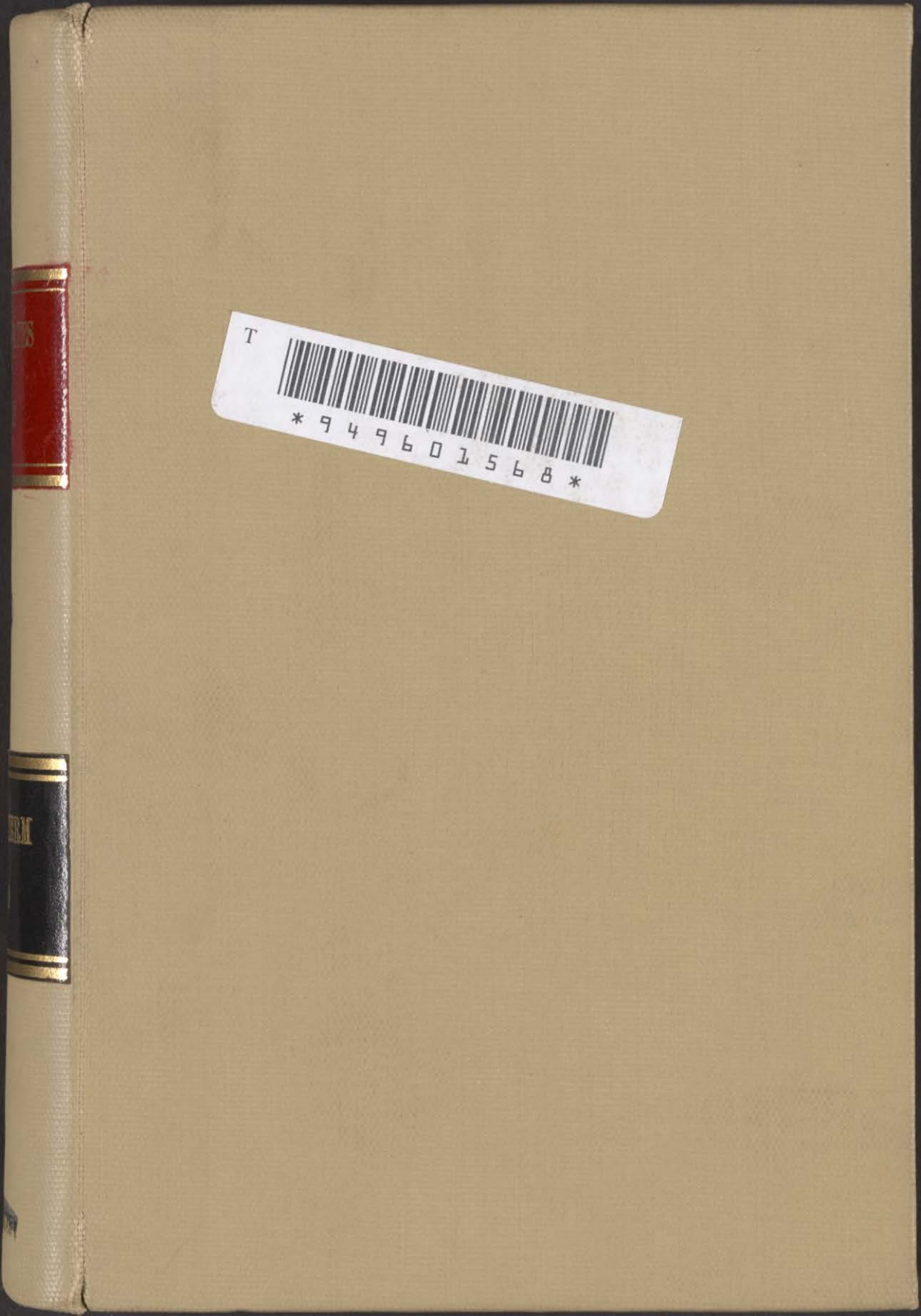


UNITED STATES REPORTS

VOLUME 140

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1890

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1891

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief 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.

HENRY BILLINGS BROWN, 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 Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

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, 1890.

PENNOYER *v.* McCONNAUGHY.

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

No. 1280. Submitted January 5, 1891.—Decided April 20, 1891.

A suit in equity against the board of land commissioners of the State of Oregon, brought by a purchaser of swamp and overflowed lands under the act of October 26, 1870, in order to restrain the defendants from doing acts which the bill alleges are violative of the plaintiff's contract with the State when he purchased the lands, and which are unconstitutional, destructive of the plaintiff's rights and privileges, and which it is alleged will work irreparable damage and mischief to his property rights so acquired, is not a suit against the State within the meaning of the Eleventh Amendment to the Constitution of the United States.

The cases reviewed in which suits at law or in equity against officials of a State, brought without permission of the State, have been held to be, either suits against the State, and therefore brought in violation of the Eleventh Amendment to the Constitution; or, on the other hand, suits against persons who hold office under the State, for illegal acts done by them under color of an unconstitutional law of the State, and therefore not suits against the State.

The act of the legislature of Oregon of January 17, 1879, repealing the act of October 26, 1870, concerning the swamp and overflowed lands, and making new regulations concerning the same, did not invalidate an application, duly made before its passage, to purchase such lands; but such an application could be perfected by making the payments required by the

act of 1870 after its repeal, but within the time prescribed by that act; and a title thus acquired is good against the State.

The act of the legislature of Oregon of February 16, 1887, declaring all certificates of sale of swamp or overflowed lands void on which twenty per cent of the purchase price was not paid prior to January 17, 1879, and requiring the board of commissioners to cancel such certificates, impaired the contract made by the State with the defendant in error under the act of October 26, 1870, as that act and the act of January 17, 1879, are construed by the court, and was therefore violative of article 1, section 10, of the Constitution of the United States.

This was a suit in equity by the appellee, a citizen of California, against the appellants, who, under the constitution of Oregon, as governor, secretary of state, and treasurer of state, comprised the board of land commissioners of that State, to restrain and enjoin them from selling and conveying a large amount of land in that State, to which the appellee asserted title. The lands are a portion of those granted to Oregon under the swamp land act of March 12, 1860, 12 Stat. 3, and are claimed by the appellee to have been sold by the State to one H. C. Owen, in 1881 and 1884, for a valuable consideration, in accordance with the provisions of an act of the State legislature approved October 26, 1870, from whom appellee derived title.

There was a demurrer to the bill, on the ground that the suit was practically against the State, and was, therefore, prohibited by the Eleventh Amendment to the Constitution. The demurrer was overruled by Judge Deady, January 28, 1890, his opinion being reported in 43 Fed. Rep. 196. On rehearing before the same judge August 18, 1890, the order overruling the demurrer was confirmed, 43 Fed. Rep. 339, and a decree entered perpetually enjoining the defendants from selling the lands in question, as prayed in the amended bill. An appeal from that decree brought the case here.

The material facts in the case, as presented by the amended bill and the demurrer, were as follows: Art. VIII, § 5, of the constitution of the State of Oregon, provides that "the governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom,

and their powers and duties are such as may be prescribed by law," etc. The act of the legislature of the State, approved October 26, 1870, provided a method for the disposal of the swamp and overflowed lands enuring to her under the act of March 12, 1860. By its first section it enacted that the commissioner of lands (who at that time was the governor of the State) should appoint a deputy or deputies to select all the swamp and overflowed lands in the field, describing each tract selected in a clear and distinct manner, either by legal subdivisions or by actual survey, and to make return of the same to the commissioner for examination. The act then provided as follows:

"SEC. 2. So soon as the selection of swamp and overflowed lands in any county has been completed by said Commissioner of Lands, it shall be the duty of said Commissioner to make out maps and descriptions thereof in duplicate, one copy to be kept in suitable books in his office, and the other to be filed in the office of the County Clerk of the county in which such swamp lands may be located; and it shall be the duty of such County Clerk to forward his official certificate to said Commissioner of the date on which said maps and descriptions were so filed. Upon the receipt of such certificate it shall be the duty of said Commissioner to give public notice of said completion, approval and filing, for four weeks successively in some weekly newspaper published in such county; and if no newspaper is published in such county, then in such newspaper as he may select in an adjoining county.

"SEC. 3. The swamp and overflowed lands of this State shall be sold by said Commissioner at a price not less than one dollar per acre in gold coin. Any person over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration to become a citizen, as required by the naturalization laws, may become an applicant for the purchase of any tract or tracts of said swamp and overflowed lands upon filing his application therefor (describing the tract or tracts he desires to purchase), by the actual survey; or, if no survey has been made, then by fences, ditches, monuments or other artificial or natural landmarks, with said Commissioner,

whose duty it shall be to immediately endorse thereon the actual date of such filing. In case of adverse applicants for the same tract or parcel of swamp land, it shall be the duty of said Commissioner to sell the same to the legal applicant therefor, whose application is first filed. Within ninety days after the date of the public notice provided in section two of this act, twenty per centum of the purchase money shall be paid by the applicant to said Commissioner, whose duty it shall be to issue to the applicant a receipt therefor, and the balance of said purchase money shall be paid on proof of reclamation, as hereinafter provided.

"SEC. 4. No patent shall be issued to any applicant for any swamp or overflowed lands until the applicant therefor has proved, to the satisfaction of said Commissioner, that the land for which he claims a patent has been drained or otherwise made fit for cultivation; but upon such proof being made, and payment of the balance of the purchase money on the amount of land actually reclaimed, the said Commissioner shall issue to the applicant making such proof and payment, a patent for the land so reclaimed. Said patent shall be approved and signed by the Governor, Secretary of State and State Treasurer, as provided for by the Constitution. At the expiration of ten years from and after his first payment, all swamp lands claimed by an applicant, upon which no such proof of reclamation and payment has been made, shall revert to the State, and the money paid thereon shall be forfeited: *Provided*, That all swamp land which has been successfully cultivated in either grass, the cereals or vegetables for three years, shall be considered as fully reclaimed within the meaning of this act."

"SEC. 6. . . . *Provided*, That in case the office of Commissioner of Lands is not created by law, the provisions of this Act shall be executed by the Board of Commissioners for the sale of school and university lands." Session Laws, 1870, p. 54.

While this act was in force, to wit, at a date prior to October 18, 1878, Henry C. Owen made an application to purchase a large quantity of swamp lands from the State, including the lands in controversy, agreeably to the provisions

of the act; and on the 23d of November, 1881, and the 3d of April, 1884, within ninety days after the date of the public notice of the completion of the maps and description of the lands, provided for in the second section of the act, he paid to the board of commissioners, as required by the third section, the twenty per centum of the price of over forty-three thousand acres of land. Owen sold these lands to one Felton, who sold them to the plaintiff for the sum of $30,000, the latter also assuming to pay to the State the remainder of the purchase price when it became due.

After Owen made his application to purchase, as above mentioned, but before he had made the first payment, to wit, October 18, 1878, the legislature of the State passed an act which went into effect January 17, 1879, (ninety days after its date, as provided by the constitution of the State,) expressly repealing the aforesaid act of 1870, and making entirely new regulations for the disposition and sale of the swamp lands belonging to the State. Its ninth section was as follows: "All applications for the purchase of swamp and overflowed lands . . . made previous to the passage of this act, which have not been regularly made in accordance with law, or which were regularly made, and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever." Session Laws of 1878, pp. 41, 46.

February 16, 1887, the legislature of the State passed an act, the first section of which provided as follows: "All certificates of sale, issued by the board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom, for swamp or overflowed lands on which the twenty per centum of the purchase price was not paid prior to January 17, 1879, are hereby declared void and [of] no force or effect whatever; and said board of commissioners is hereby authorized and directed to cancel said certificates of sale." Session Laws of 1887, pp. 9, 10. The certificates of sale herein referred to were the receipts provided for in the third section of the act of 1870.

Argument for Appellants.

Acting under the provisions of the statute of 1887, the board of land commissioners cancelled the certificates of sale issued to Owen, as aforesaid, because the twenty per centum of the price of the land had not been paid prior to January 17, 1879, the date when the act of 1878 went into effect; and, claiming that said lands had reverted to the State, had ordered them to be sold, and had actually sold about 1000 acres of them under the act of 1887.

Mr. Lewis L. McArthur and *Mr. H. H. Northup* for appellants.

I. Owen never had a contract with the State which was protected by the Constitution of the United States. The act of October 26, 1870, was not a grant nor did it partake of the nature of a grant. It was a mere preëmption privilege. Such a privilege might be revoked by the State at any time before any actual consideration passed or before the person who had filed an application for purchase had entered upon or occupied the land or had begun the reclamation thereof. We contend that by simply applying to purchase swamp and overflowed lands under the act referred to, no such contract relations arose between the applicant and the State as are contemplated by the constitutional provision invoked by the appellee. In other words the act does not belong to that class of laws which can be denominated contracts, except so far as it has been actually executed and complied with.

By the act of 1878 a new method of disposing of the public lands of the State was established. Restrictions were placed upon the quantities of land to be purchased by any one applicant, the purchase price was changed, and protection was afforded actual settlers.

With the repeal of the act of 1870 Owen's mere naked application to purchase the lands in controversy was bereft of all legal life. No subsequent act on his part, of whatever nature, could restore it. Payment of the twenty per centum, at the time averred in the amended bill, gave him no right whatsoever to any of the lands and the acceptance of the

twenty per centum by the board of land commissioners was without authority of law and did not bind the State.

It is common learning that the authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted, and cannot bind the public under powers that have been taken away. *Anthony* v. *County of Jasper*, 101 U. S. 693; *Coler* v. *Cleburne*, 131 U. S. 162, 173.

Furthermore, as if to place this matter beyond all contention, section 9 of the act of 1878 declared that

"All applications for the purchase of swamp and overflowed lands, or tide lands, made previous to the passage of this act, which have not been regularly made in accordance with law, or which were regularly made, and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever."

The effect of this section was, as we contend, to require payment by Owen of the twenty per centum prior to January 19, 1879, the date when the act took effect. Nor does this construction of the section render it unconstitutional, as impairing the obligation of any contract which Owen had with the State, for the very obvious reason that he had acquired no vested rights under the alleged contract.

It is only vested rights growing out of contracts or growing out of transactions in the nature of contracts authorized by statute, that are protected by the constitutional provision invoked by the appellee. And the right must be so far perfected, as that nothing remains to be done by the party asserting it. Then only is it that the repeal of the statute does not affect the right. Then only is it that it becomes a vested right which stands independently of the statute. And so this court decided in *Steamship Company* v. *Joliffe*, 2 Wall. 450.

II. This suit, in substance and effect, is one against the State, and comes within the prohibition of the Eleventh Amendment to the Constitution. The appellants have no personal interest

in the controversy. They are sued in their representative capacity, as officers of the State. We claim that the State is, in a substantive sense, the actual party defendant, and, the State being within the constitutional exemption guaranteed by the Eleventh Amendment, the court below did not have jurisdiction. This principle was decided in *In re Ayers*, 123 U. S. 443, in which it was distinctly held that where a bill in equity is brought against the officers and agents of a State, the nominal defendants have no personal interest in the subject matter of the suit, and such bill, being for an injunction against such officers and agents to restrain and enjoin them from acts which it is alleged they threaten to do, in pursuance of a statute of the State, in its name and for its use, and which, if done, would constitute a breach on the part of the State of an alleged contract between it and the complainants, is a suit against the State within the meaning of the Eleventh Amendment, although the State may not be named as a party defendant.

Mr. C. A. Dolph and *Mr. C. R. Bellinger* for appellee.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The contention of the complainant below was, that the act of 1887, under which the defendants below assumed to act, in the matter of the cancellation of his certificates of sale, was in violation of section 10, article I, of the Constitution of the United States, in that it impaired the obligation of the contract made between Owen and the State for the sale of the lands; that the defendants were, therefore, acting in the premises without authority of law; and that, for those reasons, it could not be asserted that the suit was against the State. The defendants, on the other hand, insisted that the aforesaid legislation was valid and constitutional; that the suit was, in effect, against the State; and that, therefore, the Circuit Court was forbidden to exercise jurisdiction in the matter by the Eleventh Amendment to the Constitution.

This appeal, therefore, involves the construction and appli-

cation of two distinct provisions of the Constitution which are set up, one against the other, by the parties to the controversy, in support of their respective contentions. The complainant below bases his claim for the relief prayed for upon that clause of section 10, article I, which provides that "no State shall pass any law impairing the obligation of contracts;" whilst the defendants below, the appellees, rely upon the Eleventh Amendment to the Constitution, 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 any of the United States by citizens of another State, or by citizens or subjects of a foreign State."

The question, then, of jurisdiction is first presented for determination. Is this suit, in legal effect, one against a State, within the meaning of the Eleventh Amendment to the Constitution? A very large number of cases involving a variety of questions arising under this amendment have been before this court for adjudication; and, as might naturally be expected, in view of the important interests and the wide-reaching political relations involved, the dissenting opinions have been numerous. Still the general principles enunciated by these adjudications will, upon a review of the whole, be found to be such as the majority of the court and the dissentients are substantially agreed upon.

It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that "no State shall pass any law impairing the obligation of contracts." This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself.

In the application of this latter principle two classes of

cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayers*, 123 U. S. 443; *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v. *Greenhow*, 107 U. S. 769; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52.

The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial — is not, within the meaning of the Eleventh Amendment, an action against the State. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U. S. 773; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270.

It is not our purpose to attempt a review of all, or even many, of these decisions, as to do so intelligently would unnecessarily protract this opinion, and in this connection, would subserve no useful purpose. It will be sufficient, perhaps, to refer to some of those which this case most nearly resembles.

It is believed that the case before us is within the principles of the great and leading case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, the opinion in which was delivered by Chief Justice Marshall. That was a suit in equity, brought

in the Circuit Court of the United States for the District of Ohio, by the president, directors and company of the Bank of the United States, to restrain Ralph Osborn, auditor of the State of Ohio, from executing a law of that State which was in violation of, and destructive to, the rights and privileges conferred upon the complainants by the charter of the bank and by the Constitution of the United States. One of the leading inquiries in the case was, whether an injunction could be issued to restrain a person, who was a State officer, from performing an official act enjoined by the statute of the State. The question presented by that inquiry was discussed, in a masterly manner, on the assumption that the statute of the State was unconstitutional, and it was held that in such a case, grounds of equity interposition existing, injunction would lie.

With regard to the objection, that if any case was made by the bill, for the interference of a court of chancery, it was against the State of Ohio, and was, therefore, within the prohibition of the Eleventh Amendment, the court held that the exemption of the State from suability could not be pleaded by its officers when they were proceeded against for executing an unconstitutional act of the State. This question was discussed most thoroughly, in the light of the other provisions of the Constitution relating to the jurisdiction of the Federal courts, and the conclusion arrived at thus announced: "It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the Constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took or to those who received the money for which this suit was instituted." 9 Wheat. 859.

The statute of Ohio, under which the defendant was acting, was then examined and found to be unconstitutional. The case may then be said to have fully established the doctrine that an officer of a State may be enjoined from executing a statute of the State which is in conflict with the Constitution of the United States, when such execution would violate and destroy the rights and privileges of the complainant.

The principle stated by Chief Justice Marshall, (in that case,)

that "in all cases where jurisdiction depends on the party, it is the party named in the record," and that "the Eleventh Amendment is limited to those suits in which the State is a party to the record," has been qualified to a certain degree in some of the subsequent decisions of this court, and now it is the settled doctrine of this court that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit. *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76; *In re Ayers*, *supra*.

But the general doctrine of *Osborn* v. *Bank of the United States*, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from. On the contrary, the principles of that case have been recognized and enforced in a very large number of cases, notably in those we have referred to, as belonging to the second class of cases above mentioned.

In *Davis* v. *Gray*, the State of Texas had granted to a railroad corporation of that State 16 alternate sections of land per mile along the line of the road which was thereafter to be located. The company surveyed the lands and located its road through them. After all those things had been done, the commissioner of the state land office, and the governor of the State, acting under the authority of a statute of the State, which had declared the lands forfeited to the State, were selling certain of the lands and delivering patents for them to the purchasers. At the suit of the receiver of the road, the Circuit Court of the United States enjoined them from interfering with the rights of the road in the premises, and selling and conveying its lands; and that decree was affirmed by this court. Some of the expressions in the opinion in that case were criticised in the subsequent case of *United States* v. *Lee*, 106 U. S. 196, 244, and also in *In re Ayers*, 123 U. S. 443, 487,

488, where the objectionable expressions were examined and held to have been mere *dicta.* It has not been overruled, however, but, on the contrary, it has been cited with approval and relied upon as authority in a number of subsequent cases; and the underlying principles of it are regarded as sound.

In *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541, the same principle was applied. In that case an injunction was issued by the Circuit Court of the United States, at the suit of the holder of certain bonds of the State of Louisiana, to restrain the board of liquidation of the State, composed of the governor and certain other state officers, from issuing certain of the same kind of bonds to liquidate a debt claimed to be due from the State to the Louisiana Levee Company, on the ground that such use would impair the securities of the complainant, and would thus be violative of the contract he had with the State; and that decree was affirmed by this court on appeal. In delivering the opinion of the court, Mr. Justice Bradley said: "The objections to proceeding against state officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will

be treated by the courts as null and void;" citing *Osborn* v *Bank of the United States* and *Davis* v. *Gray*.

Poindexter v. *Greenhow* has been adverted to. That was an action in detinue against the treasurer of the city of Richmond, Virginia, for the recovery of an office desk which he had seized for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the State of Virginia, under the funding act of March 30, 1871, and made by that act receivable for all taxes due the State. The defendant, under color of office, as tax collector, and acting in the enforcement of a statute of the State passed in 1882, which forbade the receipt of the coupons for taxes, refused to receive such tender and made the seizure complained of. It was held by this court that the act of the General Assembly passed in 1882 was unconstitutional and void, because it was an impairment of the contract entered into between the State and its bondholders by the act of 1871; that being unconstitutional, it afforded no protection to the defendant; that the action was properly maintainable against him, as a wrongdoer; and that it was not an action against the State, in the sense of the Eleventh Amendment. The whole question was discussed most thoroughly by Mr. Justice Matthews, both on principle and authority, and the following from the opinion of the court, delivered by Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 452, quoted with approval: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him."

Allen v. *Baltimore & Ohio Railroad Company*, 114 U. S. 311, decided at the same time as *Poindexter* v. *Greenhow*, and on the authority of that case, was, in all essential features, similar to the case under consideration. In discussing the

remedy by injunction against officers of a State, in such cases, Mr. Justice Matthews, delivering the opinion of the court, relied largely upon *Osborn* v. *Bank of the United States; Board of Liquidation* v. *McComb; Davis* v. *Gray* and many other cases; and the language above quoted from *Board of Liquidation* v. *McComb* was quoted with approval.

The case of *McGahey* v. *Virginia*, 135 U. S. 662, 684, was a suit instituted in the Circuit Court of Alexandria, Virginia, in the name of the Commonwealth, against the defendant, under the act of May 12, 1887, for the recovery of taxes due from him, in payment of which coupons cut from the bonds of the State had been tendered and not accepted. Judgment for the State was rendered by the Circuit Court, which, on appeal, was affirmed by the Supreme Court of the State. Brought before this court on a writ of error, the judgment of the state court was reversed. This case, with seven others, reported under this title, grew out of the legislation of the State regarding coupons of the same character as those involved in the Virginia coupon cases. Mr. Justice Bradley, delivering the unanimous opinion of the court, after a full and exhaustive review and analysis of the decisions in those cases and others like them, presented a summary of the propositions established by those decisions which cannot be well abridged, as follows:

"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 General 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 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."

The dividing line between the cases to which we have referred and the class of cases in which it has been held that the State is a party defendant, and, therefore, not suable, by virtue of the inhibition contained in the Eleventh Amendment to the Constitution, was adverted to in *Cunningham* v. *Macon & Brunswick Railroad*, where it was said, referring to the case of *Davis* v. *Gray*, *supra*: "*Nor was there in that case any affirmative relief* granted by ordering the governor and land commissioner *to perform any act towards perfecting the title of the company.*" 109 U. S. 453, 454. Thus holding, by implication, at least, that affirmative relief would not be granted against a State officer, by ordering him to do and perform acts forbidden by the law of his State, even though such law might be unconstitutional.

The same distinction was pointed out in *Hagood* v. *Southern*, which was held to be, in effect, a suit against the State, and it was said: "A broad line of demarcation separates from such cases as the present, in which the decrees require, *by affirmative official action* on the part of the defendants, *the performance of an obligation which belongs to the State in its political capacity*, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and prop-

erty rights of the plaintiffs, under color of authority, unconstitutional and void." 117 U. S. 52, 70.

The cases in which suits against officers of a State have been considered as against the State itself, and, therefore, within the inhibition of the Eleventh Amendment to the Constitution, and those in which such suits were considered to be against state officers, as individuals, were elaborately reviewed and distinguished in the recent case of *In re Ayers*, 123 U. S. 443. That case came before us on application for *habeas corpus* by the attorney general of Virginia, the auditor of the State, and the commonwealth's attorney for Loudoun county in that State, who were in the custody of the United States marshal for the Eastern District of Virginia, for contempt of court, in disobeying a restraining order of the Circuit Court of the United States for that district, commanding them not to institute and prosecute certain suits in the name of the State of Virginia, required to be brought by the statutes of the State. The suit in which the restraining order was issued was nominally against certain officers of the State, but this court held that it was, in effect, a suit against the State itself, and, therefore, in violation of the Eleventh Amendment to the Constitution. And that such being true, the acts and proceedings of the Circuit Court in that suit were null and void for all purposes; and the prisoners were discharged. In delivering the opinion of the court, Mr. Justice Matthews, referring to the class of cases in which it had been adjudged that the suit was against state officers in their private capacity, and not against the State, said: "The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. . . . This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled." 123 U. S. 500, 501.

In *Hans* v. *Louisiana*, 134 U. S. 1, 20, 21, the general rule on this subject was concisely stated by Mr. Justice Bradley in the following terms: "To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contract, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the case before us, as set forth in our introductory statement. In this connection it must be borne in mind that this suit is not nominally against the governor, secretary of state, and treasurer, as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the State when he purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. The case cannot be distinguished, in principle, from *Osborn* v. *Bank of the United States*, *Davis* v. *Gray*,

Board of Liquidation v. *McComb* and *Allen* v. *Baltimore & Ohio Railroad Co.*, cited above, and the reasoning in those cases applies with equal force in this. The essential difference between these cases and the case of *In re Ayers*, upon which the appellants mainly rely, was pointed out in the last-named case, and need not be adverted to further in this connection. We think it clearly demonstrated from the authorities above referred to that the relief prayed can be granted, if, as is contended for, the legislation of the State under which the defendants are assuming to act is unconstitutional, in that it operates to impair the obligation of a contract. And this leads to a consideration of that legislation with respect to that contention.

The position of the complainant below is, that, as the swamp lands of the State were for sale upon the terms and conditions mentioned in the act of 1870, a valid contract, binding upon both parties to it, was completed between the State and the applicant the moment a legal application to purchase was filed with the proper officer of the State and accepted by him. This was the view taken by the Circuit Court.

We quote from the opinion of Judge Deady as follows: "The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal, standing offer by the State of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof with the board, and complying with the subsequent conditions of payment and reclamation. The application is a written acceptance of the offer of the State, in relation to the land described therein, and, on the filing of the same, the minds of the seller and the purchaser — the State and the applicant — came together on the proposition, and thenceforth there was an agreement between them for the sale and purchase of that parcel of land, binding on each of them, until released therefrom by some substantial default of the other, not overlooked or excused." 43 Fed. Rep. 202.

We think this view very forcible, and it would be conclusive

to our minds but for the consideration which suggests itself that the bare application itself, unaccompanied by the payment of any consideration, partakes somewhat of the nature of a preëmption claim under the laws of the United States, with reference to which it has been held that the occupancy and improvement of the land by the settler, and the filing of the declaratory statement of such fact, confers no vested right upon him, as against the government of the United States, until all the preliminary acts prescribed by law, including the payment of the price, are complied with. *Yosemite Valley Case*, 15 Wall. 77; *Frisbie* v. *Whitney*, 9 Wall. 187.

But we do not deem it necessary to determine whether the court was correct in that view of the case, for, in our opinion, another element of the case is of sufficient importance to control its disposition. Even if no vested right accrued to the applicant immediately upon the filing of his application and its acceptance by the authorities of the State, it is conceded on all hands that he acquired such a right upon the payment of the twenty per centum of the purchase price of the lands embraced in his application, if such payment was made in accordance with law. The defendants contend that the payments in this case were not made in accordance with law, because they were not made until after the act of October 18, 1878, went into effect, which act not only expressly repealed the act of 1870, under which the sale to Owen was made, but, in its ninth section, provided as follows: "All applications for the purchase of swamp and overflowed lands, . . . made previous to the passage of this act, which have not been regularly made in accordance with law, or which were regularly made, and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever." The argument is, that the applicant had not fully complied with the law of 1870, "including the payment of the twenty per centum of the purchase price" of the lands embraced in his application, previous to the passage of this act, and that, therefore, under the act, his application be-

came null and void. On the other hand, it is insisted with equal earnestness that the applicant had done all in his power to complete his application, prior to the act of 1878, and was only prevented from doing so and paying the first instalment of the purchase money, by reason of the delay on the part of the officers of the State, in performing the duties imposed upon them by the act of 1870; that the ninety days after the publication of notice of the completion, approval and filing of the maps and description of lands, provided for by the second section of the act of 1870, within which, under the third section of the act, the applicant was required to pay the first instalment of the purchase money, did not expire until long after the act of 1878 went into effect; that within said ninety days the applicant paid, and the commissioner received, the twenty per centum of the purchase price of the land embraced in his application; and that, by reason of the premises and for the further reason that, until now, the act of 1878 had never been considered as nullifying applications such as the one under consideration, the application of Owen should be held good and valid, and operative to vest in the applicant an indefeasible right and title to the lands in dispute.

There is some force in both of these contentions. But it seems to be conceded that, as stated in the opinion of Judge Deady, from the passage of the act of 1878 until the enactment of the statute of 1887, the construction put upon the former act was in harmony with that claimed by the plaintiff in this case. The act does not appear to have ever received a construction at the hands of the Supreme Court of the State; but the board of land commissioners, whose duty it was to administer the swamp land grant on behalf of the State, always followed that construction. A copy of an opinion of the board, delivered a few years after the passage of the act of 1878, on a contest involving other lands similarly circumstanced, between Owen and a party claiming that Owen's right had become forfeited, under the act of 1878, for his failure to pay the twenty per centum of the purchase price of the lands prior to the passage of that act, is set forth in the brief of counsel for appellee. That opinion is admitted by counsel for appellants

to have been delivered by the board, and the copy is not controverted. It is as follows: "The act of 1878 does not, however, attempt to interfere with applicants who had complied with the law of 1870. Section 9 of that act provides that 'all applications for the purchase of swamp land made previous to the passage of this act [act of 1878] which have not been regularly made in accordance with law, or which were regularly made, and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever.' A strict construction of this language might have the effect to forfeit all applications where the twenty per centum had not been paid, although the applicant had fully complied with the law as far as the circumstances would admit of a compliance. We have had occasion to consider that question frequently, and have concluded that it ought not to receive that construction. The legislature may have had the power to suspend every application of that character and declare it a nullity, but we do not think it so intended; that it only intended to declare void those applications where the non-payment of the twenty per centum had been a violation of the condition contained in the act of October 26, 1870. In many cases the applicant to purchase under the latter act was not in default when it was repealed, although he had not paid the twenty per centum [of the] purchase price, as the circumstances had not arisen or the time elapsed requiring its payment."

In *Corpe* v. *Brooks*, 8 Oregon, 222, 223, 224, the powers and duties of the board of commissioners were defined by the Supreme Court of the State in the following language: "This board was created by the state constitution and by it invested with the power to dispose of these State lands, and its powers and duties are such as are provided by law. It is composed of the governor, secretary of state and state treasurer, and is a part of the administrative department of the government, and exercises its powers independent of the judiciary department, and its decisions are not subject to be reversed by the

court. It occupies in this State the same relation to the state judiciary as the land department of the United States does to the United States courts, and their decisions have not been the subject of review by the United States courts."

The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect. We do not think the construction of the act of 1878 by the board of commissioners is subject to either of these objections. The board evidently went upon the theory that the applicant to purchase land from the State, under the act of 1870, acquired by his application some sort of a property right, at least, that was not defeated by a repeal of the statute under which he applied; that if his right was not defeated by the repeal of the statute, he certainly ought to be allowed to go on and complete it according to the terms of the act, even though it had been repealed in the meantime; and that the ninth section of the act of 1878, therefore, did not nullify applications for the purchase of land from the State when the twenty per centum of the purchase price had not been paid prior to its going into effect. It is not straining that section to rule, as did the board of land commissioners, that "it only intended to declare void those applications where the non-payment of the twenty per centum had been a violation of the condition contained in the act of October 26, 1870." That section declares, among other things, that all applications for the purchase of swamp lands made previous to the passage of that act in which the applicants had not fully complied with all the terms and requirements of the law of 1870, including the payment of the twenty per centum of the purchase price, should be declared void, etc.

We think there were strong reasons for the view taken by

the board of land commissioners that the phrase "including the payment of the twenty per centum of the purchase price" had reference to a condition prescribed by the act of 1870; and that what the legislature intended thereby was, that all applications should be void in which the applicant had not paid the twenty per centum of the price, *in accordance with the terms* of the act of 1870. That is to say, one of the terms or conditions of the act of 1870, prescribed by its third section, was, that the applicant should pay the twenty per centum of the purchase price within a specified time, viz., ninety days after the notice of the completion, approval and filing of the map and description of the land; and if he had not complied with that condition his application was nullified by the ninth section of the act of 1878. The State had the right to contract for the sale of its swamp lands, and in the enforcement of its contract it had the right to insist upon a full compliance with the terms of the contract on the part of the applicant. It had the right to make the time of payment of the essence of the contract, and we are not prepared to say it did not do so. This reasoning leads logically to the conclusion that the ninth section of the act of 1878 was not intended to render void applications to purchase in which every condition of the act of 1870 had been complied with so far as lay in the power of the applicant, and where the failure to make the payment specified was caused solely by the failure of the other contracting party. We therefore accept the construction of the act of 1878 adopted by the board of land commissioners, and acted upon for so long a period of time in the administration of the swamp land grant, and hold that the application of Owen, in this case, was not rendered void by the act of 1878; and that, by the subsequent payment of the first instalment of the purchase price of the land embraced in his application, he acquired a vested right to those lands. In other words, by such payment, this contract with the State became so far executed as to be embraced in the class of contracts protected by § 10 of Art. 1 of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts."

Syllabus.

Does the statute of 1887, above quoted, impair such a contract? We think it does, beyond all doubt. It, in so many words, authorizes the board of commissioners to cancel the certificates of sale where the twenty per centum of the purchase price of the land had not been paid prior to January 17, 1879, and treats the lands embraced in such certificates as reverted to the State. That legislation surely impaired the obligation of the contract Owen had with the State, for its effect was to destroy valuable property, rights and privileges belonging to him. It was, therefore, violative of the Constitution of the United States. Art. 1, § 10.

That statute being the one under which the appellants assumed to act, affords them no security or immunity for the acts complained of; and it cannot be said, therefore, that this is a suit against the State, within the meaning of the Eleventh Amendment.

Decree affirmed.

HENDERSON *v.* CARBONDALE COAL AND COKE COMPANY.

HITCHCOCK *v.* CARBONDALE COAL AND COKE COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Nos. 247, 248. Argued March 24, 25, 1891. — Decided April 20, 1891.

The rule in *Gibson* v. *Shufeldt*, 122 U. S. 27, that "in equity as in admiralty, when several persons join in one suit to assert several and distinct interests, and those interests alone are in dispute, the amount of the interest of each is the limit of the appellate jurisdiction," affirmed and applied.

Equity leans against lessors seeking to enforce a forfeiture of the lease, and only decrees in their favor when there is full, clear and strict proof of a legal right thereto.

Leased property in Illinois being in the hands of a receiver, and there being no evidence that he lived at St. Louis, proof of the mailing of a registered letter to him at that place, claiming a forfeiture of the lease for non-payment of rent, and of an endorsement on the receipt of the receiver's name "per C. M. Pierce" is not such proof of the personal ser-

vice of demand and notice as authorizes a decree of forfeiture under the statutes of Illinois.

The presumption that a letter mailed in the ordinary way reaches its destination, is a presumption of fact, not of law, and does not arise unless it also appears that the person to whom it is addressed resides in the city or the town to which it is addressed.

No foundation is laid for a decree of forfeiture of a lease for non-payment of rent, if it appears that the lease described in the notice of claim of forfeiture is a different lease from the lease produced and proved in the judicial proceedings to obtain such a decree.

Under the statute of Illinois full, clear and strict proof of delivery to the proper party of a demand for payment of rent in arrear, and notice of claim of forfeiture of a lease in case of failure to do so, is necessary, in order to entitle the lessor to a decree of forfeiture.

A court of equity has full power over its orders and decrees during the term at which they are entered; and may grant a rehearing of a cause at the term at which it was heard and decided.

When a party who is ordered to appear in a pending suit in equity, voluntarily appears, without service of process, and answers, setting up his claims, it is too late for him to object that there was error in the order.

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

On the 1st day of February, 1878, there was existing under the laws of the State of Illinois a corporation known as the Carbondale Coal and Coke Company. It then executed a mortgage on its properties to secure the sum of fifty thousand dollars. On the 1st day of January, 1881, it consolidated with the St. Louis Coal and Coke Company, under which consolidation the new company assumed the liabilities of the constitutent companies, but retained the name of the Carbondale Coal and Coke Company. Prior to the consolidation, the St. Louis Coal and Coke Company had also executed a mortgage to secure the sum of seventy-five thousand dollars. The business of the corporation was that of mining coal in the counties of Williamson and Jackson, Illinois. For this business it bought some lands and leased others. Its mortgages covered both the property owned and the property leased. In October, 1884, a suit was commenced in the Circuit Court of the United States for the Southern District of Illinois by certain stockholders and creditors, making the company and the trustees in the two mortgages defendants, and John W. Harrison was on the same day appointed receiver. Subsequently

Statement of the Case.

Harrison resigned his trust, and Howard A. Blossom was by order of the court named as his successor. Among the leases which the Carbondale Coal and Coke Company had were the following: One executed March 28, 1871, by G. T. Johnson and wife, of one hundred and twenty acres; one April 5, 1873, by Nancy Priddy, widow of Peters Priddy, and guardian of the minor heirs of Peters Priddy, to wit, Belinda, Rodey, Henry, Martha and Susan Priddy, of eighty acres; one March 25, 1871, by Thomas Waldron and wife, of forty acres; one March 18, 1871, by Mary Waldron and Catharine Waldron, widow of Henry Waldron, and guardian of the minor heirs of Henry Waldron, to wit, Jacob, David, Martha, Henry and Catharine Waldron, of one hundred and five acres; and one March 18, 1871, by Tinsley Priddy and wife, of one hundred and forty acres. The consideration of these leases was one dollar per acre each year until such time as the lessee should commence mining, and then a royalty of five cents per ton for all coal mined. None of the leases were of the surface ground, but simply of so much thereof as should be necessary for the mining of coal thereunder, the sale and mining of coal being the substantial matter of transfer. These leases also contained this stipulation in respect to forfeiture: "And it is furthermore agreed that if at any time said party of the second part, its successors or assigns, shall be in default and fail to pay any sum due for rent or royalty as aforesaid, for the term of ten days after written demand therefor, by the party legally entitled to demand and receive the same, the party of the second part, its successors and assigns, shall forfeit all right to mine in, or otherwise hold or enjoy, the tract or surveyed sub-division of land for and on account of which said unpaid sum shall have become due; and, after such default and demand as aforesaid, the party legally entitled to the life estate or fee simple ownership of said land may at once, or at any time thereafter, enter into the exclusive possession thereof, the mines and all the appurtenances thereto belonging, and hold the same free and discharged of every and all claims of the party of the second part, its successors, assigns, or other legal representatives."

