimately liable to redeem them. This demurrer was sustained and judgment given that the fund was a trust fund held by the State of Arkansas for the purposes to which it was devoted, and therefore the State could not properly contract to receive other than lawful money for property disposed of belonging to said fund.

We think that the principle of this case sustains the decision of the Court of Appeals of Virginia in the case now under consideration, and the judgment of that court is

Affirmed.

It may be argued that the principle involved in the last case is equally applicable to all taxes raised for the support of the state government, inasmuch as the funds necessary for that purpose, as well as those raised for the purpose of maintaining public free schools, are required to be paid in cash. But there is this difference, that the tax for school purposes is set apart for that specific use, under the express requirement of the consti-

tution, whilst the general tax for carrying on the government is, or should be, adequate to meet not only the actual expenses of the government itself, but also the outstanding debts and obligations that may be due and payable during the fiscal year, of which the coupons are themselves a part. If the tender of tax-receiving coupons to any considerable amount is apprehended, the rate of taxation should be raised so as to produce a sufficient surplus over and above such coupons to meet the expenses of the government. If the influx of coupons should be so uncertain that no safe calculation could be made on the subject, an arrangement could probably be made with the coupon holders, for limiting the proportion of tax which would be received in coupons. It is certainly to be wished that some arrangement may be adopted which will be satisfactory to all the parties concerned, and relieve the courts as well as the Commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret.

APPENDIX.

MEMORIAL ORATION,

DELIVERED AT

THE CELEBRATION OF THE ONE-HUNDREDTH ANNIVERSARY OF THE FRAMING AND PROMULGATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA IN INDEPENDENCE SQUARE, PHILADELPHIA, SEPTEMBER 17th, 1887,

BY MR. JUSTICE MILLER.

Mr. President and Fellow-Countrymen:

The people of the United States, for ten or twelve years past, have commemorated certain days of those different years as the centennial anniversaries of important events in their history. These gatherings of the people have been in the localities where the historic events occurred. It is a little over eleven years since the great centennial anniversary of the adoption of the Declaration of Independence was celebrated in this city, where the Congress sat which proclaimed it. The grand industrial exhibition, the august ceremonies of the day, and all the incidents of the commemoration, in no respect fell below what was demanded by the importance of the occasion. May it be long before the people of the United States shall cease to take a deep and pervading

---

The Centennial Address of Chief Justice Fuller before the two Houses of Congress, on the 11th day of December, 1889, having been printed in the Appendix to Volume 132 of these Reports, and the speeches of the Chief Justice, of Mr. Justice Field and of Mr. Justice Harlan, at the Centennial Celebration in New York, in the Appendix to Volume 134, it has been thought proper to complete the work by preserving, in the Appendix to this Volume, Mr. Justice Miller's Oration at the celebration in Philadelphia, September 17, 1887, of the one hundredth anniversary of the formation of the Constitution.

interest in the Fourth of July, as the birthday of our national life, or the event which then occurred shall be subordinated to any other of our national history.

We are met here to commemorate another event in our progress, in many respects inferior to none in importance in our own history, or in the history of the world. It is the formation of the Constitution of the United States, which, on this day, one hundred years ago, was adopted by the convention which represented the *people* of the United States, and which was then signed by the delegates who framed it, and published as the final result of their arduous labors, — of their most careful and deliberate consideration, — and of a love of country as unmixed with selfishness as human nature is capable of.

In looking at the names of those who signed the instrument, our sentiment of pious reverence for the work of their hands hardly permits us to discriminate by special mention of any. But it is surely not in bad taste to mention that the name of George Washington is there as its first signer and president of the convention; the man of whom it was afterwards so happily declared by the representatives of a grateful people, that he was "first in war, first in peace, and first in the hearts of his countrymen." He was the first man selected to fill the Chief Executive office of President created by the Constitution; and James Madison, another name found in the list of signers, filled the same office.

James Wilson, of Pennsylvania, John Blair, of Virginia, and John Rutledge, of South Carolina, were made justices of the court established by that instrument, with a large view among its other functions of expounding its meaning. With no invidious intent it must be here said that one of the greatest names in American history — Alexander Hamilton — is there as representing alone the important State of New York; his colleagues from that State having withdrawn from the convention before the final vote on the Constitution. Nor is it permissible, standing in this place and in this connection, to omit to point to the name of Benjamin Franklin, the venerable philosopher and patriot; of Robert Morris, the financier of the Revolution; and of Gouverneur Morris, the brilliant scholar and profound statesman.

It is necessary to any just appreciation of the Constitution, whose presentation for acceptance to the people of the United States a hundred years ago on this day we commemorate, that some statement of its origin, and of the causes which led to it, should be made. The occasion requires that this shall be brief.

The war of seven years, which was waged in support of the independence of these States, former provinces of Great Britain, — an independence announced by the Declaration of July 4th, 1776, already referred to, — the war which will always be known in the history of this country as the war of the Revolution, was conducted by a union of those States under an agreement between them called Articles of Confederation. Under these articles each State was an integer of equal dignity and power in a body called the Congress, which conducted the affairs of the incipient nation. Each of the thirteen States which composed this confederation sent to Congress as many delegates as it chose, without reference to its population, its wealth, or the extent of its territory; but the vote upon the passage of any law, or resolution, or action suggested, was taken by States, the members from each State, however numerous or however small, constituting one vote, and a majority of these votes by States being necessary to the adoption of the proposition.