Under these leases, prior to the appointment of the receiver, the lessee had paid to these various lessors many thousand dollars, and yet had never mined a ton of coal, or disturbed the surface of the soil; so that this money had been paid by the lessee without receiving any present equivalent, and solely in anticipation of future profit from the mining of coal therein. The time of payment of these rentals had been a matter of convenience between the lessors and lessee. The former had purchased goods at the store of the latter, and at the end of the respective years a settlement of accounts had generally been made. No stress had been laid by either party upon the exact date, the first of January, at which the rents were due. The rents due on the first of January after the appointment of the receiver, to wit, January 1, 1885, were not paid, and as to some of the leases there was still other rent due. More than six months thereafter, and on the 17th day of July, 1885, an intervening petition was filed on behalf of all these lessors or their successors in interest. The purpose of this petition was not the collection of rent, but the forfeiture of the leases. Before the final decree in the Circuit Court, Johnson settled with the receiver and dropped out of the litigation, leaving it to proceed in respect to the four other leases, the amount of land included therein being three hundred and sixty-five acres. For this land, as heretofore stated, annually for more than a dozen years one dollar an acre had been paid by the lessee to the lessors, without the slightest return to the lessee — no occupation of the surface of the land — no mining of any coal. These lands were patented by the United States to the original patentees between 1850 and 1860. The purchase price of government lands was then one dollar and a quarter per acre. As a matter of general history, it is well known that land warrants with which government lands could be located were on the market at prices ranging from fifty cents to a dollar an acre. So that we start into this investigation with the fact that these lands were bought from the government, title in fee simple being acquired, not to exceed twenty years before these leases, at not more than one dollar and a quarter per acre; and that for more than a dozen years before the appointment of

a receiver and the commencement of this litigation, the owners of these lands had received each year a dollar an acre rental, without ever surrendering the possession of the surface, or losing a pound of coal beneath. In other words, that amount paid was clear gain and with no loss.

It also appears that the mortgages were executed and the bonds of the Coal and Coke Company negotiated on the security of these leases, as well as of the fee simple property; so that while the lessors were receiving rent other parties were loaning money to the lessee on the strength of its title to the properties. Further, while in the order appointing the receiver the Coal and Coke Company was directed to assign and transfer over to the receiver all its property, including these leases, it does not appear that any actual assignment or transfer was made by the Coal Company; and the receiver apparently took possession only by virtue of the order of appointment. No notice of non-payment, no claim of forfeiture, was given to the trustees in the mortgages; none to the company mortgagor. The sole basis of forfeiture is in alleged notices to the receiver, after the non-payment of the rent due on January 1, 1885. No application was made to the court for an order on the receiver for the payment of the rent, or, in the alternative, a surrender of the leased property. In fact, all parties were ignored in the proceedings by which the forfeiture is claimed, except the receiver, and he was dealt with as having such absolute ownership and entirety of control, as to justify parties claiming a forfeiture of leasehold property in his possession, in ignoring the court which appointed him, the trustees of the mortgages which were being foreclosed, and who represented the beneficial ownership of the property, and the mortgagor which had taken the leases, given the mortgages, and had an equity of redemption in the mortgaged property.

It further appears that the title to these properties had changed since the execution of the leases. These changes resulted from death and succession of interest as well as from conveyances; so that there was at the time the receiver took possession some doubt as to who were entitled to the rentals,

or, at least, a portion of them. In view of this fact, the receiver had been advised by his counsel not to pay them until an order had been made by the court for their payment, which would be protection to him in so doing. In consequence of this advice no payment was made. It does not appear that any effort was made to satisfy the receiver as to the title to this leased property, or as to the parties to whom the rent was due; nor that there was any purchase of goods from the company's store, as theretofore, with the view of having the amounts thereof applied on the rent. It does appear that there was some talk among the lessors of the existence of a rival corporation ready to rent these lands. Under these circumstances, the claimants, as heretofore stated, on July 17, 1885, filed their petition. The receiver answered, and on September 15, 1885, an order was entered forfeiting the leases. An application for rehearing was made at the same term and on the 25th of September, which was immediately sustained. Thereafter and on the 23d of February, 1886, William E. Burr, the trustee in the mortgage of the Carbondale Coal and Coke Company, filed an answer to the intervening petition; and an amount of money necessary to cover all these rentals was deposited in the office of the clerk of the Circuit Court, to be paid to such parties as should show themselves entitled thereto. Testimony was taken, and on the 6th of November, 1886, upon the petition, answers of the receiver and trustee and the testimony, a decree was entered dismissing the petition, adjudging the leases to be in full force, and directing all persons claiming an interest in the rental fund to present their claims. From this the intervenors have appealed, and their appeal is the first of the two cases before us for consideration. The other arises in this way: Between the 15th of September, 1885, on which day the order was entered forfeiting the leases, and the 25th of September, 1885, on which day the rehearing was granted, Hitchcock, this appellant, leased from the intervenors the lands whose leases had thus been forfeited. After the rehearing had been granted, the court ordered that he be made a party to the proceedings, in response to which order he appeared and filed an answer, setting up his claims.

At the same time and as a part of the decree against the lessors, one was entered against him, decreeing that the leases made by the intervenors to him be set aside, and that he be restrained from interfering with the rights of the Carbondale Coal and Coke Company and the receiver to carry on mining operations in these premises. From such decree he has taken this appeal.

Mr. James McCartney for appellant Ethan A. Hitchcock.

Mr. W. W. Barr for appellants Henderson and others submitted on his brief.

Mr. H. J. May for appellees. *Mr. A. H. Garland*, *Mr. Charles S. Taussig* and *Mr. James Taussig* were on the brief.

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

A preliminary question in the first case requires notice: Is the amount in controversy sufficient to give this court jurisdiction of this appeal? What is the subject matter of the controversy? Evidently the leasehold interests held by the Coal and Coke Company. What is the value of those interests? The pleadings in the intervention proceedings do not disclose it. In the order allowing these appellants to appeal it is stated that, "It appearing to the court that there is a greater amount than the sum of five thousand dollars involved in the property in suit by the intervening petitioners herein," (naming them,) "it is therefore hereby ordered, adjudged and decreed by the court that said intervening petitioners be allowed an appeal," etc. That is, the total value of all the leasehold interests is found to be in excess of five thousand dollars; but there is no joint interest on the part of these several intervenors. They do not appear as jointly interested in a single piece of the property in dispute. There are four leases, each independent of the other, and each including separate property. The lessors in one lease are in no manner

interested in the property covered by the other leases. While the stipulations in the various leases respecting forfeiture are alike, the proceedings for forfeiture are different; and, even if similar proceedings were taken in each case, that would not make a unity of interest in the various lessors. The forfeiture of each lease is an independent cause of action, in respect to which the lessors in the other leases have no interest. One may have taken proper proceedings to establish a forfeiture, and the other not. The failure of the one would not defeat the right of the other. Any lessor may drop out of the litigation without disturbing the right of the others to proceed. The fact that they have united in one intervening petition does not give them a unity of interest. It is precisely the same as though four persons, having independent and separate claims of fifteen hundred dollars each against the company, had united their several claims in one petition. Even though no objection on account of misjoinder was or could have been made, it would not change the fact that each one's interest was separate from that of the others, and amounted to only fifteen hundred dollars. There is nothing in the pleadings or in the findings which shows the separate value of each leasehold interest; and where there are separate interests the jurisdiction of this court does not depend upon the aggregate value of such interests, but, as to each party, upon the value of his interest. This matter has several times been considered in this court, and the decisions are uniform. In the case of *Gibson* v. *Shufeldt*, 122 U. S. 27, the question was considered at length, and the authorities in this court fully reviewed. In it the rule was stated as follows: "But in equity, as in admiralty, when several persons join in one suit to assert several and distinct interests, and those interests alone are in dispute, the amount of the interest of each is the limit of the appellate jurisdiction." There are no affidavits of value filed with this record. Indeed, it is probable they would not be admissible. *Red River Cattle Company* v. *Needham*, 137 U. S. 632. If we turn to the testimony, we find nothing which satisfactorily establishes the value of any one of these leasehold interests. While one of the witnesses, assuming an uniform thickness of

the vein of coal beneath each tract, made large estimates of value, yet other testimony plainly disclosed that which all experience affirms, an uncertainty as to such thickness, and also made manifest the expense and difficulties attending the mining of whatever coal there may in fact be beneath the property. And more than that, the considerations of the conveyances offered in evidence clearly tend to establish that the total value of no single leased tract, including therein both the fee of the land and the leasehold interest, is equal to five thousand dollars. Under these circumstances, this court has no jurisdiction of this appeal, and it must be dismissed.

In the second case the appeal, as above stated, is by a party who claims a subsequently acquired leasehold interest in all the tracts, the aggregate value of which is found to be in excess of five thousand dollars. So we proceed further to consider the question as to the right of forfeiture, for if the leases were never forfeited Hitchcock could not by a subsequent lease acquire any rights to the coal, to the prejudice of the Coal and Coke Company.

Upon this matter we observe that it is evident, from the statement of facts heretofore made, that the claims of the intervenors rest upon no equitable considerations, but only on the letter of the law. They do not seek to continue their contract and recover the rent, but to enforce a forfeiture; and forfeitures are never favored. Equity always leans against them, and only decrees in their favor when there is full, clear and strict proof of a legal right thereto. One condition essential to the forfeiture of a lease by the lessor was at common law, and is, under the statutes of Illinois, a demand. In *Prout* v. *Roby*, 15 Wall. 471, 476, this court said, quoting from *Connor* v. *Bradley*, 1 How. 217: "It is a settled rule at the common law, that where a right of reëntry is claimed on the ground of forfeiture for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset on the day when the rent is due, upon the land, in the most notorious place of it, though there be no person on the land to pay." It is not pretended that any such demand was made in this case. The statutes of Illinois have this pro-

vision: "Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person above the age of twelve years, residing on or in possession of the premises; and in case no one is in the actual possession of said premises, then by posting the same on the premises." Starr & Curtis's Annotated Statutes, 1885, p. 1495, sec. 10.

Under this section two methods of serving demand and notice are provided: One personally upon the tenant; the other, on the leased premises. There was no attempt at the latter. Indeed, as the lessors were in actual possession of the surface of the ground, and the lessee had as yet made no entrance into the coal veins, it might have been difficult to have complied with the statute, by giving such a notice on the premises as would have forfeited the leases. Neither was any notice given at the offices or works of the Coal and Coke Company in Illinois. What the lessors attempted, was to give personal notice to the receiver, and to him alone, by mail, in St. Louis. There is no testimony showing that Harrison, the receiver, lived in St. Louis. It is true, in the cross-bill of the trustee in the mortgage of the Coal and Coke Company, filed a year after the appointment of the receiver, and months after the filing of the intervening petition, Harrison is described as residing in St. Louis; but if this description in the cross-bill of the trustee can be invoked by the intervenors as an admission in their behalf, it would seem to imply that the party whose admission was thus relied upon was himself the one entitled to notice; and, in this respect, it must be borne in mind that the receiver was appointed, not at the instance of this trustee, or in a suit filed by him, but at the instance of and in a suit filed by certain stockholders and creditors of the Coal and Coke Company.

But passing this, as to two of the leases, notices were sent on February 2, 1885, in a registered letter, and the registry return receipt was in evidence. The endorsement on the receipt is "John W. Harrison, per C. M. Pierce." These letters were not directed to Harrison as receiver of the Coal and

Coke Company, and there is no testimony as to who C. M. Pierce was, or what relations, if any, he sustained to the Coal and Coke Company, or the receivership or John W. Harrison. There was no other evidence tending to show that Harrison ever received the notices. It may be that C. M. Pierce was a secretary or employé of John W. Harrison's, authorized to receive and receipt for his letters, but there is no evidence as to the fact. No reason is given why personal service was not made on Harrison. Doubtless, as receiver, he was often at the company's office and works in Illinois, in the immediate neighborhood of the leased premises, and the residences of the lessors. At any rate, St. Louis is not very distant, and if it were too much trouble for these lessors, themselves, to visit St. Louis, the notices could easily have been sent to some one there, by whom personal service could have been made. It is true that the receiver, in his answer to the intervening petition, does not deny the receipt of these notices. But for two reasons this does not help the intervenors: First, the allegation in the petition in respect to demand and notice, and the service thereof, is limited by a reference to the writing containing the demand and notice, a copy of which is attached as an exhibit, and a like reference to the registry return receipt, also attached as an exhibit; and doubtless the receiver could not deny these matters. The question is not whether these demands and notices were prepared and placed in an envelope and mailed as stated, nor whether the registry return receipt was as stated, but whether these facts establish personal service on the receiver. His failure to deny the facts does not justify the inference which intervenors draw from them. It only leaves the matter for the determination of the court. The other is, that in equity proceedings a party must prove all the facts necessary to his right, except so far as they are admitted by the adverse party. From these considerations it is evident that, as to these two cases, no such proof was made of the personal service of demand and notice as entitled petitioners to a decree of forfeiture.

Passing now to a third lease — the one executed by Nancy Priddy, as widow and guardian. It appears that the property

leased passed, by sundry conveyances subsequent to the lease, to William Henderson, one of the intervenors. We do not understand that there is any question as to his ownership of the property, or as to his having acquired all the title originally held by the lessors. He, too, attempted to give notice by mail, instead of by personal service, and on the 1st of January, 1885, at Carterville, Illinois, he mailed a notice, of which the following is a copy, to John W. Harrison, receiver, etc., at St. Louis, Missouri:

"CARTERVILLE, ILL., *January* 1, 1885.

"To John W. Harrison, Receiver of the Carbondale Coal and Coke Company.

"SIR: There is now due me for rent or lease money on east one-half of the southeast quarter of section 33, township 8, range 1 east, eighty dollars for the year 1884. I hereby demand payment of the amount due me and for said rent as aforesaid, and if payment be not made within ten days from the date of this demand I shall claim a forfeiture in accordance with the terms of the lease heretofore given to A. C. Bryden, president of the Carbondale Coal and Coke Company, by me, for the minerals underlying said above-described real estate.

"Yours truly, WILLIAM HENDERSON."

This notice was not mailed in a registered letter. There is no testimony as to whether the letter thus mailed was returned to the sender; and no evidence of the receipt of the letter, other than that which flows from the fact of mailing. Undoubtedly, under some circumstances, this is evidence of the receipt. In 2 Wharton on Evidence, sec. 1323, the rule is thus stated: "The mailing a letter, properly addressed and stamped, to a person known to be doing business in a place where there is established a regular delivery of letters, is proof of the reception of the letter by the person to whom it is addressed. Such proof, however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case." In support of this proposition many authorities are cited, among them the case of *Lindenberger* v. *Beall*, 6 Wheat.

104. In the case of *United States* v. *Babcock*, 3 Dillon, 571, 573, in which the question was elaborately discussed by counsel, Judge Dillon stated the law in these words: "Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid, and actually deposited in the post office, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow in *Comm.* v. *Jeffries*, 7 Allen, 548, 563, that this 'is evidence tending to show that they reached their destination, and were received by the persons to whom they were addressed.'" This is not a conclusive presumption, and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters; — "a fact," says Agnew, J., *Tanner* v. *Hughes*, 53 Penn. St. 290, "in connection with other circumstances, to be referred to the jury, under appropriate instructions, as its value will depend upon all the circumstances of the particular case." See also *Rosenthal* v. *Walker*, 111 U. S. 185. This presumption, which is not a presumption of law, but one of fact, is based on the proposition that the post office is a public agency charged with the duty of transmitting letters; and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case. It is a probability resting on the custom of business and the presumption that the officers of the postal system discharged their duty. But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed; and in this respect the observations heretofore made as to the evidence that Harrison, the receiver, resided in St. Louis, are pertinent.

But, passing that, let us examine the notice itself. The real estate is described, and an amount of rent alleged to be due; but the claim of forfeiture is, as expressed, "in accordance with the terms of the lease heretofore given to A. C. Bryden, president of the Carbondale Coal and Coke Company by me." No such lease appears in evidence. The only lease in respect to this real estate shown is one from Nancy Priddy, widow of

Peters Priddy and guardian of the minor heirs of said Peters Priddy, to the Carbondale Coal and Coke Company. We may not assume what the provisions of the lease referred to were in respect to forfeiture; and there can be no doubt but that parties to a lease may, by express stipulation, provide for an extension of the statutory conditions of forfeiture. We do not mean to be understood as saying that parties may by contract deprive the lessee of the protection against summary forfeiture, given by the statute. There may be a public policy which will prohibit any such agreement for a summary deprivation of right, but there is no public policy which prevents contract stipulations in the other direction. Parties may make a lease, with a valid stipulation therein, that no forfeiture shall take place until after twelve months' demand and notice, and in other respects limiting the right of reëntry. And when a forfeiture is demanded in accordance with the terms of a lease, before such forfeiture can be decreed it is necessary that the lease be produced in evidence, in order that the court may see that there are in it no contract stipulations in respect to forfeiture beyond the statutory provisions. It is true that the intervenor Henderson testifies that he did not give any lease to A. C. Bryden, and that the lease he referred to in his demand was that given by Nancy Priddy, guardian, etc., to the Cole and Coke Company on April 5, 1873. But can it be that parol testimony is competent to thus change the whole tenor and scope of a written instrument? This is a proceeding in strict right. Intervenor demands a forfeiture, and as evidence of his right to a forfeiture alleges a written demand in accordance with the terms of a described lease. When his case comes on for hearing he says there is no such lease, and the one referred to was an entirely different lease, between different parties from those therein named. Surely it needs no argument to show that such a notice, with such evidence, does not lay the foundation for a decree of forfeiture.

With regard to the remaining lease, substantially the same observations are appropriate. This was the notice which was given, and it was served in the same way:

"CARTERVILLE, ILL., *Jan.* 1, 1885.

"To John W. Harrison, receiver of the Carbondale Coal & Coke Company.

"SIR: There is now due me for rent of lease on southwest quarter of southeast quarter of section 33, township 8 south, of range 1, forty dollars ($40) for the year 1844, less the amount received at the company's store, at Carterville, Ill., in goods, etc. I hereby demand payment of the amount due me for said rent as aforesaid, and if payment be not made within ten days from the date of this demand I shall claim a forfeiture in accordance with the terms of the lease heretofore given to you by me for minerals underlying said above-described real estate.

"Yours truly, JOSEPH WALDRON."

The only lease of this real estate, which was in evidence, was one executed March 11, 1873, by Thomas Waldron and his wife, Barbara Waldron, to the Carbondale Coal and Coke Company, which lease recites that on the 25th day of March, 1871, a right had been given by Joseph Waldron and wife to Frank J. Chapman and two others, to enter upon the premises and mine the coal and other mineral therein, upon certain conditions which are not detailed, and which further recites, "that Thomas Waldron and wife are now the owners of the real estate, and that the mining rights given to Chapman and others have been assigned to the Carbondale Coal and Coke Company," and thereafter proceeds to describe the terms and conditions of the lease. Similar testimony was given as in the Henderson case, except that in this the intervenor did not testify that he had not made a lease directly to the receiver, nor that the lease which he referred to in his demand was the one executed by Thomas Waldron and wife to the Carbondale Coal and Coke Company. This, however, makes no material difference, for, as we have seen, the testimony of Henderson as to his intentions and what he meant by his demand is incompetent as against its plain letter. It is needless, therefore, to enter into any new discussion of the sufficiency of this demand and notice.

In conclusion, in respect to all these leases, it may be observed that there is not that full, clear and strict proof of the delivery to the receiver, even if he were the party alone entitled thereto, of a demand and notice, correct in its description, and sufficient to entitle the lessor to a forfeiture.

Appellant further insists that the court erred in granting a rehearing to the receiver. The rehearing was granted at the same term; and it is familiar law that a court of equity has full power over its orders and decrees during the term in which they are entered. In *Doss* v. *Tyack*, 14 How. 297, 313, this court said: "The court, in vacating the decree, were correcting an error both of fact and of law; and, during the term at which it was rendered, they had full power to amend, correct or vacate it, for either of these reasons." And in *Basset* v. *United States*, 9 Wall. 38, 41, in which the action of a court in setting aside a judgment at the same term at which it was rendered was sustained, it was said that "this control of the court over its own judgment, during the term, is of every-day practice." As from the foregoing opinion it is apparent that the court erred in its first decree, its action in granting a rehearing cannot be condemned; and where a judgment or decree is set aside at the term at which it is rendered, it is as though it had never been. It appears from the evidence that Hitchcock had full notice of the proceedings in the Circuit Court, so that he cannot claim to have been misled. Knowing that the court had full power during the term to vacate its own decree, he took these leases subject to the possibility of such vacating of the decree.

It is also objected that there was error in making Hitchcock a party to these proceedings; but, although the court ordered that he be made a party, no process was served on him; he voluntarily appeared and filed an answer, setting up his claims. It is too late now for him to object that there was error in this.

From these various considerations it is ordered that the appeal in No. 247 be dismissed, and that the decree in No. 248 be affirmed.

SCOTLAND COUNTY COURT *v.* UNITED STATES *ex rel.* HILL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 298. Argued April 9, 10, 1891. — Decided April 20, 1891.

When the bonds of the plaintiff in error which form the basis of the subject of controversy were issued, there existed a power of taxation sufficient to pay them and their accruing coupons, which power entered into and formed part of the contract, and could not be taken away by subsequent legislation.

The case is stated in the opinion.

Mr. John C. Moore for plaintiffs in error.

Mr. F. T. Hughes for defendant in error. *Mr. John H. Overall* was with him on the brief.

Mr. Justice Harlan delivered the opinion of the court.

In the year 1879, William Hill, the testator of the defendants in error, obtained a judgment in the court below against the county of Scotland, Missouri, for the sum of $46,944, the amount of certain coupons of bonds bearing date September 1, 1870, and issued to the Missouri, Iowa and Nebraska Railway Company, a corporation created by the consolidation of the Alexandria and Nebraska City Railroad Company of Missouri (originally the Alexandria and Bloomfield Railroad Company) with the Iowa Southern Railway Company of Iowa. The bonds recited that they were issued under and pursuant to an order of the Scotland county court for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, "as authorized by an act of the general assembly of the State of Missouri, entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company,' approved February 9, 1857." Laws of Missouri, 1856–1857, 94.

The consolidation above referred to took place under a general statute of Missouri, approved March 2, 1869, (Laws of Missouri, 1869, p. 75,) authorizing the consolidation of railroad companies in that State with companies owning connecting railroads in adjoining States. The fourth section of that act is as follows: "Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this State, which may be thus consolidated with one in the adjacent State, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place."

The tenth section of the act incorporating the Alexandria and Bloomfield Railroad Company provided: "Said company shall, in all things, be subject to the same restrictions, and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company by an act entitled 'An act to incorporate the North Missouri Railroad Company,' approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein reënacted." Among the rights and privileges thus acquired by the Alexandria and Bloomfield Company, and which passed to the consolidated company, are those enumerated in the fourteenth section of the act incorporating the North Missouri Railroad Company, in these words: "It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county." Laws of Missouri, 1851, pp. 483, 486.

At the first trial of the action there was a verdict and judgment against the county. That judgment was reversed for error in excluding evidence offered in its behalf, and the case was remanded for a new trial. *Scotland County* v. *Hill*, 112 U. S. 183, 185. At the next trial there was a judgment

against the county for the above amount, which was affirmed by this court. *Scotland County* v. *Hill*, 132 U. S. 107.

The present action was by information for a mandamus against the county court of Scotland County and the judges thereof, requiring the levy and collection of a tax for the payment of this judgment. The alternative mandamus recited the judgment, and the failure of the county to pay it, or by its proper officers to levy and collect a tax for its payment, and commanded the county court and the judges thereof to forthwith levy and cause to be collected upon all the real estate and personal property in the county subject to taxation a tax for the payment of the judgment, with interest and costs, including the costs of this proceeding, and to pay the same according to law.

To this mandamus the county court and its judges made a long return, the object, apparently, of the greater part of which was to reopen the questions involving the authority of the county to issue the bonds and coupons in question. But the material parts of the return are as follows: "Respondents aver that neither at the date of the execution of the coupons in relator's judgment merged, nor at any period prior to said date, nor at the present time, was there or is there now any law in force in the State of Missouri requiring or authorizing the county court of Scotland County, in the State of Missouri, to levy any special tax upon the taxable property of or in said county, in the State of Missouri, for the purpose of paying the judgment in said relator's writ described. Respondents aver that they did at the May term, 1887, of the county court of Scotland County, in the State of Missouri, make and cause to be entered upon the records of said court, (as will fully appear from a duly certified copy of said order herewith filed, marked 'Exhibit A,' and made part of this return,) an order levying upon all the property, real or personal, subject to taxation for state purposes in said Scotland County, a tax for county purposes of one-half of one per cent upon each and every one hundred dollars of the assessed value of such property." It was also averred in the return that during each year prior to 1887 similar levies had been made by the respondents or their pre-

decessors, namely, one-half of one per cent upon each one hundred dollars of the assessed value of property in the county; that the judgment could only be paid out of taxes levied and assessed for county purposes; that there were no funds, at the time the return was made, with which to pay the judgment; and that respondents would violate the law of the State if they made a larger levy. A demurrer to the return was sustained, and the respondents electing to stand by their return, a judgment was entered in accordance with the prayer of the information. 32 Fed. Rep. 714.

Certain questions, arising out of the subscription by Scotland County to the capital stock of the Missouri, Iowa and Nebraska Railway Company, and the issuing by its county court of bonds in payment of such subscription, have been closed by former adjudications. It has been heretofore determined that the power of the county, derived under the act of February 9, 1857, from the charter of the North Missouri Railroad Company, to subscribe, without a previous vote of the people, to the capital stock of the Alexandria and Bloomfield Railroad Company, was a privilege of that company which passed, by the above consolidation, to the Missouri, Iowa and Nebraska Railway Company; that the prohibition in the constitution of Missouri of 1865 against municipal subscriptions to the stock of, or of loans of credit to, companies, associations or corporations, without the previous assent of two-thirds of the qualified voters at a regular or special election, limited the future exercise of legislative power, but did not take away any authority granted before that constitution went into operation; and that the subscription made by the county court was binding, and the bonds issued in payment thereof were valid. *County of Scotland* v. *Thomas*, 94 U. S. 682, 693, 694; *County of Ralls* v. *Douglass*, 105 U. S. 728; *Ralls County Court* v. *United States*, 105 U. S. 733, 734; *Scotland County* v. *Hill*, 132 U. S. 107, 111, and authorities there cited.

The only question, therefore, open for discussion in the present case is whether the tax which the order below required to be levied and collected, namely, a tax *sufficient* to pay Hill's judgment, with interest and costs, was authorized by law.

The contention of respondents is that when the bonds were issued September 1, 1870, they had no power, under the laws of Missouri, to levy a tax in excess of one-half of one per cent; and, as in the year 1887, when this action was commenced, and in previous years, the levies made by them and their predecessors in office were up to that limit, they were without power to make the additional levy required by the judgment in this case. The court below held that, under the laws of the State, when the bonds were negotiated the county court had ample authority to levy such tax as was necessary to pay them. The question thus presented is within a narrow compass.

We have seen that the Alexandria and Bloomfield Railroad Company was invested with all the privileges, rights and immunities granted to the North Missouri Railroad Company, and that by the charter of the latter company the county court of any county making a subscription to its stock, was authorized to issue bonds to raise funds to pay for the stock subscribed, "and to take proper steps to protect the interest and credit of the county." This power of the county court was a right and privilege of the company in whose behalf it was to be exercised. Now, was not the power "to protect the interest and credit of the county," in respect to bonds it had legally issued for stock, a power to levy and collect a tax sufficient to pay the bonds and the interest accruing thereon? This question was answered in the affirmative in *Ralls County* v. *United States*, 105 U. S. 733, 735, 736. That was a proceeding by mandamus to compel the county court to pay a judgment rendered against Ralls County, Missouri, for the interest due on bonds issued by that county in payment of a subscription to the stock of the St. Louis and Keokuk Railroad Company, whose charter provided (as did that of the Alexandria and Bloomfield Railroad Company) that it should "be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company," "and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county." Laws of Missouri, 1856–7, pp. 125, 132,

§ 29. In that case, as in this, the county court insisted that its power of taxation was limited to the levy of an annual tax of one-half of one per cent on the taxable property in the county, and, as that amount of tax had been levied at the times provided by law, the duty of the court had been fully performed. On the other side it was contended that if the county funds were not sufficient to pay the judgment the county court should be required to levy and collect such tax as was necessary for that purpose. This court, speaking by Chief Justice Waite, held that the creditor was entitled to any fund that could be lawfully raised by the county to pay the judgment; that the coupons carried with them into the judgment all the remedies which in law formed a part of their contract obligations; that "when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract; as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation" — citing *Loan Association* v. *Topeka*, 20 Wall. 655, and *United States* v. *New Orleans*, 98 U. S. 381. After referring to and distinguishing *United States* v. *County of Macon*, 99 U. S. 582, in which it appeared that the authority of the municipality to contract was burdened with a special limitation upon its power of taxation, the court proceeded: "In the present case there is no such special limitation. The defence rests entirely on the power to tax to 'defray the expenses of the county,' which it has always been the policy of the State to restrict. The county court was, however, not only authorized to issue bonds, but to 'take proper steps to protect the interest *and credit* of the county.' It would seem as though nothing more was needed. As the commercial credit of the county, in respect to its negotiable bonds, could only be protected, under ordinary circumstances,

by the prompt payment of both principal and interest, at maturity, and there is nothing to show that payment was to be made in any other way than through taxation, it necessarily follows that power to tax to meet the payment was one of the essential elements of the power to protect the credit. If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other. Here it seems to have been understood by the legislature that the ordinary taxes might not be enough to enable the county to meet the extraordinary obligation that was to be incurred, and so, without placing any restriction on the amount to be raised, the county court was expressly authorized to do *all* that was necessary to protect the credit of the county. . . . The subscription was paid by the bonds; but the obligation to pay the bonds, principal and interest, when they matured was legally substituted."

All that was said in that case is applicable to the present case, and places beyond question the power and duty of the county court of Scotland to levy such tax as may be sufficient to pay the judgment obtained by Hill, with interest and costs.

Judgment affirmed.

BORAH *v.* WILSON.

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

No. 309. Argued and submitted April 15, 1891. — Decided April 20, 1891.

This case is affirmed upon the authority of *Harter* v. *Kernochan*, 103 U. S. 562, and other cases.

THIS was an action brought by citizens, owners of real estate and taxpayers in Wayne County, Illinois, against the officers of that county to have certain issues of bonds of that

county cancelled as invalid, and an injunction issued to prevent the levy of taxes to pay any of the principal or interest upon them.

Mr. H. Tompkins for appellants submitted on his brief.

Mr. George A. Sanders for appellees. *Mr. T. C. Mather*, *Mr. J. A. Connolly* and *Mr. O. J. Bailey* filed a brief for same.

Per Curiam. The decree of the Circuit Court is affirmed upon the authority of *Leach* v. *The People*, 122 Illinois, 420; *Harter* v. *Kernochan*, 103 U. S. 562; *Bonham* v. *Needles*, 103 U. S. 648.

Affirmed.

STEVENSON *v.* BARBOUR.

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

No. 304. Argued and submitted April 14, 1891. — Decided April 20, 1891.

There being no assignment of errors and no specification of errors, and the record presenting no question of law, the judgment below is affirmed.

The case is stated in the opinion.

Mr. J. G. Carlisle for plaintiff in error submitted on his brief.

Mr. Orrin B. Hallam for defendant in error.

Per Curiam. No assignment of errors accompanies the transcript of record in this case, nor is there any specification of the errors relied on in the brief of counsel for plaintiff in error. Moreover, the record presents no question of law calling for the exercise of our right of review. *Fishburn* v. *Railway Co.*, 137 U. S. 60; *Pacific Express Co.* v. *Malin*, 132 U. S. 531, 538.

The judgment is *Affirmed.*

UNITED STATES *v.* CHIDESTER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 313. Submitted April 15, 1891. — Decided April 20, 1891.

United States v. *Barlow*, 132 U. S. 271, affirmed and applied to the point that when there is evidence tending to establish the issues on the plaintiff's part, it is error to take the case from the jury.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error submitted on his brief.

No appearance for defendant in error.

PER CURIAM. This was an action brought under sections 3961 and 4057 of the Revised Statutes. There was evidence tending to establish the issues on plaintiff's part, within the rule laid down in *United States* v. *Barlow*, 132 U. S. 271. The court took the case away from the jury and in that committed error.

The judgment is reversed, and the cause remanded with a direction to award a new trial.

PENNSYLVANIA RAILROAD COMPANY *v.* GREEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 315. Argued April 16, 1891. — Decided April 20, 1891.

In an action against a railroad company by a passenger to recover damages for injuries received at the station of arrival by reason of its improper construction, if there be conflicting evidence, the case should be submitted to the jury under proper instructions.

Statement of the Case.

THE declaration in this case "complains for that whereas the defendant is a corporation chartered under the laws of this Commonwealth and the operator of a steam railroad, with the usual appliances for the carrying of freight and passengers, and the plaintiff alleges that heretofore, to wit, on the 12th day of October, 1882, the said Anna M. Green was a passenger on one of the trains of the defendant, and the defendant disregarding its duty in that particular, conducted itself so negligently and took such little care of the said Anna M. Green that by reason of the said disregard of duty and negligence on the part of the defendant the said Anna M. Green was greatly injured, maimed and bruised, and hath suffered greatly both in body and in mind; and the said plaintiff says that the defendant was guilty of the said negligence at Moorestown, to wit, at the county aforesaid.

"And also for that whereas, heretofore, to wit, on the 12th day of October, 1882, the defendant, a corporation chartered under the laws of this Commonwealth, was the operator and had the control of a steam railroad for the carrying of freight and passengers, with the usual appliances, stations, etc., incident thereto, and the plaintiff says that on the day aforesaid the said Anna M. Green was a passenger on one of the trains of the defendant; and whereas it then became and was the duty of the defendant to exercise due and proper care in the construction of its stations and to use proper care to provide means whereby the said Anna M. Green might leave the said train with safety and not negligently to subject the said Anna M. Green to the risk of personal injury in and about one of its stations, to wit, the station at Moorestown, yet the defendant disregarded its duty in that particular and failed to provide a proper station, to wit, the station at Moorestown, and negligently subjected the said Anna M. Green to risk of personal injury in the use of its said station, whereby, on the day aforesaid, at the county aforesaid, the said Anna M. Green became sick, sore, lame, maimed and bruised, and hath suffered greatly both in body and in mind, to the damage of the plaintiff in the sum of twenty-five thousand dollars, and therefore brings suit."

At the trial there was conflicting evidence, and the defendant asked the court, among other things, to instruct the jury:

(1) "That there was not sufficient evidence in the case to maintain the cause of action on the part of the plaintiff, as set forth in the first count in the *narr.*, and hence there can be no recovery by the plaintiff under that point."

(2) That "the evidence in the case is insufficient to maintain the cause of action as set forth in the second count in the *narr.*, and hence there can be no recovery by the plaintiff under that count."

(7) That "under all the evidence in the case the verdict must be for the defendant."

The court refused, to which exceptions were taken, and the refusal made part of the assignments of error.

Mr. George Tucker Bispham for plaintiff in error. The court did not desire to hear further argument.

Mr. Leoni Mellick and *Mr. John W. Wescott* for defendant in error.

Per Curiam. The only exceptions properly preserved were to the refusal of the court to give defendant's first, second and seventh instructions to the effect that there could be no recovery under the first or under the second count of the declaration, (and there were but two,) and that the verdict must be for the defendant.

We are of opinion that the case was clearly, under each count, for the consideration and determination of the jury, subject to proper instructions as to the principles of law involved, which were given, and that the court did not err in declining to instruct as prayed.

The judgment is

Affirmed.

HILL *v.* CHICAGO AND EVANSTON RAILROAD COMPANY.

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

No. 246. Argued March 24, 1891. — Decided April 20, 1891.

The decree of June 8, 1885, dismissing the bill in this case as to certain parties for want of equity, and denying relief to complainant "upon all matters and things in controversy," which was before this court in *Hill* v. *Chicago & Evanston Railroad*, 129 U. S. 170, was a final decree as to all matters determined by it; and its finality is not affected by the fact that there was left to be determined by the master, a further severable matter in which the appellant parties had no interest.

IN EQUITY. The case is stated in the opinion.

Mr. M. D. Grover for appellant.

Mr. John W. Cary for appellees who were not dismissed by the decree of June 8, 1885.

Mr. John N. Jewett for the appellees who were dismissed by the decree of June 8, 1885, submitted on his brief.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity to compel a transfer to the complainant of certain shares of the capital stock of the Chicago and Evanston Railroad Company, and for other relief. It is brought against numerous defendants, who are alleged to be interested more or less in the several contracts and transactions out of which the claim of the complainant arises.

Issue having been joined by the replication to the answer, evidence was taken, and upon the pleadings and proofs the case was brought to a hearing in May, 1885, before the Circuit Court of the United States for the Northern District of Illinois. On the 8th of June following a decree was made, by which,

among other things, it was ordered and decreed that the bill be dismissed for want of equity as against certain of the defendants named, and that relief be denied to the complainant "upon all matters and things in controversy" therein, except as to the amount of money paid by the defendant William C. Goudy for right of way in execution of a certain contract designated; and that for the purpose of ascertaining that amount the case be retained as to the other defendants, and be referred to a master in chancery to take additional testimony on that subject, and to report the amount paid; the court also declaring that on the making of the report such further decree would be rendered as might be equitable. The defendants against whom the case was thus retained were the Chicago and Evanston Railroad Company and its directors, constituting the only parties interested in the amount to be ascertained. From this decree the complainant prayed an appeal, which was allowed, upon the filing of the specified bond with sureties to be approved by the court. No such bond was given, nor was the appeal perfected, nor the record filed in this court at its next subsequent October term. In January, 1889, the appeal was on motion dismissed, this court following in that respect its repeated decisions that it has no jurisdiction of an appeal, unless the transcript of the record is filed here at the next term after the appeal is taken. *Hill* v. *Chicago & Evanston Railroad*, 129 U. S. 170, 174.

The master in chancery took testimony upon the subject of the amount paid by the defendant Goudy, as directed, and in January, 1887, made his report, which, on the 14th of July following, was confirmed; and the court thereupon ordered and decreed that the Chicago and Evanston Railroad Company forthwith pay to the complainant the sum of $6513, with interest, and the costs of the reference and of the suit; and also that all other relief prayed by the complainant be denied as against that company, and that the bill be dismissed against the remaining defendants for want of equity, with costs. From this decree the complainant prayed an appeal, which was allowed and perfected.

The case is now before the court upon this last appeal, and

the question is whether, upon it, any of the matters which were determined by the decree of June 8, 1885, are again open for consideration. All the errors alleged relate to that decree; none are assigned to the decree of July 14, 1887.

We are of the opinion that the decree of June 8, 1885, was a final decree, within the meaning of that term in the law respecting the appellate jurisdiction of this court, as to all matters determined by it, and that they are closed against any further consideration. It disposed of every matter of contention between the parties, except as to the amount of one item, and referred the case to a master to ascertain that. It dismissed the bill against several defendants for want of equity, and denied relief to the complainant upon all matters in controversy except as to that amount, and retained the case only as against the parties interested in that matter. The rights and liabilities of all the parties were in other respects determined.

But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled. It was, however, a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable, did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment. The decree of July 14, 1887, covered that matter, and finally disposed of it. The decree of June 8, 1885, was appealable as to the matters which it fully determined; so also was the decree of July 14, 1887, as to the severable matter which it involved. *Todd* v. *Daniel*, 16 Pet. 521; *Forgay* v. *Conrad*, 6 How. 201; *Withenbury* v. *United States*, 5 Wall. 819; *Germain* v. *Mason*, 12 Wall. 259; *Milner* v. *Meek*, 95 U. S. 252. But the time

Statement of the Case.

to appeal from the first decree elapsed; and, no question being raised as to the second decree, that of July 14, 1887, it must be *Affirmed, and it is so ordered.*

INTERNATIONAL TOOTH CROWN COMPANY *v.* GAYLORD.

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

No. 294. Argued April 8, 1891. — Decided April 27, 1891.

Letters patent No. 277,941, granted May 22, 1883, to Cassius M. Richmond for an artificial denture, are void by reason of an abandonment of the invention to the public by the inventor before the patent was applied for.

Letters patent No. 277,943, granted to Cassius M. Richmond May 22, 1883, for a process for preparing roots of teeth for the reception of artificial dentures, are void for want of novelty and for want of invention in the invention claimed in it.

It is no invention, within the meaning of the law, to perform with increased speed a series of surgical operations, old in themselves, and in the order in which they were before performed.

In equity, for the infringement of letters patent. The case was stated by the court as follows:

This was a bill in equity for the infringement of two letters patent, granted May 22, 1883, to Cassius M. Richmond, viz., No. 277,941 for an artificial denture, and No. 277,943 for a process for preparing roots of teeth for the reception of artificial dentures.

The main contest took place over No. 277,941, which covered a device intended to replace the loss or destruction of that part of the natural tooth which projects into the mouth externally to the gum, the device being an artificial crown to be placed upon and supported by the natural stump or root of the partially destroyed tooth. The manner in which this is done was stated in the specification substantially as follows: The top of the tooth is cut off and a hole drilled in the root;

the end of the tooth being then properly prepared, a ferrule is made of such a size and shape as to exactly fit the base of the root. An artificial porcelain or other crown of suitable color, size and shape is then selected to be applied to the root; upon the back of this crown is placed a platinum or gold plate, which has holes through it to allow the passage of pins which are firmly imbedded in the porcelain. The root and crown having been so prepared, the crown is placed in position and attached to the ferrule by wax, which holds the crown sufficiently firm in position to allow of the removal of the ferrule. Thereafter a suitable pin is imbedded in the wax, which is designed to enter the hole which has been drilled in the root. The crown thus prepared is then invested or protected by a suitable covering of marble dust or plaster, leaving the wax exposed. This investiture holds the parts firmly in the position they are to occupy when placed in the mouth. The wax is then melted from behind the crown and replaced by a suitable gold solder, which is blown in by a blow-pipe, and fused around the pin. This solder unites with the pin, the ferrule and plate, making a solid backing to the crown, and firmly holding all the parts together. The prepared crown is then slipped upon the prepared root and cemented thereto. The ferrule when in position should project under the free margin of the gum sufficiently to prevent the root from decay, and is likewise concealed from view by the gum.

Following this description, the patentee proceeded to state that "when this denture is applied to a root the end of the root is entirely protected from the injurious action of the fluids of the mouth, and is hermetically sealed, being covered by a closed cap. This inclosing-cap is of the greatest importance, because otherwise decay must necessarily take place by reason of the action of the fluids of the mouth on the exposed dentine, and the denture would become useless. By this arrangement, therefore, both the end of the root and so much of the same as might otherwise be exposed to the fluids of the mouth are hermetically sealed, and the root is thus protected from the injurious effect which would otherwise result from the action of the fluids. It is obvious, likewise, that by this

arrangement the end of the root may retain its natural configuration, and its substance is not destroyed by cutting away or shaping the same at the sides, which is very injurious and tends greatly to the destruction of the root. . . . The caps hereinbefore described are so constructed, as set forth, as to cover and inclose the prepared end of the root, wholly excluding the juices of the mouth therefrom, and preventing the decay that would otherwise result."

Infringement was alleged and admitted of all the claims of the patent, which read as follows:

1. The combination of a prepared root, having its natural terminal contour near the margin of the gum, with an inclosing-cap attached thereto for supporting an artificial denture, substantially as described.

2. Combination of a prepared root, having its natural terminal contour near the margin of the gum, with an inclosing-cap attached thereto, and with an artificial porcelain or other crown supported by said cap, substantially as described.

3. The combination of a prepared root, having its natural terminal contour near the margin of the gum, with an inclosing-cap attached thereto, the said cap being attached to the root by a pin or suitable attaching contrivance passing upward and into a suitable cavity in the root, substantially as described.

4. The combination of a tooth crown, a metallic backing soldered to said crown, and a pin firmly soldered to said artificial backing and secured to and passing through a ferrule adapted to surround the root, substantially as described.

Two other claims are practically repetitions of the above.

The principal defence to this patent was that of abandonment, and upon this ground the bill was dismissed by the Circuit Court, whose opinion regarding the validity of this patent is contained in another case involving the same facts, reported as *The International Tooth Crown Co.* v. *Richmond*, 24 Blatchford, 223, and 30 Fed. Rep. 775.

Patent No. 277,943 was for a method of preparing the roots for the application of the cap covered by the prior patent, which consisted in grooving the same by opposite grooves, suddenly removing the crown from the root by a suitable for-

ceps or other contrivance, and then immediately expelling the nerve from its cavity by driving a suitable shaped piece of wood into the nerve cavity, in removing the same and cleansing the cavity, and in immediately plugging or filling the upper part of the nerve cavity by driving in another piece of wood.

The defence to this patent, viz., want of novelty, was sustained by the court below and the bill dismissed.

Mr. E. N. Dickerson for appellant.

Mr. John K. Beach and *Mr. Charles K. Offield* for appellees.

Mr. Justice Brown delivered the opinion of the court.

Prior to the invention of Dr. Richmond, the only method of supplying an artificial for a natural crown, in case the tooth had decayed or broken off, was by what is called a peg tooth. This was made by drilling the nerve canal larger; then a porcelain tooth with a hole in it was ground to fit the root, and the two were connected together by a wooden or metallic pin or dowel made to fit the hole in the porcelain as well as the hole in the tooth. The operation, however, was very unsatisfactory. It was found to be impossible to fit the artificial and the natural tooth so closely together that particles of food and saliva would not work in between them, fouling the mouth and ultimately causing the decay of the root or such a swelling of the wood as would split the root in the act of mastication, or such an enlargement of the cavity as would cause the wooden pin to drop out, resulting in either case in the loss of the tooth. It was the object of Dr. Richmond to supersede this method of crowning teeth by a more perfect, cleanly and durable device.

It is substantially conceded in this case, and was found by the court below, that his patent No. 277,941 describes an invention of great utility in the practice of dentistry, which has been largely adopted by the profession throughout the country, for building upon the roots of decayed teeth artificial crowns, which are claimed to be as strong and as well adapted to the purposes of mastication as natural teeth, and to imitate them

so perfectly in appearance that it is impossible to distinguish them except by a critical examination.

Gold or other metallic caps were not wholly unknown before the invention of Dr. Richmond. One such, known as the Morrison operation, was described in the Missouri Dental Journal of May, 1879. Another is explained in the patent of November 4, 1873, to John B. Beers, who seems to have been the first to make use of a screw or pivot to attach the cap to the root of the tooth. In both of these cement or porcelain enamel was used to fill the cap and secure the necessary adhesion to the root. Two or three other similar devices are shown; but none of them seem to have been attended by any practical success, and neither of them exhibits the combination of the Richmond patent. Indeed, it was scarcely claimed that his invention had been anticipated, and, as infringement of all his claims was admitted, the whole defence practically turned upon the question of abandonment.

The facts bearing upon this defence are substantially as follows: Dr. Richmond began his experiments in fitting a gold collar to the neck of a tooth as early as 1875 or 1876 in San Francisco, and he states himself that he performed the operation described in his principal patent in the mouth of one Kalloch on Christmas of 1876, and, so far as he knew, the operation was entirely successful, and the tooth still remained in the mouth of his patient. He further states in his examination that he practised this operation extensively in San Francisco, Chicago, Detroit, Cleveland, New York and New London, and demonstrated it to five hundred dentists in private practice and in public clinics. In their general characteristics these operations, as he states them in his testimony, were the same as were described in his patent, although there appear to have been certain differences in detail. Sometimes the tooth was backed with gold and sometimes with platina; sometimes the crowns were made entirely of platina, except the solder and porcelain. The operation was performed by making a band surrounding the root, with a porcelain front, a pin extending into the root, and the whole cemented on the root in one piece. The band was made with a piece of gold-

plate material soldered together to form a solid ring; this was fitted around the end of the root. The porcelain tooth was then ground upon this band to correspond with the adjoining tooth. The tooth was then waxed into its position; the band was then removed, and the porcelain waxed into its position on the band; the pin was then inserted into the wax forming the crown, the porcelain, pin and band being held together with wax. It was then invested, as it is called, with marble dust and plaster. The wax was then removed, and that portion of it which was filled with wax before was filled with gold, forming one solid crown.

It is but just to the plaintiff to state in this connection that Richmond appears to have had a quarrel with the treasurer of the plaintiff company in 1883, very soon after the patent was issued to the Richmond Tooth Crown Company as assignee of the inventor; and that he was called as a witness by the defendants, and apparently testified under a strong bias against the plaintiff; but his evidence regarding the extent of his operations is fortified by a large number of letters from dentists in different parts of the country, written in 1878 and 1879, certifying in strong language to the value of his invention. Indeed, the evidence is that he instructed Dr. Gaylord, one of the defendants in this suit, in the art of making and applying this tooth crown as early as 1879, performing two operations in Dr. Gaylord's mouth and one in that of a patient, and receiving pay for the same. As the application for the patent was not made until December 1, 1882, more than two years after all these operations were conducted, the evidence of abandonment is overwhelming, if it be once admitted that the operation was identical with that described in the patent, or different from it only in an immaterial particular.

The reply to all this testimony is, that the tooth crowns made prior to the year 1880 were defective, because they were made with an incomplete metallic floor to the ferrule, and for that reason the metal cap or thimble was more or less leaky. There is considerable evidence upon this point, Dr. Gaylord swearing that the operation taught to him was exactly like that which was described in the patent, while the plaintiff's

witnesses lay great stress upon the point that the cap was imperfect by reason of the incomplete covering to the root, although in some cases the hole or aperture is admitted to have been microscopic. Among the earliest exhibits put in evidence is that known as Searles, No. 1, which was a tooth which had been treated by the defendant Gaylord in 1879, according to the Richmond process as then practised, and which remained in good condition until 1885, when it fell out, the root having become loose. The exhibit as originally put in evidence showed the root surmounted by a crown. This Exhibit Searles, No. 1, is claimed to be identical with the patent in having a floor extending completely across the ferrule, and united therewith in front as well as in the rear. With regard to this, however, the plaintiff's expert testifies that he had examined it with a magnifying glass and with a microscope, and did not find that there was a closed cap. "There is a platina floor, but it is not closed. Therefore the tooth cannot show the perfected invention of Richmond, for it does not show any hermetically closed metallic cap, and without this the said perfected invention is not found." The same witness on redirect testifies further with regard to this hole by saying: "I have examined Searles, No. 1, carefully under a powerful magnifying glass. I find an opening in the gold around the pin, and also another opening about the middle of the gold which forms a part of the floor." It was said by the Circuit Judge of this and another similar exhibit, "It is conceded by the expert for the complainant that if these dentures had been made with a ring or ferrule having a complete floor embracing the exposed end of the root, they would be the tooth crowns of the patent. One of them has a half floor of platinum back of the porcelain under the ring, intended to partially inclose the exposed end of the root, and the other has a partial floor, made of loose gold foil stuffed behind the porcelain before the solder was flowed through the back of the crown. It is insisted that when the crown is constructed in this way it does not have the inclosing-cap of the patent, and consequently the end of the root is not hermetically sealed. The controversy as to this patent is thus narrowed to the question whether the sub-

stitution of a complete floor over the end of the ferrule, so as to wholly inclose the end of the natural root, in the place of a partial floor, involves sufficient invention to sustain the patent."

But whether a cap thus constructed be imperfect or not, it is entirely clear that the closing of this alleged hole, which is so small that its very existence is denied, is such a carrying forward and perfection of the original device as would occur to any ordinary dentist, since it is of the very alphabet of dental science that the dentine of a tooth shall be protected as far as possible from the action of food and the fluids of the mouth. There is little doubt that some progress was made between the first operations of Dr. Richmond in San Francisco and that disclosed by his patent; but the real invention was made when the ferrule with the porcelain crown was adopted and applied to the root of a tooth prepared for the purpose of receiving it. All subsequent progress was made on this line and in furtherance of this idea, and was such as would occur to an ordinarily skilful dentist. There is a multitude of cases in this court to the effect that something more is required to support a patent than a slight advance over what had preceded it or mere superiority in workmanship or finish. *Smith* v. *Nichols*, 21 Wall. 112; *Atlantic Works* v. *Brady*, 107 U. S. 192, 199; *Pickering* v. *McCullough*, 104 U. S. 310.

Nor do we think the use which Dr. Richmond made of his invention can be fairly called experimental. The fact that he taught it to a large number of dentists throughout the country, with no suggestion that it was an experiment, and received pay for such instruction, precludes the defence he now sets up that all this was simply tentative. It was said in *Smith & Griggs Mfg. Co.* v. *Sprague*, 123 U. S. 249, 256, by Mr. Justice Matthews, speaking for this court: "A use by the inventor for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experi-

ment is merely incidental to that, the principal, and not the incident, must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition." If, as was said in *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S. 92, 94, and *Egbert* v. *Lippmann*, 104 U. S. 333, a single instance of sale or of use by the patentee may be fatal to the patent, much more is this so where the patentee publicly performs an operation covered by his patent in a dozen different cities throughout the country, and teaches it to other members of the profession, who adopt it as a recognized feature of their practice. Granting that, under the rule laid down in *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, a patentee has a right to test the durability of his invention as one of the elements of its success, it is manifest that his experiments to that end should extend no farther, either in time or in the number of cases in which it is used, than is reasonably necessary for that purpose. In that case the inventor of a pavement who had filed a caveat therefor laid seventy-five feet of it upon an avenue belonging to a toll corporation, of which he was a stockholder, and allowed it to remain there six years before he took out his patent, visiting it almost daily. As the test was purely experimental, and he received no compensation for the use of his pavement, it was held not to constitute an abandonment. But the court observed: "If the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale, within the meaning of the law." Manifestly that case is no authority for the use that was made of the patented device in the present case.

In preparing his specification Dr. Richmond naturally laid great stress upon the hermetical sealing of the cap; as he must have been satisfied that his first operations constituted a complete abandonment of what he did to the public, and that the entire validity of his proposed patent would depend upon his

ability to draw a distinction between his operations as formerly and as then conducted. We are satisfied, however, that his real invention, and the only one to which he was properly entitled to a patent, is such as he put in practice prior to the years 1878 and 1879, and taught so extensively throughout the country. In the light of this testimony we are compelled to hold that this constituted such an abandonment of his claim as to preclude his obtaining a valid patent for it.

Little need be said with regard to patent No. 277,943, which is for preparing the root for the reception of the denture described in the former patent. This preparation consists in removing the crown from the root, and then driving into the nerve cavity a suitably shaped piece of wood; in removing the same and cleansing the nerve cavity; and in immediately plugging or filling the upper part of the nerve cavity by driving in another piece of wood, as described in his fourth claim. These operations were all old, and were performed in the order stated in this patent. Practically, the only novelty is in the immediate filling of the nerve cavity with a wooden plug after the previous operation. In this connection, the patent states that, "in order to avoid pain by treating the tooth while still benumbed, and to prevent abscess or inflammation, it is very important to close the pulp canal immediately. This I accomplish by driving a second piece of wood, shaped like the first, into the pulp canal in the presence of carbolic acid, filling it to its apical foramen, thus perfectly excluding the air."

It is hardly necessary to say that it is no invention, within the meaning of the law, to perform with increased speed a series of surgical operations old in themselves, and in the order in which they were before performed. With what celerity these successive operations shall be performed depends entirely upon the judgment and skill of the operator, and does not involve any question of novelty which would entitle him to a patent therefor.

The decree of the court below dismissing the bill is therefore

Affirmed.

Mr. Justice Brewer did not sit in this case and took no part in its decision.

ILLINOIS GRAND TRUNK RAILWAY COMPANY *v.* WADE.

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

No. 251. Submitted March 24, 1891. — Decided April 27, 1891.

June 25, 1870, the town of Lamoille voted to subscribe $30,000 to the stock of appellant, and August 6, 1870, voted to subscribe $10,000 additional thereto. February 1, 1871, the town subscribed $40,000 thereto, issued 40 bonds of $1000 each in payment thereof, and received $40,000 in stock. The company parted with the bonds, and the same were sold for 90 cents on the dollar, and the majority of them came into possession of the appellee. The $10,000 additional subscription was held void as violating the provisions of the Constitution of Illinois, adopted July 2, 1870. Thereupon the appellee filed this bill against the town and the railway company, tendering the bonds for surrender and cancellation, and praying that $10,000 of the stock held by the company should be transferred to him. A decree was entered in accordance with the prayer of the bill, from which the railway company only appealed. *Held*,

(1) That the plaintiff's rights, so far as concerned the town, rested on the decree which the town had not appealed from, and there was no matter of subrogation to be considered in the controversy with the railway company;

(2) That the railway company, having parted with the bonds for consideration, had no equities which it could set up as against the claim of the plaintiff;

(3) That there was no question of laches or limitation;

(4) That it was too late to raise the objection that these matters could not be combined in one suit.

IN EQUITY. The case is stated in the opinion.

Mr. John J. Herrick for appellant.

Mr. George A. Sanders and *Mr. Thomas S. McClelland* for appellee.

MR. JUSTICE BREWER delivered the opinion of the court.

The Illinois Grand Trunk Railway Company was incorporated in 1867, under a special charter granted by the legis-

lature of the State of Illinois. On June 25, 1870, the town of Lamoille voted to subscribe to the capital stock of the railway company to the amount of thirty thousand dollars, and to issue in payment therefor its bonds, payable in ten years, of equal amount. On August 6, 1870, another election was held, at which the town voted to subscribe the further sum of ten thousand dollars to the stock of the railway company, and to issue its bonds, in equal amount, in payment therefor. On February 1, 1871, in pursuance of these two elections, a subscription on behalf of the town was made, and its forty bonds, for the sum of one thousand dollars each, were executed and delivered to the railway company, and a certificate for forty thousand dollars of capital stock was issued by the railway company and delivered to the town. These bonds were payable "to bearer," and when received by the railway company were transferred by it to the Chicago, Burlington and Quincy Railroad Company, and by the latter were sold at ninety cents on the dollar. Thereafter, and in 1871, the appellee bought the majority of these bonds, including therein the whole of the last ten thousand dollars thereof from Jacob R. Shepherd & Co., paying ninety-nine cents on the dollar.

No question is made as to the sufficiency or validity of this transfer, or as to the fact that the appellee acquired all the title of the Illinois Grand Trunk Railway Company, the original obligee in the bonds. It appears that on July 2, 1870, this section of the Illinois constitution of 1870, which had been separately submitted to and adopted by a vote of the people, went into effect:

"No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." Starr & Curtis' Stat. vol. 1, 167.

The effect of the adoption of this section was to render void

the action of the town on August 6, and invalidate the ten thousand dollars of bonds issued in pursuance of that vote. *Wade* v. *Walnut*, 105 U. S. 1, and cases cited in the opinion.

On March 28, 1885, Wade, the holder of these ten thousand dollars of void bonds, filed his bill in the Circuit Court of the United States for the Northern District of Illinois, against the town of Lamoille and the Illinois Grand Trunk Railway Company, in which bill he tendered the bonds to the town for surrender and cancellation, and prayed that ten thousand dollars of the forty thousand dollars of stock issued by the railway company to the town be transferred to him. Both the town and the railway company filed answers; the town simply putting the plaintiff to proof of his allegations, and asking that if the plaintiff be decreed the title to the stock, the decree, so far as the town is concerned, be at his costs and on condition of the surrender and cancellation of the bonds. The railway company answered, denying at length the principal allegations of plaintiff's bill, and pleading laches and limitation, in addition, as a defence. After the testimony had been taken, and on June 24, 1887, a decree was entered in favor of the plaintiff, substantially directing that Wade deposit in the office of the clerk of the Circuit Court, for the benefit of the town, the ten thousand dollars of bonds and their coupons, and that thereupon he be put into possession of ten thousand dollars of the stock of the railway company held by the town. From this decree the railway company alone prosecutes an appeal, the town being content to abide by its terms. In this respect it may be noticed that the plaintiff in his bill alleged that the people of the town of Lamoille were willing that he should have all the benefit and advantage which he could derive from said stock, but that the officers of the town refused to deliver the certificate. Appellant relies largely upon the case of *Ætna Life Insurance Company* v. *Middleport*, 124 U. S. 534, and contends that under the authority of that case the plaintiff could not be subrogated to the rights of the town in this ten thousand dollars of stock. It also contends that the subscription by the town to that amount of stock, and the issue by the railway company thereof, was itself a void transaction,

and conferred no title on the town thereto; and, finally, that laches and limitation constituted a good defence to plaintiff's claim.

Assuming that the first contention of appellant might be of force if the town had joined in the appeal, we are of opinion that it is a defence which the railway company alone cannot now make. By the decree, the rights of the town to that stock have been transferred to the plaintiff. The town not challenging the decree, it is final, and the plaintiff, in respect to the rights of the town in the stock, stands in the same attitude that he would stand if the town had voluntarily transferred it to him. The railway company has no interest in protecting the rights of the town. It could not interfere to prevent a voluntary transfer of the stock, and it cannot be heard to say that the town shall not abide by the terms of that decree; so that the present appeal is to be considered by us precisely as though the town had voluntarily transferred the stock to the plaintiff, or as though he had in a different suit, and by a prior decree, obtained a transfer of its interest. There is, therefore, no matter of subrogation to be considered, and no inquiry into the extent to which this doctrine could be applied. The plaintiff has all the rights that the town had. Under those circumstances, can the railway company challenge this decree? It insists that the whole transaction in respect to the ten thousand dollars of stock between the town and itself was void; but the facts, as disclosed, are, that there were two votes to subscribe, one on June 25, for thirty thousand dollars, and one on August 6, for ten thousand dollars, of stock. The validity of the first vote, and of the bonds issued thereunder, is not challenged. No separate subscriptions were made, but on February 1, 1871, one subscription of forty thousand dollars was made by the town, and one certificate for four hundred shares of one hundred dollars each, issued by the railway company to the town. Can the legal title of the town to these four hundred shares be doubted? Clearly not. It has paid therefor thirty thousand dollars of valid securities. If it has not paid in full for the four hundred shares, it has paid seventy-five per cent of the amount due therefor; and its title acquired

thereby was good. Whatever rights the railway company might have if the ten thousand dollars of bonds had been declared void while in its hands, or if it had not sold them and received consideration for them from other parties, or if, having received consideration, it had returned the same and taken up the bonds when they were declared void, and now tendered them back to the town, need not be considered. It is enough that it took the forty thousand dollars of bonds as payment for this subscription for an equal amount of stock; that it disposed of those bonds and received value therefor; and that it has never offered to return the void bonds to the town, and never taken any proceedings to assert its equitable rights, if any it had, in the stock. The equity of plaintiff's claim is manifest. The railway company received all the bonds — the void as well as the valid — on the same terms, and as payment dollar for dollar, for the stock it issued. It transferred all the bonds, receiving the same consideration for one as for the other. The party who took these bonds from it sold the entire series, and received ninety cents on the dollar; and so, by subsequent sales, they passed from one to another until the major part of the whole series reached the plaintiff. The railway company has never returned any of the consideration it received, or been called upon to pay back a single dollar; neither has any one of the subsequent vendees. The plaintiff, and the plantiff alone, is the one out of money; and now, when he proposes to take this stock for the money which he has paid out, and thus close the entire transaction, the railway company objects. It received these bonds as valid; it got full value for them, and still objects that the town ought not to be permitted to do justice to the party who has unfortunately parted with his money for these void securities. If ever there was a case in which no wrong was done, and justice and equity are meted out to all the parties, this is such a case.

In regard to the last contention, it is enough to say that the rights of complainant as against the railway company may be considered as having been for the first time established by the decree; and surely in that light there is no question of laches or limitation. If it be objected that, therefore, when the bill

was filed in the first instance no right existed in plaintiff, as against the railway company, it is enough to say that no objection was made on the ground that plaintiff had not yet acquired the rights of the town. It may be true that for all the relief claimed, and in view of the fact that the stock was all included in one certificate, the railway company was a necessary party to the suit; and yet it cannot be doubted that the plaintiff could, in a separate proceeding against the town alone, have established his right to one-fourth of the four hundred shares, and thereafter filed his bill to compel a recognition by the railway company of this right. No objection was made to combining these matters in one suit, and it is now too late to raise the objection.

The decree of the Circuit Court was right, and it is

Affirmed.

The CHIEF JUSTICE did not participate in the consideration and decision of this case.

No. 252. ILLINOIS GRAND TRUNK RAILWAY COMPANY *v.* WADE. Appeal from the Circuit Court of the United States for the Northern District of Illinois, submitted March 24, 1891, presents the same questions, and the decree in that case also will be affirmed.

The CHIEF JUSTICE did not participate in the consideration and decision of this case.

Mr. John J. Herrick for appellant.

Mr. George A. Sanders and *Mr. Thomas S. McClelland* for appellee.

HARPER COUNTY COMMISSIONERS *v.* ROSE.

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

No. 284. Submitted April 2, 1891. — Decided April 27, 1891.

The filing of an unverified general reply to a verified answer in Kansas, does not admit the truth of the statements in the answer if it was not incumbent on the plaintiff to file it.

The question of the fraudulent organization of Comanche County in Kansas was fully considered by this court in *Comanche County* v. *Lewis*, 133 U. S. 198, and is no longer open.

The validity of bonds such as are sued on in this case was settled by the decisions in *Lewis* v. *Commissioners*, 105 U. S. 739, and *Comanche County* v. *Lewis*, 133 U. S. 198.

This was an action on twenty bonds and a large number of interest coupons attached, issued by Harper County, Kansas, December 1, 1873, for the purpose of raising the necessary funds to build a court-house. The bonds and coupons were in form like the following, differing only as to their numbers:

"United States of America, *State of Kansas.*

"Number 1. Dollars, 500.

"*Court-House Bond of Harper County, State of Kansas.*

"Know all men by these presents that the county of Harper, in the State of Kansas, acknowledges itself to owe and promises to pay to bearer five hundred dollars, lawful money of the United States of America, on the first day of December, A.D. eighteen hundred and eighty-three, at the National (500) Park Bank, in the city of New York, with interest at the rate of ten per cent per annum, payable semi-annually on the first days of June and December of each year, on the surrender of the annexed coupons as they become due, at said National Park Bank in the city of New York.

"This bond is one of a series of fifty bonds, of five hundred dollars each, issued for the purpose of building a court-house in said county in pursuance of and in accordance with the

vote of a majority of over three-fifths of the qualified electors of said county of Harper, at an election held for that purpose, as required by law, on the 4th day of November, A.D. 1873.

"In testimony whereof, the board of county commissioners of said county have caused this bond to be signed by the chairman of said board and by the county clerk of said county, and to be sealed with the seal of said county, and to be registered, as required by law, at Bluff City, the county seat of said county, this the first day of December, A.D. 1873.

"[SEAL.] "N. W. WEAVER,

"*Chairman Board of County Commissioners.*

"Attest: G. H. WALKER, *County Clerk of Harper County.*"

"25 The County of Harper, State of Kansas, 25

"Will pay to the bearer, at the National Park Bank, in the city of New York, on the first day of (4) December, 1875, twenty-five dollars, for six months' interest due on court-house bond. No. one. N. W. WEAVER,

"*Chairman Board of County Commissioners.*

"G. H. WALKER, *County Clerk.*"

Upon each bond was the following certificate of registration, signed and sealed by the auditor of state:

"Court-House Bond of Harper County, State of Kansas.

"I, D. W. Wilder, auditor of the State of Kansas, do hereby certify that this bond was regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the legislature entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1873.

"Witness my hand and official seal this 12th day of March, 1874.

"D. W. WILDER, *Auditor of State.*"

Statement of the Case.

These bonds were purchased by the plaintiff, in open market, before maturity, for a valuable consideration, without notice of any defect in their issue or in any of the proceedings relating to the organization of the county issuing them, and not having been paid at maturity, this suit was brought to enforce their payment.

There was a demurrer to the petition setting up the statute of limitations of Kansas, as to certain of the coupons, which the court sustained. The defendant then answered. The answer consisted of a general denial and the following special denials and averments: It denied (1) that at the date the bonds were issued, or at any time prior thereto, the county of Harper was a body corporate or politic capable of issuing any such bonds; (2) that at said date N. W. Weaver was chairman of the board of county commissioners, or that G. H. Walker was county clerk, of that county; (3) the execution of the bonds and coupons sued on; (4) that at the date when the bonds were issued there was any person or persons or any body corporate or politic in Harper County that had any authority to issue said bonds and coupons; and (5) that the bonds and coupons were ever registered in Harper County, as required by law, or that there was ever any election held as to their issue, as required by law. It then averred that all papers, acts and statements relating to the attempted organization of Harper County, on the 20th of August, 1873, and everything contained therein, were false, fraudulent and forged; and that said bonds and coupons, and all acts as to their attempted issue, were false, fraudulent and forged.

The plaintiff filed a reply, and issue being joined, the case went to trial before Judge Foster and a jury. On the trial the plaintiff, to maintain the issue on his part, gave evidence, which was undisputed, to prove that he was a *bona fide* holder of the bonds and coupons sued on, having purchased them before maturity, for a valuable consideration, in open market, in the city of St. Louis. He also introduced in evidence properly exemplified copies of records in the office of the secretary of State of Kansas, relative to the organization of the county of Harper in 1873, showing that that organization

had been officially recognized by both the executive and the legislative departments of the government of the State. The bonds and coupons sued on were also introduced in evidence by the plaintiff. To the introduction of the foregoing evidence the defendant at the time objected, but the objections were overruled and exceptions were saved.

The defendant to maintain the issue on its part offered to introduce certain oral evidence tending to disprove the organization of the county in 1873, or at any time prior to the issue of the bonds and coupons in suit; and also offered to prove, by the same kind of evidence, that at the date of the issue of the bonds and coupons neither N. W. Weaver, who signed them as "Chairman Board of County Commissioners," nor G. H. Walker, who attested them as "County Clerk," lived in the territory comprised in Harper County. To the introduction of this evidence the plaintiff objected, and the court sustained the objections, whereupon exceptions were taken.

The jury, under the direction of the court, found a verdict in favor of the plaintiff for the sum of $17,645, upon which judgment was rendered. A motion for a new trial having been overruled, this writ of error was sued out.

Mr. William E. Earle and *Mr. William T. S. Curtis* for plaintiff in error.

Mr. W. H. Rossington, *Mr. Charles B. Smith* and *Mr. E. J. Dallas* for defendant in error.

Mr. Justice Lamar, after making the foregoing statement of the case, delivered the opinion of the court.

A preliminary question of pleading raised by the defendant meets us at the threshold of our investigations. It is urged that, as the answer was verified by the oath of the defendant, and as the reply was not verified by any oath of the plaintiff, therefore the verified answer must be taken as true, under section 108 of the Code of Civil Procedure of Kansas, as amended by sec. 1, c. 61, Kansas Laws of 1886. That section is as follows:

"SEC. 108. In all actions, allegations of the execution of written instructions and endorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account, duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

We do not think this section has any application to the question at issue. The answer in this case was nothing more than a general denial of the legality of the bonds and coupons sued on, for the reasons therein stated, and it was not incumbent upon the plaintiff to file any reply at all. This section of the code might have applied against the defendant had its answer not been verified. Moreover, suppose all that is claimed by the answer be taken as true, we do not see how it can operate to defeat the right of the plaintiff to recover on the bonds in suit.

At the date the bonds were issued, duly organized counties in the State of Kansas had ample authority to issue bonds for the purpose of internal improvements. Statutes of 1868, c. 52 (now Compiled Laws of 1885, p. 509); act of March 2, 1872, sec. 1; *Comanche County* v. *Lewis*, 133 U. S. 198. Indeed, this proposition does not appear to be disputed.

It is also admitted by the plaintiff in error that questions affecting the fraudulent organization of the county in 1873 are no longer open; for, while that organization was confessedly fraudulent, it was recognized and validated by the legislative and executive departments of the State of Kansas in various ways, and was directly passed upon by the Supreme Court of the State in *The State ex rel.* v. *Stevens*, 21 Kansas, 210. In that case the proceedings relative to the organization of Harper County in 1873 were reviewed by the Supreme Court of Kansas, and it was held that, although the original organization of the county was fraudulent, yet, as the county had a *de facto* organization, as the records of such organization appeared regular and valid upon their face, and as the governor recognized and proclaimed such organization, the subsequent recognition of the validity of it by the legislature of the State made the same valid and binding. See also *Comanche County* v. *Lewis*, *supra*.

These bonds having been issued while that organization of the county was in existence, and reciting that they were issued "in pursuance of and in accordance with a vote of a majority of over three-fifths of the qualified electors" of the county "as required by law;" and the auditor of the State having certified that they were "regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered," in accordance with the law of the State, are the valid obligations of the county in the hands of *bona fide* purchasers, for value, before maturity. *Comanche County* v. *Lewis*, *supra*; *Lewis* v. *Commissioners*, 105 U. S. 739, 749.

There is no material distinction, in principle, between this case and the cases just cited. *Comanche County* v. *Lewis* involved the validity of bonds similar to these in suit, which had been issued by Comanche County, and *Lewis* v. *Commissioners* involved the validity of similar bonds issued by Barbour County, Kansas. The bonds in suit in both of those cases were held valid and binding upon the respective counties; and the reasons for such rulings were very fully and clearly stated in the opinions therein. This case is ruled by those, and the judgment below is

Affirmed.

ÆTNA LIFE INSURANCE COMPANY *v.* WARD.

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

No. 1388. Argued March 4, 5, 1891. — Decided April 27, 1891.

When the trial court has given the substance of a requested charge to the jury, it is under no obligation to repeat it in the requested language.

When evidence offered by one party at the trial tends to discredit that offered by the other, it is for the jury to weigh and decide, under proper instructions from the court.

In an action to recover on a policy of life insurance where the defence is that the death was caused by intemperance, which by the terms of the policy exempted the company from liability, it is no error in the court to instruct the jury that they are at liberty to reject the diagnosis of a

Statement of the Case.

medical witness offered on behalf of the defendant, if they have no confidence in his skill and experience, the same having been assailed by the plaintiff's testimony.

An instruction to the jury in such case that the evidence of the defence need not be so convincing as to be beyond reasonable doubt, but that the weight of testimony must decidedly preponderate on the side of the defendant is not error, when the two clauses are taken together and in connection with the whole tenor and effect of the charge, although the phrase "decidedly preponderate" is not technically exact with reference to the weight and quantity of evidence necessary to justify a verdict in civil cases.

In a case like this, this court is confined to the consideration of exceptions taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge; and it has no concern with questions of fact or with the weight to be given to evidence which was properly admitted.

THIS was an action on a policy of life insurance. There have been three trials of it by jury, in each of which there has been a verdict in favor of the plaintiff, for the full amount of the policy. The case was before the court at October term, 1887, *Ætna Life Ins. Co.* v. *Davey*, 123 U. S. 739, where the judgment of the court below on the first verdict was reversed and a new trial ordered because of certain erroneous instructions to the jury in the charge of the court. The proceedings in the court below in relation to the first and second trials are reported in 20 Fed. Rep. 482; 20 Fed. Rep. 494; 38 Fed. Rep. 650, and 40 Fed. Rep. 911.

The case as now presented is as follows: The defendant in error, Ada Ward, formerly Ada Davey, was the wife of William A. Davey, of Jersey City, New Jersey, and the beneficiary named in a policy of life insurance issued by the plaintiff in error on the life of Mr. Davey, for the sum of $10,000, dated July 16, 1879. Mr. Davey died on the 6th of August, 1881, at Alexandria Bay, New York, and within ninety days thereafter, to wit, August 16, 1881, his widow gave to the company due notice and proofs of his death, as required by the terms of the policy, and demanded payment of the amount named therein, which was refused, and thereupon this action was brought. So far as the present status of the case is concerned, the defence to the action is, that there was a breach of that

condition in the policy, on the part of Mr. Davey, which provided that if he "shall become so far intemperate as to impair his health or induce delirium tremens," then the policy should become null and void.

On the trial of the case before Judge Green and a jury, the plaintiff, to maintain the issue on her part, introduced evidence showing the death of Mr. Davey, and also certain papers constituting proofs of loss, including the certificate of death of the deceased by Dr. Rae, the family physician. In this certificate the following questions and answers occur: "3. Was his last illness occasioned, or had his general health been impaired, by any pernicious habits? A. He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health." "5. Was his health impaired by intemperance? A. See answer to 3. B. Was his death caused, directly or indirectly, from intemperance? See answer to 3." The plaintiff thereupon rested her case.

The defendant introduced the evidence of a large number of witnesses to prove the breach of the above-mentioned condition in the policy. All of them were associated with him whilst he was at Alexandria Bay, most of them boatmen engaged in rowing on the St. Lawrence River, clerks and keepers of hotels, a bell-boy, the physician who attended him in his last illness, and two medical experts. The evidence of these witnesses was to the following effect: In the evening of the 24th of July, 1881, Mr. Davey arrived at Alexandria Bay on the St. Lawrence River, on his annual fishing excursion to that place, and put up at the Crossman House. He seemed at that time to be in delicate health, and one of the witnesses, at least, testified that he shuffled in his walk while going up to the hotel. From that date up until Monday, August the 1st, William White, the boatman, testifies that the deceased was on the river every day with him, from 8 or 9 A.M. until the middle of the afternoon or in the evening, and that while on the river the deceased drank about a quart of brandy daily. In addition thereto, according to the testimony of the bell-boy at the hotel, the saloon-keeper and several boatmen, he drank at the bar of the Crossman House every evening, quite freely, and

sometimes in the morning before breakfast; and frequently went across the river to Lockport and to another place known as the Island View House, kept by one Theodore Lear, and drank heavily of brandy at both places, as testified to by the respective keepers and bar-tenders of those hotels. The bell-boy at the Crossman House testifies that very often during the period mentioned he had several drinks sent to his room in the evening and sometimes in the morning; and that on the afternoon of Tuesday, August 2, at the request of Mr. Davey, he carried two quart bottles of liquor to his room — one of brandy or whiskey and the other of gin. On going to his room on the morning of Wednesday, the 3d of August, the bell-boy says those two bottles were empty and Mr. Davey was sitting in bed in a very weak and nervous condition, his clothing and the bed clothing spattered with blood, and there was considerable blood in the slop-jar beside the bed. The bell-boy notified the proprietor of the hotel of the affair, and he, together with Frank Bruce, a clerk at the hotel, (who was then studying medicine and has since graduated in that science, and is now a practising physician,) went to Davey's room. They at once sent for Dr. L. C. Watson, a practising physician at that place. Dr. Watson testified that Davey said to him that he had been cautioned by his family physician that if he persisted in "having these times," he would have hemorrhage of the stomach, which would probably kill him. And then looking at the blood, he said: "There is the blood, and I suppose it is all up with me now."

Bruce and Dale also testified that Davey complained of seeing pitch, fire and smoke in the room when none existed; and Bruce further testified that Davey imagined that somebody was trying to saw off his limbs, and that there was a heavy pipe lying across his chest, and exhibited various other symptoms usual in cases of acute alcoholism or delirium tremens. At times he was quite violent, called continually for liquor, but by and by calmed down very materially, so that by the time his family physician, Dr. Rae, and Mrs. Davey arrived he had sunk into a state of exhaustion and quietude.

The evidence on the part of the defence tended to show

that Davey's death was superinduced by an excessive use of ardent spirits, which brought on delirium tremens; and the evidence of two physicians who were examined as experts was to the effect that the symptoms described indicated that Mr. Davey suffered from delirium tremens, and that any one drinking brandy to the extent he did, as testified to by the witnesses for the defence, would greatly impair his health and bring about death.

The evidence in rebuttal was given by witnesses who had been acquaintances, neighbors, business associates, intimate friends, and members of his family, who stated that they were familiar with his habits of life. Their evidence was to the effect that no sign of intoxication or intemperate use of liquor was ever seen by them during a period of many years, immediately preceding his death, though all spoke of his constant use, in a moderate degree, of alcoholic liquors. The result is that the evidence of witnesses who were associated with the deceased at Alexandria Bay is inconsistent with the idea of a moderate use of liquor by him, or with any idea other than that his last illness and death were due to excessive drinking of alcoholic liquors; whilst on the other hand the evidence of his neighbors, friends, business associates and family was, though in one sense, of a negative character, to the effect that his whole course of conduct and habits were at variance with the course of life pursued by him just before his death, as testified to by the witnesses for the defence. One witness only, for the plaintiff, a Mr. Mattoon, an elderly gentleman, saw Davey at Alexandria Bay in the summer of 1881, before he was taken violently ill. He did not stop at the same hotel as Davey, but saw him five or six times for short periods of thirty minutes or more, between the date of his arrival, July 23, and July 31, at all of which times he was apparently sober.