The most important matters on which Congress acted were but little else than recommendations to the States, requesting their aid in the general cause. There was no power in the Congress to raise money by taxation. It could declare by way of assessment the amount each State should contribute to the support of the Government, but it had no means of enforcing compliance with this assessment. It could make requisitions on each State for men for the army which was fighting for them all, but the raising of this levy was wholly dependent upon the action of the States respectively. There was no authority to tax, or otherwise regulate, the import or export of foreign goods, nor to prevent the separate States from taxing property which entered their ports, though the property so taxed was owned by citizens of other States.

The end of this war of the Revolution, which had established our entire independence of the crown of Great Britain, and which had caused us to be recognized theoretically as a member of the family of nations, found us with an empty treasury, an impaired credit, a country drained of its wealth and impoverished by the exhaustive struggle. It found us with a large national debt to our own citizens and to our friends abroad, who had loaned us their money in our desperate strait; and worst of all, it found us with an army of unpaid patriotic soldiers who had endured every hardship that our want of means could add to the necessary incidents of a civil war, many of whom had to return penniless to families whose condition was pitiable.

For all these evils the limited and imperfect powers conferred by the Articles of Confederation afforded no adequate remedy. The Congress, in which was vested all the authority that those articles granted to the General Government, struggled hopelessly and with constant failure from the treaty of peace with England, in 1783, until the formation of the new Constitution. Many suggestions were made for enlarging the powers of the Federal Government in regard to particular subjects. None were successful, and none proposed the only true remedy, namely, authority in the National Government to enforce the powers which were entrusted to it by the Articles of Confederation by its own immediate and direct action on the people of the States.

It is not a little remarkable that the suggestion which finally led to the relief, without which as a nation we must soon have perished, strongly supports the philosophical maxim of modern times, — that of all the agencies of civilization and progress of the human race, commerce is the most efficient. What our deranged finances, our discreditable failure to pay our debts, and the sufferings of our soldiers could not force the several States of the American Union to attempt, was brought about by a desire to be released from the evils of an unregulated and burdensome commercial intercourse, both with foreign nations and between the several States.

After many resolutions by state legislatures which led to nothing, one was introduced by Mr. Madison into that of Virginia, and passed on the twenty-first day of February, 1786, which appointed Edmund Randolph, James Madison, Jr., and six others, commissioners, "to meet such commissioners as may be appointed by other States in the Union, at a time and place to be agreed, to take into consideration the trade of the United States; to examine the relative situation and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony."

This committee was directed to transmit copies of the resolution to the several States, with a letter respecting their concurrence, and proposing a time and place for the meeting. The time agreed upon was in September, 1786, and the place was Annapolis. Nine States appointed delegates, but those of five States only attended. These were New York, New Jersey, Pennsylvania, Virginia, and Delaware. Four other States appointed delegates who, for various reasons, did not appear, or came too late. Of course such a convention as this could do little but make recommendations.

What it did was to suggest a convention of delegates from all the States, "to devise such further provisions as might appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union." It also proposed that whatever should be agreed upon by such a convention should be reported to Congress, and confirmed by the legislatures of all the States.

This resolution and an accompanying report were presented to Congress, which manifested much reluctance and a very unreasonable delay in acting upon it, and a want of any earnest approval of the plan. But the proceedings of the Annapolis convention had been laid before the legislatures of the States, where they met with a more cordial reception, and the action of several of them in approving the recommendation for a convention, and appointing delegates to attend it, finally overcame the hesitation of Congress. That body, accordingly, on the 21st of February, 1787, resolved that, in its opinion, "it was expedient that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

On the day here recommended — May 14th — delegates from Virginia and Pennsylvania met and adjourned from day to day until the 25th, during which period delegates from other States made their appearance. On that day the delegates of seven States, duly appointed, being present, the convention was organized by the election of General Washington as its president, at the suggestion of Franklin. On the 28th the representation in the convention was increased to nine States; and on the 29th Edmund Randolph, delegate from Virginia, and governor of that State, inaugurated the work of the convention by a speech in which he presented an outline of a constitution for its consideration.

From this time on, the convention labored assiduously and without intermission, until, on the seventeenth day of September, one hundred years ago, it closed its work by presenting a completed instrument, which, being subsequently ratified by the States, became the Constitution of the United States of America.

All the States except Rhode Island were finally represented in

the convention and took part in framing the instrument, a majority of the delegates of each State assenting to it. That State sent no delegate to the convention; and when the Constitution was presented to it for ratification no convention was called for that purpose until after it had gone into operation as the organic law of the National Government; and it was two years before she accepted it and became in reality a State of the Union.

It is a matter for profound reflection by the philosophical statesman, that while the most efficient motive in bringing the other States into this convention was a desire to amend the situation in regard to trade among the States, and to secure a uniform system of commercial regulation, as necessary to the common interest and permanent harmony, the course of Rhode Island was mainly governed by the consideration that her superior advantages of location, and the possession of what was supposed to be the best harbor on the Atlantic coast, should *not* be subjected to the control of a Congress which was by that instrument expressly authorized "to regulate commerce with foreign nations and among the several States," and which also declared that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor any vessel bound to or from one State be obliged to enter, clear, or pay duties in another."

That the spirit which actuated Rhode Island still exists, and is found in other States of the Union, may be inferred from the fact that at no time since the formation of the Union has there been a period when there were not to be found in the statute-books of some of the States acts passed in violation of this provision of the Constitution, imposing taxes and other burdens upon the free interchange of commodities, discriminating against the productions of other States, and attempting to establish regulations of commerce which the Constitution says shall only be done by the Congress of the United States.

During the session of the Supreme Court which ended in May last no less than four or five decisions of the highest importance were rendered, declaring statutes of as many different States to be void because they were forbidden by this provision of the Federal Constitution.

Perhaps the influence of commerce in bringing into harmonious action a people whose interests are common, while the governments by which they are controlled are independent and hostile, is nowhere more strikingly illustrated than in the unification of

the German people, which has taken place under the observation of most of us. Only a few years ago — very few in the chronicles of a nation — what is now the great central Empire of Europe consisted of a number of separate kingdoms, principalities and free cities. Some of these were so powerful as to be rated among the great powers of Europe. Several of them were small dukedoms, each with an autonomy and government of its own. Each levied taxes and raised revenue from all the merchandise carried through its territory, and customs officers at the crossing of every line which divided one of them from the other collected duties on all that could be found in the baggage or on the person of the traveller. When the railroad system had pervaded Europe, and persons and property could be carried by them for two or three hundred miles on a continuous track through many of these States, the burden became intolerable. Their governments began to make treaties for the rates of taxation, for freer transit of persons and goods, and to these treaties the States became parties one after the other, until the Zollvereins of North Germany and of South Germany included at last all of them except Austrian Germany. When this was done the unification of Germany was a foregone conclusion. The war with France only hastened what the Zollverein had demonstrated to be a necessity. What her poets and statesmen, and the intense longing of the sons of Germany for a union of all who spoke the language of the Fatherland, and the wisdom of her patriotic leaders had never been able to accomplish, was attained through the Zollverein, and the demands of commerce were more powerful in the unification of the German people than all the other influences which contributed to that end.

We need not here pursue the detailed history of the ratification and adoption of the Constitution by the States. The instrument itself, and the resolution of Congress submitting it to the States, both provided that it should go into operation when adopted by nine States. Eleven of them accepted it in their first action in the matter. North Carolina delayed a short time, and Rhode Island two years later changed her mind; and thus the thirteen States which had united in the struggle for independence became a nation under this form of government.

Let us consider now the task which the convention undertook to perform, the difficulties which lay in its way, and the success which attended its efforts. In submitting to Congress the result of their labors, the convention accompanied the instrument with a letter signed under its authority by its president, and addressed to

the President of Congress. Perhaps no public document of the times, so short, yet so important, is better worth consideration than this letter, dated September 17th, 1787. From it I must beg your indulgence to read the following extracts: —

"Sir: — We now have the honor to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable. The friends of our country have long seen and desired that the power of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the general government of the Union; but the impropriety of delegating such extensive trusts to one body of men" (meaning Congress) "is evident. Hence results the necessity of a different organization. It is obviously impracticable in the Federal Government of these States to secure all the rights of independent sovereignty to each, and yet provide for the interests and safety of all." Again:

"In all our deliberations on this subject we kept steadily in view that which appears to us the greatest interest of every true American, — *the consolidation of our Union*, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the convention to be less rigid on points of inferior magnitude than might otherwise be expected; and thus the Constitution which we now present is the result of a spirit of amity, and of that natural deference and concession which the peculiarity of our political situation rendered indispensable."

The instrument framed under the influence of these principles is introduced by language very similar. The opening sentence reads: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

This Constitution has been tested by the experience of a century of its operation, and in the light of this experience it may be well to consider its value. Many of its most important features met with earnest and vigorous opposition. This opposition was shown in the convention which presented it, and the conventions of the States called to ratify it. In both, the struggle in its favor was arduous and doubtful, the opposition able and active. For a

very perspicuous and condensed statement of those objections, showing the diversity of their character, the importance of some and the insignificance of others, I refer my hearers to section 297 of the Commentaries of Mr. Justice Story on the Constitution. Perhaps the wisdom of this great instrument cannot be better seen than by reconsidering at this time some of the most important objections then made to it. One of these which caused the opposition of several delegates in the Constitutional Convention, and their refusal to sign it, was the want of a well-defined Bill of Rights. The royal charters of many of the colonies, and the constitutions adopted by several States after the revolt, had such declarations, mainly assertions of personal rights and of propositions intended to give security to the individual in his right of person and property against the exercise of authority by governing bodies of the State. The Constitution was not void of such protection. It provided for the great writ of *habeas corpus*, the means by which all unlawful imprisonments and restraints upon personal liberty had been removed in the English and American courts since Magna Charta was proclaimed; and it declared that the privilege of that writ should not be suspended, unless in cases of rebellion or invasion the public safety should require it. The Constitution also declared that no *ex post facto* law or bill of attainder should be passed by Congress; and no law impairing the obligation of contracts by any State. It secured the trial by jury of all crimes within the State where the offence was committed. It defined treason so as to require some overt act, which must be proved by two witnesses, or confessed in open court, for conviction.

It can hardly be said that experience has demonstrated the sufficiency of these for the purpose which the advocates of a bill of rights had in view, because upon the recommendation of several of the States made in the act of ratifying the Constitution, or by legislatures at their first meeting subsequently, twelve amendments were proposed by Congress, ten of which were immediately ratified by the requisite number of States, and became part of the Constitution within two or three years of its adoption.

In the presentation and ratification of these amendments, the advocates of a specific bill of rights, and those who were dissatisfied with the strong power conferred on the Federal Government, united; and many statesmen who leaned to a strong government for the nation were willing, now that the Government was established, to win to its favor those who distrusted it by the adoption of these amendments. Hence a very slight examination of them

shows that all of them are restrictions upon the power of the General Government, or upon the modes of exercising that power, or declarations of the powers remaining with the States and with the people. They establish certain private rights of persons and property which the General Government may not violate. As regards these last, it is not believed that any acts of intentional oppression by the Government of the United States have called for serious reprehension; but, on the contrary, history points us to no government in which the freedom of the citizen and the rights of property have been better protected and life and liberty more firmly secured.

As regards the question of the relative distribution of the powers necessary to organized society, between the Federal and State governments, more will be said hereafter.