Dr. Rae, the family physician, who furnished the certificate of death, arrived at Alexandria Bay about noon on Friday the 4th, and left about 3 o'clock in the afternoon of the following day, before Davey died. At the trial, among other things, he testified that when he arrived he found Davey in a dying condition; but when questioned as to the cause of death he ad-

hered to the statements made in the certificate of death furnished by him, testifying on this point as follows:

"You certified that he was in the habit of using stimulants? A. Yes, sir. Q. And that was true? A. Yes, sir. Q. And by stimulants you wish us to understand alcoholic liquor? A. Yes, sir. Q. And when you say probably they impaired his health, that was your opinion at that time? A. Yes, sir. Q. You don't deny that it was your judgment that they impaired his health? A. They mean tobacco and liquor together. Q. I ask you about stimulants, nothing about tobacco. You don't deny that in your judgment they impaired his health? A. I said they probably did. Q. I don't ask you what you said in your certificate, and if you will pay attention to the question we will get along faster. You don't deny that it is your judgment that they impaired his health, do you? A. No, sir. Q. You adhere to the statements that are contained in the certificate? A. Yes, sir; as far as I know."

There was also some evidence given by Mrs. Davey, over the objections of the defendant, to the effect that Mr. Davey took stimulants upon the advice of a Dr. Kellerman of New York city, since deceased, quite frequently during the day; and that, for several years previous to his death, Mr. Davey had been suffering from lung trouble, at several times having had hemorrhages.

At the close of the testimony, which was quite voluminous, the defendant requested the court to direct the jury to bring in a verdict in its favor, but this the court refused to do, and the defendant excepted. The jury returned a verdict in favor of the plaintiff for the full amount of the policy, and, judgment having been entered on the verdict, the defendant prosecuted this writ of error.

Mr. Wayne McVeagh and *Mr. Theron G. Strong* for plaintiff in error.

Mr. John Linn and *Mr. Cortlandt Parker* for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

The chief difficulty in the way of a connected review of this case lies in the great number of errors assigned by the plaintiff in error, embracing exceptions to the admission of evidence during the progress of the trial, and to the charge of the court, and also to refusals to charge as requested. They are sixty-six in number, covering ten pages of the printed record. They are, however, reduced by the brief of counsel to forty-five specifications grouped under twelve different headings. As we cannot discuss them singly, in the order in which they are presented, without being involved in an entanglement of multiform and somewhat inconsistent propositions, we will endeavor to dispose of the most material points under our own arrangement.

When the case was here before, speaking of the clause in the policy which is now in dispute, we said: "If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words 'so far intemperate as to impair his health,' although he may not have had delirium tremens, and although, previously to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Whether death was so caused is a matter to be determined by the jury under all the evidence." 123 U. S. 743, 744. Accordingly, on this trial of the case, to rebut the evidence offered by the defence, tending to show an excessive use of liquors on the part of the deceased, the plaintiff sought to show that the deceased had taken stimulants, at various times, sometimes in considerable quantities, upon the advice of his physician. The first, second and third specifications of error are that the court erred in allowing Mrs. Davey to answer certain questions put to her with reference to the fact of the deceased having taken stimulants upon the advice of his physician. As the questions were in proper form, and as such evidence was germane to the issue, there was no error in allowing her to answer them. It was shown that Dr. Kellerman, who prescribed stimulants for Mr. Davey during his lifetime, was dead at the time of the

trial, and, as Mrs. Davey testified that she was present when the prescription was given and afterwards prepared the stimulants for her husband, in accordance with that prescription, the evidence was properly admitted.

Without referring to the other exceptions relating to the evidence, none of which we think were well taken, we will proceed to the consideration of the specifications of error which relate to the instructions given and to those refused. The first specification of error, which we think proper to notice, is that the court erred in refusing to give the following instruction: "To establish the breach of the condition of the policy, 'become so far intemperate as to impair his health,' it is not necessary to satisfy the jury that his health was impaired to the extent of causing death." It is our opinion that this request was properly refused. The court had already given the substance of it to the jury, as a fundamental proposition underlying the entire body of the charge, in the following terms: "But this contract was made by the company and Mr. Davey upon certain expressed conditions, seven in all, which in clear and positive language limit in various ways the rights and obligations of both the contracting parties. It will be necessary for you, gentlemen, to consider, however, only one, or, to speak more accurately, only part of one of these conditions. It is the third, as you will find them numbered in the body of the policy or contract, which you will have before you. In that condition you will find these words: 'If the insured shall become so far intemperate as to impair his health or induce delirium tremens, this policy or contract shall become null and void.' In other words, so far as this suit is concerned, the contract between the Ætna Life Insurance Company and Mr. Davey was this: For the consideration of the sum of $233.60, to be paid by Mr. Davey to the insurance company annually during his life, that company insured his life for ten thousand dollars, upon the expressed condition, nevertheless, that if Mr. Davey became so far intemperate as to impair his health, or became so far intemperate as to induce delirium tremens, then and in the case of the happening of either of these alternatives the contract became null and void, and the company would be

liable no longer under it." "If the company have satisfied you that he has done either one or the other — that he has become so far intemperate as to impair his health, or by his intemperance has induced delirium tremens — a complete defence to this suit has been made, and your verdict would be for the defendant." "I think it proper, before I call your attention to the evidence which has been given, and which I shall do very briefly, to explain as clearly as I can what is meant by the words, 'so far intemperate as to impair health or induce delirium tremens.'" "Mr. Davey agrees that he will not become so far intemperate as what? Why, become so far intemperate as to impair his health, or so far intemperate as to induce delirium tremens. If impairment of health or if delirium tremens was caused by or followed his intemperance, then the degree of intemperance which has been forbidden by this condition has been reached. Thus you will perceive that if a single debauch, lasting for a period of a few days, or it may be a single day only, results in the impairment of health or in delirium tremens, it will be clearly that intemperance which is positively forbidden." After this full and explicit instruction there was certainly no error in refusing the request to repeat it in different language.

Five of the exceptions relate to the charge given by the court with reference to the liquor taken by the deceased on the advice of his physician, and four relate to the refusal of the court to charge as requested by the plaintiff in error on the same point. Those parts of the charge that are excepted to are as follows: "If the jury should believe that the efficient controlling cause of the death of William A. Davey was the excessive and continuous use of strong drinks for several days and nights immediately preceding his death, yet if they believe that it was taken in good faith for medical purposes under medical advice, such use was not a violation of that condition of the policy which declares that it shall be null and void if he shall become so far intemperate as to impair his health or induce delirium tremens." "Whether the health of William A. Davey was impaired by the use of alcoholic stimulants not taken in good faith for medicinal purposes or under

medical advice, is a matter to be determined by the jury under all the evidence." "If, on the other hand, the testimony does not so satisfy you, [that Mr. Davey became so intemperate in the use of alcoholic spirits as to impair his health, or that, at Alexandria Bay, in 1881, he indulged in the use of alcoholic liquor to such an extent as to induce delirium tremens,] or if you are convinced that all the liquor which he used was used in good faith, under medical advice and for medical purposes, as claimed by the plaintiff, then your verdict should be for the plaintiff." "It is in evidence that Mr. Davey did take alcoholic stimulants under medical advice. If his taking them was only under such advice and only in such quantities as prescribed by [his] physician, even if impairment of health followed, yet the policy would not become void." "If, from all the testimony in this case, you conclude that Mr. Davey's condition in this respect was produced by a strict, fair and *bona fide* following of Dr. Kellerman's prescription, then that impairment of health, if there was any, which it is alleged existed, known as cirrhosis of the liver, does not avoid this policy."

There certainly can be no objection taken to these instructions when considered in the abstract, nor do we think there is anything in the context of the charge that in any degree militates against this view. On the contrary, in immediate connection with the last paragraph of the charge above objected to, the court called particular attention to the prescription of Dr. Kellerman, as testified to by Mrs. Davey, and further stated: "That prescription was, as Mrs. Davey gives it to us, to take an egg with sherry wine in the morning and a milk punch before retiring at night, and brandy and water, if he needed it, during the day. I leave it entirely with you to say whether, if you believe the witnesses of the defendant and some of the witnesses for the plaintiff as to the habit of Mr. Davey in the use of intoxicating liquor for many years prior to his death, you can conscientiously say that such was a *bona fide* following of medical advice; otherwise the condition is broken if the impairment of health follows." These charges were not detrimental to the defendant, as to the law of the case, and fairly put the case to the jury upon this point.

The refusals to charge, as above specified, were justified, because the effect of the charges as requested would have been to utterly nullify those portions of the charge above set forth, which we have just stated properly put before the jury the law of the case. In that connection the court went to the uttermost limit it could go in the premises, by saying that "there was nothing in the case, so far as I remember, to justify the jury in finding that the quantity of liquor which Davey, according to the evidence of some witnesses, drank at Alexandria Bay in the summer of 1881, was taken in good faith, for medicinal purposes." On this branch of the case, therefore, we conclude there was no error on the part of the court below in the conduct of the trial. We think the law, as enunciated by us when the case was here before, was so stated to the jury that the defendant could not have been prejudiced, in any particular.

Sixteen of the specifications of error are but variant forms of the motion made at the close of the testimony to have the court direct the jury to bring in a verdict for the defendant. It is not necessary to consider them in detail. There was evidence in the case going to discredit, in some particulars, the evidence offered by the defence to prove the breach of the condition in the policy, and it was eminently proper that all of that evidence should be taken into consideration and weighed by the jury, under proper instructions from the court, in arriving at their verdict.

It is claimed, however, that on the merits of the defence the action of the court below was erroneous both as to what it charged and as to its refusals to charge; and those objections form the basis of seven other specifications of error. The charge of the court on the merits of the defence was to the effect that the burden of proof was on the defendant to establish its defence satisfactorily in the minds of the jury. In respect to this, after referring impartially, and somewhat in detail, to the evidence, the court said: "If, on the other hand, the testimony does not so satisfy you, or if you are convinced that all the liquor which he used was used in good faith, under medical advice and for medical purposes, as claimed by

the plaintiff, then your verdict should be for the plaintiff. In weighing this testimony I desire you to be guided by two principles which control in this case, and the first is this: That the burden of proof is upon the defendant in this case — that is, the obligation is upon it to prove the facts relied upon by it as a defence. The plaintiff is not called upon to prove that these facts did not exist. It is its duty to present to you evidence which is to satisfy your mind. Such evidence need not be so convincing as to make the effect beyond reasonable doubt, but the weight of the testimony must decidedly preponderate on the side of the defendant. The other principle is this: You are to be governed, as I have said, by the weight of evidence. Now, the evidence in the case is of two kinds, positive and negative, and you must distinguish between them. If a number of credible witnesses have testified that they have frequently seen a party intoxicated or visibly under the influence of strong drink, their testimony is not to be rejected because an equal number of like credible witnesses testify that they never saw the party in such a condition. The testimony in the one case is positive, in the other case it is negative, and both statements may be true. The witnesses for the plaintiff say that they never saw Mr. Davey intoxicated or so under the influence of liquor as not to be able to attend to his business. This testimony of itself does not negative or overcome the positive testimony of those who declared, under oath, that they had seen him intoxicated. You must weigh the testimony as a whole, and let the result of your deliberations be such as commends itself to sound reason and conscientious judgment."

In our opinion this charge of the court, with the exception of the statement that "the weight of the testimony must decidedly preponderate on the side of the defendant," (which will be noticed hereafter,) was, to say the least, quite as favorable to the defendant as it had the right to demand. The special charges prayed, so far as they were in accordance with law, were embraced in the charge as given.

A few of those specifications of error, however, require special mention. One of them grows out of a request to

charge made by the plaintiff, to wit, that "if those opinions (of physicians) are founded on testimony giving what is called the history of the case, the jury must determine whether that history is true. Therefore, if the jury do not credit the story of William White and Andrew Duclone, whose relation is stated to have been given to Dr. Watson, the jury have the right to reject his diagnosis; and they have the right, anyhow, if they do not confide, under all the evidence, in his skill and experience in cases of this sort." The court gave that charge as follows: "The first part of that charge is, that these opinions are founded upon testimony giving what is called the history of the case, and you must determine whether that history is true. You must determine whether the facts upon which the hypothetical questions are based have been proved or not to your satisfaction. I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience, under the evidence in this case, to reject his diagnosis." The exception is to these words: "I also charge you that you have the right, if you do not confide in Dr. Watson's skill and experience, under the evidence in this case, to reject his diagnosis."

It is not conceived that there is any error in that part of the charge. The jury were the judges of the credibility of the witnesses White and Duclone, and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function. Neither do we consider that there was any error in that part of the charge specifically excepted to therein. The jury were not told that

they could reject the evidence of Dr. Watson, but simply his diagnosis of the case, that is, his conclusion as to the nature of the disease from the various symptoms detailed by him. It may be true that Dr. Watson was fully as competent to diagnose the disease, if not more so, than the jury. But the province of the jury was to determine if the deceased died from the effects of acute alcoholism or delirium tremens, as claimed by the defendant, and in arriving at their conclusion they were required to weigh the evidence bearing upon that issue. The evidence of Dr. Watson was relevant and tended to prove the defence, but the weight to be given it lay with the jury. It was not the province of the court to direct the jury to accept the diagnosis of the case made by Dr. Watson. To have done so would have been to reject all the evidence offered by the plaintiff tending to establish a contrary conclusion, and would have had the effect to direct the jury to return a verdict for the defendant. We think the court committed no error in this particular.

Two of the specifications of error relate to the charge of the court, and its refusal to charge as requested, on the question as to whether Mr. Davey's death was occasioned by exposure to the sun, or sunstroke. The court was requested to charge, in this connection, that "there is nothing in the case to justify the jury in finding that Davy, in the summer of 1881, had a sunstroke." The court refused to give that charge in so many words, but said: "You will remember that counsel in summing up for the plaintiff alluded to certain symptoms, which were proved, which he claimed were evidences of sunstroke. There certainly has been no one who testified here that Mr. Davey had a sunstroke, in those words, but you are the judges of the evidence, as I have stated before, to say whether he was suffering from exposure to the sun or sunstroke, or whether he was suffering, as the other witnesses testify, from alcoholism or the other diseases named. Otherwise I decline to charge as asked. This leaves the matter entirely with you." We think the charge as given was as favorable to the defendant as it had the right to demand. It left the question to the jury, and that was eminently proper.

The most important specification of error in the entire list is as follows: "The court erred in charging the jury that 'the weight of the testimony must decidedly preponderate on the side of the defendant.'" Objection is particularly made to the use of the word "decidedly" in this connection. The argument is, that the effect of that part of the charge was to direct the jury to return a verdict for the plaintiff, unless the evidence introduced by the defendant to establish its defence should satisfy them, beyond a reasonable doubt, that the defence had been made out. The phrase "decidedly preponderate" is not technically exact, with respect to the weight and quantity of evidence necessary and proper to justify a verdict in civil cases. If, therefore, this clause of the charge stood isolated from any other part of it, bearing upon the same subject matter, there would be serious objection to it. But we think the immediate context, as above quoted, shows that no such meaning can be fairly derived from it as is claimed by the defendant. On the contrary, such meaning is excluded in the same sentence, where the jury were told that "such evidence need not be so convincing as to make the effect beyond reasonable doubt;" and then immediately follows the clause objected to. We think the clause, when taken in connection with the whole tenor and effect of the entire charge, and especially in view of the immediate context, could not have misled the jury in the premises.

Eight other specifications of error relate to the effect to be given to the certificate of death furnished by Dr. Rae, the defendant contending that such certificate was of itself *prima facie* evidence of the fact that the deceased came to his death from the effects of alcoholic stimulants, etc.; and that that certificate must be overcome by the plaintiff to justify a recovery by her. On this point the court charged the jury as follows: "Now, gentlemen, as a matter of law, I charge you that this certificate is not to be taken or accepted by you as conclusive evidence of the truth of the facts therein stated, nor is the plaintiff bound by this statement or estopped from proving to your satisfaction a different cause of death. It is entitled to the weight which you would give an opinion of a

learned physician, as to the cause of his death, who saw the person spoken of shortly before his death, and who had personal knowledge of the person for some time previous to his death. Especially must that weight be given to this statement when, as in this case, the person who made the certificate, Dr. Rae, testifies before you that he adheres now to the opinion he expressed in that paper." And in the refusals to charge specifically on the question, as prayed by the defendant, the court did not depart from this general charge in any material respect. We think the charge as given embodies the law of the case on the point at issue, and, therefore, that the objections to it are without avail.

Upon the whole case we do not think that the defendant was in any manner prejudiced by any of the rulings of the court on the trial of the case. It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted. *Minor* v. *Tillotson*, 2 How. 392, 393; *Zeller's Lessee* v. *Eckert*, 4 How. 289; *Dirst* v. *Morris*, 14 Wall. 484, 490; *Prentice* v. *Zane*, 8 How. 470, 485; *Wilson* v. *Everett*, 139 U. S. 616.

Judgment affirmed.

In re WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

ORIGINAL.

No. 8. Original. Argued April 13, 14, 1891. — Decided April 27, 1891.

A judgment in an action of tort, for damages and costs, was rendered in the Supreme Court of the District of Columbia, at special term. It was affirmed by the general term, with costs. The latter judgment was

affirmed by this court, with costs. Nothing was said about interest in either of the three judgments. On the presentation of the mandate of this court to the general term, it entered a judgment for the payment of the judgment of the special term, with interest on it at the rate of six per cent per annum from the time it was originally rendered. *Held*, that the judgment on the mandate should have followed the judgment of this court and not have allowed interest.

As the amount of the interest was not large enough to warrant a writ of error, the proper remedy was by mandamus, there being no other adequate remedy, and there being no discretion to be exercised by the inferior court.

This court does not decide whether a judgment founded on tort bears or ought to bear interest, in the Supreme Court of the District of Columbia, from the date of its rendition.

The fact that the judgment of this court merely affirmed the judgment of the general term with costs, and said nothing about interest, is to be taken as a declaration of this court that, upon the record as presented to it, no interest was to be allowed.

A mandamus was issued to the general term, commanding it to vacate its judgment so far as concerned the interest, and to enter a judgment on the mandate, affirming its prior judgment, with costs, without more.

THE case is stated in the opinion.

Mr. Enoch Totten and *Mr. Walter D. Davidge* for the petitioner.

Mr. C. C. Cole and *Mr. William A. Cook* opposing. *Mr. W. L. Cole* was on their brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 16th of January, 1884, Lewis H. McDade brought an action at law in the Supreme Court of the District of Columbia against the Washington and Georgetown Railroad Company, to recover damages for personal injuries alleged to have been inflicted upon him in consequence of the negligence of the employés of the company, and of the unfit character and condition of the machinery used in the shops of the company where McDade was employed at the time he sustained the injuries. The cause was put at issue, and a trial was had before a jury, which resulted in a verdict for the plaintiff, on the 18th of December, 1885, for $6195. Upon that verdict a judg-

ment was entered on the same day, in special term, that the plaintiff recover against the defendant $6195 for his damages, and that he also recover his costs of suit, and have execution thereof. The defendant filed a motion for a new trial on a bill of exceptions, and the case was heard by the general term of the court, which, on the 28th of June, 1886, affirmed the judgment with costs. 5 Mackey, 144. Nothing was said in either of the judgments about interest. The defendant brought the case to this court by a writ of error, and, on the 19th of May, 1890, it affirmed the judgment of the general term. *Washington &c. Railroad Co.* v. *McDade*, 135 U. S. 554. The judgment of this court, in terms, was, that the judgment of the general term, of June 28, 1886, "be and it is hereby affirmed, with costs to be taxed by the clerk, and that the plaintiff have execution thereof." Nothing was said about interest.

The mandate of this court, issued May 27, 1890, recited the judgment of the general term and contained the judgment of this court, and then commanded the Supreme Court of the District "that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding." Afterwards, the mandate was presented to the Supreme Court of the District in general term, and a motion was made to it, on behalf of McDade, to enter up a judgment against the railroad company for interest on the judgment of the special term at the rate of six per cent per annum thereon from the 18th of December, 1885. On the 9th of June, 1890, the court decided the motion in favor of McDade, and on that day entered up a judgment, against the railroad company for the payment of the judgment, with interest on it according to the terms of the motion. The mandate was filed on the same day, and the terms of the order made thereon by the general term were, that McDade have execution of his judgment against the railroad company rendered by the special term, to wit, the sum of $6195, "with interest thereon from the date thereof until paid," and the costs of the plaintiff in the suit in the Supreme Court of the District, to be taxed by the clerk.

The railroad company, at the time of the making of that order, objected and excepted to the judgment in open court. It thereupon, on the 23d of June, 1890, filed in the office of the clerk of this court a petition setting forth the foregoing facts and praying for a writ of mandamus to the Supreme Court of the District, commanding it to vacate the judgment of June 8, 1890, so far as it related to interest on the judgment of December 18, 1885, and to enter a judgment on the mandate of this court in accordance with its terms, that is to say, a judgment affirming the judgment of the general term of June 28, 1886, with costs, without more.

On that petition, on application of the railroad company, this court made an order, at its present term, requiring the Supreme Court of the District to show cause why the writ of mandamus prayed for should not issue. A return to this order has been filed, in which the latter court states, that by the mandate it was commanded that such execution and proceedings be had in the cause as, according to right and justice and the laws of the United States, ought to be had, and that the order of June 9, 1890, was passed in the cause because the court sitting in general term believed said order was in accordance with right and justice and the laws of the United States; and it annexes, as its reasons for passing the order, the opinion of the general term, composed of Justices Hagner, Cox and James, 18 Washington Law Reporter, 719, delivered June 9, 1890, by Mr. Justice Hagner.

We are of opinion that the writ of mandamus prayed for must be granted, irrespectively of the question largely discussed at the bar and considered in the opinion of the general term, as to whether a judgment founded on tort bears or ought to bear interest, in the Supreme Court of the District, from the date of its rendition.

Upon the hearing on the writ of error, which resulted in the judgment and mandate of this court, the question of the allowance of interest on the judgment from its date until it should be paid was a question for the consideration of this court. The fact that the judgment of this court merely affirmed the judgment of the general term with costs, and said nothing

about interest, is to be taken as a declaration of this court that, upon the record as presented to it, no interest was to be allowed. It was thereupon the duty of the general term to enter a judgment strictly in accordance with the judgment of this court, and not to add to it the allowance of interest.

The judgment of the general term of June 28, 1886, made no allowance of interest, nor did the judgment of the special term of December 18, 1885. Those were the judgments which were affirmed by this court, and it affirmed them as not providing for any interest; and this court did not itself award any interest. The command of the mandate of this court, "that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding," did not authorize the general term of the Supreme Court of the District to depart in any respect from the judgment of this court. Under these circumstances, the general term had no authority to make its order of June 9, 1890, in regard to interest on the judgment.

The amount of such interest calculated at the rate of six per cent per annum from December 18, 1885, to June 9, 1890, was not quite $1700. The amount involved was, therefore, too small to be the subject of a writ of error from this court. The only relief which the railroad company could obtain in the premises was, therefore, by a writ of mandamus. A mandamus will lie to correct such an error, where there is no other adequate remedy, and where there is no discretion to be exercised by the inferior court. *Sibbald* v. *United States*, 12 Pet. 488; *Ex parte Bradley*, 7 Wall. 364, 376; *Virginia* v. *Rives*, 100 U. S. 313, 329.

In *Perkins* v. *Fourniquet*, 14 How. 328, 330, the Circuit Court had failed to carry out the mandate of this court, and the matter was brought to this court by an appeal. A motion having been made to dismiss the appeal on the ground that it would not lie, this court said: "This objection to the form of proceeding involves nothing more than a question of practice. The mandate from this court left nothing to the judgment and discretion of the Circuit Court, but directed it to carry

into execution the decree of this court, which was recited in the mandate. And if the decree of this court has been misunderstood or misconstrued, by the court below, to the injury of either party, we see no valid objection to an appeal to this court, in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt, to enforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution. But an appeal from the decision of the court below is equally convenient and suitable."

The principle has been well established, in numerous cases, that, on a mandate from this court, containing a specific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate. *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Durant* v. *Essex Company*, 101 U. S. 555, 556.

The case of *Boyce's Executors* v. *Grundy*, 9 Pet. 275, is very much in point. In that case, this court had entered a decree simply affirming the decree below with costs, and had sent down a mandate commanding the inferior court, in the terms of the mandate in the present case, "that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding." On receiving the mandate, the court below varied its former decree, and, among other things, awarded an additional amount of money intended to be interest upon the original sum decreed, from the time of the rendition of the decree in the court below to the time of the affirmance in this court. This court, on appeal, after referring to the statute which authorized it, in case of affirmance, to award to the respondent just damages for his delay, and to the rules of this court, made in 1803 and 1807, prescribing an award of damages in cases where the suit in this court is for mere delay, said: "It is, therefore, solely for the decision of the Supreme Court whether any damages or interest (as a part thereof) are to be allowed or not in cases of affirmance. If upon the affirmance no allowance of interest or damages is made, it is

equivalent to a denial of any interest or damages; and the Circuit Court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed, but is limited to the mere execution of the decree in the terms in which it is expressed. A decree of the Circuit Court allowing interest in such a case is, to all intents and purposes, *quoad hoc*, a new decree, extending the former decree;" citing *Himely* v. *Rose*, 5 Cranch, 313, and *The Santa Maria*, 10 Wheat. 431, 442. See, also, *Bank of United States* v. *Moss*, 6 How. 31.

We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the special term, or whether it would have been proper for the special term, in rendering the judgment, or otherwise, to have allowed interest upon it, or whether it would have been proper for the general term to do so; but we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this court awarded no interest in its judgment of affirmance, all that the general term could do, after the mandate of this court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the general term, and directing execution of the judgment of the special term of December 18, 1885, with costs, and without interest, and of the judgment of the general term of June 28, 1886, for costs.

A writ of mandamus is granted, commanding the general term to vacate its judgment of June 9, 1890, in favor of McDade against the railroad company, so far as the same relates to interest upon the judgment of the special term of December 18, 1885, and to enter a judgment on the mandate of this court of May 27, 1890, in accordance with its terms, that is to say, a judgment affirming the judgment of the general term of June 28, 1886, with costs, without more.

Mr. Justice Brewer did not sit in this case, or take any part in its decision.

HUGHES *v.* DUNDEE MORTGAGE COMPANY.

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

No. 306. Argued April 14, 15, 1891. — Decided April 27, 1891.

By the terms of the appointment of a law agent in this country of a corporation established at Dundee in Scotland, and engaged in lending money upon mortgages of real estate here, he was to "do all work, and carry through all procedure, and see to the execution and registration and publication of deeds, requisite and necessary for giving and securing to the company valid and effectual first and preferable mortgages over real estate for such loans as the directors at Dundee may from time to time sanction and authorize," and was to "be responsible to the company for the validity and sufficiency of all mortgages prepared or taken by" him; was not to take or receive in behalf of the company any commission or bonus from borrowers beyond lawful interest on money lent; nor to act as a local director of the company, or be interested in any property mortgaged; and his "professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages," were not to exceed a scale prescribed. *Held*, that the duties for which he was to be compensated by fees from borrowers, included giving to the company certificates of title; and that his successor, appointed on the same terms, except in being expressly required to grant certificates of title, and in being also made general attorney and counsellor of the company, could not recover anything from the company for making out such certificates.

This was an action brought against the Dundee Mortgage and Trust Investment Company, Limited, a corporation of Great Britain, having its home office at Dundee in Scotland, and an office at Portland in Oregon, and engaged in lending money on the security of mortgages of land in that State and in Washington Territory, by Ellis G. Hughes, an attorney at law and a citizen of Oregon, to recover the reasonable value of services performed by him from January 1, 1875, to January 31, 1880, for the Oregon and Washington Trust Investment Company, Limited, (a similar corporation, alleged to have been since consolidated with, and its liabilities assumed by, the defendant,) in issuing to that company written certificates of

title upon loans made by it upon such mortgages. One defence set up in the answer was that by a special contract between that company and the plaintiff he was to be paid only out of the fees charged to borrowers.

At the trial, the plaintiff offered in evidence the following documents:

1st. A resolution of the board of directors of the Oregon and Washington Trust Investment Company, Limited, dated December 17, 1875, in these terms:

"Attorneyship. The directors, having in view the recommendation of the local board, resolved and hereby resolve to appoint Mr. Ellis G. Hughes as the local agent of the company, this appointment to subsist during the pleasure of the Dundee board."

2d. A letter of the secretary of the same company, dated December 18, 1875, transmitting to plaintiff that resolution, and saying:

"I have now the pleasure to annex extract from the minutes of a meeting of my directors, held yesterday, from which you will see that they have appointed you to the very responsible position of law agent for the company in Portland, Oregon. I do not at this time require to enlarge upon the duties required from you in this position, as you already have had some considerable experience of them. It may be well, however, to remind you of what you no doubt have very clearly in view, viz. that in all cases the company has a clear and indisputable first mortgage to the subjects pledged in security, and that the company's business is conducted in accordance with the laws of the State of Oregon, the Territory of Washington and the United States of America, are matters for which you are personally responsible to my directors and the company."

3d. Certain printed rules transmitted to the plaintiff at the same time, as follows:

"Attorney at law. It shall be the duty of the company's attorney or attorneys —

"(A) To prepare all mortgages, deeds, notes, coupons and other documents in connection with the company's loans, and

to be responsible for their due execution, publication, registration and validity.

"(B) To be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged, and to grant certificates to that effect.

"(C) To take charge of and to conduct such proceedings as may from time to time be instituted by the company, or in which the company may be interested, subject to such instructions as may be issued thereanent.

"(D) To advise the local board and the directors of any point of legal or other interest to the company, which may be developed or come under his or their notice from time to time, by legislative or judicial action or otherwise.

"(E) And generally to give his or their best attention to all matters connected with the legal department of the company's business, and to give such information or advice as may from time to time be requested or occur to him or them."

The plaintiff then proved the issue of the certificates mentioned in the declaration, and introduced testimony as to the value of the services rendered and responsibility assumed in issuing the same; and rested his case.

Whereupon, it being then admitted in open court "that Addison C. Gibbs had been the attorney of the Oregon and Washington Trust Investment Company, Limited, prior to the appointment of the plaintiff as such, that the plaintiff had been the partner of said Gibbs, and had taken his appointment on the same terms as Gibbs had held his, save only as it might be varied by the resolution, the letter of the secretary, and the printed rules, offered in evidence by the plaintiff," the defendant offered in evidence a letter from the secretary of that company to Gibbs, dated August 22, 1874, which, it was admitted, contained the terms of the appointment of Gibbs, and the body of which was as follows:

"The directors of the Oregon and Washington Trust Investment Company, Limited, have had under consideration a recommendation to appoint you as law agent in and concerning the preparation of mortgages for loans authorized by them in America, and I have now the pleasure of informing you that

they have appointed you as law agent on the following footing:

"1. You shall do all work, and carry through all procedure, and see to the execution and registration and publication of deeds, requisite and necessary for giving and securing to the company valid and effectual first and preferable mortgages over real estate for such loans as the directors at Dundee may from time to time sanction and authorize.

"2. In the performance of your duties as law agent aforesaid you will have regard to the amended rules made by the directors, of which a copy is hereunto annexed.

"3. You shall not directly nor indirectly take or receive for behoof of the company any commission, bonus or other benefit from a borrower; and the company shall not covenant for or accept in respect of any loan anything but the interest conditioned to be paid in and by the mortgage, and which interest shall never exceed what is lawful and right.

"4. You shall not, by yourself or any or either of your partners, be or act as local directors of the company; and you shall not, directly nor indirectly, be interested in any property mortgaged or proposed to be mortgaged to the company, or be in copartnery or joint adventure or otherwise connected with any borrower.

"5. Your professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages, shall in no case exceed what the laws of the State warrant, and, although the law might warrant and allow more, shall never exceed what follows: Scale of maximum fees to be charged borrowers by law agent. For loans under $2001, 3½ per cent (exclusive of travelling and hotel bills); for loans under $4001 and above $2000, 3 per cent (inclusive of ditto); for loans above $4000 and under $20,000, 2½ per cent (do. do.).

"6. You shall be responsible to the company for the validity and sufficiency of all mortgages prepared or taken by you.

"7. I commend to your attention a letter which I have today written to Mr. Reid, defining his duties as manager of the company at Portland; and both you and he will be

pleased to understand that that appointment, according to the terms of that letter, and your appointment, according to the terms of this letter, are made upon the footing that the said appointments and terms thereof are lawful and right, according to the laws of the States or countries in which the real estates upon which the company's loans may be made are situated, and according to the laws of the United States; and nothing shall be done by you or Mr. Reid, directly or indirectly, either in your own names or for your own behoof or in the name or for behoof of the company, to prejudice or affect or imperil in any way the validity and sufficiency of any mortgage granted or to be granted to the company, or to create or give rise to any claim, penalty, tax or other exaction or loss to the company.

"8. Your appointment is, of course, at the pleasure of the company."

The defendant also offered in evidence the following parts of a letter written by the plaintiff to John Leng, one of the directors of the Oregon and Washington Trust Investment Company, Limited, dated September 30, 1876:

"To take up separately the different subjects upon which you requested an expression of my views." "Attorney's fees. The fees now charged upon each loan as the fees of the attorney for the examination of titles, and of which one half of one per cent on the entire amount of the loan is now paid to Mr. Reid, is a scale of fees based upon the minimum charges made by respectable and responsible attorneys here for the same service and responsibility. I have always felt that it was an injustice to the attorney to require any part of these fees to be paid to the company's manager. The division was acceded to, at the time when established, under the belief that, if the company's expenses were kept down until it was demonstrated that its business in Oregon would be profitable, the directors would then feel disposed to make such allowance for the pay of its manager, etc., as to give to each one employed in the company's service ample compensation for services rendered. The business of the company is now in such a prosperous condition as, I think, entitles me to ask that I be allowed

to receive for my services in their behalf at least the minimum fees charged for like services by gentlemen in equal standing in my profession here, which would be the entire fees now charged borrowers, and out of which there is now paid Mr. Reid one half of one per cent on the entire amount of the loan. It would be no object to, but in fact a loss for me to continue to act as the attorney of the company if the fees actually received by me are to continue as at present."

The defendant also offered in evidence a resolution of the Oregon and Washington Trust Investment Company, Limited, dated November 23, 1876, in these terms:

"Attorney. That Mr. Hughes, the company's attorney, be remunerated by fees charged borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration, which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

The plaintiff, for the purpose of showing the meaning and intent of that resolution, offered in evidence a letter from John Leng to the plaintiff, dated November 24, 1876, in these terms:

"My colleagues have cordially adopted my recommendation that you receive your fees according to the scale now subsisting, without any deduction. This will take effect 1st January, and I hope will be quite satisfactory to you. I learned in the Eastern States that the mortgage form of one large lending company provides that the expenses paid to the attorney in the event of foreclosure shall be such sum as the court may consider reasonable or a reasonable sum. They say the borrower never objects to this, and the attorney is always allowed what satisfies him. Would it not be well for you to adopt this?"

The plaintiff also proved that that resolution was transmitted to him with that letter. No other testimony as to the terms of the contract with the plaintiff was offered by either party.

The court directed the jury to return a verdict for the defendant, and entered judgment theron; and the plaintiff excepted to the direction, and sued out this writ of error.

Mr. J. N. Dolph for plaintiff in error.

Mr. J. Percy Keating and *Mr. Thomas De Witt Cuyler* for defendant in error.

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

It has been necessary to state the facts at length in order to make the case intelligible. But the questions of law lie within a narrow compass.

The scope and effect of the contract in question depended wholly upon written correspondence, and in no degree upon extrinsic circumstances, and were, therefore, to be determined by the court. *Goddard* v. *Foster*, 17 Wall. 123, 142; *Hamilton* v. *Liverpool &c. Ins. Co.*, 136 U. S. 242, 255.

The duties of Gibbs, the plaintiff's predecessor, as defined in the letter to him from the secretary of the company of August 24, 1874, containing the terms of his appointment "as law agent in and concerning the preparation of mortgages for loans authorized by them in America," were to "do all work, and carry through all procedure, and see to the execution and registration and publication of deeds, requisite and necessary for giving and securing to the company valid and effectual first and preferable mortgages over real estate for such loans as the directors at Dundee may from time to time sanction and authorize," and to "be responsible to the company for the validity and sufficiency of all mortgages prepared or taken by" him. For the protection of borrowers, as well as of the company, he was prohibited from taking or receiving in behalf of the company any commission or bonus from borrowers beyond lawful interest on the money lent them; from acting on the one hand as a local director of the company, or being interested on the other in any property mortgaged, or proposed to be mortgaged; and his "professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages," were limited by a scale prescribed. Although "certificates of title" were not specifically

mentioned, it is quite evident that his duties, as thus defined, included a report or certificate in some form to the company of the title of each parcel of land upon the mortgage of which it was to lend money. It is equally evident that he was to be paid nothing by the company, but was to find his whole compensation in the fees paid him by the borrowers and mortgagors.

It was admitted that the plaintiff took his appointment on the same terms as Gibbs had taken his, save only as it might be varied by the secretary's letter to the plaintiff of December 18, 1875, and by the directors' resolution and the printed rules enclosed in that letter.

The secretary's letter to the plaintiff informed him that he had been appointed "law agent for the company in Portland," referred to his previous experience of the duties of his position, and reminded him that he would be personally responsible to the directors and the company for its having a clear and indisputable first mortgage in each case, and for its business being conducted in accordance with the local laws. Among the plaintiff's duties, as defined by the printed rules sent him, were "to prepare all mortgages, deeds, notes, coupons and other documents in connection with the company's loans, and to be responsible for their due execution, publication, registration and validity;" and "to be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged, and to grant certificates to that effect." In this respect, these rules exactly accord with the prior directions to Gibbs, except in expressly mentioning (what was only implied in those directions) the duty to grant certificates of title.

The necessary conclusion is that, so far as the duty of investigating and certifying titles and preparing mortgages, and of being responsible to the company for the due execution and registration of the mortgages and for their validity as a first lien on the lands mortgaged — in other words, so far as his duties were substantially the same as those previously performed by Gibbs — he was to be compensated in the same manner, namely, by fees paid by borrowers; and this is clearly assumed in the plaintiff's subsequent letter of September 30,

1876, to a director of the company, and in the ensuing resolution of the company and letter of that director.

The compensation to be received by the plaintiff for such duties was not increased or affected by the fact that by the rules by which he was governed he was also made general attorney and counsellor of the company, and might, for his services as such, (in regard to which no question arises in this case,) be entitled to other compensation, as none had been specified in the contract between the parties.

Judgment affirmed.

In Nos. 307 and 308, between the same parties, and argued at the same time, the facts are similar, and the judgments are likewise

Affirmed.

SCOTT *v.* NEELY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 314. Argued April 15, 16, 1891.— Decided April 27, 1891.

The Circuit Court of the United States in Mississippi cannot, under the operation of sections 1843 and 1845 of the Code of Mississippi of 1880, take jurisdiction of a bill in equity to subject the property of the defendants to the payment of a simple contract debt of one of them, in advance of any proceedings at law, either to establish the validity and amount of the debt, or to enforce its collection; in which proceedings the defendant is entitled, under the Constitution, to a trial by jury.

The general proposition that new equitable rights created by the States may be enforced in the Federal courts is correct, but it is subject to the qualification that such enforcement does not impair any right conferred, or conflict with any prohibition imposed by the Constitution or laws of the United States.

Clark v. *Smith*, 13 Pet. 195, distinguished from this case.

Holland v. *Challen*, 110 U. S. 15, explained and shown to contain nothing sanctioning the enforcement in the Federal courts of any rights created by state law, which impair the separation established by the Constitution between actions for legal demands and suits for equitable relief.