As soon as it became apparent to the convention that the new government must be a nation resting for its support upon the people over whom it exercised authority, and not a league of independent States brought together under a compact on which each State should place its own construction, the question of the relative power of those States in the new government became a subject of serious difference. There were those in the convention who insisted that in the legislative body, where the most important powers must necessarily reside, the States should, as in the Articles of Confederation, stand upon a perfect equality, each State having but one vote; and this feature was finally retained in that part of the Constitution which vested in Congress the election of the President, when there should be a failure to elect by the electoral college in the regular mode prescribed by that instrument. The contest in the convention became narrowed to the composition of the Senate, after it had been determined that the legislature should consist of two distinct bodies, sitting apart from each other, and voting separately. One of these was to be a popular body elected directly by the people at short intervals. The other was to be a body more limited in numbers, with longer terms of office; and this, with the manner of their appointment, was designed to give stability to the policy of the Government, and to be in some sense a restraint upon sudden impulses of popular will.

With regard to the popular branch of the legislature, there did not seem to be much difficulty in establishing the proposition, that in some general way each State should be represented in it in proportion to its population, and that each member of the body should vote with equal effect on all questions before it. But when it was

sought by the larger and more populous States, as Virginia, Pennsylvania and Massachusetts, to apply this principle to the composition of the Senate, the resistance of the smaller States became stubborn, and they refused to yield. The feeling arising under the discussion of this subject came nearer causing the disruption of the convention than any which agitated its deliberations. It was finally settled by an agreement that every State, however small, should have two representatives in the Senate of the United States, and no State should have any more; and that no amendment of the Constitution should deprive any State of its equal suffrage in the Senate without its consent. As the Senate has the same power in enacting laws as the House of Representatives, and as each State has its two votes in that body, it will be seen that the smaller States secured, when they are in a united majority, the practical power of defeating all legislation which was unacceptable to them.

What has the experience of a century taught us on this question? It is certainly true that there have been many expressions of dissatisfaction with the operation of a principle which gives to each of the six New England States, situated compactly together, as much power in the Senate in making laws, in ratifying treaties, and in confirming or rejecting appointments to office, as is given to the great State of New York, which, both in population and wealth, exceeds all the New England States, and nearly if not quite equals them in territory.

But if we are to form an opinion from demonstrations against, or attempts to modify, this feature of the Constitution, or any feature which concerns exclusively the functions of the Senate, we shall be compelled to say that the ablest of our public men, and the wisdom of the nation, are in the main satisfied with the work of the convention on this point after a hundred years of observation. And it is believed that the existence of an important body in our system of government, not wholly the mere representative of population, has exercised a wholesome conservatism on many occasions in our history.

Another feature of the Constitution which met with earnest opposition was the vesting of the executive power in a single magistrate. While Hamilton would have preferred a monarch, with strong restriction on his authority, like that in England, he soon saw that even his great influence could not carry the convention with him. There were not a few members who preferred in that matter the system of a single body (as the Congress) in which

should be reposed all the power of the nation, or a council, or executive committee, appointed by that body and responsible to it. There were others who preferred an executive council of several members, not owing its appointment to Congress.

Our ancient ally — the French nation — following rapidly in our footsteps, abolished the monarchical form of government, and in attempting the establishment of a representative republic has found the governments so established up to the present time very unstable and of short duration. It is impossible for an American, familiar with the principles of his Government, and the operation of its Constitution, to hesitate to attribute these failures of the French people very largely to the defects in their various constitutions in points where they have differed from ours. Their first step, upon the overthrow of the monarchy, was to consolidate into one the three representative estates of nobles, clergy and commons, which had always, when called together by the king, acted separately. After a little experience in governing by committees, this body selected seven of their number, called the directors, to whom the executive powers were committed. It is sufficient to say of this body that, though tolerated for a while as an improvement on Robespierre and his Committee of Public Safety, it was easily overturned by Napoleon, who in rapid succession established an executive of three consuls, of which he was chief, then of consul for life in himself, and finally the empire, of which he was the head, and was at the same time the executive, the legislature and the fountain of justice. It is needless to recount the history of the second republic and the second empire. For a third time France now has a republican government. This has a president, a senate, and a house of deputies, as our Constitution has; but its president is a cipher, elected by the assembly for seven years. It was supposed that the length of the term would give stability to the government and efficiency to the office. It has in practice turned out that the president is but a public show, the puppet of the prevailing faction (it can hardly be called a party) in the house of deputies. His main function — a very disagreeable one — is to reconstruct perpetually dissolving cabinets, in which he has no influence, and whose executive policy is controlled by the deputies on whose demand they are appointed, all of them acting under constantly impending dread of a Parisian mob. The senate of this system, like the house of lords of Great Britain, is without any actual influence on the government, and is unlike our Senate, the members of which represent States, and have both the power

and the courage, when they deem it necessary, to resist the President or the House of Representatives, or both.

The present government of France has existed longer than any republic ever set up in that country. The sentiment of the people is essentially republican. The strongest sympathies, the ardent wishes of every lover of liberty and of republicanism in the world, are with that gallant people; and, commemorating, as we do to-day, the events of a hundred years ago, — the successful establishment of the grandest republic the world has ever known, — our hearts, filled with grateful remembrance of their valuable aid, are warm with ardent wishes that they may share the blessings we enjoy.

It was urged against our Constitution by many liberty-loving men, both in the convention and out of it, that it conferred upon the executive, a single individual, whose election for a term of four years was carefully removed from the direct vote of the people, powers dangerous to the existence of free government. It was said that with the appointment of all the officers of the government, civil and military, the sword and the purse of the nation in his hands, the power to prevent the enactment of laws to which he did not assent — unless they could be passed over his objection by a vote of two-thirds in each of the two legislative houses — and the actual use of this power for four years without interruption, an ambitious man of great personal popularity could establish his power during his own life and transmit it to his family as a perpetual dynasty.

Perhaps of all objections made to important features of the Constitution this one had more plausibility, and was urged with most force. But if the century of our experience has demonstrated anything, it is the fallacy of this objection and of all the reasons urged in its support.

The objection that the electoral college was a contrivance to remove the appointment of the President from the control of popular suffrage, was, if it had any merit, speedily overcome without any infraction of the Constitution by the democratic tendencies of the people. The electors composing the college, who it was supposed would each exercise an independent judgment in casting his vote for President, soon came to be elected themselves on distinct pledges made beforehand, that they would vote for some person designated as a popular favorite for that office. So that at the present time the electors of each State, in sending to the capital their votes for President, do but record the instruction of a

majority of the citizens voting in that State. The term of four years for the Presidential office is not now deemed too long by any one, while there are many who would desire that it should be made longer, say seven or ten years.

The power of appointment to office requires the consent of the Senate to its exercise; and that body has asserted its right of refusing that assent so courageously and so freely, that there can be no real fear of its successful use by the President in a manner to endanger the liberty of the country, unless the Senate itself shall be utterly corrupted. Nor can the means for such corruption be obtained from the public treasury unless Congress in both branches shall become so degenerate as to consent to such use.

Nor have we had in this country any want of ambitious men, who have earnestly desired the Presidency, or, having it once, have longed for a continuation of it at the end of the lawful term. And it may be said that it is almost a custom when a President has filled his office for one term acceptably, that he is to be re-elected, if his political party continues to be a popular majority. Our people have also shown the usual hero worship of successful military chieftains, and rewarded them by election to the Presidency. In proof of this it is only necessary to mention the names of Washington, Jackson, Harrison, Taylor and Grant. In some of them there has been no want of ambition, nor of the domineering disposition, which is often engendered by the use of military power. Yet none of these men have had more than two terms of the office. And though a few years ago one of the most largely circulated newspapers of the United States wrote in its paper day after day articles headed "Cæsarism," charging danger to the republic from one of its greatest benefactors and military chiefs, it excited no attention but derision, and deserved no other.

There is no danger in this country from the power reposed in the Presidential office. There is, as sad experience shows, far, far more danger from nihilism and assassination, than from ambition in our public servants.

So far have the incumbents of the Presidency, during the hundred years of its history, been from grasping, or attempting to grasp, powers not warranted by the Constitution, and so far from exercising the admitted power of that office in a despotic manner, a candid student of our political history during that time cannot fail to perceive that no one of the three great departments of the Government — the Legislative, the Executive and the Judicial — has been more shorn of its just powers, or crippled in the exercise of them, than the Presidency.

In regard to the function of appointment to office, — perhaps the most important of the executive duties, — the spirit of the Constitution requires that the President shall exercise freely his best judgment and follow its most sincere conviction in selecting proper men.

It is undeniable that for many years past, by the gradual growth of custom, it has come to pass that in the nomination of officers by the President, he has so far submitted to be governed by the wishes and recommendations of interested members of the two houses of Congress, that the purpose of the Constitution in vesting this power in him, and the right of the public to hold him personally responsible for each and every appointment he makes, is largely defeated. In other words, the great principle lying at the foundation of all free governments, that the legislative and executive departments shall be kept separate, is invaded by the participation of members of Congress in the exercise of the appointing powers.

History teaches us in no mistaken language how often customs and practices, which were originated without lawful warrant and opposed to the sound construction of the law, have come to overload and pervert it, as commentators on the text of Holy Scripture have established doctrines wholly at variance with its true spirit.

Without considering many minor objections made to the Constitution during the process of its formation and adoption, let us proceed to that one which was the central point of contest then, and which, transferred to the question of construing that instrument, has continued to divide statesmen and politicians to the present time.

The convention was divided in opinion between those who desired a strong national government, capable of sustaining itself by the exercise of suitable powers, and invested by the Constitution with such powers, and those who, regarding the Articles of Confederation as a basis, proposed to strengthen the General Government in a very few particulars, leaving it chiefly dependent on the action of the States themselves for its support and for the enforcement of its laws.

Let us deal tenderly with the Articles of Confederation. We should here, on this glorious anniversary, feel grateful for any instrumentality which helped us in the days of our earliest struggle. Very few are now found to say anything for these articles, yet they constituted the nominal bond which held the States together during the war of independence. It must be confessed that the

sense of a common cause and a common danger probably did more to produce this united effort than any other motives. But the articles served their purpose for the occasion; and though when the pressure of imminent danger was removed they were soon discovered to be a rope of sand, let them rest in a peaceful, honorable remembrance.

Between those who favored a strong government of the Union and those who were willing to grant it but little power at the expense of the States, there were various shades of opinion; and while it was the prevailing sentiment of the convention that "the greatest interest of every true American was the consolidation of the Union," there were many who were unwilling to attain this object by detaching the necessary powers from the States and conferring them on the National Government.

These divergent views had their effect, both in the constitutional convention and in those held for its ratification. Around this central point the contention raged, and it was only by compromises and concessions, dictated by the necessity of each yielding something for the common good, — so touchingly mentioned in the letter of the convention to Congress, — that the result was finally reached. The patriotism and the love of liberty of each party were undisputed. The anxiety for a government which would best reconcile the possession of powers essential to the state governments with those necessary to the existence and efficiency of the government of the Union, was equal, and the long struggle since the adoption of the Constitution on the same line of thought, in its construction, shows how firmly these different views were imbedded in our political theories.