Statement of the Case.

THIS was a suit in equity to subject to the payment of a debt alleged to be due and owing to the complainants by the defendant George Y. Scott, certain property owned by him and other property owned by his wife and codefendant, Lottie M. Scott. The material facts out of which it arose, so far as is necessary for an intelligent consideration of the questions discussed, may be briefly stated as follows:

In 1873 the defendant George Y. Scott was in partnership with his brother, Charles Scott, in the practice of the law in Bolivar County, Mississippi. Their practice is represented to have been large and lucrative. They were also engaged in other business, in which it is said they were successful, and that their income from all sources was from twelve to fifteen thousand dollars a year. In 1876 the brothers were of opinion that lands in the Mississippi Delta would in the then near future become valuable, and were therefore desirable as investments. They accordingly made purchases of different tracts, and took deeds of the lands to their respective wives. In some cases their notes were given for part of the purchase money.

In January, 1880, the brothers dissolved their law partnership, and a partition of the lands purchased was made between their wives. Subsequently, during the same year, other lands were purchased by George Y. Scott, and the deeds taken in the name of his wife. In 1881, he also purchased a large tract, and took the deed in his own name, paying part of the purchase money in cash, and giving his promissory notes for the balance.

The lands thus purchased by him, and those held by his wife, were greatly improved by him, and put in a high state of cultivation, and valuable crops were raised on some of them. In March, 1883, to enable him to carry on the "planting business" on these lands, he arranged what is termed "a line of credit" with the firm of Brooks, Neely & Company, of Tennessee, the complainants herein, as factors and commission merchants; they to furnish him supplies and money as needed, and he to ship to them the cotton raised on the plantations, to be sold by them, and the proceeds applied to the payment of their advances. The dealings between Scott and the com-

plainants under this arrangement continued until July 6, 1885, at which time he owed them a balance of $6264.89, on account, and a note of $2000.

The present suit was commenced in March, 1886, to subject, as stated above, the property owned by the defendant George Y. Scott and other property owned by his wife, to the payment of these sums with interest, and in aid thereof to set aside as fraudulent the conveyances to the wife of the lands purchased by her husband. Issue being joined on the replications to the answers by the defendants, testimony was taken, and upon the pleadings and proofs the case was heard by the District Court of the United States for the Northern District of Mississippi, exercising the powers of a Circuit Court. It was adjudged and decreed that certain parcels of the lands, which were described, were subject to the debt due the complainants, and that they had a lien for the same from the date of filing their bill, which debt, from the report of the master, was found to be $8547.89. It was also decreed that the defendant George Y. Scott pay that sum within thirty days, and in default thereof that a commissioner of the court, appointed for that purpose and "clothed with the title to said lands," proceed to advertise them, or a sufficiency thereof, and sell the same to the highest bidder for cash, and report his proceedings to the court. From this decree the defendants appealed to this court.

Mr. Edward Mayes for appellants.

Mr. W. V. Sullivan for appellees. *Mr. F. A. Montgomery* was with him on the brief.

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

This is a suit in equity to subject the property of the defendants to the payment of a simple contract debt of one of them, in advance of any proceedings at law, either to establish the validity and amount of the debt, or to enforce its collection. It is founded upon sections 1843 and 1845 of the Code of

Mississippi of 1880, being parts of the chapter which treats of the Chancery Courts of the State. They are as follows:

"SEC. 1843. The said courts shall have jurisdiction of bills exhibited by creditors, who have not obtained judgments at law, or having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors, as if complainant had a judgment and execution thereon returned 'no property found.'"

"SEC. 1845. The creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against *bona fide* purchasers before the service of process upon the defendant in such bill."

At the outset of the case the question is presented, whether a suit of this kind, where the complainant is a simple contract creditor, can be maintained in the courts of the United States. It is sought to uphold the affirmative of this position on the ground that the statute of Mississippi creates a new equitable right in the creditor, which, being capable of assertion by proceedings in conformity with the pleadings and practice in equity, will be enforced in those courts. The cases of *Clark* v. *Smith*, 13 Pet. 195, *Broderick's Will*, 21 Wall. 503, and *Holland* v. *Challen*, 110 U. S. 15, are cited in its support.

The general proposition, as to the enforcement in the Federal courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the States by whose legislation it is created. The Constitution, in its Seventh Amendment, declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." In the Federal courts this right cannot be dispensed with, except by the assent of the

parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact.

In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal courts. Uniting with a demand for its payment, under the statute of Mississippi, a proceeding to set aside alleged fraudulent conveyances of the defendants, did not take that right from them, or in any respect impair it.

This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary act of 1789 enacted that such suits "shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law;" and this prohibition is carried into the Revised Statutes. Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity. *Hipp* v. *Babin*, 19 How. 271, 278; *Lewis* v. *Cocks*, 23 Wall. 466, 470; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 573; *Buzard* v. *Houston*, 119 U. S. 347, 351. All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their law side. Demands of this kind do not lose their character as claims

cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States.

In *Bennett* v. *Butterworth*, 11 How. 669, 674, in commenting upon the practice prevailing in the courts of Texas, Mr. Chief Justice Taney, after observing that although the common law had been adopted in Texas, the forms and rules of pleading in common law cases had been abolished, and the parties were at liberty to set out their respective claims and defences in any form that would bring them before the court, said: "Although the forms of proceedings and practice in the state courts have been adopted in the District Court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed, (under the authority of the act of August 23d, 1842,) regulating proceedings in equity in the courts of the United States."

This decision was followed in *Thompson* v. *Railroad Companies*, 6 Wall. 134, 137, the court there observing that "the remedies in the courts of the United States are, at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles," citing also to that effect the case of *Robinson* v. *Campbell*, 3 Wheat. 212. In *Fenn* v. *Holme*, 21 How. 481, 484, 486, the same doctrine was affirmed.

The Code of Mississippi gives to a simple contract creditor a right to seek in equity, in advance of any judgment or legal

proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property. There the whole suit, involving the determination of the validity of the contract, and the amount due thereon, is treated as one in equity, to be heard and disposed of without a trial by jury. It is not for us to express any opinion of the wisdom of this law, or whether or not in its operation it is more advantageous in the interests of justice than an entire separation of proceedings at law from those for equitable relief. It is sufficient that under the statute of the United States such separation is required in the Federal courts, and by the Constitution, in cases at common law, a right to a trial by jury is secured to the defendant.

The attempt is made to assimilate the enforcement of the state law in the Federal courts in the same manner as in the state courts, to proceedings in suits to enforce mortgages, and other liens upon property, created by contract as security for loans and advances. No jury, it is said, is required in those suits to ascertain the amount due on the mortgage debt, and why, it is asked, should there be any jury in the case under the state statute — that giving a lien for the debt claimed by the filing of the bill to set aside the fraudulent conveyances of the debtor. The distinction between the cases is plain, and will be obvious from a brief statement of their nature. A mortgage is in form a conveyance vesting in the mortgagee a conditional estate which becomes absolute on the non-performance of the condition. Originally, at law, it carried the rights and incidents of ownership; although at an early day equity gave to the mortgagor, even after breach of condition, a right to recover the property from forfeiture, upon payment of the debt or obligation secured, within a prescribed period. The ancient law as to the character of the instrument still prevails in some of the States, but in a majority of them this has been changed from a consideration of the object of the instrument and the intention of the parties, and it is there regarded as a mere lien upon or pledge of the property for the payment of the debt or the performance of the obligation stated. Whatever character may be ascribed to it

from its form, it has always been treated by courts of equity as intended for security, and is enforced by them solely to give effect to that intention. *Hutchins* v. *King*, 1 Wall. 53. The debt or obligation, to secure which it is given, is stated in the instrument itself, and the only proceeding with reference to its amount is one of calculation as to the interest thereon, or as to what remains due after credit of payments; and it is only to ascertain this that a reference is made to an accountant, usually a master in chancery, and not to try the validity of the debt or obligation secured. The equitable suit is to enforce the application of the property to the purposes intended by the contract of the parties. In the case at bar, under the statute of Mississippi, there is no amount stated by the defendant as due, which is secured by any lien on property executed by him; and that amount is uncertain, not resting in mere calculation of interest or in the application of credits, but upon proof of the existence and validity of the alleged contract between the parties. In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding. *Smith* v. *Railroad Co.*, 99 U. S. 398, 401; *Angell* v. *Draper*, 1 Vern. 398, 399; *Shirley* v. *Watts*, 3 Atk. 200; *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *McElwain* v. *Willis*, 9 Wend. 548, 556; *Crippen* v. *Hudson*, 3 Kernan, 161; *Jones* v. *Green*, 1 Wall. 330.

In *Wiggins* v. *Armstrong*, Chancellor Kent held that a creditor at large, or before judgment, was not entitled to the interference of a court of equity by injunction to prevent the debtor from disposing of his property in fraud of the creditor; citing some of the above authorities, and stating that the reason of the rule seemed to be that until the creditor had established his title he had no right to interfere, and it would lead to unnecessary and perhaps a fruitless and oppressive interrup-

tion of the debtor's rights; adding, "unless he has a certain claim upon the property of the debtor he has no concern with his frauds."

It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract or by contribution to its value by labor or material, or by judicial proceedings had, which distinguishes cases for the enforcement of such lien or interest from the case at bar.

Upon the contention of the complainants it is not perceived why all actions at law, even for injuries to persons or property, may not be withdrawn by the State from a court of law to a court of equity, by allowing a lien upon the property of the defendants on the issue of process at the commencement of the action, and authorizing the court to direct a sale of the whole or a portion thereof, in its discretion, to pay the damages recovered, and to set aside any obstacles to their satisfaction from fraudulent conveyances of the wrong-doer. Whatever control the State may exercise over proceedings in its own courts, such a union of legal and equitable relief in the same action is not allowed in the practice of the Federal courts.

As to the cases to which we are referred, *Clark* v. *Smith*, 13 Pet. 195, and *Holland* v. *Challen*, 110 U. S. 15, a few words only need be said.

In the first case the act of Kentucky of 1796 had provided that "any person having both legal title to and possession of land may institute a suit against any other person setting up a claim thereto; and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claim thereto, and pay the complainant his costs, unless the defendant shall, by answer, disclaim all title to such lands, and offer to give such release to the complainant, in which case the complainant shall pay to the defendant his costs, except, for special reasons appearing, the court should otherwise decree."

The validity of this law was sustained, the court observing that "the state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but, having created a right, and at the same

time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts.". To this view there can be no possible objection; nor can there be to the enforcement in the Federal courts of the right created. The statute simply enlarged the cases in which, without it, bills to quiet title could be maintained in the courts of the United States. Previously to its passage, in order to maintain such suit, it was necessary that the title of the plaintiff should be established by successive judgments in his favor. Upon that appearing, he being in possession of the property, courts of equity would interpose and grant a perpetual injunction to quiet his possession against any further litigation. That statute only did away with the necessity for the previous adjudications at law in favor of his right, it being declared sufficient to call into exercise the powers of a court of equity that he was in possession of the land and of the title, and was disquieted by the assertion of a claim to the property by the defendant.

In the second case, *Holland* v. *Challen*, the suit was brought to quiet the title of the plaintiff to certain real property in Nebraska, against the claim of the defendant to an adverse estate in the premises. It was founded upon a statute of that State which provided: "That an action may be brought and prosecuted to final decree, judgment or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title of such real estate."

In that suit neither party was in possession, and the jurisdiction was maintained in equity, as no remedy in such case could be afforded in an action at law. As we there said, speaking of unoccupied lands: "It is a matter of every-day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements

upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild and uncultivated land. Few persons would be willing to take possession of such land, enclose, cultivate and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character, statutes, like the one of Nebraska, have been passed by several States, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use and improvement of lands thus situated in the States should not be enforced by the Federal courts, when the controversy to which it may give rise is between citizens of different States."

It was objected in that case that if the suit was allowed under the statute in the Federal courts, controversies properly cognizable in a court of law would be drawn into a court of equity, but the court said:

"There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the Federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law."

There is nothing in that decision that gives sanction to the

enforcement in the Federal courts of any rights created by state law which impair the separation there required between actions for legal demands and suits for equitable relief.

In the subsequent case of *Whitehead* v. *Shattuck*, 138 U. S. 146, *Holland* v. *Challen* was referred to and explained; and it was said that a suit in equity for real property against a party in possession would not be sustained, because there would be a plain, adequate and complete remedy at law for the plaintiff, and that it was only intended to uphold the statute so far as suits in the Federal courts were concerned, in authorizing such suits against persons not in possession.

It follows from the views expressed that the court below could not take jurisdiction of this suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief. Its decree must therefore be

Reversed, and the cause remanded with directions to dismiss the bill, without prejudice to an action at law for the demand claimed, and it is so ordered.

Mr. Justice Lamar did not sit in this case nor take any part in its decision.

BIRDSEYE *v.* SCHAEFFER.

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

No. 920. Submitted April 20, 1891. — Decided April 27, 1891.

It is again decided that an order remanding a cause from a Circuit Court of the United States to the state court from which it was removed, is not a final judgment or decree which this court has jurisdiction to review.

This cause was removed to the Circuit Court of the United States for the Western District of Texas prior to the passage of the act of March 3, 1887, providing that no appeal or writ of error from the decision of the Circuit Court remanding a cause to a state court from which it had been removed, should be allowed. The order remanding the cause to the state court

from which it had been removed was made subsequent to that act, but prior to the act of February 25, 1889; the writ of error was allowed on the 7th of June, A.D. 1889, subsequent to the act of February 25, 1889.

A motion was made to dismiss the writ on the grounds: (1) That there was no jurisdiction to issue the same and no jurisdiction to take cognizance of the record filed herein; (2) Because the judgment of the Circuit Court complained of, remanding the cause to the District Court of Nueces County, Texas, from which it had been removed for trial, was not a final judgment and cannot be reviewed by this court.

Mr. Philip B. Thompson and *Mr. J. M. Vale* for the motion.

Mr. Bethel Coopwood and *Mr. John Hancock* opposing.

PER CURIAM. The writ of error is dismissed upon the authority of *Gurnee* v. *Patrick County*, 137 U. S. 141; *Richmond & Danville Railroad Co.* v. *Thouron*, 134 U. S. 45.

Dismissed.

BALL *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 1351. Argued April 10, 1891. — Decided April 27, 1891.

On the 4th of December, 1888, the clerk of the District Court of the United States for the Eastern District of Texas, at Galveston, certified to the Circuit Judge for the fifth circuit that the District Judge of that district was "prevented by reason of illness from continuing the holding of the present November term of the District and Circuit Courts of the United States for the Eastern District of Texas, at Galveston; and also the coming terms of said courts at Tyler, Jefferson and Galveston, in the year 1889." Thereupon the Circuit Judge issued an order designating and appointing "the judge of the Western Judicial District of Louisiana to conclude the holding of the present November term of the District and Circuit Courts for the Eastern District of Texas, at Galveston, and also to hold the coming terms of the District and Circuit Courts in said Eastern District of Texas, during the year 1889, and during the disability of the judge of said district, and to have and exercise within said district during said period, and during such disability, the powers that are vested

Statement of the Case.

by law in the judge of said district." On the 12th of March, 1889, Congress created a new division of the Eastern Judicial District of Texas, the courts to be held at Paris, Texas, and with "exclusive original jurisdiction of offences" committed within a designated portion of Indian Territory attached to that district, and directed two terms to be held, one in April, and one in October. 25 Stat. p. 786, c. 333, § 18. Under the authority so given the judge of the Western District of Louisiana held the Circuit Court at Paris in October, 1889, during which term persons were tried and convicted of the offence of murder, committed in that part of the Indian Territory; and on the following April term they were sentenced to death. Before that term commenced, the regular District Judge of that district died. *Held*, that in holding the October term, the judge acted as a judge *de jure;* and during the April term, if not *de jure*, as a judge *de facto*, whose acts could not be attacked collaterally.

On a Sunday morning a jury returned a verdict of guilty against persons on trial for murder, whereupon the court remanded them to custody to await judgment and sentence. *Held*, that this was not a judgment, but only a remand for sentence.

At common law it was essential in a trial for a capital offence, that the prisoner should be present, and that it should appear of record that he was asked before sentence whether he had anything to say why it should not be pronounced.

An indictment for murder which fails to aver the time of the death is fatally defective if found more than a year and a day after the death.

An indictment for murder which fails to aver the place of the death is also fatally defective.

This writ of error was sued out on time.

By stipulation between counsel, an order made by the Circuit Judge for the Fifth Circuit, on the 4th of December, 1888, was added to the record in this case, which order is as follows:

"Whereas, it appears by the certificate of the clerk of the District Court hereto annexed, that the Hon. Chauncey B. Sabin, United States District Judge for the Eastern District of Texas, is prevented by reason of illness from continuing the holding of the present November term of the District and Circuit Courts of the United States for the Eastern District of Texas, at Galveston, and also the coming terms of said courts at Tyler, Jefferson and Galveston in the year 1889; and whereas, in my judgment, the public interests require the designation and appointment of a district judge from another

district within the circuit to hold the present and coming terms of the District and Circuit Courts in said Eastern District during the disability of the judge of said district:

"Now, therefore, I, Don A. Pardee, Circuit Judge of the Fifth Judicial Circuit, in pursuance of law, do hereby designate and appoint the Hon. Aleck Boarman, Judge of the Western Judicial District of Louisiana, to conclude the holding of the present November term of the District and Circuit Courts for the Eastern District of Texas, at Galveston, and also to hold the coming terms of the District and Circuit Courts in said Eastern District of Texas, during the year 1889, and during the disability of the judge of said district, and to have and exercise within said district during said period, and during such disability, the powers that are vested by law in the judge of said district.

"Witness my hand at Galveston, December 4, 1888.

"Don A. Pardee, *Circuit Judge.*"

The certificate annexed was under the hand of "C. Dart, clerk U. S. Dis. Court, Eastern Dist., Texas, at Galveston," and the seal of the court, and set forth "that the Hon. Chauncey B. Sabin, United States District Judge for the Eastern District of Texas, is prevented by reason of illness from continuing the holding of the present November term of the District and Circuit Courts of the United States for the Eastern District of Texas, at Galveston; and also the coming terms of said courts at Tyler, Jefferson and Galveston, in the year 1889."

The certificate and order were certified to by Mr. Dart, December 22, 1890, and that they were filed by him December 4, 1888, and recorded on the minutes of the District Court in the clerk's office.

At this time the Statute directed that the courts of the Eastern Judicial District of Texas should be held twice in each year at Galveston, Tyler and Jefferson. 20 Stat. 318, c. 97. By section 18 of an act of Congress approved March 1, 1889, 25 Stat. 786, c. 333, § 18, two separate terms of the Circuit Court at Paris in the same district were established, to be held

on the third Monday of April and the Second Monday of October, and it was provided that "the United States courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offences committed against the laws of the United States within the limits of that portion of the Indian Territory, attached to the Eastern Judicial District of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory," etc. By section 19 of the same act it was provided that the judge of the Eastern Judicial District should appoint a clerk of the court, who should reside at the city of Paris, and H. H. Kirkpatrick was appointed such clerk. The October term, 1889, of the Circuit Court at Paris fell on the 14th day, being the second Monday, of that month, and was opened and held by Judge Boarman, assuming to act under the appointment of December 4, 1888, no record of which appeared on the minutes of the court in the clerk's office at Paris.

Upon the 17th of October, 1889, an indictment was returned into the Circuit Court against the plaintiffs in error and one M. F. Ball, which set forth:

"That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, whose names are to the grand jurors otherwise unknown, late of the county of Pickens, in the Chickasaw Nation, in the Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in said Pickens County, in said Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said Fifth Circuit, and annexed to and constituting part of the Eastern District of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently and feloniously, and with their malice aforethought, and with a certain deadly weapon, to wit, a certain gun in the hands of the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box with said gun held as aforesaid, said gun being then

and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball and the said J. C. Ball and the said R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish, and languishing did die.

"And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully, feloniously and with their malice aforethought, and the malice aforethought of each of them, did kill and murder the said William T. Box, the said M. F. Ball and J. C. Ball and R. E. Boutwell, and each of them, being there, white men and not citizens of said Chickasaw Nation, or of the Indian Territory, or any nation or tribe thereof; contrary to the form of the statutes of the United States of America in such cases made and provided, and against the peace and dignity of the United States of America."

The defendants were arraigned on the 30th of October, and after moving for separate trials, which were denied, pleaded not guilty, and, a jury having been empanelled, trial was entered upon and continued October 31 and November 1 and 2, on which last day the jury retired to consider of their verdict. The record of Sunday, November 3, is as follows:

"This day came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men which heretofore had been tried, empanelled and sworn as required by law, and having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to wit:

"'We, the jury, find the defendants J. C. Ball and R. E. Boutwell, guilty as charged in this indictment, and we find M. Filmore Ball not guilty.

"'Nov. 3d, 1889. A. P. Ball, Foreman.'

Statement of the Case.

"It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County, to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day."

A bill of exceptions to the action of the court in the admission of certain testimony over defendants' objection, was taken on the 31st of October, and is referred to as "No. 1."

On the 15th of November, 1889, a motion "for a new trial and to arrest the judgment" was filed, which, among other causes, assigned error as set forth in the bill of exceptions just referred to; and also error as shown by bill of exceptions No. 2, which does not appear in the record; and also error in instructing the jury on Sunday morning to return a verdict on that day, as shown by bill of exceptions No. 3, which also does not appear. A separate motion in arrest of judgment was also filed November 15, 1889, but whether with the other motion is not clear. This motion was not signed by the defendants, but commenced: "And now come the defendants, John Ball and Robert Boutwell, in their own proper person and by their attorneys," and assigned various reasons why judgment should be arrested, and particularly that Judge Boarman had no lawful authority to act as the judge of the Circuit and District Courts for the Eastern District of Texas, holding sessions at Paris, because Judge Sabin was the duly and lawfully appointed and qualified judge of said court, and Judge Pardee the duly and lawfully appointed and qualified judge of the Fifth Judicial Circuit, and that neither of them were in any manner disqualified from holding those offices or performing the duties thereof, and that there was no evidence shown to the Circuit Judge or the Circuit Justice that Judge Sabin was disabled to hold the United States Circuit Court at Paris, begun and held on the 14th of October, 1889, or to perform the duties of his office, nor had any such fact been made to appear by the certificate of the clerk of said court under the seal of the court to the

Circuit Judge or Circuit Justice, nor was there any order of such judge or justice designating and appointing Judge Boarman to discharge the judicial duties of Judge Sabin for the United States courts holding sessions at Paris, nor was such appointment filed in the clerk's office and entered on the minutes thereof, etc.

On the same day the record states: "The motion of the defendants for a new trial and in arrest of judgment herein coming on to be heard, because it is the opinion of the court that the law is against the motion, the same is overruled, to which ruling of the court the defendants excepted." The record then contains the following: "By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robert E. Boutwell and John C. Ball, be executed by being hung, until each and either are dead, according to the forms, delays and processes provided in the laws of the United States. This done and signed in open court Nov. 15, 1889. Aleck Boarman, Judge." This is endorsed, "Filed Nov. 15, 1889. H. H. Kirkpatrick, Clerk," and is followed by this entry: "This day the defendants in open court excepted to the sentence of the court this day pronounced upon them."

A bill of exceptions was filed November 22, 1889, reciting that on the 15th of November the motion of the defendants in arrest of judgment came on to be heard and was read, and "the court stated that such an order assigning & appointing the Hon. Aleck Boarman to hold the Circuit & District Courts referred to in said motion had been made, and was entered on the minutes of the District and Circuit Courts of the United States for the Eastern District of Texas, at Galveston, in the State of Texas, and thereupon overruled said motion," and the defendants duly excepted. The bill of exceptions continued:

"On the trial of the motion to arrest the judgment and sentence in this case the court did not refuse the defendants an opportunity of showing, by evidence, that the order designating myself as the judge to hold this term of the court in place of Judge Sabin, was not of record at Paris, Texas. The court, not prohibiting them from tendering evidence on that point,

said it was known to the court that a proper order authorizing this judge to hold the terms of court in the District and Circuit Court of the Eastern District in Texas, Fifth Circuit, was executed, signed and properly recorded at Galveston, Texas, which is one of the places for holding courts in the Eastern District. The court further held as above, because if it had been proved that such an order was not on record in the clerk's office at Paris, it would have had no weight in considering the allegations in the motion for arrest, because the order, to the knowledge of the judge, had been properly issued and was duly recorded or entered at Galveston in accordance with his instructions."

On the 30th day of March, Judge Sabin died, and Judge Boarman held the stated term of the Circuit Court for the Eastern District of Texas, beginning on the third Monday in April, until the second day of June, 1890, when Judge Bryant was sworn in as Judge Sabin's successor, and held court at Paris thereafter. On the 5th of May, 1890, Judge Boarman presiding, the United States attorney filed a motion that the court fix a day for the execution of the defendants, John C. Ball and Robert E. Boutwell, and on the 18th of July, 1890, at Paris, the defendants were brought into court before Judge Bryant, and each filed a motion in arrest of further proceedings and to vacate and set aside the orders and proceedings against him theretofore made, upon the principal ground of the want of legal authority on the part of Judge Boarman.

In support of the motion the record heretofore given was introduced by each defendant. The motion was overruled as to each, and each excepted, and a separate bill of exceptions was duly allowed, signed and filed, and the court rendered the same judgment against each, that against Ball being as follows:

"This day came the United States, by the United States attorney, and the defendant in his own proper person and by attorney appeared, and the United States attorney moved the court to fix a day of execution of the defendant, John C. Ball. And it appearing to the court that on the 15th day of November, 1889, during a former term of this court, the sentence of

death was pronounced upon the defendant, John C. Ball, for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of the court, to wit, on the third day of November, 1889, and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the finding herein by the Supreme Court of the United States have been begun: It is therefore ordered, adjudged and decreed by the court that the defendant, John C. Ball, be now remanded to the custody of the marshal, to be by him kept securely confined in the jail of Lamar County, Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and between the hours of 12 o'clock M. and 4 o'clock P.M. of said 19th day of December, 1890, be hanged by the neck until he, the said John C. Ball, is dead, and the clerk of this court is ordered to issue a death warrant in accordance with this sentence, and deliver the same to the marshal, who shall execute the same according to law."

Thereupon the defendants procured an order allowing sixty days within which to apply for a writ of error, which writ was allowed within the time given, and the cause brought to this court.

Mr. John E. Kenna (with whom was *Mr. Charles J. Faulkner* on the brief) for plaintiff in error. *Mr. J. C. Hodges*, *Mr. Austin Pollard*, *Mr. R. F. Hodges* and *Mr. F. W. Minor* also filed a brief for the same.

Mr. Solicitor General for defendant in error.

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

The following errors are assigned upon the record or specified in the briefs of counsel: (1) That the indictment was fatally defective in not alleging when and where the victim died: (2) That the court erred in denying defendants' motion

for separate trials: (3) And in entering a joint judgment against defendants and a joint sentence of death, and that the alleged judgment and sentence were not entered according to law, and the motion in arrest should have been granted: (4) That Judge Bryant should have granted the motions filed by each of the defendants to vacate and set aside the prior proceedings: (5) That the court erred in refusing to allow the wives of the defendants to testify, "as shown by bill of exceptions No. 2:" (6) Because there was no record at Paris showing that Judge Boarman was ever designated, appointed and authorized to hold the Circuit Court at Paris, except as shown in the bill of exceptions filed November 22: (7) That Judge Boarman had no legal authority to hold court at Paris: (8) That the only judgment ever rendered against defendants was entered of record on Sunday, November 3, and was void for that reason: (9) That no judgment in legal form has ever been entered adjudging defendants guilty of murder: (10) That the alleged judgment of November 15 was no judgment: (11) That Judge Bryant had no power to hold any part of the April term, 1890, at Paris, because Judge Boarman held the first part of that term without authority: (12) That the court erred in admitting certain testimony, as shown by bill of exceptions No. 1.

The original appointment of Judge Boarman to hold terms of the District and Circuit Courts for the Eastern District of Texas was made by the Circuit Judge, December 4, 1888, under section 591 of the Revised Statutes, on account of the disability of Judge Sabin, upon the certificate of the clerk at Galveston, and related to the November term, 1888, at Galveston, and the coming terms at Tyler, Jefferson, and Galveston, in the year 1889, and was duly filed in the clerk's office, and entered on the minutes of the District Court, at Galveston.

The statute of March 1, 1889, provided for two terms of the Circuit Court, at Paris, in that district, and Judge Boarman held the October term, 1889, at that city, apparently under the same appointment, no certificate of disability having been made by the clerk at Paris, and no new appointment having been filed or recorded there, as, indeed, was the fact as to the

appointment of December 4, 1888. Under section 596, Revised Statutes, the Circuit Judge, whenever, in his judgment, the public interest so required, could designate and appoint, in the manner and with the powers provided in section 591, the District Judge of any judicial district within his circuit, to hold the District or Circuit Court in place of, or in aid of, any other District Judge within the same circuit. This section contemplates that the appointment made under it should state what court the appointee was to hold, and that it was in place of the judge of the District Court, or in aid of him; and that the appointment should be filed and entered on the minutes, as provided in section 591.

Under section 602, when the office of judge of any District Court is vacant, all process, pleadings and proceedings pending before such court were continued, of course, until the next stated term after the appointment and qualification of his successor, except when that term might be held as provided in section 603. By the latter section, when the position of District Judge was vacant in any District Court in the State containing two or more districts, the judge of the other, or of either of the other districts, might hold the District Court or the Circuit Court in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurred.

It was the opinion of Mr. Attorney General Black that the power to designate a District Judge to hold court in case of disability under section 591, as it originally existed in the act of July 29, 1850, 9 Stat. 442, c. 30, did not extend to the case of a vacancy. 9 Opinions Attys. Gen. 131. That opinion was given on the 23d of January, 1858, and by act of Congress of August 6, 1861, 12 Stat. 318, c. 59, the provision was made now embodied in section 603, Rev. Stat.

The State of Texas contained three districts, and Judge Boarman was not the District Judge of either. A vacancy was created by the death of Judge Sabin, March 30, 1889, yet Judge Boarman held the April term, 1890, until the succession of Judge Bryant. We are of opinion that the irregularities alleged did not place Judge Boarman, in holding the October term, in any other position than that of a judge *de*

jure, and that as to the April term, he was judge *de facto* if not *de jure*, and his acts as such are not open to collateral attack. *Norton* v. *Shelby County*, 118 U. S. 425; *In re Manning*, 139 U. S. 504; *Clark* v. *Commonwealth*, 29 Penn. St. 129; *Fowler* v. *Beebe*, 9 Mass. 231; *Commonwealth* v. *Taber*, 123 Mass. 253; *State* v. *Carroll*, 38 Connecticut, 449; *Keith* v. *State*, 49 Arkansas, 439; *People* v. *Bangs*, 24 Illinois, 184.

This view disposes of the sixth, seventh, and eleventh errors assigned, and requires us to consider whether the alleged judgment rendered by Judge Boarman on the 15th of November so far constituted a final lawful judgment and sentence of death against the defendants, that the writ of error cannot be maintained, because not sued out within the time provided by law. We proceed, therefore, to examine that question. By section 6 of the act of Congress of February 6, 1889, 25 Stat. 656, c. 113, it is provided that in all cases of conviction of crime, the punishment for which provided by law is death, tried before any court of the United States, a writ of error may issue for the revision of the final judgment of such court, if sued out upon a petition filed with the clerk of the court in which the trial shall have been had, "during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." The writ of error in this case was sued out within sixty days after July 18, 1889, that time having been duly allowed by order entered of record, but it was not brought during the October term of the Circuit Court, nor within sixty days after the expiration of that term. The record does not show when that was, but it must have been prior to the third Monday of April, when the April term commenced.

At common law no judgment for corporal punishment could be pronounced against a man in his absence, and in all capital felonies it was essential that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced. *Rex* v. *Harris*, 1 Ld. Raym. 267; 2 Hale P. C. 401; Com. Dig. Indictment, N;

2 Hawk. c. 48, § 22; Wharton, Cr. Pl. & Pr. §§ 549, 906; *Messner* v. *People*, 45 N. Y. 1; *Dougherty* v. *Commonwealth*, 69 Penn. St. 286; *Croker* v. *State*, 47 Alabama, 53; *James* v. *State*, 45 Mississippi, 572; *State* v. *Jennings*, 24 Kansas, 642; 1 Bish. Cr. Pro. §§ 275, 1293; 1 Chit. Cr. Law, 699.

In *Hamilton* v. *The Commonwealth*, 16 Penn. St. 129, Chief Justice Gibson said: "We find no entry that the prisoner was demanded whether he had anything to say why sentence of death should not be pronounced on him, the absence of which was ruled in *Rex* v. *Geary*, 2 Salk. 630, and *The King* v. *Speke*, 3 Salk. 358, to be fatal. In fact, there is nothing on the docket to show even that the prisoner was present when he was sentenced, except the supplementary memorandum that 'he was present in court during every stage of the trial, from the time of his arraignment up to the time when the sentence was passed by the Honorable Ellis Lewis, president judge of the court, on him. Indeed, the whole trial, from its commencement to its termination, was according to law.' A record is constituted of proper and legitimate elements set down in their order; for it is certainly not law that all the gossip a clerk or prothonotary writes down in his docket, *ipso facto* becomes the very voice of undeniable truth. The judges of a court of error must determine for themselves, and consequently on facts, instead of sweeping assertions. The premises to found a sentence of death are set forth in 1 Ch. Crim. L. 720, and the form of the entire record is given in 4 Bla. Com. App. 1, in which there is a demand of the prisoner 'if he hath or knoweth anything to say wherefore the said justices ought not, on the premises and verdict, to proceed to judgment and execution against him,' together with his answer, that he 'nothing further saith, unless as he before had said.' . . . The forms of records are deeply seated in the foundations of the law; and as they conduce to safety and certainty, they surely ought not to be disregarded when the life of a human being is in question. Our practice of rotation has excluded experience from the county offices, and it would, perhaps, be profitable were the presiding judge to superintend the entries. It would at least prevent our judicial records from becoming entirely barbarous."

Opinion of the Court.

The reasons for the rule of the common law, that the defendant should be personally present before the court at the time of pronouncing the sentence, are compendiously given by Mr. Justice Scholfield, in *Fielden* v. *The People*, 128 Illinois, 595, to be that the defendant might be identified by the court as the real party adjudged guilty; that he might have a chance to plead a pardon, or move in arrest of judgment; that he might have an opportunity to say why judgment should not be given against him; and that the example of being brought up for the animadversion of the court and the open denunciation of punishment might tend to deter others from the commission of similar offences. The same learned court held, however, in *Gannon* v. *The People*, 127 Illinois, 507, that while it was the better practice to call up the defendant to say why he should not be sentenced, yet the omission to do so was no ground for reversal in any case. But the great weight of authority is the other way.

On Sunday, the third of November, the record shows the return of the verdict finding "the defendants, J. C. Ball & R. E. Boutwell, guilty as charged in this indictment, and we find M. Filmore Ball not guilty," which is followed by these words: "It is therefore considered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court. It is further ordered that the defendant, M. F. Ball, be discharged and go hence without day." If this could be regarded as the judgment of the court, it was void because entered on Sunday. *Mackalley's Case*, 5 Coke, 111; *Swann* v. *Broome*, 3 Burrow, 1595; *Baxter* v. *People*, 3 Gilm. (8 Illinois) 368; *Chapman* v. *State*, 5 Blackford, 111. But it is clear that it cannot be treated as a judgment, and is in effect nothing more than a remand for sentence.

On November 15 this order was filed: "By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robt. E.

Boutwell and John C. Ball be executed by being hung, until each and either are dead, according to the forms, delays and processes provided in the laws of the United States. This done and signed in open court Nov. 15, 1889. Aleck Boarman, Judge."

It will be perceived that neither in the verdict, nor the order of November 3, nor that of November 15, is it stated of what offence the defendants were found guilty, nor does it appear, nor in our opinion is it fairly deducible from the record, that the defendants were present when the latter order was entered, and it is not pretended that they were asked, or either of them, what they had to say why sentence of death should not be pronounced upon them. It is true that the record of November 15 has this entry: "This day the defendants in open court excepted to the sentence of the court this day pronounced upon them," but that admits fairly of the construction that the exception was entered by their attorneys, as does the motion in arrest, which though it states that the defendants came in their own proper person and by attorney, is signed only by the attorneys, the record being somewhat obscure as to the point of time during the day when this was done.

We do not think that the fact of the presence of the prisoners can by fair intendment be collected from the record, no mention being made to that effect in the order, it not appearing therefrom that the sentence was read or orally delivered to them, and the usual question not having been propounded. On the 18th of July, 1890, Judge Bryant entered separate orders, which recited that on the 15th day of November, 1889, the sentence of death had been pronounced upon each defendant for the crime of murder, in compliance with the law and the verdict of the jury rendered November 3, 1889, and it was "therefore ordered, adjudged and decreed" that each defendant should be hanged on the day specified therein, and that the clerk should issue a death warrant in accordance with the sentence, and deliver the same to the marshal to execute.

Although the matters referred to amount chiefly, if not wholly, to error merely, yet, in view of the character of the objections, we must hold that the judgment against these defendants did not become final until the entry of the orders

by Judge Bryant, and that as the writ of error was prosecuted within the sixty days given by him for the purpose, it ought not to be dismissed; and, retaining jurisdiction, we hold that the orders of November 15, 1889, and July 18, 1890, must be reversed for the errors indicated.

It may be that this leaves it open to us to remand the cause with an order to the Circuit Court to proceed and give judgment on the verdict, but we do not care to discuss this, as we are clear that the indictment is fatally defective, and that a capital conviction, even if otherwise regular, could not be sustained thereon.

The indictment charges an assault by the defendant upon one William T. Box with a loaded gun, and the infliction of mortal wounds by the discharge of its contents, "of which mortal wounds the said William T. Box did languish, and languishing died." This fails to aver either the time or place of the death. By the common law, both time and place were required to be alleged. It was necessary that it should appear that the death transpired within a year and a day after the stroke, and the place of death equally with that of the stroke had to be stated, to show jurisdiction in the court. The controlling element which distinguished the guilt of the assailant from a common assault was the death within a year and a day, and also within the same jurisdiction. Bac. Ab. Indictment, G. 4; *Commonwealth* v. *Macloon*, 101 Mass. 1; *Chapman* v. *The People*, 39 Michigan, 357, 360; *Riggs* v. *State*, 26 Mississippi, 51; *People* v. *Wallace*, 9 California, 31; 1 Bish. Cr. Pro. 3d ed. §§ 407, 408; 2 Id. § 534; Wharton, Homicide, 2d ed. §§ 845, 846.

In *United States* v. *Guiteau*, 1 Mackey 498, the Supreme Court of the District of Columbia was held to have jurisdiction to try, convict and sentence the murderer of President Garfield within the District of Columbia, although the death happened in New Jersey, the felonious blow having been struck in the District. The opinion of Mr. Justice Cox, upon the trial, and those of Mr. Justice James and Mr. Justice Hagner, speaking for the court in general term, learnedly discuss the question. An application having been made to Mr.

Justice Bradley of this court for a writ of *habeas corpus*, in giving his reasons for denying it, he said: "It is contended that the murder was committed only partly within the District of Columbia and partly within the State of New Jersey, and therefore cannot be said to have been committed within the District of Columbia. By the strict technicality of the common law this position would probably be correct, although Lord Chief Justice Hale, one of the greatest criminal lawyers and judges that ever lived, uses the following language: 'At common law,' says he, 'if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was that he might be indicted where the stroke was given, for the death was but a consequence, and might be found, though in another county, and if the party died in another county, the body was removed into the county where the stroke was given, for the coroner to take an inquest *super visum corporis*.' This case shows that in Lord Chief Justice Hale's opinion the principal crime was committed where the stroke was given, and that when the production of the dead body gave the jury ocular demonstration of the *corpus delicti*, the difficulty of jurisdiction was overcome. But to remove the doubt as to the power of jurors to try such a case, it was enacted by the statute 2 and 3 Edward VI, c. 24, that the murderer might be tried in the county where the death occurred; and to remedy the difficulty where the stroke, or the death, happened out of England, it was enacted by a subsequent statute, 2 George II, c. 21, that the trial might be in the county where the stroke was given if the party died out of the realm; or where the death occurred, if the stroke was given out of the realm; this, in effect, making the murder a crime in the county in which either the stroke was given or the death occurred. These statutes, as the Supreme Court holds, and as their reasoning satisfactorily shows, were in force in Maryland in 1801, when the Supreme Court was organized, and by the organic act of Congress became laws of the District of Columbia. If, therefore, the District had continued a part of the State of Maryland, with those laws in force, and if the murder in question had taken place exactly

as it did, it would have been considered a murder committed within the State of Maryland and within the county out of which the District was carved, and would have been indictable and triable in such county. When therefore Congress, in 1801, conferred upon the courts of the District jurisdiction to try all crimes and offences committed within the District, it gave jurisdiction to try the murder of which the prisoner has been found guilty, the present law being a mere codification of that enactment. For the same reason the crimes act of 1790, when it came to operate upon the District, became applicable to such a murder."