The party which came to be called the party of State Rights has always dreaded that the alleged supremacy of the national power would overthrow the state governments, or control them to an extent incompatible with any useful existence. Their opponents have been equally confident that powers essential to the successful conduct of the General Government, which either expressly or by implication are conferred on it by the Constitution, were denied to it by the principles of the State Rights party. The one believed in danger to the States, from the theory which construed with a free and liberal rule the grants of power to the General Government, and the other believed that such a construction of the Constitution was consistent with the purpose and spirit of that instrument, and essential to the perpetuity of the nation.

If experience can teach anything on the subject of theories of

government, the late civil war teaches unmistakably that those who believed the source of danger to be in the strong powers of the Federal Government were in error, and that those who believed that such powers were necessary to its safe conduct and continued existence were in the right. The attempted destruction of the Union by eleven States, which were part of it, and the apparent temporary success of the effort, was undoubtedly due to the capacity of the States under the Constitution for concerted action, by organized movements, with all the machinery ready at hand to raise armies and establish a central government. And the ultimate failure of the attempt is to be attributed with equal clearness to the exercise of those powers of the General Government, under the Constitution, which were denied to it by extreme advocates of State Rights. And that this might no longer be matter of dispute, three new amendments to the Constitution were adopted at the close of that struggle, which, while keeping in view the principles of our complex form of State and Federal Government, and seeking to disturb the distribution of powers among them as little as was consistent with the wisdom acquired by a sorrowful experience, confer additional powers on the government of the Union, and place additional restraints upon those of the States. May it be long before such an awful lesson is again needed to decide upon disputed questions of constitutional law.

It is not out of place to remark that while the pendulum of public opinion has swung with much more force away from the extreme point of State Rights doctrine, there may be danger of its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights of the States, and of the General Government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country, and to its existence for another century, as it has been for the one whose close we are now celebrating.

Having considered the objections originally made to this great work, in the light of its operation for a century, what shall we say of it in regard to those great features which were more generally acceptable? The doctrine of Montesquieu, then in the height of his fame, that the powers essential to all governments should be distributed among three separate bodies of magistracy, — namely, legislative, executive and judicial, — was, as Madison affirms in number XLVII. of the *Federalist*, recognized by the convention as the foundation of its labors. The apparent departure from that principle in making the Senate a participant in the exercise of the

appointing power, and the treaty-making power, works well, because the initiative remains with the executive. The power of that body to try impeachments of public officers for high crimes and misdemeanors — a function essentially judicial — while it has not produced any substantial injury has, perhaps, operated as a safety-valve in cases of great popular excitement. As an efficient remedy, it must be conceded to be a failure.

But the harmony and success with which the three great subdivisions of the organized government of the Constitution have coöperated in the growth, prosperity and happiness of this great people, constitute the strongest argument in favor of the organic law, which governs them all. It is the first successful attempt, in the history of the world, to lay the deep and broad foundations of a government for millions of people and an unlimited territory, in a single written instrument, framed and adopted in one great national effort.

This instrument comes nearer than any of political origin to Rousseau's idea of a society founded on a social contract. In its formation, States and individuals, in the possession of equal rights, — the rights of human nature common to all, — met together and deliberately agreed to give up certain of those rights to government for the better security of others; and that there might be no mistake about this agreement it was reduced to writing, with all the solemnities which give sanction to the pledges of mankind.

Other nations speak of their constitutions, which are the growth of centuries of government, and the maxims of experience, and the traditions of ages; many of them deserve the veneration which they receive. But a constitution, in the American sense of the word, as accepted in all the States of North and South America, means an instrument in writing, defining the powers of government, and distributing those powers among different bodies of magistrates for their more judicious exercise. The Constitution of the United States not only did this as regards a national government, but it established a federation of many States by the same instrument, in which the usual fatal defects in such unions have been corrected, with such felicity that during the hundred years of its existence the union of the States has grown stronger, and has received within that union other States exceeding in number those of the original federation.

It is not only the first important written constitution found in history, but it is the first one which contained the principles necessary to the successful confederation of numerous powerful States.

I do not forget, nor do I mean to disparage, our sister, the federal republic of Switzerland. But her continuance as an independent power in Europe is so largely due to her compact territory, her inaccessible mountains, her knowledge of the necessity of union to safety, and the policy of her powerful neighbors, which demands of each other the recognition of her rights, that she hardly forms an exception. But Switzerland stands to-day — may she ever stand — as the oldest witness to the capacity of a republican federation of States for sound government, for the security of freedom and resistance to disintegrating tendencies. But when we look to the results of confederation in the Olympic Council, and the Achaian League of ancient history, and in modern times to the States of Holland and the old German Empire, we must admit that the United States presents the most remarkable, if not the only successful, happy and prosperous, federated government of the world.

Let us consider for a moment the evidence of this. When the Constitution was finally ratified, and Rhode Island also accepted it, the Government was composed of thirteen States. It now numbers thirty-eight. The inhabited area of those States was found between the Allegheny Mountains and the Atlantic Ocean, a region which, when we now look over a map of the United States, seems to be but the eastern border of the great republic. Its area now includes all the territory between the Atlantic and Pacific Oceans, — a distance of over three thousand miles east and west, — and between the St. Lawrence and the great lakes on the north and the Gulf and States of Mexico on the south. Besides these thirty-eight States, the remainder of this immense region is divided into eight Territories, with an organized government in each, several of which are ready to be admitted into the Union as States, under a provision of the Constitution on that subject, and in accordance with the settled policy of the nation.

The thirteen States which originally organized this Government had a population believed to be, in round numbers, three millions, many of whom were slaves. To-day it seems probable that sixty millions are embraced in the United States, in which there breathes no soul who owns any man master.

I have already suggested the impoverished condition of the country at the close of the Revolutionary war. To-day I do not hesitate to make the assertion, that if you count only that which is real wealth and not accumulated capital in the shape of evidences of debt, — which is but a burden upon such property, — I mean, if you count lands and houses and furniture, and horses and

cattle and jewels, — all that is tangible and contributes to the comfort and pleasure of life, — the United States to-day is the wealthiest country upon the face of the globe, and is the only great government which is so rapidly paying off its national debt that it is begging its creditors to accept their money not yet due, with a reasonable rebate for interest.

Under the Government established by this Constitution we have, in the century which we are now overlooking, had three important wars, such as are always accompanied by hazardous shocks to all governments. In the first of these we encountered the British Empire, the most powerful nation then on the globe, — a nation which had successfully resisted Napoleon, with all the power of Europe at his back. If we did not attain all we fought for in that contest, we displayed an energy and courage which commanded for us an honorable stand among the nations of the earth.

In the second, — the war with Mexico, — while our reputation as a warlike people suffered no diminution, we made large accessions of valuable territory, out of which States have been since made members of the Union.

The last war, — the recent civil war, — in the number of men engaged in it, in the capacity of the weapons and instruments of destruction brought into operation, and in the importance of the result to humanity at large, must be esteemed the greatest war that the history of the world presents. It was brought about by the attempt of eleven of the States to destroy the Union. This was resisted by the Government of that Union under the powers granted to it by the Constitution. Its results were the emancipation of three millions of slaves, the suppression of the attempt to dissever the Union, the resumption of an accelerated march in the growth, prosperity and happiness of this country. It also taught the lesson of the indestructibility of the Union, of the wisdom of the principles on which it is founded, and it astonished the nations of the world, and inspired them with a respect which they had never before entertained for our country.

I venture to hope that with the earnest gaze of the wisest and ablest minds of the age turned with profound interest to the experiment of the federative system, under our American Constitution, it may suggest something to relieve the nations of Europe from burdens so heavy that if not soon removed they must crush the social fabric. Those great nations cannot go on forever adding millions upon millions to their public debts, mainly for the support of permanent standing armies, while those armies make such heavy

drafts upon the able-bodied men whose productive industry is necessary to the support of the people and of the government.

I need not dwell on this unpleasant subject further than to say that these standing armies are rendered necessary by the perpetual dread of war with neighboring nations.

In the principles of our Constitution by which the autonomy and domestic government of each State are preserved, while the supremacy of the General Government at once forbids wars between the States, and enables it to enforce peace among them, we may discern the elements of political forces sufficient for the rescue of European civilization from this great disaster.

Do I claim for the Constitution, whose creation we celebrate today, the sole merit of the wonderful epitome which I have presented to you of the progress of this country to greatness, to prosperity, to happiness and honor? Nay, I do not; though language used by men of powerful intellect and great knowledge of history might be my justification if I did.

Mr. Bancroft, the venerable historian, who has devoted a long and laborious life to a history of his country, that is a monument to his genius and his learning, says of the closing hours of the convention: "The members were awe-struck at the result of their councils; the Constitution was a nobler work than any one of them believed possible to devise." And he prefaces the volume of his invaluable history of the formation of the Constitution with a sentiment of Mr. Gladstone, the greatest living statesman of England. He says: "As the British constitution is the most subtile organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

And while I heartily endorse this, and feel it impossible to find language in which to express my admiration and my love for the Constitution of the United States, and my profound belief that the wisdom of man, unaided by inspiration, has produced no writing so valuable to humanity, I should fail of a most important duty if I did not say on this public occasion, that no amount of wisdom in a constitution can produce wise government unless there is a suitable response in the spirit of the people.

The Anglo-Saxon race, from whom we inherit so much that is valuable in our character, as well as our institutions, has been remarkable in all its history for a love of law and order. While other peoples, equally cultivated, have paid their devotion to the man in power, as representative of the law which he enforces, the

English people, and we their descendants, have venerated the law itself, looking past its administrators, and giving our allegiance and our obedience to the principles which govern organized society. It has been said that a dozen Englishmen or Americans, thrown on an uninhabited island, would at once proceed to adopt a code of laws for their government, and elect the officers who were to enforce them. And certainly this proposition is borne out by the early history of our emigrants to California, where every mining camp organized into a political body, and made laws for its own government, which were so good that Congress adopted them until they should be repealed or modified by statute.

I but repeat the language of the Supreme Court of the United States when I say that in this country the law is supreme. No man is so high as to be above the law. No officer of the Government may disregard it with impunity. To this inborn and native regard for law, as a governing power, we are indebted largely for the wonderful success and prosperity of our people, for the security of our rights; and when the highest law to which we pay this homage is the Constitution of the United States, the history of the world has presented no such wonder of a prosperous, happy civil government.

Let me urge upon my fellow-countrymen, and especially upon the rising generation of them, to examine with careful scrutiny all new theories of government and of social life, and if they do not rest upon a foundation of veneration and respect for law as the bond of social existence, let them be distrusted as inimical to human happiness.

And now let me close this address with a quotation from one of the ablest jurists and most profound commentators upon our laws, — Chancellor Kent. He said, fifty years ago: "The Government of the United States was created by the free voice and joint will of the people of America for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of our national greatness."

INDEX.

BILL OF REVIEW.

See EQUITY, 7.

CASES AFFIRMED.

1. *Leisy* v. *Hardin*, 135 U. S. 100, followed in *Lyng* v. *Michigan*, 161.
2. The rulings in *Hawkins* v. *Glenn*, 131 U. S. 319, confirmed, and applied to these cases. *Glenn* v. *Liggett*, 533.