This subject received elaborate consideration in *Commonwealth* v. *Macloon*, *supra*, where all the common law authorities are cited, and the conclusion reached that the inquiry is properly determined by the existence of statutory provisions. See also *In re Palliser*, 136 U. S. 257, 265, and cases cited.

In *United States* v. *McGill*, 4 Dall. 426; S. C. 1 Wash. C. C. 463, Mr. Justice Washington and Judge Peters had no difficulty in holding that, to constitute the crime of murder on the high seas, the mortal stroke must be given and the death happen there, Congress not then having provided for such a case. And see *United States* v. *Armstrong*, 2 Curtis, 446; *United States* v. *Davis*, 2 Sumner, 482, 485.

By the Constitution, the accused in all criminal prosecutions has the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed, but, when not committed within any State, the trial shall be at such place or places as Congress may by law have directed. Art. III, sec. 2; Amend. Art. VI.

By section 5339 of the Revised Statutes, it is provided that "every person who commits murder . . . within any fort, arsenal, dock-yard, magazine or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death."

Sec. 731 provides: "When any offence against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished

in either district, in the same manner as if it had been actually and wholly committed therein." If this section is applicable to the crime of murder, it certainly could not apply if the stroke were given in one district and the death ensued in some other country than the United States.

The accused is entitled to be informed of the nature and cause of the accusation against him, and jurisdiction should not be exercised when there is doubt as to the authority to exercise it. All the essential ingredients of the offence charged must be stated in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may be enabled to prepare his defence and avail himself of his acquittal or conviction against any further prosecution for the same cause. Hence, even though these defendants might have been properly tried in the Eastern District of Texas, if the fatal stroke were inflicted there, though the death occurred elsewhere, yet, nevertheless, the averment of the place of death would still remain essential.

And while it may be conceded that as this indictment was found on the 17th of October, 1889, and the day of the assault is fixed as on the 26th of June of that year, and it is asserted that Box died, the failure to aver the time of death is not fatal, we hold that the omission to state the place is so. By section 1035 Rev. Stat. a party may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged. The verdict found the defendants guilty as charged, and the order of November 15 used no other language. Defendants were well charged with assault, but not with murder, and the verdict must be held to have related only to that which was well charged, upon which no such judgment as that before us can be sustained.

The judgments are reversed and the cause remanded, with a direction to quash the indictment, and for such further proceedings in relation to the defendants as to justice may appertain.

Mr. Justice Gray and Mr. Justice Brewer did not hear the argument and took no part in the decision of this case.

MANNING *v.* AMY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS, HOLDEN AT BOSTON.

No. 303. Argued April 14, 1891. — Decided May 11, 1891.

The defendant in an action in a state court after moving to dismiss the action, and after pleading in abatement answered, December 29, 1884, the last day of the term at which the writ was returnable, and moved to remove the case to the Federal court for the district "in case said motion should not be allowed and in case said plea should not be sustained." No steps being taken on the motion for removal, the case came on for trial in the state court at January term, 1886. The motion being then pressed, the court ruled that it was too late, and proceeded to trial, and gave judgment against the defendant. *Held*,

(1) That the conditional application for removal in December, 1884, was not a valid application for removal as contemplated by the statute;

(2) That the application made at the trial term in 1886 was made too late.

THE case is stated in the opinion.

Mr. Jerome F. Manning in person for plaintiff in error.

Mr. Theodore F. H. Meyer for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an action on contract, brought in the Superior Court of the Commonwealth of Massachusetts for the county of Suffolk, by Henry Amy, a citizen of New York, against Jerome F. Manning, a citizen of Massachusetts, principal defendant, and certain other named defendants who were supposed to have property belonging to Manning in their possession, to recover the amounts of four certain promissory notes, aggregating $23,475, exclusive of interest.

The action was commenced September 5, 1884, by a writ returnable on the first Tuesday in October, 1884. It appearing on the return day that the writ had been served on only a few of the garnishees, and not on the principal defendant, the court made an order directing that personal service be

made upon him at least fourteen days prior to the fourth Tuesday in October of that year. Personal service was effected on the defendant October 9, 1884, at Boston, by a deputy sheriff, and return thereof was made on the following day. On the 14th of that month, Charles Cowley entered his appearance specially for the defendant Manning, and on the 22d of the same month filed a motion to dismiss the action. On the 6th of November, following, Wilbur H. Powers entered a special appearance for Manning, and filed a motion to dismiss and a plea in abatement, both of which were based upon the ground that the writ had not been personally served on him. On the 22d of December, 1884, the aforesaid motion and plea not having been passed upon, the court ordered the defendant Manning to file an answer on or before December 26 of that year. This he did.

On the 29th of December, 1884, the last day of the October term of the court, Manning filed what purported to be a petition and bond for the removal of the cause to the United States Circuit Court for the District of Massachusetts, and he also, simultaneously and in connection therewith, filed the following motion:

"*Defendant's Motion Touching the Removal of this Action.*

"And now comes the defendant specially and suggests to the court that he has heretofore filed a motion to dismiss this action for causes therein set forth and also a plea in abatement for causes therein set forth, but neither said motion nor said plea has yet been heard or determined by this court, and the court is about to adjourn without day.

"He also suggests that he has herewith filed a petition for the removal of this cause to the Circuit Court of the United States for the District of Massachusetts, together with a suitable bond therefor, but that he has filed the same without prejudice to said motion or said plea.

"Wherefore, in case said motion should not be allowed and in case said plea should not be sustained, he prays the court to order the removal of this action, as prayed for in said petition. "Jerome F. Manning,

"By his att'y, Wilbur H. Powers."

Thereupon the case was continued *nisi* to the January term, 1885, "the defendant reserving his right to remove to the Circuit Court of the United States." At a hearing on the 3d of March, 1885, the aforesaid motion to dismiss and the plea in abatement were overruled, and the defendant appealed on March 10, 1885. What became of this appeal does not appear, but it does not seem to have been perfected, as no proceedings on it appear in the record.

Nearly a year afterwards, to wit, on the 2d of February, 1886, the cause being still on the trial docket of the Superior Court, at its January term, 1886, Wilbur H. Powers withdrew his appearance as attorney for defendant Manning; and on the 8th of the same month Charles Cowley appeared generally for him. When the case was reached for trial at the January term, 1886, of the court, the defendant's counsel called the court's attention to the steps taken by him to secure the removal of the cause to the Circuit Court of the United States, and asked the court to remove the same, at the same time objecting to a trial in the state court. The court ruled, however, that the request came too late, that the right to remove was waived, and overruled the objection and ordered the trial to proceed. The case went to trial on the 11th of February, before the court and a jury, resulting in a verdict, on the 16th of the same month, in favor of the plaintiff, for $27,958.38. On the 19th of February the defendant made a motion for a new trial, which was heard on the 8th of March following, and allowed, unless the plaintiff should remit from the amount of the verdict the sum of $699.24. The plaintiff filed a remittitur of that amount on the 9th of March, whereupon the motion for a new trial was overruled.

The case then went to the Supreme Judicial Court for the Commonwealth of Massachusetts, on exceptions taken by the defendant. Those exceptions were overruled by that court, (144 Mass. 153,) the rescript being received by the Superior Court at its January term, 1887.

A motion for a new trial, on the ground of newly discovered evidence, was overruled by the Superior Court on the 14th of May, 1887; and on the 23d of that month that court

entered judgment in favor of the plaintiff, and against the defendant, for the sum of $29,335.37 damages, and for costs of suit, taxed at $95.22. Thereupon the present writ of error was sued out.

The foregoing is a statement of all the facts essential to the present inquiry. From this statement it is readily perceived that the only Federal question in the case is as to the effect of the so-called application for the removal of the cause to the Circuit Court of the United States for the District of Massachusetts.

It is familiar law that, in a proper case, the filing of a petition for removal, accompanied by a proper and legal bond, operates of itself to remove a case from the state court to the United States Court. It is sought to bring this case within that rule; and it is, therefore, insisted that the proceedings in the Superior Court on the 29th of December, 1884, operated, in law, to oust that court of jurisdiction and to remove the cause to the Federal court. We think, however, that such was not the effect of those proceedings.

No question is made as to the diverse citizenship of the parties, nor can it admit of a doubt that the application for removal, if it can be properly called such, was, when first filed, made at the proper time. If, therefore, the petition and bond had been in due form, and had been unaccompanied by the motion filed simultaneously with them, and as a part of them, it is equally clear that the removal to the Federal court would have been properly effected.

Counsel for defendant in error insist that both the petition and the bond are defective in form and effect, in that the petition asks for the removal of the case to the "Circuit Court of the United States for the First District of Massachusetts," (whereas no such district existed as the first district of Massachusetts,) and that the bond was not justified nor the sureties approved when the case was reached for trial. It should be observed that no objection was made to the removal in the state court on either of these grounds. We do not deem it necessary to pass upon these defects of the petition and the bond, for it is clear to our minds that, with the accompanying

motion, they do not constitute a valid application for removal, as contemplated by the statute. Indeed, the proceeding was not even in intent an application for removal to take effect on the date of its filing. The petition, read and construed, as it must be, with the accompanying motion, asks not for a removal, but for the judgment of the court on a motion and a plea in abatement which, if rendered as asked for, would have made a removal unnecessary and impossible. In any view, it was a mere conditional application for removal in case the court, after consideration of the motion to dismiss and the plea in abatement, should overrule both.

The record recites that after the motion touching the removal of the case was filed with the petition and bond for removal, "thence the same was continued *nisi* to the January term, 1885, the defendant *reserving* his *right* to remove to the Circuit Court of the United States as aforesaid," the continuance being manifestly ordered for the purpose of an opportunity to hear and determine the said motion and plea. The avowed purpose of the defendant in the proceedings was to have the state court retain jurisdiction for the purpose of getting a judgment in his favor, and not to have the case removed unless the judgment went against him. It is clear that Congress did not, by the act of March 3, 1875, intend to allow the defendant "to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal." *Removal Cases*, 100 U. S. 457, 473. Such a proceeding was not authorized by that act. We hold, therefore, that the proceedings in the state court on the 29th of December, 1884, did not have the effect to remove the cause to the Federal court.

Did the subsequent action of the defendant's attorney in calling the attention of the court to those proceedings when the case was called at a subsequent term of the court, in February, 1886, have that effect? We think not. An inspection of the record shows that, as stated above, the answer of the defendant was filed on the 26th of December, 1884, at the October term of the court, and that on the same day he claimed a trial by jury. The case was then ready for trial, so far as

the issues in it were concerned, and could have been tried at that term of the court. That term closed on the 29th day of that month; and on the 3d day of March, 1885, which was the next term, said motion and plea in abatement were overruled, and the defendant excepted. The case was then put on the trial list for that term and the subsequent terms, up to the time it was reached in its order at the January sitting, 1886; and the defendant took no further action for the removal until it was reached for trial, when he called attention to the steps he had taken for removal, and objected to the trial of the action in the State court. It was then too late, under the statute of March 3, 1875, to make an application for removal to the Federal court. *Babbitt* v. *Clark*, 103 U. S. 606, 612; *Pullman Palace Car Co.* v. *Speck*, 113 U. S. 84, 87; *Gregory* v. *Hartley*, 113 U. S. 742, 746.

This disposes of the only Federal question in the case, and the judgment of the court below is

Affirmed.

Mr. Justice Bradley was not present at the argument, and took no part in the decision of this case.

UNITED STATES *v.* EWING.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 1117. Argued March 12, 13, 1891. — Decided May 11, 1891.

There being a dispute between the appellee, a commissioner of a Circuit Court of the United States, and the appellant, respecting the official fees of the former for services in criminal cases. *Held*,

(1) That the law of the State in which the services are rendered must be looked at in order to determine what are necessary;

(2) That in Tennessee a temporary mittimus may become necessary, and a charge for it should be allowed unless there has been an abuse of discretion in regard to it;

(3) That only one fee can be charged for taking the acknowledgment

of defendants' recognizances, but that one fee can be charged, as an acknowledgment in such case is necessary;

(4) That charges for drawing complaints and for taking and certifying depositions to file are proper;

(5) That a charge for "entering returns to process" is unobjectionable;

(6) That a charge for "writing out testimony" is allowable;

(7) That the items for fees for dockets, etc., which were allowed on the authority of *United States* v. *Wallace*, 116 U. S. 398, decided at October term, 1885, should have been disallowed, as the right to make such charges was taken away by the proviso in the deficiency appropriation act of August 4, 1886, 24 Stat. 274, which, although a proviso in a annual appropriation bill, operated to amend Rev. Stat. § 847;

(8) That a commissioner, acting judicially, has the discretion to suspend a hearing, and that per diem fees for continuances should be allowed.

This action was brought by the appellee, Ewing, in the District Court of the United States for the Eastern District of Tennessee, for the recovery of certain amounts claimed to be due him for services as commissioner of the Circuit Court for that district from January 3, 1887, to April 1, 1889. Performance of such services was admitted as charged, the district attorney relying upon the illegality of the charges, and judgment was rendered for the plaintiff for $841.05; from which this appeal was taken by the United States. The items upon the allowance of which error was assigned are stated in the opinion of the court.

Mr. John C. Chaney for appellant. *Mr. Assistant Attorney General Cotton* was with him on the brief.

Mr. George A. King for appellee.

Mr. Justice Brown delivered the opinion of the court.

The duties of commissioners of the Circuit Court are thus defined in section 1014 of the Revised Statutes: "For any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any . . . justice of the peace or other magistrate, of any State where

he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case." As this section requires proceedings to be taken "agreeably to the usual mode of process against offenders in such State," it is proper to look at the law of the State in which the services in such case are rendered, to determine what is necessary and proper to be done, and inferentially for what services the commissioner is entitled to payment. *United States* v. *Rundlett*, 2 Curtis, 41; *United States* v. *Horton*, 2 Dill. 94. We have held in *United States* v. *Jones*, 134 U. S. 483, that the approval of the commissioner's account by the Circuit Court of the United States is *prima facie* evidence of its correctness, and in the absence of clear and unequivocal proof of mistake on the part of the court, should be conclusive, although the approval of such court is not a prerequisite to the institution of a suit in a Court of Claims, or, since the act of March 3, 1887, 24 Stat. 505, c. 359, in a Circuit or District Court, for the recovery of the amount claimed. *United States* v. *Knox*, 128 U. S. 230.

We proceed to the consideration of the several items involved in this case:

1. Items 1 and 2 were for temporary mittimuses, disallowed by the comptroller as unnecessary, upon the ground that "the warrant of arrest is sufficient to hold defendant or commit until examination." Rev. Stat. section 847, provides that the commissioner shall have "for issuing any warrant . . . the same compensation as is allowed to clerks for like services;" and section 828 provides that clerks shall have $1 for this service. So far as these items are for mittimuses issued after the examination is concluded, to await the action of the grand jury, no question is made as to the propriety of their allowance; but it is claimed that, pending the examination, it is the duty of the marshal to keep the prisoner in his custody

under his warrant of arrest, and that the mittimus is therefore unnecessary. It appears, however, that under the laws of Tennessee, upon the subject of criminal procedure, § 5877, the magistrate may, "for good cause adjourn the examination from time to time, without the consent of the defendant, not exceeding three days at any one time, and, in such case, if the offence is not bailable, or if the defendant does not give the bail required, *he shall be committed to jail in the meantime;* or if the offence is bailable, the defendant may give bail in such sum as the magistrate directs for his appearance for such further examination." Code Tenn. 1884. As there are no Federal jails or other places of temporary confinement under control of the marshal, such commitments must be made to state jail, and it follows that a mittimus is proper if not necessary to authorize the keeper of such jail to detain the prisoner, as against a writ of *habeas corpus* from a state court. Said Mr. Justice Story, speaking for this court, in *Randolph* v. *Donaldson*, 9 Cranch, 76, 86, "The keeper of a state jail is neither in fact nor in law the deputy of the marshal. He is not appointed by, nor removable at the will of, the marshal. When a prisoner is regularly committed to a state jail by the marshal, he is no longer in the custody of the marshal, nor controllable by him. The marshal has no authority to command or direct the keeper in respect to the nature of the imprisonment. . . . For certain purposes, and to certain intents, the state jail lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be keeper of the United States. But this would no more make the marshal liable for his acts than for the acts of any other officer of the United States whose appointment is altogether independent." We do not wish to be understood as holding that a mittimus is necessary in all such cases to authorize the detention of the accused, especially if the keeper of the jail be, as is frequently the case, a deputy marshal of the United States; but that it is within the discretion of the commissioner to issue such writ, if in his opinion the safe custody of the prisoner requires this precaution; and if there be no abuse of such discretion we do not feel at liberty to review

his action. *Stafford* v. *United States*, 25 C. Cl. 280. Nor do we consider a mittimus necessary every time a prisoner is taken out and returned to jail, pending his examination, since an order of the court or the district attorney, under the statute, would be a sufficient protection to the officer.

It is true that, by section 1030 of the Revised Statutes, "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal." This section relates, however, exclusively to the action of the clerk in entering the order of the court or district attorney, and to the action of the marshal in transferring the prisoner to and from his place of detention, and has no reference whatever to his custody by a state officer pending or following his examination.

No error is assigned by the attorney general upon the allowance of the third item.

2. Item 4 is "for more than one acknowledgment for defendants' recognizances." The exception to this item is well taken. Revised Statutes, § 828, allows a clerk, "for taking an acknowledgment, twenty-five cents," but the taking of such acknowledgment in a criminal case by the accused and his sureties is a single act, for which only one fee can be charged. *Churchill* v. *United States*, 25 C. Cl. 1.

3. The exception to the fifth item, which is "for all acknowledgments to defendants' recognizances," is overruled. An acknowledgment is necessary to a judicial recognizance.

4. The allowance for drawing complaints, as "for taking and certifying depositions to file," is a proper charge. While the duty of a committing magistrate is to take complaints and issue warrants upon them, which may perhaps imply that they are written by the person making them, the general, if not the universal, practice is for the magistrate himself to put them in writing, and the Tennessee Code evidently contemplates this method of procedure in enacting as follows: Sec. 5845: "Upon information made to any magistrate of the commission of a public offence, he shall examine on oath the informant, reduce

the examination to writing and cause the examination to be signed by the person making it." Sec. 5846: "The written examination shall set forth the facts stated by the informant tending to establish the commission of the offence and the guilt of the defendant." It is eminently proper that the magistrate, who would naturally be presumed to understand the requisites of a complaint better than the informant, who is usually unlearned in law, should himself reduce it to writing. Exception to this item is, therefore, overruled.

5. Item 7, "for entering returns to process," is unobjectionable; indeed, the Treasury Department seems to have receded from its action in disallowing this item, and paid a portion of the charge.

6. Item 8, "for writing out testimony," is clearly allowable. Not only is this the general practice in every properly conducted commissioner's office, but the rule of the Circuit Court for the Eastern District of Tennessee requires that each commissioner shall "keep a docket, showing the issuance of warrant, upon whose complaint the same was issued, the nature of the offence charged and the officer to whom delivered for execution. And when a warrant is returned, he will in all cases write out substantially the evidence of each witness as given before him, and return the same to the clerk of this court, for the information of the district attorney." The local practice of Tennessee also requires the testimony before the committing magistrate to be reduced to writing. Sec. 5887: "The evidence of the witnesses shall be reduced to writing by the magistrate, or by his direction, and signed by the witnesses respectively."

7. The 9th, 21st and 22d items for fees for dockets, indexes, etc., appear to have been allowed upon the authority of *United States* v. *Wallace*, 116 U. S. 398, in which case it was held by this court, that under the provisions of Revised Statutes, §§ 847 and 828, a commissioner, who, by direction of the court, kept a docket with entries of each warrant issued, and subsequent proceedings thereon, made on the day of occurrence, was entitled to the same fees allowed to the clerk of a court for similar services. This case was decided in January, 1886. In the deficiency appropriation bill passed in August of the same

year, 24 Stat. 256, 274, c. 903, it was enacted that "the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in the appropriations for the fiscal year ending June 30th, 1886, and for other objects hereinafter stated; namely, . . . Judicial: . . . For fees of commissioners, and justices of the peace acting as commissioners, fifty thousand dollars: *Provided*, That for issuing any warrant or writ, and for any other necessary service commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees." It is insisted that, as this proviso is contained in an appropriation bill, it should be limited in its application to the appropriation for that year, and should not be considered as a general inhibition of all allowances of docket fees. The cases of *United States* v. *Dickson*, 15 Pet. 141, and *Minis* v. *United States*, 15 Pet. 423, are cited in support of this view. The limitation and effect of provisos in enacting clauses of a statute are considered in these cases, and the rule declared, in the first of them, that "where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms."

In the case of *Minis* v. *United States*, it is said by Mr. Justice Story, p. 445: "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought into its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enact-

ment." In that case an act making appropriations, 4 Stat. 754, c. 26, contained a proviso that "no officer of the army shall receive any per cent or additional pay, extra allowance or compensation, in any form whatsoever, on account of disbursing any public money, appropriated by law *during the present session*, for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description or for any other service or duty whatsoever, unless authorized by law." This proviso was held to be limited to the appropriation for that year, and not to be permanent in its operation.

In the case under consideration, if the proviso had been simply that commissioners should not be entitled to any docket fees, we should have had little doubt that it would be held as applying only to the $50,000 appropriated in the bill; but as the proviso contains a substantial reënactment of the clause of the Revised Statutes, § 847, fixing the fees for similar services, with the prohibition against docket fees tacked thereto as an amendment, we find it impossible to give effect to the whole proviso without construing it as expressing the intention of Congress to amend that clause of § 847. The language of that clause is: "For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services." The language of the proviso is: "For issuing any warrant or writ and for any other necessary service commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees." The repetition of this language was obviously useless and nugatory, unless upon the theory that prohibition of docket fees was intended as an amendment to it, since, by § 847, commissioners were already to be paid the same compensation as clerks for like services. Indeed, it seems highly improbable that Congress should put the fees of commissioners upon the same basis as those of clerks, with the exception of docket fees, and make it a mere temporary expedient applicable only to the appropriation for a single year, when the same reasons would continue to exist for making it of permanent application. A majority of the courts in which

this question has arisen have adopted this view. *Faris* v. *United States*, 23 C. Cl. 374; *Strong* v. *United States*, 34 Fed. Rep. 17; *McKinistry* v. *United States*, 34 Fed. Rep. 211; *Thornley* v. *United States*, 37 Fed. Rep. 765; *Calvert* v. *United States*, 37 Fed. Rep. 762; *Crawford* v. *United States*, 40 Fed. Rep. 446; *Goodrich* v. *United States*, 42 Fed. Rep. 392.

8. Items 10, 11, 12 and 13 are for per diem fees in various cases where continuances were granted at the request of the defendant. While it is doubtless the duty of the commissioner to make as speedy a disposition of cases as is possible, consistent with a due regard for the interests of the government and the protection of the accused, we held in *United States* v. *Jones*, 134 U. S. 483, that in hearing and deciding upon criminal charges he acted in a judicial capacity, and we have no doubt he is invested with a discretionary power to suspend the hearing of a case where, in his judgment, a proper regard for the interests of justice requires it. This item was properly allowed.

These are all the items to the allowance of which exception was taken by the government. It is true that a number of items were rejected by the court below, which, upon the authority of *United States* v. *Jones*, 134 U. S. 483, appear to have been properly allowable, but as no appeal was taken by the plaintiff from the disallowance of such items we do not feel at liberty to consider them. *United States* v. *Hickey*, 17 Wall. 9.

The case will be remanded to the District Court with directions to vacate the judgment heretofore rendered, and enter a new judgment in conformity to this opinion.

UNITED STATES *v.* McDERMOTT.

McDERMOTT *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 1152, 1603. Argued March 12, 13, 1891. — Decided May 11, 1891.

There being a dispute between the United States and a Commissioner of a Circuit Court of the United States, acting as Chief Supervisor of Elections, respecting the official fees of the latter; *Held*,

(1) That he was entitled to charge as commissioner for drawing the oaths of the supervisors, for administering them and for his jurat to each oath;

(2) Also for drawing affidavits of services by each supervisor for which compensation was claimed, as such affidavit had been required by the government;

(3) That he should be allowed for drawing complaints in criminal proceedings;

(4) That the charges for docket fees should be disallowed;

(5) That he should be allowed for preparing and printing the instructions to supervisors as a whole, but not a charge per folio for each copy furnished to a supervisor;

(6) That the same rule should be applied to special instructions to supervisors;

(7) That the charge for notifying supervisors of their appointments should be disallowed;

(8) That the department of justice having demanded copies of the oaths of office of the supervisors, the charge for them should be allowed;

(9) That the charges for certificates to the deputy marshals' and supervisors' accounts should be allowed for the same reason;

(10) That the statute makes no provision for the allowance of mileage and attendance upon court in his capacity of commissioner;

(11) That his charge for administering oaths to voters in his capacity of commissioner should be allowed;

(12) That his per diem charge of $5 per day should be disallowed.

THIS action was brought by McDermott for the recovery of certain sums claimed to be due him for services as Commissioner of the Circuit Court for the District of Kentucky, and also for his fees as Chief Supervisor of Elections during the

months of October and November, 1888. The petition set out in full the services for which the several charges were made, to which the district attorney interposed a demurrer, raising only questions of law as to the legality of the several charges. Upon the hearing before the Circuit Court judgment was rendered for $1500.05, 40 Fed. Rep. 217, from which both parties appealed to this court.

Mr. John C. Chaney for the United States. *Mr. Assistant Attorney General Cotton* was with him on the brief.

Mr. Orrin B. Hallam for McDermott.

Mr. Justice Brown delivered the opinion of the court.

No question was made as to petitioner's appointment as Commissioner and Chief Supervisor, nor as to his account having been duly approved by the court, as required by the act of Congress of February 22, 1875, 18 Stat. 333, c. 95, and forwarded to the department at Washington. That the services had actually been performed was also admitted by the district attorney. Errors are assigned, however, by the Attorney General, to the allowance of the following items of commissioner's fees:

1. For drawing oaths of 369 supervisors, at 15 cents per folio; for administering each oath, 10 cents; and for his jurat to each oath, 15 cents.

By Revised Statutes, § 2026, it is made the duty of the Chief Supervisor to "prepare and furnish all necessary books, forms, blanks and instructions for the use and direction of the supervisors of election in the several cities and towns in their respective districts; . . . and he shall receive, preserve and file all oaths of office of supervisors of election, and of all special deputy marshals appointed under the provisions of this title."

From this it appears to have been the intention of Congress that the supervisors should take an oath, which should be reduced to writing and filed with the Chief Supervisor, and

in consideration of the number of such supervisors, their short tenure of office, and presumed inexperience in the drawing of legal documents, and of the desirableness of securing uniformity in the oaths so administered, it is fairly inferable that it was the intention of Congress that the Chief Supervisor should himself prepare these oaths, and file them in his office; but as no authority is given him by the statute to administer the oath, and as no other person is specially designated for that purpose, the oath may properly be taken before any one authorized by the laws of the United States to administer oaths. As petitioner is both Chief Supervisor and Commissioner, he may be allowed at the rate of 15 cents per folio for drawing the oath and 10 cents for administering it, as charged in his account. By requiring the Chief Supervisor to be appointed from the United States commissioners, and also providing (§ 2031) that there shall be allowed and paid to him, for his services as such officer, compensation "apart from, and in excess of, all fees allowed by law for the performance of any duty as Circuit Court commissioner," it was manifestly intended by Congress that he should be allowed to charge for such services as he rendered in his capacity as United States commissioner, but was not authorized to perform in his capacity as Chief Supervisor.

(*a*) With regard to the jurat, we think it a proper charge under that clause of that section 828 which allows 15 cents per folio "for entering any return, . . . or making any record, *certificate*, return or report." A jurat is in reality a certificate of the officer who administered the oath that the affiant had subscribed and sworn to the same before him.

2. Drawing affidavits of supervisors as to the actual performance of the services for which compensation was claimed by them, administering the oath and drawing the jurat to such affidavits.

Upon what evidence the department shall act in determining the compensation to which each supervisor is entitled must depend somewhat upon the discretion of the auditing officers or head of the department. It would certainly be competent for the department to pay upon such certified rolls

as are used in the case of jurors and witnesses, or it may require the accounts to be verified by the affidavits of the claimants. In respect to these accounts, the Attorney General wrote to the marshal under date of November 13, 1888, as follows: "In answer to your letter of the 6th inst., you are informed that commissioners' affidavits, and badges of special deputy marshals and of supervisors of election should be affixed to the pay rolls as vouchers when forwarded to the Treasury for settlement." By the commissioner's affidavit is probably understood an affidavit sworn to before a commissioner. If the government requires these affidavits for its own protection, it is no more than right and just that it should pay for them. We do not wish to be understood, however, as holding that in every case the expense of verifying the accounts of persons having claims against the government is properly chargeable against it, but for the reasons stated in support of the allowance of item 1, we think it should be allowed in this case. A similar practice obtains in the payment of jurors and witnesses.

3. The charges for drawing complaints in criminal proceedings are allowed for the reasons stated in *United States* v. *Ewing*, *ante*, 142. The local practice of Kentucky, as well as the almost universal practice of commissioners to draw these complaints themselves, is ample justification for this charge. It appears to have been the practice of the Department of Justice for the past twenty years to allow these as proper charges for drawing complaints, and if there were any doubt as to the propriety of their allowance, such doubt, in view of this long continued practice, should be resolved against the government.

4. The charges for docket fees must be disallowed upon the authority of *United States* v. *Ewing*, *ante*, 142, wherein the question is fully considered.

Exceptions were also taken to the allowance of the following fees charged for services as Chief Supervisor:

5. Preparing and furnishing instructions to supervisors, $911.25. With regard to this, petitioner states, that as required by § 2026, he "prepared and furnished necessary instruc-

tions for the use and direction of the supervisors" in the city of Louisville, with regard to registering voters, and explained to them their rights, powers and duties under the law with reference to such registration. "Said instructions were prepared after a careful examination of the statutes of the United States and of the State of Kentucky, and the decisions of their courts on the subject of elections, and said instructions were given to said supervisors orally and on paper. Said printed instructions contained ten folios each, and they were delivered to 215 supervisors, and for drafting said paper the statute allows 15 cents per folio; and the proper charge for said instructions is $322.50." The petitioner also prepared and delivered to 219 supervisors for the same city instructions relative to their rights, powers and duties at said election, and relative to all legal questions that might arise, each one of which contained 13 folios, for which he claims the sum of $427.05. He also makes a further claim to $161.70 for instructions to 98 supervisors who served in some of the smaller towns.

By § 2026 it is made the duty of the Chief Supervisor to "prepare and furnish all necessary books, forms, blanks and instructions for the use and direction of the supervisors of election in the several cities and towns in their respective districts;" but § 2031, prescribing the fees of the Chief Supervisor, makes no mention of compensation for services of this description, although an allowance of 15 cents per folio is made for a copy "of any paper on file" in his office. It is by virtue of this clause that this large amount is claimed. These instructions are prepared by the Chief Supervisor, printed and a copy transmitted to each supervisor. Of the propriety of furnishing these instructions we have no doubt, and that the expense of printing the same is a proper charge against the government would seem to follow from the language of § 2026, which makes it his duty to prepare and furnish such instructions. For preparing these instructions we think he is entitled to charge at the rate of 15 cents per folio, but we cannot think it was the intention of Congress to authorize a similar charge for each copy furnished to supervisors. These

instructions are in no sense original documents, nor do we think they can fairly be considered as copies of papers on file, within the meaning of § 2031. It may be difficult to classify them under any particular provision of the statute; but the very magnitude of the charge as compared with the service rendered, or the expense incurred in rendering it, is in itself a cogent argument that it was not within the contemplation of Congress. This was the ruling of the Court of Claims in the case of *Muirhead*, 13 C. Cl. 251 and 15 C. Cl. 116, and we think it is correct. The exception to this charge is accordingly sustained.

6. The same rule should be applied to the special instructions issued to 23 supervisors at one time and 22 at another. So far as they are original, he is entitled to charge at the rate of 15 cents per folio; so far as they are copies, he is entitled to the expense of printing.

7. Exception was also taken by the petitioner to the disallowance of a claim for $79.35 for notices sent by him to the several supervisors of their appointment. It is provided by § 2026 "that the Chief Supervisor shall receive the applications of all parties for appointment to such positions," and shall present such applications to the judge, and "furnish information to him in respect to the appointment by the court of such supervisors," and that he shall also "receive, preserve and file all (their) oaths of office," but there is no provision for notifying them of their appointment.

We agree with the Circuit Judge that, while it is evidently proper that a notice of their appointment should come from the Chief Supervisor, and that provision should be made for payment for this service, there is no authority in the statute for allowing this charge, and that it is beyond the power of the courts to supply this omission.

8. For furnishing copies of the oaths of office of supervisors to the Department of Justice. The propriety of this charge can be better understood by a reference to the correspondence between the Chief Supervisor and the Attorney General. The former writes under date of November 19, 1888: "In your instructions to the United States marshal relative to the pay-

ment of supervisors [you say they] must present their 'commissions, oath, and badge of office, with an affidavit that they are the persons to whom the commission issued; that they performed the day's service as charged,' etc. 'The same facts should also be known to you through other means.' The supervisor's oath of office, I am, by the statute, required to file with my papers and preserve; but if you wish, and so order, I will give each supervisor a certified copy of the oath of office, and will charge the government for the copy." In reply, the Attorney General writes as follows: "In answer to your letter of 18th instant, you are requested to give each supervisor a certified copy of his oath of office, that the record of his right to payment may be made complete." Under these circumstances he is clearly entitled to a fee of 15 cents per folio as for "a copy of a paper on file" in his office. The department, having demanded it, is not in a position to claim that it was unauthorized.

9. The 9th item, for certificates to the deputy marshals' and supervisors' accounts, falls within the same category. In his letter to the Attorney General of November 19, 1888, from which the above extract was made, the petitioner also stated as follows: "I shall also attach to each affidavit made to prove the number of days' service a certificate of my own, showing for how many days each supervisor is entitled to pay." In a letter of November 30 to the district attorney he says: "You said some weeks ago that it was your opinion that I should attach to each of such supervisors' affidavits my official certificate, under seal, stating that the claim was just. Since then the Attorney General has written me to make an official copy of each supervisor's oath of office filed with me, and to give official copy to United States marshal. (1) Should I now give him also an official copy of each deputy marshal's oath of office filed? and (2) should I attach my certificate, under seal, of the justness of each claim made by said deputy marshals to the affidavit made by them when they presented their claims?" In answer to this the district attorney writes him: "I would say that I think you are required to furnish an official copy of the oath of office of each of the deputy

marshals and supervisors, attested by your seal of office, and also that your certificate upon their affidavits of their services should also be attested by your seal of office." If this method of verifying and approving the accounts of these officers was needlessly exact and complicated, it does not seem to have been the fault of the petitioner, as he was careful to obtain instructions beforehand, and the government is in no position to repudiate the act of the department in demanding these certificates. This amount should therefore be allowed.

10. The petitioner excepts to the refusal of the court to allow him mileage, at the rate of 10 cents per mile, for a trip to Covington and Newport under the orders of the court. By section 2012, "the court, when so opened by the judge, shall proceed to appoint and commission, from day to day and from time to time, . . . for each election district or voting precinct . . . two citizens, residents of the city or town, etc.," and by section 2013, "the Circuit Court, when opened by the judge, as required in the two preceding sections, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this title." By § 2026 it is made the duty of the Chief Supervisor to "receive the applications of all parties for appointment to such positions;" and upon the opening of the Circuit Court "he shall present such applications to the judge thereof, and furnish information to him in respect to the appointment by the court of such supervisors of election." It is perhaps fair to infer from the language of the last section that it was contemplated that the supervisors should attend the court in person, but there seems to have been no provision made for such compensation, or for mileage in going and returning. It is true that by section 847 a commissioner is allowed the same compensation allowed to clerks for like services, and in section 828 the clerk is allowed for mileage and attendance upon court. But the difficulty is that the petitioner did not make the journey in his capacity as commissioner, but in that of supervisor, and there is no provision for allowance of mileage to the latter. We express no

opinion upon the point whether he is entitled to his expenses, as no claim is made for them, *eo nomine*.

11. Fees for swearing twenty-three voters as to their qualifications and transmitting their affidavits to the supervisors. By § 2026 it is made the duty of the Chief Supervisor to "cause the names of those upon any such list [of electors] whose right to register and vote is honestly doubted, to be verified by proper inquiry and examination at the respective places by them assigned as their residences;" and while he has no authority as Chief Supervisor to administer an oath to such voters, it certainly would be a proper method of inquiry and examination. He did have such authority as commissioner, and for administering such oath he is entitled by law to his fee of 10 cents and for his jurat 15 cents, which is the amount charged in this case. There was no impropriety in his using as Chief Supervisor the information he had obtained as commissioner, and, indeed, the Chief Supervisor would probably have been given authority to administer oaths in that capacity had the act not required him to be appointed from among the Circuit Court commissioners.

12. The last item to which exception is taken is to the disallowance of per diems for 25 days' attendance upon court at $5 per day. As we have already stated, it is perhaps a fair inference from § 2026 that the personal presence of the Chief Supervisor at the sessions of the court was contemplated by Congress; but there is no provision in the law for a per diem fee. Indeed, the implication from § 2031 is opposed to it. This section provides that "there shall be allowed and paid to the Chief Supervisor, for his services as such officer, the following compensation apart from, and in excess of, all fees allowed by law for the performance of any duty as Circuit Court commissioner;" among which, however, there is no mention of any fee for attendance upon court. "And there shall be allowed and paid to each supervisor of election, and each special deputy marshal, who is appointed and performs his duty under the preceding provisions, compensation at the rate of $5 for each day he is actually on duty, not exceeding ten days." The intention of Congress evidently was that the

Chief Supervisor, whose duties are entirely distinct from those of an ordinary supervisor, should be paid by fees, and that the ordinary supervisor should receive as his sole compensation $5 per day while actually on duty, referring, evidently, to their duty at the registration and polls, and not to any supposed obligation to attend upon the court. As a commissioner, he is only entitled to a per diem of $5 when hearing or deciding a criminal case, and nothing for attendance upon court.

It results that the action of the Circuit Court must be sustained, except in regard to the two items for docket fees and instructions to supervisors, and that its judgment should be reduced by the amount disallowed of those two items.

The case will therefore be

Remanded to the Circuit Court, with directions to vacate the judgment heretofore rendered, and to enter a new judgment in conformity to this opinion.

UNITED STATES *v.* POINIER.

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

No. 1151. Argued March 12, 13, 1891. — Decided May 11, 1891.

There being a dispute between the United States and Poinier respecting his charges for his services as Chief Supervisor of Elections; *Held*,

(1) That he was entitled to charge a fee for filing recommendations for appointments (entitled by him informations), but not for recording and indexing them;

(2) That he was entitled to charge for indexing appointments, but not for recording them;

(3) That he was entitled to charge for preparing instructions to supervisors;

(4) That he was entitled to charge a reasonable sum, within the discretion of the court and the treasury accounting officers, for procuring and distributing the same;

(5) That he was not entitled to a per diem charge for attendance upon the Circuit Court;

(6) That he was entitled to charge for stationery, and for printing forms and blanks.

Opinion of the Court.