CONSTITUTIONAL LAW.

CONTRIBUTORY NEGLIGENCE.

CORPORATION.

CUSTOMS DUTIES.

ERROR.

EVIDENCE.

JUDGMENT.

See EQUITY, 5, 8;
JURISDICTION, A, 3;
LACHES, 2.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. A suit was brought to recover from T. possession of a tract of land of about 35 acres, part of a larger tract of 186 acres, which the plaintiff claimed to own. The lessor of T. of the 35 acres was made defendant, and answered, claiming to own the land sued for and also the rest of the 186 acres. The plaintiff recovered a judgment for the 35 acres, their value not exceeding $2000. The value of the 186 acres was about $10,000. The lessor having brought the case to this court by a writ of error, it was dismissed, on the ground that the amount involved was not sufficient to give this court jurisdiction, because it did not exceed $5000, exclusive of costs. *Vicksburg, Shreveport & Pacific Railroad* v. *Smith*, 195.
2. When the Commissioner of Pensions, in executing an instruction from the Secretary of the Interior to increase a pension, gives a construction to a statute which had not been construed by the Secretary, but which had been left open to the commissioner to construe, mandamus does not lie to compel the commissioner to give a different construction to it. *United States ex rel. Miller* v. *Raum*, 200.
3. A decree in equity setting aside a conveyance of personalty and of real estate as fraudulently made to hinder, delay and defraud the plaintiff, and appointing a receiver of all the property of both classes, and ordering a sale of all that remained, and an accounting by the defendants of so much of the personalty as they had parted with and of the proceeds thereof, and the payment of arrears of alimony due the plaintiff from the proceeds of the sale, and further ordering that the receiver should hold the balance subject to the order of the court as to alimony subsequently to accrue, is not a final decree from which an appeal can be taken, inasmuch as there still remains to be determined what personal property had been parted with, and what was its value and the amount of the proceeds to be accounted for. *Lodge* v. *Twell*, 232.
4. In this case, on a writ of error to review the judgment of the Supreme Court of a State, it was held that no federal question was involved, because the case was decided by the state court on a ground broad enough to maintain the judgment independently of any federal question; and the writ was dismissed. *Beatty* v. *Benton*, 244.
5. An amendment to a complaint in an action pending in a state court, allowed by the court after the evidence was in, by which the *ad damnum* clause was increased from a sum too small to allow the de-

MANDAMUS.

See JURISDICTION, A, 2.

MARSHAL AND DEPUTY MARSHALS.

See CONSTITUTIONAL LAW, 2, 4, 5.

MASTER AND SERVANT.

1. An employer of labor in connection with machinery is not bound to insure the absolute safety of the machinery or mechanical appliances which he provides for the use of his employés, nor is he bound to supply for their use the best and safest or newest of such appliances; but he is bound to use all reasonable care and prudence for the safety of those in his service, by providing them with machinery reasonably safe and suitable for use, and if he fails in this duty, he is responsible to them for any injury which may happen to them through a defect of machinery which was, or ought to have been known to him, and which was not known to the employés; but if an employé, who is injured by reason of a defect in such machinery, knew of the defect which caused it, and remained in the service of his employer, and continued to use the defective machinery without giving notice thereof to him, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use. *Washington & Georgetown Railroad* v. *McDade*, 554.
2. When a person employed by another to labor in connection with machinery, is wanting in such reasonable care and prudence as would have prevented the happening of an accident, and is injured by the machinery, he is guilty of contributory negligence, and his employer is thereby absolved from responsibility for the injury, although it was occasioned by defect in the machinery and through the negligence of the employer. *Ib.*

MINERAL LAND.

1. A lode patent, issued subsequently to the issue of a placer patent of a tract within whose metes and bounds the lode patent is located, is not conclusive evidence that the lode was so known at the time of the issue of the placer patent as to authorize the issue of the lode patent. *Iron Silver Mining Co.* v. *Campbell*, 286.
2. Where two parties have patents for the same tract of land, and the question in a judicial proceeding is as to the superiority of title under those patents, and the decision depends upon extrinsic facts not shown by the patents, it is competent to establish it by proof of those facts. *Ib.*

PAYMENT.

PENSION.

See JURISDICTION, A, 2.

that has been said, or even all that has been adjudged in those cases, on the subject of the act of the legislature of Virginia of March 30, 1871, to provide for the funding and payment of the public debt, and the issue of coupon bonds of the State under its provisions, it is now *Held*,

(*a*) That the provisions of the act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute;

(*b*) That the various acts of the assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect;

(*c*) That no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State;

(*d*) That any lawful holder of the tax-receivable coupons of the State issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress — by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him; that no conclusion short of this can be legitimately drawn from the series of decisions reviewed by the court without wholly overruling that rendered in the *Coupon Cases* and disregarding many of the rulings in other cases, which the court would be very reluctant to do; and that to this extent the court feels bound to yield to the authority of its prior decisions whatever may have been the former views of any member of the court. *McGahey* v. *Virginia*, 662.

2. In *Bryan* v. *Virginia*, *Cooper* v. *Virginia* and *McGahey* v. *Virginia*, it is *Held*, (1) That the provision in the act of the General Assembly of Virginia of January 26, 1886, which imposes upon the taxpayer the duty of producing the bond from which the coupons tendered by him in payment of taxes were cut, at the time of offering the coupons in evidence in court, is an unreasonable condition, in many cases impossible to be performed, so onerous and impracticable as not only to affect, but to destroy the value of the instruments in the hands of the holder who had purchased them; and is repugnant to the Constitution