THIS was an action against the United States, brought under the act of March 3, 1887, 24 Stat. 505, to recover for services performed as Chief Supervisor of Elections during the months of October and November, 1888. The petition set forth in substance that the claimant was a commissioner of the Circuit Court, and had also been appointed Chief Supervisor of Elections for the several districts of South Carolina; that he resided in Spartanburg, in the western district of South Carolina, and that his duties required his attendance before the Circuit Court in the city of Charleston; that between the 5th of October and the 14th of November, 1888, he peformed the services and incurred the expenses set forth in his petition, and in the schedule annexed thereto; that his account was duly presented to the Circuit Court and approved; that such account, amounting to $963.70, was subsequently presented to the Treasury Department, and allowed at $314.45, leaving a difference of $649.25, for which the action was brought. Upon trial in the District Court, judgment was rendered in favor of the petitioner for $641.15, 40 Fed. Rep. 139, from which the United States appealed to this court.

Mr. John C. Chaney for appellant. *Mr. Assistant Attorney General Cotton* was with him on the brief.

Mr. C. C. Lancaster for appellee. *Mr. John Wingate* was with him on the brief.

MR. JUSTICE BROWN delivered the opinion of the court.

No question is made in regard to the actual performance of the services charged for, but the Attorney General contends that there is no warrant of law for the allowance of the following items:

1. "Recording and indexing 105 informations, $31.50." It is not altogether easy to determine what is meant by "informations," as used in this connection. The only authority for this charge, to which our attention has been directed, is contained in the clause of § 2026, which provides that the Chief Supervisor "shall receive the applications of all parties for ap-

pointment," and shall present such applications to the judge, and "furnish information to him in respect to the appointment by the court of such Supervisors of Election." It would seem from this that the "applications" were presumed to be in writing, and that the only "information" contemplated was such knowledge of the qualification and competency of the applicants as the Chief Supervisor might think fit to furnish orally to the judge. There is no paper or document contemplated by the statute which can properly be called an "information." If, as would appear from the opinion of the court below and from the brief of the petitioner, these informations were the recommendations of the agents or committees of each political party, there is clearly no necessity for recording them, though a charge for filing them as a part of the records of the office would seem to be proper under § 2031, which allows "for filing and caring for every return, report, record, document, or other paper required to be filed by him under any of the preceding provisions, ten cents." It does not, however, follow that every paper which the law authorizes to be filed must therefore be recorded or copied. To entitle a paper or document to be recorded it should have some permanent value. Where the original paper is preserved or filed, such for instance as the pleadings, exhibits, depositions or other papers in a common suit at law or equity, no necessity ordinarily exists for its being recorded. As a charge of ten cents for filing these informations was allowed by the department, the exception to this item for recording and indexing is therefore sustained.

2. "Recording and indexing appointment of 1008 supervisors," two folios each at 15 cents, $302.40. The only connection of the Chief Supervisor with the appointment of his subordinates is set forth in § 2026, which provides that he shall receive their applications, and upon the opening of the court "he shall present such applications to the judge thereof, and furnish information to him with respect to the appointment by the court of such supervisors of election." The appointments are made by the judge of the court; the order for these appointments is entered by the clerk in his journal, and the

commissions are then signed by the judge and delivered to the supervisors. It is doubtless proper that a list of these appointments shall be preserved in the office of the Chief Supervisor, and that the same shall be indexed, but there is no necessity whatever for the copying or recording such appointments for which the large charge of $302.40 is made. The charge of 15 cents per folio for indexing such appointments would seem to be proper, but the charge for recording them is unnecessary and should be disallowed as a mere effort to multiply fees.

3. For preparing instructions to supervisors, $2.40. This item is allowed upon the authority of *United States* v. *McDermott*, *ante*, 151.

4. The petitioner does not make a per folio charge for copies of such instructions as was done in the case of *McDermott*, *ante*, 151; but he claims for 1008 of such copies at 10 cents each. We think he is entitled to the expense of printing and distributing these instructions, and, as the court below not only formally approved his account including this charge, but upon reconsideration formally allowed it as a proper and necessary disbursement, such allowance should not be disturbed. Where the statute provides generally for the expense of printing blanks, and the court allows the account, or the officers of the department are of the opinion that the charge is a reasonable one for the expense and trouble of printing and distributing copies of such blanks, such allowance would be regarded as conclusive by this court, under our ruling in the case of *United States* v. *Jones*, 134 U. S. 483. The trouble of procuring and distributing copies of these instructions is one of those services for which no distinct compensation is made by statute, and the propriety of an allowance for the same is a matter largely within the discretion of the court and the accounting officers of the Treasury. The exception to this item is, therefore, overruled.

5. The exception by the Attorney General to the charge for per diems and mileage for attendance upon the Circuit Court at Charleston is sustained upon the authority of *United States* v. *McDermott*. The argument that, while the statute

makes no provision for paying the Chief Supervisor for his attendance upon court, he is entitled as a commissioner to the same fees as a clerk for the performance of like services, that the clerk is entitled to a per diem, and, therefore, the commissioner should be, is somewhat strained, in view of the fact that he does not attend as commissioner, and that no allowance is ever made to a commissioner for attendance except when hearing and deciding criminal cases himself. If no allowance be made by statute to commissioners or to chief supervisors for attendance or mileage it is difficult to see upon what theory the petitioner is entitled to it.

6. Certain items for stationery allowed by the court below are objected to by the Attorney General, but are properly allowable under that clause of section 2026 which requires the Chief Supervisor to prepare and furnish all necessary books, forms, blanks and instructions for the use and direction of supervisors. What shall be deemed necessary forms and blanks must be left to a certain extent to the court passing upon the question, and we should not feel authorized to disturb such allowance unless its discretion were abused. As the petitioner made no charge for drawing these instructions to supervisors, to which he would have been entitled under our ruling in *United States* v. *McDermott*, he is at least entitled to the expense of printing them.

The judgment of the court below must be vacated and set aside, and a new judgment entered in conformity with this opinion.

UNITED STATES *v.* BARBER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 1164. Argued and submitted March 12, 13, 1891. — Decided May 11, 1891.

On the authority of *United States* v. *Ewing*, *ante*, 142, the appellee's fees as commissioner of the Circuit Court for the Middle District of Alabama, acting in criminal cases, are allowed for "drawing complaints," in con-

nection with recognizances of defendants for examination; and for recognizances of witnesses, and for the charge per folio for depositions taken on examination: and on the authority of *United States* v. *McDermott*, *ante*, 151, the fees for administering oaths and for each jurat are allowed.

The appellee is also entitled to a fee for filing a complaint; to charge per folio for pay rolls of witnesses; and to charge per folio for transcripts of proceedings when the originals are not sent up; but he is not allowed to charge for filing and entering every declaration, etc., if several are attached together.

When a series of sheets are attached together, they form a single paper within the meaning of the law.

This action was brought to recover fees in 149 criminal cases in which certain proceedings were had before the appellee, as commissioner of the Circuit Court for the Middle District of Alabama. The items of the several services were set out in a bill of particulars, which was admitted to be correct, the district attorney interposing a demurrer to the petition for the purpose of securing a judicial determination of the legality of the several charges. Judgment having been entered in favor of the petitioner for $802.09, an appeal was taken by the United States to this court.

Mr. John C. Chaney for appellant. *Mr. Assistant Attorney General Cotton* was with him on the brief.

Mr. R. R. McMahon and *Mr. W. W. Dudley* for appellee submitted on their brief.

Mr. Justice Brown delivered the opinion of the court.

It was admitted that the petitioner was a commissioner of the Circuit Court; that he actually and necessarily performed the services set forth in his petition; and that his accounts containing those charges were duly approved by the District Court, as required by law. Objection was made by the government to the allowance of the following items:

1. "Drawing complaints." In the case of *United States* v. *Ewing*, *ante*, 142, we held that where the local practice required a magistrate to reduce the examination of the complaining witnesses to writing, an allowance for drawing the complaint,

as "for taking and certifying depositions to file," was a proper charge under Rev. Stat. § 847. By § 4256 of the Code of Alabama, it was provided that "upon a complaint being made to any one of the magistrates specified in section 4680, that such offence has in the opinion of the complainant, been committed, the magistrate must examine the complainant and such witnesses as he may propose, on oath, take their depositions in writing, and cause them to be subscribed by the persons making them." By § 4257 "the depositions must set forth the facts stated by this complainant and his witnesses tending to establish the commission of the offence and the guilt of the defendant." Under these sections it is made the duty of the committing magistrate to reduce the deposition or complaint of the principal witness or witnesses to writing, and we see no reason why he should not be paid therefor. This was the view of the Court of Claims of a similar claim made under the practice of Alabama in the case of *Ravesies* v. *United States*, 24 C. Cl. 224. The objection to this item is therefore overruled.

(*a.*) Petitioner is also allowed a fee of 10 cents for each oath administered in connection with these complaints, and 15 cents for each jurat, as for a certificate. *United States* v. *McDermott*, *ante*, 151.

(*b.*) He is also entitled to a fee of 10 cents for filing such complaint; under § 847 and under the clause of § 828, "for filing and entering every declaration, plea or other paper, 10 cents."

2. No objection is made by the government to the second series of items for issuing 45 warrants at $1 each, entering 128 returns thereon at 15 cents per folio, and filing such warrants at 10 cents each, nor to the charges for like services in connection with the issuing and return of subpœnas.

3. The fourth series of items relates to charges in connection with the recognizances of defendants for examination. We have already held in *United States* v. *Ewing*, *ante*, 142, that a charge for the acknowledgment of recognizances was proper, though but one acknowledgment for each recognizance can be allowed. There is no valid objection to the allowance

for the oaths of sureties and the jurats to such oaths. It is usual and proper to require that persons offering themselves as sureties for the appearance of the accused in court shall justify to their pecuniary responsibility, and the expense of their so doing stands upon the same footing as the recognizance itself. It is true that the taking of recognizance or bail for appearance is primarily for the benefit of the defendant, and in civil cases it is usual to require the costs of entering into such recognizances to be paid by the defendant or other person offering himself as surety. But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time; and as these persons usually belong to the poorest class of people, to require them to pay the cost of their recognizances would generally result in their being detained in jail at the expense of the government, while their families would be deprived, in many instances, of their assistance and support. Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail, and as the whole proceeding is adverse to them, the expense connected with their being admitted to bail is a proper charge against the government.

4. The same rule will apply to recognizances of witnesses summoned at the expense of the government.

5. The charge per folio for pay rolls of witnesses is proper, as well as the charge of 10 cents for each oath administered to a witness in support of his claim for attendance and mileage.

6. The charge per folio for transcripts of proceedings is lawful under Revised Statutes, § 1014, which provides that "copies of the process (issued by the commissioner) shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case." In most districts it is the habit of commissioners to send up the original proceedings before them, a practice to which there seems to be no objection, conducing, as it does, to a diminution of expenses to the government; but where the requirements of section

1014 are literally adhered to, the expense of preparing such transcript is a proper charge against the government.

7. The charge per folio for depositions taken on examination is, we think, fairly allowable, upon the same principle on which we have allowed it for preparing complaints. Section 4286 of the Criminal Code of Alabama requires that "the evidence of witnesses examined must be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively." As there is no special provision for the allowance of a charge for such evidence, it may be considered as a deposition within § 847, for the taking and certifying of which the commissioner is entitled to 20 cents per folio. We held a similar charge to be proper in the case of *United States* v. *Ewing*, *ante*, 142.

8. But the charge for filing such depositions should be disallowed. Section 828 allows "for filing and entering every declaration, plea or other paper, 10 cents." Each deposition is not necessarily a "paper" within the meaning of this clause. If two or more depositions are embraced in a single paper, or a series of sheets are attached together, they form but a single paper, within the meaning of the law. We had occasion recently to pass upon this question in the case of *Schell's Executors* v. *Fauché*, 138 U. S. 562, where two letters pasted together were held to constitute but one in law.

These embrace all the items to which objection is made by the Attorney General. It remains, that upon being modified by deducting the last item of $10.80, the judgment of the court below must be

Affirmed.

UNITED STATES *v.* VAN DUZEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 1244. Argued March 12, 13, 1891. — Decided May 11, 1891.

A clerk of a Circuit or District Court of the United States, receiving papers sent up in criminal cases by the commissioners before whom the examinations were had, may file them in the order and as they come from the commissioners, and is entitled to his fee for filing each such paper.

He may also charge for filing oaths, bonds and appointments of deputy marshals, jury commissioners, bailiffs, district attorneys and their assistants, and further for recording them if required by order of court or by custom to do so; but not for administering the oaths of office to them or preparing their official bonds.

He is also entitled to his legal charges for approving the accounts of such officers under the act of February 22, 1875, 18 Stat. 333, c. 95.

He is also entitled to charge for furnishing a copy of an indictment to the defendant when ordered to do so by the court; but not otherwise.

He is also entitled to a fee for filing criminal cases sent up by a commissioner, but not for docketing the same unless indictment is found.

When the Treasury Department requires copies of orders for payment by the marshal of sums due to jurors and witnesses to be authenticated by the seal of the court, the clerk is entitled to his fee for affixing it; but not otherwise.

He is not entitled to a fee for entering an order for trial and recording a verdict in a criminal case, that charge being covered by the fee " for making dockets and indexes, issuing venire, taxing costs," etc.

Charges for filing precipes for bench warrants are proper; but no such precipe is required after sentence, the sentence being in itself an order for a mittimus.

When it is the practice in a district to require records to be made up in criminal cases, the clerk is entitled to charge for incorporating in it the transcript from the commissioner.

When, in a district there is a rule of court that the clerk, in issuing subpœnas in criminal cases, shall make copies to be left with witnesses, he is entitled to compensation for such copies.

THIS was an action brought to recover for services as clerk of the Circuit and Districts Courts of the United States for the Northern District of Iowa, the items of which were annexed to the petition. Judgment having been rendered in

favor of petitioner for $516.16, 41 Fed. Rep. 571, an appeal was taken by the United States to this court.

Mr. John C. Chaney for appellant. *Mr. Assistant Attorney General Cotton* was with him on the brief.

Mr. C. C. Lancaster for appellee. *Mr. Thomas A. Hamilton* also filed a brief for appellee; and *Mr. A. J. Van Duzee* in person filed a brief for same.

Mr. Justice Brown delivered the opinion of the court.

This account consists of ninety-nine separate items, which we proceed to consider in the order in which they appear in the demurrer filed in the court below, and in the opinion of the court.

1. The first series of items embraces the fees charged in forty-five criminal cases, for filing the papers certified up by the commissioners before whom the examinations were had. In the majority of the cases the number of papers filed by the clerk ranged from four to six, in a few they were eight in number, and in one sixteen. In the whole forty-five cases there were filed 267 papers. By Rev. Stat. § 828, the clerk is allowed ten cents "for filing and entering every declaration, plea or other paper." By section 1014 the commissioners of the Circuit Court are required to return copies of the process as speedily as may be into the clerk's office of the court to which the defendant is bound over to appear, together with the recognizances of the witnesses for their appearance to testify in the case. In preparing the transcript of proceedings for transmission from a lower to a higher court it is usual and proper to attach the papers together, with a suitable endorsement indicating their character as a transcript, and to treat them as one paper, and if in such case the original be sent up, the same course should be pursued. If such papers are sent up separately, they are liable to be mixed with papers subsequently filed in the case and produce confusion. Such transcript or papers are properly sent up as soon as the case is finished before the commissioner, and before action is taken

by the grand jury. The accounting officers of the Treasury in this case seemed to assume either that the clerk should select certain papers and file those only, or should fasten them together and file the bundle as one paper. The clerk, however, is not responsible for the manner in which such papers are transmitted by the commissioner, nor is it his duty to select out the complaint, the recognizance or any other particular paper, and say that that only should be filed. Because the statute allows the fee "for filing and entering," it does not necessarily follow that before he is entitled to the fee he must enter every paper that he files upon his court docket; he may make the entry upon any proper book kept for the purpose. His duty is discharged by filing them as they are received, and the exception to his charge therefor is accordingly overruled.

2. The charges for filing the oaths, bonds and appointments of deputy marshals, jury commissioners, bailiffs, district attorneys and their assistants, are properly made against the government and should be allowed; and where, by order of the court or custom of the office, it is the practice to require such documents to be recorded or entered upon the journal, the clerk's fees for such services are also properly chargeable. But the expense of taking the oaths and executing the proper bonds is not so chargeable, since it is the duty of persons receiving appointments from the government to prepare and tender to the proper officer the oaths and bonds required by law; in other words, to qualify themselves for the office. What shall be done with such qualifying papers does not concern them; their own duty is discharged by the tender of such papers properly executed according to law.

3. The same principle applies to the charges for approving the accounts of these officers. By the act of February 22, 1875, 18 Stat. 333, c. 95, "before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States

Circuit or District Court, and in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid." It follows from this section that the officer has performed his duty by "rendering" his account in proper form to the court, with the proper affidavit or oath in support of the actual and necessary performance of the services therein charged. He is not concerned with the method of verification adopted by the government for its own convenience and protection, and is no more liable for the expense of entering the orders of approval of such accounts, or for the certified copies of such orders, than he is for the expense of auditing such accounts at the Treasury Department. The statute imposes upon the court to a certain extent the duties of an auditing officer, but such duties are imposed not for the benefit of the claimant, who is entitled to his statutory compensation for the services rendered, but for the protection of the government, and the expenses attendant thereon are proper charges against the government.

4. For copies of indictments furnished to defendants in criminal cases. By the Sixth Amendment to the Constitution, "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." By § 1033, where a person is indicted for a capital offence a copy

of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before his trial. There would appear to be a negative pregnant here, and it has accordingly been held that in cases not capital the prisoner is not entitled to a copy of the indictment at government expense. *United States* v. *Bickford*, 4 Blatchford, 337; *United States* v. *Hare*, 2 Wheeler, C. C. 283, 288. Nor is he entitled to a list of witnesses and jurors. *United States* v. *Williams*, 4 Cranch, C. C. 372; *United States* v. *Wood*, 3 Wash. C. C. 440.

There is no other statutory provision for carrying out the constitutional obligation of the government to inform the prisoner of the nature and cause of the accusation, or for summoning witnesses, or procuring the assistance of counsel, except that by § 878 indigent defendants are entitled to have their witnesses subpœnaed at the expense of the government. There is, however, no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners. The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government. We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government; and, when such order is made, the clerk is entitled to his fee for the copy. In many cases, however, the defendant does not desire a copy, or pleads guilty to the indictment upon its being read to him, and in such cases there is no propriety in forcing a copy upon him and charging the government with the expense. This appears to have been the ruling of the court below, and we see no valid objection to it.

5. For docketing, indexing and taxing costs in nine cases sent up from the commissioner's office, in which the defendant was bound over to appear to answer an indictment by the grand jury. The grand jury, however, ignored the bills, and, of course, no indictment was ever filed. The fee bill allows

"for making dockets and indexes, taxing costs and other services in a cause which is dismissed or discontinued, . . . one dollar." The real question is, whether papers so sent up and filed can be said to constitute of themselves a "cause" which should be docketed. While it is true that a criminal cause is begun in the commissioner's office by the filing of a complaint and the issuing of a warrant, it is equally true that there is no "cause" in the District or Circuit Court, within the meaning of the law, until an indictment or information is filed. Copies of the process before the commissioner are required by section 1014 to be returned as speedily as may be into the clerk's office of the court, together with the recognizances of the witnesses, etc. The filing of such transcript, however, is not the institution of a suit. The object of the provision seems to be to inform the district attorney of the fact that the defendant has been held to bail or committed to await the action of the grand jury — a proceeding which may be very necessary where the commissioner resides at a distance, and to enable him to prepare an indictment. For filing such papers we have held the clerk to be entitled to a fee, but it is not usual or proper to docket cases as such until the grand jury or district attorney has taken affirmative action in regard to them.

6. For seals affixed to copies of orders for payment by the marshal of sums due to jurors and witnesses. Section 855 requires the marshal, upon the order of the court to be entered upon its minutes, to pay to jurors and witnesses all fees to which they appear by such order to be entitled, which sum is to be allowed him at the Treasury in his accounts. If the officers of the Treasury Department require a copy of such order to be authenticated, not only by the signature of the clerk, but by the seal of the court, then, of course, the clerk is entitled to charge for affixing such seal. It is usual, however, as between officers of the same court, and between such officers and those of the Treasury Department, to accept the signatures of each other as genuine, and under such circumstances the clerk has no right to impose the unnecessary burden of a seal. *Jones* v. *United States*, 39 Fed. Rep. 410; *Singleton* v. *United*

States, 22 C. Cl. 118. The question is not so much what the law requires as a sufficient authentication of the copy of an order, for formal proof of such order in a case upon trial, but what method of authentication the department requires. The department has the right to waive the formal proof which would be required in a court of law.

7. Objection is also made to fees for entering orders for trial, and recording the verdict, in thirty-eight criminal cases, the claim being that such services are included in the fee allowed "for making dockets and indexes, issuing venire, taxing costs and all other services, on the trial or argument of a cause, where issue is joined and testimony given, three dollars." The argument is made that the entry of an order for trial, and the recording of the verdict, are not services rendered upon the trial and argument of the cause, since the order for trial precedes the trial, and the verdict follows it. Referring to the clause in question, however, to determine what shall be deemed services on the trial of a case, we find that issuing venires and taxing costs are included among such services. The former of these certainly precedes the actual trial, and the latter follows not only the verdict, but the judgment. We think it follows from this that the docket fee was intended to include these services. If it does not, it is not easy to say what it was intended to cover. (See p. 199 *post.*)

8. Charges for filing precipes for bench warrants are proper. It is not always that the district attorney desires the arrest of the defendant immediately upon the indictment being returned to the court, and it is proper that the clerk should wait for instructions before issuing the bench warrant. These instructions are given in the form of a precipe, and for filing such precipe the clerk is entitled to his fee. It appearing upon the finding of the court below that the filing of precipes is in accordance with the settled practice of the court, there is no just reason why the clerk is not entitled to his fee therefor.

With regard to mittimuses after sentence, no such precipe is required, the sentence of the court being that the defendant "be committed" until the fine be paid, or the terms of the sentence otherwise complied with. This is itself an order for

a mittimus, and the district attorney has no right to interfere with the execution of the sentence. From the moment the sentence is pronounced the case passes beyond the control or discretion of the district attorney. It is the mandate of the court, and is obligatory upon all its officers.

9. Charges for incorporating in the final record the transcript from the commissioner. There is no statute prescribing what record shall be kept by the clerk, or how it shall be kept in criminal proceedings. Properly speaking, as we have already held, the transcript from the commissioner's office is no part of the case in the Circuit or District Court; but the court, in this district, has adopted a rule that, "in all criminal cases, unless otherwise specially ordered, the final record entered therein shall include the order made by the commissioner binding the party to appear before the grand jury, if any such was made; the presentment therein; the bench warrant and return; the plea of defendant; the verdict of the jury; and the final order and sentence of the court thereon." This rule, of course, is obligatory upon the clerk, and for his services in connection therewith he is entitled to compensation. He is, therefore, entitled to recover for so much of the record as includes "the order of the commissioner binding the party to appear before the grand jury." It is not the practice in all districts to require a record to be made up in criminal cases, but, as it seems to be the practice in Iowa, we see no objection to the allowance of the item.

10. To the allowance for copies of subpœnas furnished to the marshal for services upon witnesses, objection is made upon the ground that by section 829, prescribing the fees of the marshal, he is allowed "for serving a writ of subpœna on a witness, fifty cents, and no further compensation shall be allowed for any copy, summons or notice for a witness." This, however, was intended to apply only to the marshal; and when, as in this district, there is a rule of the court that the clerk in issuing subpœnas in criminal cases shall make copies to be left with witnesses, he is clearly entitled to compensation for such copies. When the clerk performs a service in obedience to an order of the court, he is as much entitled to

compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services.

These are the only questions considered in the opinion of the court below to which exception was taken, and in the absence of an assignment of errors we do not find it necessary to discuss all the items of the account.

The judgment of the District Court must be reversed and vacated, and the case remanded with directions to enter a new judgment in conformity to this opinion.

UNITED STATES *v.* BARBER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 339. Submitted April 22, 1891. — Decided May 11, 1891.

Whether a complaint in a criminal proceeding is so unnecessarily prolix that the commissioner who drew it should not be allowed charges for it in excess of three folios, is a question of fact upon which the decision of the court below will be accepted.

It is within the discretion of a commissioner of a Circuit Court of the United States in Alabama, to cause more than one warrant against the same party for a violation of the same section of the Revised Statutes to be issued; and when the court below approves his accounts containing charges for such issues, it is conclusive upon the accounting officers of the Treasury that the discretion was properly exercised.

The acknowledgment of a recognizance in a criminal case by principal and sureties is a single act, for which only a single fee is chargeable.

THIS was a consolidation of three actions to recover for services as commissioner of the Circuit Court for the Middle District of Alabama. The services are admitted to have been rendered, and the accounts therefor approved by the proper court under the act of February 25, 1875, 18 Stat. 333. The United States interposed a demurrer to the petition, upon the hearing of which judgment was entered in favor of the peti-

tioner for $995.35, 35 Fed. Rep. 886, from which an appeal was taken and allowed to this court.

Mr. John C. Chaney for appellant submitted on his brief filed for appellant in *United States* v. *Barber*, *ante*, 164.

Mr. R. R. McMahon and *Mr. W. W. Dudley* for appellee submitted on their brief filed in that case.

Mr. Justice Brown delivered the opinion of the court.

This case was submitted upon briefs filed in a prior case between the same parties, *United States* v. *Barber*, *ante*, 164, which, however, did not discuss the points involved, and in the absence of an assignment of errors, the demurrer also being general, we are compelled to look to the disallowances by the first comptroller, and to the opinion of the court, to ascertain the questions raised upon the hearing in the court below. The objections to the accounts appear to be as follows:

1. To all charges in excess of three folios for drawing complaints. While it is true that a complaint will not ordinarily exceed three folios in length, it is obvious that there are cases, as, for instance, in prosecutions for perjury or conspiracy, where it may be much longer than that. As the complaints to which this objection is taken appear to have been either under section 2461, for cutting timber upon the lands of the United States; under section 5440, for conspiracy; under section 5392, for perjury; or under section 5393, for subornation of perjury, it is entirely probable that more than three folios may have been necessarily employed in drawing such complaints. It is evident that no iron rule can be laid down upon the subject, that something must be left to the discretion of the district attorney and the commissioner, and that, if the complaints are not unnecessarily prolix, their action should be sustained. This is a question of fact in all cases, and as the court below has found, not only in its formal approval of this account, but in its opinion upon the demurrer, that no unnecessary verbiage was employed, and no surplusage to increase fees, we think the item should be allowed.

2. The objection to charges for more than one case against the same party for a violation of the same section of the Revised Statutes is somewhat more serious, and yet we think that, under the circumstances, it is not well taken.

The object of the proceedings before the committing magistrate is to secure the attendance of the accused to answer *any* indictment that may be found by the grand jury, and ordinarily one complaint is sufficient for that purpose, however numerous the charges may be against him. The grand jury may find indictments for as many violations of law as it may see fit, but this power does not render it necessary that he should be held to bail in more than one case. It does not follow, however, that more than one proceeding may not be instituted against him, and occasionally an exigency may arise that would render it expedient to do so. Much must be left to the discretion of the district attorney in that regard; he is the sworn officer of the government, and presumed to act in its best interests. In explanation of the duplication of warrants in this case, the petitioner states that "the different cases related to different and distinct acts, at different times and places, and about different and distinct matters and things, having no connection with each other, and with different persons as defendants and witnesses. That whatever would or might have been elsewhere, courts in Alabama do not dismiss a large number of indictments against any person for no other reason than that another indictment might yet remain upon which the person, if agreeable, could be tried for some like or unlike offence, the pardoning power being placed only in the executive." While, for the reasons above stated, we are not entirely convinced by this statement, so far as it is an argument, there are certain facts contained in it which show that it was within the power of the commissioner to issue these warrants, and, under the case of *United States* v. *Jones*, 134 U. S. 483, the approval by the court of his accounts is conclusive that his discretion was properly exercised. If the officers of the Treasury were at liberty to question the propriety of every charge in all cases, the approval of the courts would be an idle ceremony. We can give no less weight to such ap-

proval than to say that it covers all matters within the discretion of the officer rendering the account. The exception to this item is therefore overruled.

3. We have already held that a fee is properly chargeable for the acknowledgment of a recognizance, but that such acknowledgment is a single act, though it be made by principal and sureties, and that but a single fee of 25 cents is chargeable therefor. *United States* v. *Ewing*, *ante*, 164.

These accounts must be allowed, with the exception of the fees charged for the acknowledgment of more than one person in each case.

The judgment of the court below must be reversed, and the case remanded with instructions to enter a new judgment in conformity to this opinion.

Mr. Justice Bradley did not sit in this case, and took no part in its decision.

CLUETT *v.* CLAFLIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 174. Submitted April 21, 1891. — Decided May 11, 1891.

Letters patent No. 156,880, granted November 17, 1874, to Robert Cluett for an improvement in shirts are void for want of invention.

This was a bill in equity to recover for the infringement of letters patent No. 156,880, granted November 17, 1874, to Robert Cluett for an improvement in shirts. In his specification the patentee stated the object of his invention to be "first, to avoid the folding in of the edges of the bosom, and the raw edges and loose threads thereof, which disfigure the bosom when so folded in; second, to stay the bosom, rendering it firmer in itself, and less likely to rumple or break; third, to avoid wrinkling of the bosom by the unevenness or fulling up of any one of the layers composing the bosom in any part thereof,

each and all of these three features having reference to the preparatory stages of manufacture, but to be completed in the bosom as attached to the shirt."

"Its construction consists in preparing and fixing the two or more layers in place smoothly in relation to each other, and then binding the edge with a folded strip of cloth like the bosom front, cut bias (or diagonally) or straight from the piece, so as to turn the curves of the bosom without tendency to gather on one side, and so as to suit round, square or any other shaped bosom, this binding extending entirely around the bosom (except at the neck and yoke) and holding the parts firmly in place by a line of stitches before the bosom is inserted in or placed on or attached to the body of the shirt, and finally attaching the bosom so prepared to the shirt body, in the manner hereinafter shown. The invention consists in the shirt bosom or shirt and bosom, so constructed, and not in the bosom alone."

His claims were as follows:

"1. In combination with a shirt body, a shirt bosom bound on the outer edge with a folded and stitched binding, and attached to the shirt body by a separate lining of stitching through such binding.

"2. The shirt bosom S, composed of two or more thicknesses of cloth, B L, bound on the outer edge with the binding B″, and secured to the shirt front F by the line of stitching O."

Upon the hearing in the Circuit Court the invention was held to be invalid for want of patentable novelty, and the bill was dismissed. 24 Blatchford, 412, and 30 Fed. Rep. 921. Plaintiff thereupon appealed to this court.

Mr. S. A. Duncan and *Mr. J. A. Skilton* for appellants.

Mr. David Tim for appellees.

Mr. Justice Brown delivered the opinion of the court.

A large amount of testimony was taken in this case in the Circuit Court, but all that we find it necessary to consider

lies within a very narrow compass. Stripped of its verbiage, this patent consists simply of a shirt bosom bound at its edges and stitched through its binding to the body of the shirt. The custom of binding the cut edges of cloth, either for ornament or to prevent ravelling, is almost as old as the art of making garments. Indeed, the plaintiffs in this case frankly admit that "it was a matter of common experience to apply narrow bindings in various ways, in fact to apply 'folded bindings,' that is, bindings with their edges turned in under the body of the binding, to the edges of various parts of different parts of wearing apparel, to conceal the raw edges from sight and protect them from being frayed out. Moreover, as in the case of the Marr shirt, the free edges of 'flies' designed to be buttoned on to the shirt front had had their edges finished up (potentially at least, as suggested in the Marr patent) by some sort of binding. Dickies, also, had been made whose edges had been provided with a folded binding. Firemen's shirts, also, had been made of flannel, on the bosom part of which an extra thickness, cut out shield-shaped, had been secured by sewing through its edges."

Their expert Benjamin admits that detached bosoms or dickies had been bound with a strip of material folded on their outer edge and stitched to the bosom by a line of stitching passing through the inner edge of the outer fold of the binding, the bosom and the outer edge of the binding. Indeed, the patentee himself, who was sworn as a witness, admitted that his firm as early as 1869 or 1870 manufactured and sold shield-shaped detachable bosoms, or dickies, the raw edges of which had been bound by folded and stitched binding. It has also been the custom, time out of mind, to attach the bosom to the body of the shirt by a row of stitching, and in this connection plaintiffs admit that it was not new in the spring of 1874 (the established date of this invention) to make dress shirts by securing a linen bosom to the body of the shirt by a row of stitches passing through the edge of the bosom.

What then was there left for Cluett to invent? Nothing, apparently, but a separate line of stitches through the binding attaching the bosom to the shirt. But whether a separate line

of stitches shall be used for this purpose, or whether such stitches shall pass through the binding or inside of it, is obviously a question of mere convenience, involving nothing which, under a most liberal construction, could be held to be an exercise of the inventive faculty. If bosoms had always been worn before as a separate garment, it is possible that cutting away the front of the shirt and inserting the bosom might have involved some slight invention, though it is very doubtful if it would sustain a patent; but as bosoms had long been bound by a folded binding, and, with or without such binding, had been attached to shirts by stitching, it would seem to approximate more closely to invention to make such attachment by a row of stitching which did not than by stitches which did, pass through such binding. In view of the simplicity of this device we find it impossible to escape the conviction that plaintiffs are laboring under a strong bias of self-interest in asserting that this improvement was "the result of careful and prolonged study and experiment." We think this case must be added to the already long list of those reported in the decisions of this court wherein the patentee has sought to obtain the monopoly of a large manufacture by a trifling deviation from ordinary and accepted methods.

In the view we have taken of this patent we do not find it necessary to consider or discuss the voluminous testimony upon the subject of anticipation.

The decree of the court below is

Affirmed.

Mr. Justice Blatchford did not sit in this case, and took no part in its decision.

Cluett v. McNeany. Appeal from the Circuit Court of the United States for the Southern District of New York; No. 175. Argued with No. 174. As this case also turns upon the validity of the same patent the decree of the court below is

Affirmed.

Mr. S. A. Duncan and *Mr. J. A. Skilton* for appellants.

Statement of the Case.

Mr. David Tim for appellees.

Mr. Justice Blatchford did not sit in this case, and took no part in its decision.

ST. PAUL PLOW WORKS *v.* STARLING.

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

No. 329. Argued April 20, 21, 1891. — Decided May 11, 1891.

By a written agreement signed by both parties, a patentee of a plow granted to another person the right to make and sell the patented plow under the patent, in a specified territory, the latter agreeing to make the plows in a good and workmanlike manner, and advertise and sell them in the usual manner, and at a price not to exceed the usual price, and account twice a year for all plows sold, and pay a specified royalty for each plow sold. After making and selling some plows, the grantee gave notice to the patentee, that he renounced the license. But he afterwards made and sold plows embracing a claim of the patent. The patentee sued him to recover the agreed royalty on those plows. He set up in defence want of novelty and of utility. The case was tried by the court without a jury, which found for the plaintiff on novelty and utility, and gave judgment for him for the amount of the license fees; *Held*,

(1) The license continued for the life of the patent;

(2) The defendant could not renounce the license except by mutual consent or by the fault of the plaintiff;

(3) The plaintiff had a right to regard the license as still in force and to sue for the royalties;

(4) This court could not review the finding that the invention was new.

The ruling out of certain evidence was a matter of discretion, and some of it was immaterial.

After the defendant put in evidence earlier patents on the issue of want of novelty, it was proper for the plaintiff to show that, before the date of any of them, he had reduced his invention to practice in a working form.

This was an action at law, brought in the Circuit Court of the United States for the District of Minnesota, by William Starling, a citizen of Nebraska, against the St. Paul Plow Works, a corporation of Minnesota.

Statement of the Case.

The complaint alleged that the plaintiff obtained letters patent of the United States, No. 154,293, issued to him August 18, 1874, for an improvement in sulky plows, of which he was the original and first inventor, and that on the 17th of December, 1877, the following contract in writing was executed and delivered by him and the defendant: "This indenture, made on this 17th day of December, A.D. 1877, between Wm. Starling, of the town of Princeton, Bureau Co., Illinois, of the first part, and the St. Paul Plow Works of St. Paul, Minnesota, of the second part, witnesseth: That the party of the first part does hereby grant to the party of the second part the right to make and sell the Starling sulky plow under patent number 154,293, dated August 18th, 1874, in the following territory, viz.: Wisconsin, Minnesota, Dakota and all that part of Iowa north of the Northwestern railway and all that territory west and north of above described territory. In consideration of the above grant the party of the second part agrees to make said sulky plows in a good and workmanlike manner, and advertise and sell them in the usual manner, and at a price not to exceed the usual price of this class of implements sold by other manufacturers, and render an account on the first day of January and July of each year, of all plows sold prior to those dates on which the royalty has not been paid, and pay to the party of the first part, his heirs or assigns, two and fifty one-hundredths dollars for each and every plow sold, said royalty for spring sales to be paid July 1st and for fall sales January 1st of each year. The party of the first part also grants to the party of the second part the right to make and sell the improvement in whiffletrees under patent 151,804, in consideration of which the party of the second part agrees to pay the party of the first part, at the time of the payment of the royalty for the sulky plows, and in the same manner, the sum of one cent for every pound of said irons used or sold."

The complaint also averred that the defendant had failed to comply with the agreement, had rendered but two accounts to the plaintiff of plows made by it under the contract, the first one in July, 1878, and the second in January, 1879, and

had never paid to the plaintiff any of the agreed royalty except on the plows so reported in said accounts, but had made and sold great numbers of said sulky plows since the date of the contract, for which it had never accounted to the plaintiff, nor paid any royalty, a portion of them being made and sold under the name of "Starling sulky plow," by which name the patented plow was known at the date of the contract, and the greater part whereof were made and sold under the name of "Star sulky plow," with slight modifications of construction from that of the Starling sulky plow, but which were in fact the plaintiff's said plow, the making and selling whereof was so licensed to the defendant, the defendant falsely alleging the same not to be the plaintiff's said plow, for the purpose of defrauding the plaintiff of his said royalty. The plaintiff claimed $10,000 damages.

The defendant filed an answer, which set up want of novelty in the patent and want of utility in the invention, and specified six prior patents as having described the alleged improvements of the plaintiff. It admitted the execution of the agreement between the parties, and denied any liability on the part of the defendant. It alleged that it had made and sold a sulky plow under the name of the "Star sulky plow," constructed on an entirely different principle from that described in and covered by the plaintiff's patent, and that on or about December 5, 1878, it gave to the plaintiff due written notice that the construction of said sulky plow under the plaintiff's patent was unsatisfactory, that a large proportion of those made and sold had been returned to the defendant as unserviceable, and that it would thereafter manufacture a sulky plow of its own design, and renounce its license and all claim of right to construct plows in accordance with the plaintiff's patent, and would construct and sell no more; and that since that date it had not made or sold any plows under said license or in accordance with the alleged invention of the plaintiff.

To this answer there was a reply, admitting that about December, 1878, the plaintiff received letters from the defendant, in which the latter stated that it had decided not to continue

manufacturing the plaintiff's said plow; but denying that such notice was of any force or effect, and alleging that any difficulty which the defendant had in selling and introducing the plaintiff's plow arose wholly from the failure of the defendant to perform the conditions of the said contract; and denying the other allegations of the answer.

A trial by jury was duly waived, and the case was tried by the court. There appears in the record a statement that on the 8th of February, 1887, "an opinion was filed in this cause, which said opinion and order pursuant thereto are in the words and figures following, viz." Then follows a paper which is headed "Opinion." This opinion is reported in 29 Fed. Rep. 790. It contained the following statement: "After the defendant had manufactured and sold between thirty-five and forty plows under the license, and on or about December 5, 1878, written notice was given the plaintiff that the construction of the sulky plow was unsatisfactory and useless, and many had been returned as unserviceable, and that the defendant would thereafter manufacture a sulky plow of its own design, and renounced its license. The defendant, after the notice, rendered an account up to January 1st, and since then has manufactured about 960 plows, called Star plow, designed by Berthiaume, and about 350 plows called the Harris plow." The opinion concludes with these words: "The conclusion is that the plaintiff is entitled to a royalty on 1310 plows at $2.50 each, making the amount of $3275, for which sum judgment is ordered." There is no finding of facts separate from such findings as the opinion contains. The "order pursuant thereto," made February 8, 1887, is headed "Order pursuant to opinion," and states that the action was tried by the court, and that the court "files its written decision and findings in favor of the plaintiff and against the defendant, viz.: 'That the plaintiff is entitled to the royalty on 1310 plows at $2.50 each, making the amount of $3275.'" The order then stays the entry of judgment for forty days.

On the 14th of March, 1887, the defendant filed a motion for a new trial, which was heard by the court, and was denied

on the 10th of October, 1887, in an opinion reported in 32 Fed. Rep. 290. On the same day, a judgment was entered, which recited that a jury had been duly waived and the cause had been tried by the court, and the court, on February 8, 1887, had filed its written findings, "wherein it finds for the plaintiff as follows, to wit: 'The plaintiff is entitled to a royalty on 1310 plows at $2.50 each, making the amount of $3275, for which sum judgment is ordered,'" that the entry of judgment pursuant to the findings had been stayed pending the hearing of the defendant's motion for a new trial, and that that motion had been made and denied; and the judgment proceeded to order that the plaintiff recover from the defendant "the aforesaid sum of $3275 so found to be due by the court, with interest thereon from the date of said findings, to wit, February 8th, 1887, being $154.10, and all amounting to $3429.10, besides plaintiff's costs and disbursements herein to be taxed, and that he have execution therefor." To review this judgment, the defendant brought a writ of error. A motion to dismiss the writ for want of jurisdiction was made at October term, 1887, 127 U. S. 376, and was denied on the ground that the case was one "touching patent rights," under § 699 of the Revised Statutes, and, therefore, the writ would lie without regard to the sum in dispute.

There was a bill of exceptions, which stated that the plaintiff offered in evidence his letters patent, No. 154,293; that it was admitted by the pleadings, proved on the trial, and found to be a fact by the judge, that on or about the 5th of December, 1878, after the defendant had manufactured and sold about 35 or 40 plows under the license, it gave to the plaintiff written notice that the construction of the sulky plow under the plaintiff's patent was unsatisfactory, and large quantities of said plows had been returned as unserviceable, and that the defendant renounced its license and would thereafter manufacture a sulky plow of its own design; that the plaintiff offered evidence tending to show that, after defendant renounced its license, it manufactured and sold 960 plows called the Berthiaume plow and 350 plows called the Harris plow; that the defendant objected to this evidence as incompetent

and immaterial, on the grounds that the plaintiff could not recover for those plows on the contract of license after it had been renounced, that the Berthiaume and Harris plows were not similar to the plaintiff's and were manufactured under other patents, and that the character of those plows was indicated and described in the prior patents pleaded in the answer; that the court overruled the objections and the defendant excepted; that the plaintiff then offered evidence tending to show that the defendant, after it renounced the license, did not advertise the Starling sulky plow in the usual manner; that the defendant objected to that evidence that it was incompetent, immaterial and irrelevant, on the ground that the license had been renounced and the defendant was not bound to advertise thereafter; that the court overruled the objection and received the evidence, and the defendant excepted; that the plaintiff offered evidence tending to prove that two Starling plows made by the defendant according to the plaintiff's patent were sold by it after said notice was given to the plaintiff, for which the defendant did not account and pay royalty to the plaintiff; that the defendant objected to this evidence as immaterial and incompetent, because it was after it had notified the plaintiff that it had done with manufacturing his plows; and that the court overruled this objection and the defendant excepted.

The bill of exceptions then set forth the evidence of several witnesses produced by the respective parties, and several patents introduced by the defendant, being the six patents set up in the answer and two others. When the six patents were offered in evidence by the defendant, it was stated that the object of offering them was to prove that the plaintiff's invention was not novel. The plaintiff then and there objected to them, on the ground that the defendant was estopped from denying the validity of the plaintiff's patent; but the objection was overruled and the plaintiff excepted, and the patents were received in evidence.

The bill of exceptions, at its close, stated that "the court made the following rulings, contained in the opinion which follows below, and ordered judgment against the defendant

for thirty-two hundred and seventy-five dollars," and that "the opinion was as follows." Then followed the opinion, in the same words previously set out in the record, which, after the paragraph before quoted from it, proceeds to describe the plaintiff's invention as authorized to be manufactured and sold by the defendant, and recites the first two claims of the plaintiff's patent, there being three claims in all. It then said: "1. I find that the defendant could not, without the consent of the plaintiff, terminate the rights conferred by the license, and, there being no limitation on its face, the license continued until the expiration of the present letters patent. 2. The Starling plow is of utility and an operative machine, although it might work better in some soils than in others. 3. I find that the first claim of the plaintiff is manifestly infringed in the Berthiaume and Harris plows, so designated, and the mechanism used is only such mechanical change as increases the power of the lever from a single to a compound action, reversing its movement from a lever moving forward to one pulled towards the driver. In the Berthiaume plow a perforated segment and a spring dog are used, in connection with which the lever operates to raise and lower the plow and beam, which are mechanical changes and equivalents only. In the Harris plow substantially the same device is used. While in the Berthiaume plow the device used for depressing the plow-beam in front is unlike Starling's, the change in that particular would not defeat the right of plaintiff to an action for breach of contract. 4. I have hesitated about going into the question of novelty, but there being in the contract of license no recital or admission that plaintiff had invented the improvement in sulky plows, and the plaintiff having joined issue on the defence of want of novelty set up in the answer, and not pleaded an estoppel, I have reluctantly allowed the defendant to introduce evidence on that issue, and find that the plaintiff's improvement is not anticipated by any of the patents introduced in evidence."

The opinion then discussed in detail the six prior patents set up in the answer, with the conclusion that no one of those patents had the combination of the plaintiff, for the purposes

Argument for Plaintiff in Error.

described in his patent, or anticipated his invention. Then followed the conclusion set forth as the finding, in the order of February 8, 1887.

The bill of exceptions then stated, that the defendant excepted to the ruling and order directing the judgment for the plaintiff, and to the ruling and conclusion of law, "that the defendant could not, without the consent of the plaintiff, terminate the rights conferred by the license, and, there being no limitation on its face, the license continued until the expiration of the present letters patent," and to the ruling and conclusion of law, that "while in the Berthiaume plow, the device used for depressing the plow-beam in front is unlike Starling's, the change in that particular would not defeat the right of plaintiff to an action for breach of contract," and to each of the rulings and conclusions of law as to each of five of the six prior patents set up in the answer, and to the ruling and conclusion of law that no one of the patents in evidence had the combination of the plaintiff for the purposes described in his patent or anticipated his improvement.

Mr. Walter H. Sanborn for plaintiff in error.

We submit that the court below erred in ordering and entering judgment in this suit upon the contract for the $2.50 each upon the 960 Berthiaume plows, and the 350 Harris plows, that were made and sold by the plaintiff in error after the contract or license was renounced by it, and this on the following grounds:

First. Because the contract did not bind the defendant in error to grant the privilege of manufacturing or selling any number of Starling sulky plows, or of manufacturing or selling them for any length of time to the plaintiff in error, and did not bind the plaintiff in error to manufacture or sell any number of Starling sulky plows or to manufacture or sell them for any length of time, and was therefore void as to all plows made or sold after either party indicated to the other its unwillingness to longer act under the contract. It was so utterly void that no damages could be recovered from either

party for failing to permit on the one hand the manufacture and sale, or failing to manufacture and sell on the other. *Bailey* v. *Austrian*, 19 Minnesota, 535; *Atkins* v. *Van Buren School Township*, 77 Indiana, 447; Addison on Contracts, Vol. 1, star pages 390, 435, 436; *Williamson* v. *Taylor*, 5 Q. B. (N. S.) 175.

Second. Because the contract was a mere naked permit or license which granted no exclusive privilege to the plaintiff in error to make and sell the Starling sulky plow, but left the defendant in error the right to give the same permit to every one else in the territory, and it in no way bound the plaintiff in error not to make and sell as many sulky plows as it chose of other designs or under other patents, and was therefore revocable by Starling and capable of being renounced by the Plow Works at any time.

Hence, when it was renounced on December 6th, 1878, and all the Starling sulky plows made to January 1st, 1879, were paid for, the defendant in error could not recover upon the contract for the 1310 plows made thereafter, which were not Starling sulky plows, but were so different that they contained at most but one of the three elements or claims that distinguished the Starling plow. *Brown* v. *Lapham*, 27 Fed. Rep. 77; *Fetter* v. *Newhall*, 17 Fed. Rep. 841, 844; *Rich* v. *Hotchkiss*, 16 Connecticut, 409, 418; *Moody* v. *Taber*, 1 Banning & Ard. 41, 43; *Bell* v. *McCullough*, 1 Fisher, 380, 381; *Sherman* v. *Champlain Transportation Co.*, 31 Vermont, 162, 180, 181, 182; *White* v. *The S. Harris & Sons Mfg. Co.*, 5 Banning & Ard. 571.

Third. Because the contract itself, if not revoked or renounced, only permitted the plaintiff in error to make and sell the *Starling sulky plow.* It only protected him in making and selling that plow, and the making and selling of the Berthiaume and Harris plows was an act in no way covered by the contract or license, and not in any way a breach of that contract. The plaintiff in error had not agreed not to make and sell other plows, but as to these other plows it stood out from under its license, was liable for infringement like any stranger if it infringed the Starling patent, and could defend

against such suits on the same ground that any stranger could defend, but for these other plows the defendant in error could not recover any royalty under the contract, because that was confined to the *Starling sulky plow*, and that alone, and none of these plows contained the distinguishing characteristics of that plow. *Burr* v. *Duryee*, 2 Fisher, 275, 281, 282, 283; *Wood* v. *Wells, Crittenden & Co.*, 6 Fisher, 382, 385.

Mr. L. L. Bond also filed a brief for plaintiff in error.

Mr. Charles S. Cairns for defendant in error.

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

The defendant contends (1) that the contract of December 17, 1877, did not bind the plaintiff to grant to the defendant the privilege of manufacturing or selling any number of Starling sulky plows, or of manufacturing or selling them for any length of time, and did not bind the defendant to manufacture or sell any number of them, or to manufacture or sell them for any length of time, and therefore ceased to be operative as to all plows made or sold after either party indicated to the other its unwillingness to act longer under the contract, and that, therefore, no damages could be recovered from either party for failing on the one hand to permit the manufacture and sale, or, on the other hand, to manufacture and sell; (2) that the contract was a mere naked permit or license which granted no exclusive privilege to the defendant to make and sell the Starling sulky plow, but left to the plaintiff the right to give the same permit to every one else in the specified territory, and in no way bound the defendant not to make and sell as many sulky plows as it chose of other designs or under other patents, and was, therefore, revocable by the plaintiff and capable of being renounced by the defendant at any time, and that the plaintiff could not recover upon the contract for the 1310 plows which were not Starling plows, but were so different that they contained at most but one of the three claims of the plaintiff's patent; (3) that the contract, if not

revoked or renounced, only permitted the defendant to make and sell the Starling sulky plow, that the making and sale of the Berthiaume and Harris plows was not covered by the contract and not a breach of it, and that the defendant was liable for infringement in making and selling other plows if it infringed the plaintiff's patent, and could defend against a suit for infringement on the same ground that any stranger could, and the plaintiff could not recover any royalty under the contract, in respect of such other plows.

It is urged by the defendant in regard to the contract (1) that it does not admit or recite the validity of the plaintiff's patent, but only allows the defendant to make and sell a particular plow under it; (2) that it gives to the defendant that privilege for no stated time and for no stated number of plows, and was, therefore, revocable at any time; (3) that it gives to the defendant no exclusive privilege to make and sell the Starling plow, but leaves the plaintiff the right to give the same privilege to every one else in the territory; (4) that it in no way binds the defendant not to make and sell as many plows of other designs or under other patents as it chooses; (5) that it does not bind the defendant to make or sell any number of Starling plows, or to make or sell them for any length of time; (6) that it is restricted to the Starling sulky plow, and does not authorize the defendant to make or sell any other plow under the patent, nor bind it to pay license fees for the sale of any other plow, but as to all other plows except the Starling sulky plow leaves defendant free to make and sell, subject only to its liability as an infringer in the same way as if there were no contract.

The defendant contends that there is an essential distinction between the contract in the present case and a contract which grants the exclusive right under a patent to make and sell the patented article in a certain territory, or the exclusive right in respect of a certain number of patented machines; that, in the latter case, the contract exists for the life of the patent, while in the present case it does not; and that in the present case the licensee could renounce all right under the license, while in the other case he could not. This ground is main-

tained upon the view that, where the patentee grants an exclusive right, he deprives himself of the privilege of granting any right to others in the given territory; and that, therefore, the exclusive licensee will not be permitted, after he has thus deprived the licensor of his privilege of licensing others, to renounce the license and thus damage the licensor, while that reason does not exist under a contract or license like that in the present case.

But we think that this attempted distinction is fanciful and not sound. Irrespectively of the point that it might well be urged that the plaintiff, in granting to the defendant "*the* right to make and sell the Starling sulky plow under patent No. 154,293," did not grant simply *a* right, but granted *the* right, that is, all the right which the plaintiff had, under the patent, to make and sell the plow in the specified territory, we are of opinion that the Circuit Court was correct in holding that the defendant could not terminate, without the consent of the plaintiff, the rights conferred by the license, and that, as there was no limitation on its face, the license continued until the expiration of the patent. The contract has no provision for its termination or its renunciation. The grant is of the right to make and sell the Starling sulky plow under the patent, that is, under the patent so long as it is a patent, for the whole term of its duration. For plows made and sold under the patent, and in accordance with any of its claims, the defendant, at all times during the existence of the patent, could set up the contract as a defence against a claim for infringement, and limit its liability for plows made and sold in accordance with any one or more of the claims of the patent, to the royalty fixed by the terms of the contract. In consideration of the grant, the defendant bound itself to make the plows in a good and workmanlike manner, and to advertise and sell them in the usual manner and at the price specified, as limited, and to render accounts and pay royalties as agreed.

The Circuit Court finds that the Starling plow "is of utility and an operative machine, although it might work better in some soils than in others." It, therefore, finds against the defendant as to the ground set up in the notice which the de-

fendant gave, that the construction of the plow under the patent was unsatisfactory. The fact that the defendant continued, after the alleged renunciation, to make and sell the plow with features embodying the first claim of the patent, and that the plow so made was successful and salable, indicates that the notice was a mere pretence, and that the defendant continued to act under the license, or else that the allegation that the construction of the plow was unsatisfactory was founded upon something in the workmanship, and not in the inherent character of the patented improvement.

We are of opinion that the license, in the absence of a stipulation providing for its revocation, was not revocable by the defendant, except by mutual consent or by the fault of the other party. If the plaintiff, after receiving the notice, had sued the defendant for infringement, he would have been properly regarded as acquiescing in the renunciation; but, instead of that, he elected to regard the license as still in force, and brought an action to recover the royalties provided for by it, which he was entitled to do. *Marsh* v. *Harris Mfg. Co.*, 63 Wisconsin, 276; *Patterson's Appeal*, 99 Penn. St. 521; *Union Mfg. Co.* v. *Lounsbury*, 41 N. Y. 363.

The defendant could not coerce the plaintiff into putting an end to the contract, by the means it adopted. It must bring a suit to set aside the contract before it can be allowed to say that, in regard to what it afterwards does, it does not act under the contract, provided the machines it makes embody a claim of the patent. Notwithstanding the defendant gave notice that it renounced the license, yet it did not in fact renounce it, for it continued to make plows embodying one of the claims of the patent. The Circuit Court found that the first claim of the plaintiff's patent was infringed in the 1310 plows, and that the changes made in those plows were mechanical changes and equivalents only, which would not defeat the right of the plaintiff to an action for breach of contract.

We cannot review the finding of the Circuit Court that none of the earlier patents put in evidence by the defendant anticipated the plaintiff's invention. Although the defendant excepted to this finding as a conclusion of law, yet it was really

a conclusion of fact on the evidence which the Circuit Court had before it. Witnesses were summoned on both sides as to what the earlier patents showed; and we cannot consider the evidence, as if this were a suit in equity.

After the defendant had introduced the alleged anticipating patents, and examined three expert witnesses in regard to them, the plaintiff rebutted such evidence by two expert witnesses. The defendant then offered further evidence to show why its contention as to the question of novelty was correct, but the court refused to permit this to be done, stating that it had heard sufficient testimony to enable it to understand the operation of the different devices, to which ruling the defendant excepted. This is assigned for error. But we are of opinion that it was a matter within the discretion of the Circuit Court. The defendant had had an opportunity of taking the testimony in question when it examined its three expert witnesses.

After the plaintiff had introduced evidence tending to show that his plow, properly made, was practical and successful, and the defendant had introduced evidence for the purpose of showing that the plaintiff's plow, well constructed, was unsalable, while the Berthiaume and Harris plows made by it were salable, the court refused to permit the defendant to show by one Carter, a practical dealer in plows, that he sold a plow substantially the same as the Berthiaume plow for $45, in competition with a plow substantially the same as the plaintiff's plow at $25, and was able to sell the former without difficulty, while the latter had no sale. The evidence was excluded as immaterial and the defendant excepted. The court found as a fact that the so-called Berthiaume plow was substantially the plaintiff's plow. The offer of evidence amounted merely to showing that one person could sell a plow for $45, while another person could not sell substantially the same plow for $25. This was certainly immaterial on any issue in the case. Moreover, both parties had gone through their testimony, and the plaintiff had given evidence in rebuttal, and it was after that that this offer was made. It was discretionary with the court whether to admit the evidence or not, as the defendant had before had an opportunity to give it.

The plaintiff, in rebuttal of the defendant's principal evidence, offered proof tending to show that he first constructed a plow containing the elements of the first claim of his patent, before the date of the earliest patent introduced by the defendant on the question of novelty. The defendant objected to this evidence as immaterial, and that it was a part of the plaintiff's case in chief; but the court overruled the objection, and the defendant excepted. After the defendant had introduced in evidence the earlier patents, it was proper for the plaintiff to show that, prior to the date of any of them, he had reduced the invention covered by his first claim to practice, in a working form. *Elizabeth* v. *Pavement Company*, 97 U. S. 126, 130; *Loom Company* v. *Higgins*, 105 U. S. 580, 592. Proof of the date of the plaintiff's invention was strictly a matter of rebuttal, after the defendant had put in the patents which were prior in date to the plaintiff's patent. The defendant might afterwards have offered evidence on the same point.

The defendant, in its principal testimony, offered to show by a witness that the lever device shown in the plaintiff's patent, and substantially the same as that shown in his model, was used on two sulky plows prior to 1872. The plaintiff objected to the evidence as incompetent and immaterial, and because the fact had not been set up in the answer; the objections were sustained, and the defendant excepted. We think the evidence was immaterial. There was no offer to prove that the lever device was so combined that the combination operated in the same way, for the same purposes, as in the first claim of the plaintiff's patent.

These are all the matters alleged on the part of the defendant which we think it important to notice.

We find no error in the record, and the judgment is

Affirmed.

Mr. Justice Bradley did not sit in this case or take any part in its decision.

UNITED STATES *v.* VAN DUZEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 1244. Reported on page 169, *ante*. — This correction announced May 25, 1891.

The court makes a correction in paragraph seven of its opinion in this case.

THE opinion of the court in this case is reported *ante*, 169. The seventh paragraph of the opinion is as follows (p. 175):

"7. Objection is also made to fees for entering orders for trial, and recording the verdict, in thirty-eight criminal cases, the claim being that such services are included in the fee allowed 'for making dockets and indexes, issuing venire, taxing costs and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.' The argument is made that the entry of an order for trial, and the recording of the verdict are not services rendered upon the trial and argument of the cause, since the order for trial precedes the trial and the verdict follows it. Referring to the clause in question, however, to determine what shall be deemed services on the trial of a case, we find that issuing venires and taxing costs are included among such services. The former of these certainly precedes the actual trial, and the latter follows not only the verdict, but the judgment. We think it follows from this that the docket fee was intended to include these services. If it does not, it is not easy to say what it was intended to cover."

The names of counsel are stated on page 170.

MR. JUSTICE BROWN delivered the opinion of the court.

Upon a reconsideration of the seventh paragraph of our opinion in this case, we have come to the conclusion that the item for entering the orders for trial, and recording the verdict should be allowed. We think the docket fee of three dollars was intended to cover the entry of the case upon the

docket, indexing the same, making cotemporaneous minutes and entries upon the docket or calendar and such other incidental services as are not covered by other clauses of the statute. Where, however, the entry is not a mere memorandum, but requires to be made part of a permanent record, it is a proper subject for a charge per folio.

The item in this case was properly allowed by the court below as for "making a record."

The opinion in the above case will be varied to this extent.

In re CLAASEN.

ORIGINAL.

No. 16. Original. Argued April 30, 1891. — Decided May 11, 1891.

Under § 5 of the act of March 3, 1891, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," a writ of error may, even before July 1, 1891, issue from this court to a Circuit Court, in the case of a conviction of a crime under § 5209 of the Revised Statutes, where the conviction occurred May 28, 1890, but a sentence of imprisonment in a penitentiary was imposed March 18, 1891.

A crime is "infamous" under that act, where it is punishable by imprisonment in a state prison or penitentiary, whether the accused is or is not sentenced or put to hard labor.

Such writ of error is a matter of right, and, under § 999 of the Revised Statutes, the citation may be signed by a justice of this court, as an authority for the issuing of the writ under § 1004.

At the time of the conviction, no writ of error from this court, in the case, was provided for by statute, nor was any bill of exceptions, with a view to a writ of error, provided for by statute or rule; and, therefore, a mandamus will not lie to the judge who presided at the trial, to compel him to settle a bill of exceptions which was presented to him for settlement after the sentence; nor can the minutes of the trial, as settled by the judge by consent, and signed by him, and printed and filed in July, 1890, and on which a motion for a new trial was heard in October, 1890, be treated by this court, on the return to the writ of error, as a bill of exceptions properly forming part of the record.

A criminal court in the Southern District of New York, sitting as a Circuit

Court therein, under § 613 of the Revised Statutes, and composed of the three judges named in that section, to hear a motion for a new trial and an arrest of judgment, in a criminal case previously tried by a jury before one of them, is a legally constituted tribunal.

A justice of this court on allowing such writ and signing a citation had authority also to grant a *supersedeas* and stay of execution.

MOTION for leave to file a petition for a writ of mandamus. The case is stated in the opinion.

Mr. Hector M. Hitchings for the petition.

Mr. Attorney General and *Mr. Edward Mitchell* opposing.

Mr. George F. Edmunds as *amicus curiæ.*

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

Peter J. Claasen, having been indicted under section 5209 of the Revised Statutes, in the Circuit Court of the United States for the Southern District of New York, was, on the 28th of May, 1890, on a trial before the court, held by Judge Benedict, District Judge for the Eastern District of New York, and a jury, found guilty on five of the counts of the indictment.

The term of that court at which the indictment was tried was one appointed exclusively for the trial and disposal of criminal business, and was held by Judge Benedict under the provision of section 613 of the Revised Statutes which enacts that "the terms of the Circuit Court for the Southern District of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the Circuit Judge of the Second Judicial Court [Circuit] and the District Judges for the Southern and Eastern Districts of New York, or any one of said three judges." That term adjourned on the day before the third Wednesday in June, 1890.

On the 24th of October, 1890, the defendant made a motion for a new trial and in arrest of judgment. At a like term of said court, held by the Circuit Judge of the Second Judicial Circuit and the District Judges for the Southern and Eastern Dis-

tricts of New York, and which began on the second Wednesday in October, 1890, this motion was heard upon the minutes of the trial, as settled and signed by Judge Benedict and printed under the provisions of a rule of the court. The motion was denied in December, 1890.

Before the defendant was sentenced under his conviction, Congress passed the act of March 3, 1891, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes." 138 U. S. 709; 26 Stat. 826, c. 517. The 5th section of that act provides that a writ of error may be taken from an existing Circuit Court direct to the Supreme Court of the United States in the following cases, among others, "in cases of conviction of a capital or otherwise infamous crime." By a joint resolution approved March 3, 1891, entitled "Joint resolution to provide for the organization of the Circuit Courts of Appeals," it was provided that nothing in the above-mentioned act of March 3, 1891, should be held or construed in anywise to impair the jurisdiction of the Supreme Court or of any Circuit Court of the United States "in any case now pending before it, or in respect of any case wherein the writ of error" should have been sued out before July 1, 1891.

On the 18th of March, 1891, the defendant was sentenced by the Circuit Court to be imprisoned for a term of six years in the Erie County penitentiary. On the 21st of March, 1891, a writ of error to the Circuit Court from this court was allowed by an Associate Justice of this court, and a citation signed, returnable here on the second Monday of April, 1891, with this direction, made by such Associate Justice: "This writ is to operate as a *supersedeas* and stay of execution, with leave to the United States to move the Supreme Court of the United States, on notice, to vacate the stay, as having been granted without authority of law."

On the same 21st of March, 1891, the defendant filed in the Circuit Court an assignment of errors, and on the 25th of March, 1891, the attorney of the United States served on the attorney for the defendant a joinder in error, having previously

filed the same in the office of the clerk of the court. Thereafter, the counsel for the defendant prepared a bill of exceptions, containing the matters supposed to be necessary to present for consideration the errors specified in the said assignment of errors, which latter paper contained additional specifications of error to those covered by the minutes of the trial, as settled by Judge Benedict, upon which the motion for a new trial and in arrest of judgment was so made. That bill of exceptions was, on the 18th of April, 1891, presented to Judge Benedict for settlement, the United States attorney attending on notice and on service of a copy of the proposed bill of exceptions.

The time to file and docket the record in this court has been enlarged so that it has not yet expired; and the term of the Circuit Court at which the defendant was sentenced has not yet expired, and will not expire until May 12, 1891.

On the presentation of the bill of exceptions to Judge Benedict, the United States attorney objected to the settlement of any bill of exceptions, for reasons including, among others, those stated in an opinion given by Judge Benedict on the 23d of April, 1891, refusing to settle and allow the bill.

The defendant now moves for leave to file a petition for a writ of mandamus, which sets forth the foregoing facts; and the motion has been argued on behalf of the petitioner and of the United States. The petition prays for a writ of mandamus to Judge Benedict, commanding him to settle and allow the bill of exceptions according to the truth of the matters which took place before him on the trial of the indictment, and to sign it, when settled and allowed, as of the 10th of April, 1891, the time a copy of it was served upon the United States attorney, with notice of settlement.

It is stated in the opinion of Judge Benedict, that the minutes of the trial, on which the motion for a new trial and in arrest of judgment was made, contained some exceptions that were noted at the trial and omitted others, and were settled by consent and signed by him. It appears from the record that this was done on July 9, 1890, and that on the same day the printed case as settled was filed in the office of

the clerk of the Circuit Court. The record also shows, that on the 24th of October, 1890, before the hearing of the motion for a new trial and in arrest of judgment, a motion was made on the part of the defendant, before the court held by the three judges, to insert in the record exceptions which did not appear in the minutes of the trial as so settled and filed; that that application was denied; and that the case was then heard. It appears from the opinion that the ground on which Judge Benedict refused to settle or sign the bill of exceptions was that, as the defendant had presented for his signature the minutes of the trial, and he had signed them, and they had been incorporated in the record with the consent of the defendant, and the case had been heard and decided by the three judges upon those minutes, the record was complete, and contained a sufficiently authenticated statement of the only exceptions which were open to review on the writ of error; that all other exceptions had been waived and abandoned; and that there was no occasion for any bill of exceptions other than, or different from, the one already incorporated in the record. The opinion also says, that the act of March 3, 1891, giving to this court the right to review the record in this case upon the writ of error, applies to the record as it stood complete, in the matter of the exceptions taken at the trial, when the statute was passed, and had no effect to revive exceptions which had been waived and abandoned, and does not require or permit a second bill of exceptions to be incorporated into the record as it stood at the time of the passage of the act.

We are of opinion that the act of March 3, 1891, went into immediate operation, so as to permit a writ of error to be allowed in the present case, as the final judgment against the defendant, by his sentence, was not rendered until March 18, 1891. The case was one of conviction of an "infamous crime," within the meaning of the act, as those words have been heretofore interpreted by this court. It was held in *Ex parte Wilson*, 114 U. S. 417, that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment to the Constitution of the United States. See also *Mackin* v. *United*

States, 117 U. S. 348; *Parkinson* v. *United States*, 121 U. S. 281; *United States* v. *De Walt*, 128 U. S. 393; *Medley, Petitioner*, 134 U. S. 160, 169; and *In re Mills*, 135 U. S. 263, 267. The purport of the rulings in those cases is, that a crime which is punishable by imprisonment in the state prison or penitentiary, as is the crime of which the defendant was convicted, is an infamous crime, whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. So it is clear that the crime in the present case is an infamous crime, although it does not appear that section 5209, or the sentence imposed, expressly provided for imprisonment at hard labor.

The writ of error was, under the act of March 3, 1891, a matter of right, and, being a writ to an existing Circuit Court, the citation could, under § 999 of the Revised Statutes, be signed by a justice of this court, as an authority for the issuing of the writ under § 1004.

We are of opinion, however, that although a writ of error will lie, the petition for the mandamus must be denied. At the time of the trial, and at the time the verdict of the jury was rendered, on the 28th of May, 1890, no writ of error from this court in a case like the present was provided for by statute. Of course, no bill of exceptions with a view to a writ of error was provided for, either by statute or rule. The granting of the writ of error now, because the final judgment on the conviction was rendered subsequently to March 3, 1891, cannot create a right to a bill of exceptions which did not exist at the time of the conviction. To so hold does not impair the jurisdiction of the Circuit Court in the case, within the meaning of the joint resolution of March 3, 1891, although the writ of error is taken out prior to July 1, 1891. The rights of the defendant in respect of a bill of exceptions stand as they did at the time he was convicted. Therefore, the bill of exceptions presented for settlement to Judge Benedict cannot be allowed; nor can the minutes of the trial as settled by

him by consent, and signed by him, and printed and filed, be treated by this court, on the return to the writ of error, as a bill of exceptions properly forming part of the record, no such bill of exceptions having been authorized on July 9, 1890.

It was suggested by the counsel for the defendant, that the Circuit Court held in this case by the three judges, under section 613 of the Revised Statutes, was improperly constituted, that all proceedings before it were without legal authority, and that its acts were of no binding force. But we are of opinion that it was a legally constituted tribunal; that it not only could have tried the cause in the first instance, but was authorized to hear and pass upon the motion for a new trial and in arrest of judgment; and that the rule made by the Circuit Court on that subject, which is quoted in the margin,[1] was a proper rule. Section 613 of the Revised Statutes has been above quoted. It is provided by § 658 that the regular terms of the Circuit Court in the Southern District of New York "exclusively for the trial and disposal of criminal cases, and matters arising and pending in said court," shall be held at the times therein specified. The provision of § 613 is that the criminal terms may be held by the three judges named

[1] CRIMINAL RULE OF THE CIRCUIT COURT. "March 12th, 1879. For the purpose of securing a right of review to defendants in criminal cases tried in the Circuit Court of the United States for the Southern District of New York, hereafter, in all such cases, where the defendant shall, within three days after conviction, file notice of a motion for a new trial upon exceptions taken at the trial, or a motion in arrest of judgment, sentence will be deferred until the next criminal term of the court, in order to give opportunity for the hearing of such motion before a court to be composed of the Circuit Judge and the two District Judges authorized by law to hold the said terms of said court, under section 613 of the Revised Statutes of the United States. The court will sit for the purpose of such hearings on the second day of each of the exclusively criminal terms provided for in section 658 of said Revised Statutes, at which time either party may move the hearing, and the same will be had upon the minutes of the trial, as settled by the judge who tried the case. The minutes so settled shall be printed by the moving party, and five copies thereof shall be filed before the first day of the term next subsequent to the term at which the trial was had, one of which copies shall be delivered to the district attorney, at his request. A failure to file such copies will be deemed an abandonment of any motion of which notice may have been given in pursuance of this rule."

in that section, or any one of them. All three may hold the court for any criminal business which may be brought before it.

The fact that the district attorney filed a joinder in error to the specific assignments of error filed by the defendant does not affect the ground upon which we dispose of the present application.

At the same time with the foregoing motion for leave to file a petition for a writ of mandamus, the Attorney General, on behalf of the United States, moved this court to annul and set aside the *supersedeas* and stay of proceedings, on the ground that the making of the order granting the same was unauthorized by law, because there is no express provision in the act of March 3, 1891, for a *supersedeas* and stay of execution. This motion was made with the view of testing the question, and has properly been argued by the Attorney General from the standpoint of having the matter finally determined one way or the other, rather than in any particular way.

Attention is called to the provision of section 4 of that act, that "the review, by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same;" and also to the provision of section 11 of that act, that "any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively;" and it is suggested that neither of those provisions applies to cases of appeals to, or writs of error from, this court. It is, therefore, contended that there is no direct provision for a *supersedeas* upon a writ of error from this court, in a criminal case.

That this court, as a court, has power to issue a writ of *supersedeas* under section 716 of the Revised Statutes is quite clear; for that section gives it power to issue all writs not

specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. *Hardyman* v. *Anderson*, 4 How. 640; *Ex parte Milwaukee Railroad Co.*, 5 Wall. 188.

We are of opinion, however, that a justice of this court had authority not only to allow the writ of error, but also to grant the *supersedeas*. By section 1000 of the Revised Statutes, it is provided that every justice or judge signing a citation on any writ of error shall take security for the prosecution of the writ, and for costs, where the writ is not to be a *supersedeas* and stay of execution, and for damages and costs where it is to be. In a criminal case, there are no damages; and in such a case, the United States being a party, it is provided by subdivision 4 of Rule 24 of this court, that in cases where the United States are a party no costs shall be allowed in this court for or against the United States.

Section 1007 of the Revised Statutes provides for the manner in which a *supersedeas* may be obtained on a writ of error. It is by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But, as there is no security required in a criminal case, the *supersedeas* may be obtained by merely serving the writ within the time prescribed, without giving any security, provided the justice who signs the citation directs that the writ shall operate as a *supersedeas*, which he may do when no security is required or taken.

We hold, therefore, that the allowance of the *supersedeas* in the present case was proper, and we deny the motion to set it aside.

To remove all doubt on the subject, however, in future cases, we have adopted a general rule, which is promulgated as Rule 36 of this court, (see 139 U. S., 706,) and which embraces, also, the power to admit the defendant to bail after the citation is served.

The order made hereon in the present case will allow the

Circuit Court, or any justice or judge thereof, in its or his discretion, to admit the defendant to bail, after the service of the citation, in such amount as may be fixed.

The motion of defendant for leave to file a petition for a writ of mandamus, and the motion of the United States to set aside the *supersedeas* and stay of proceedings, are both of them *Denied.*

Mr. Justice Bradley did not sit in this case or take any part in its decision.

KNEELAND *v.* LAWRENCE.

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

No. 333. Argued April 21, 1891. — Decided May 11, 1891.

A *bona fide* purchaser, before maturity, of coupon bonds of a railroad company payable to bearer, takes them freed from any equities that might have been set up against the original holder; and the burden of proof is on him who assails the *bona fides* of such purchase.
Tested by this rule appellant's case must fail.

The case is stated in the opinion.

Mr. John M. Butler for appellant.

Mr. George T. Porter for appellees.

Mr. Justice Lamar delivered the opinion of the court.

This case is one of a large number involving litigation growing out of the foreclosure of a mortgage upon the Toledo, Cincinnati and St. Louis Railroad of Ohio, Indiana and Illinois.

The facts necessary to an understanding of the question at issue, briefly stated, are as follows: The Frankfort and Kokomo Railroad was a road of about twenty-five miles in length, run-

ning from Frankfort to Kokomo, Indiana. On the 1st of January, 1879, the company owning the road issued two hundred bonds of $1000 each, bearing seven per cent interest, payable semi-annually and due in thirty years, and, to secure the payment thereof, executed a mortgage upon its property to the Farmers' Loan and Trust Company. Subsequently, by consolidation, that road became a part of the road of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois. On the 23d of July, 1881, the latter company issued 3000 bonds of $1000 each, bearing six per cent semi-annual interest, and due July 1, 1921, and, to secure their payment, executed to the Central Trust Company of New York and Thomas A. Hendricks a mortgage on that portion of its road running from Kokomo, Indiana, to East St. Louis, Illinois. Two hundred of these bonds were set aside to trustees, to be exchanged at par value for the original Frankfort and Kokomo bonds. One hundred and thirty of those bonds were so exchanged, the holders of the other seventy of them refusing to make the exchange.

Default having been made in the payment of interest upon the new bonds, the mortgage was foreclosed, the foreclosure decree being entered November 12, 1885. By this decree it was found that seventy of the Frankfort and Kokomo bonds were outstanding, and that there was due thereon the sum of $85,108.12; and it was decreed that that sum should be paid out of the proceeds of the foreclosure sale, next after the payment of the court costs and master's fees. The foreclosure sale took place December 30, 1885, and the appellant herein, Sylvester H. Kneeland, became the purchaser of the entire line of road from Kokomo to East St. Louis. The sale was confirmed on the 5th of February, 1886, and on the 10th of March following a deed was executed and delivered to the purchaser.

Under an order of court of December 30, 1885, it was provided that all claims which should be filed in court against the railway, or the fund arising from the sale thereof, should be referred to W. P. Fishback, a master of the court. On the 23d of July, 1886, the master reported that the appellees herein,

Lawrence Brothers & Co., had produced six Frankfort and Kokomo bonds (numbers given) with coupons attached; that said bonds were owned by S. Newton Smith, but were held by Lawrence Brothers & Co., as collateral security for advances made by them to Smith; and that there was due on said bonds the sum of $8883.16, to which should be added $1.26 per day from July 22, 1886, until they should be paid.

Exceptions were filed to the master's report by the appellant, but they were overruled, the report was confirmed and a decree was rendered in accordance therewith. An appeal from that decree brings the case here.

The ground upon which payment of these bonds was resisted, and, therefore, the ground upon which this appeal is based, is, that they are not part of the seventy bonds that were not exchanged for Toledo, Cincinnati and St. Louis bonds, but are part of the one hundred and thirty bonds that were so exchanged, and have been, therefore, fully paid and satisfied.

The evidence before the master, and which is set out in this record, shows that the appellees, as brokers, purchased these six bonds for Smith from George William Ballou & Co. Ballou & Co. had obtained possession of three of the bonds from Edward Le Conte, giving him in exchange three Toledo, Cincinnati and St. Louis bonds, two income bonds, one of $1000 and the other of $500, and thirty shares of stock in the Toledo, Cincinnati and St. Louis road. Where they obtained the other three the record does not show.

The argument for the appellant is, that Ballou & Co. were the financial agents of the Toledo, Cincinnati and St. Louis road, and that, therefore, it must be presumed that the Frankfort and Kokomo bonds held by them were a portion of the one hundred and thirty bonds that had been exchanged for a like number of Toledo, Cincinnati and St. Louis bonds, and were, therefore, fully paid and satisfied.

We cannot assent to this proposition. The record shows that the Central Trust Company of New York and Thomas A. Hendricks were the agents of the Toledo, Cincinnati and St. Louis road for the exchange of two hundred of its bonds

for the Frankfort and Kokomo bonds; and nowhere in the record is there any intimation that Ballou & Co. had any connection whatever with such agency. Admitting, as is claimed by the appellant, that Ballou & Co. were the financial agents of the Toledo, Cincinnati and St. Louis Company, it does not follow by any means that they might not have been in the *bona fide* possession of a portion, or even all, of the seventy unexchanged Frankfort and Kokomo bonds. There was certainly nothing to prevent Ballou & Co. from purchasing all of those seventy bonds from the holders of them and disposing of them as they saw fit. The three bonds which they obtained from Le Conte cannot be considered as having been exchanged for a like number of Toledo, Cincinnati and St. Louis bonds at par value; for they not only gave Le Conte a like number of bonds, but, as an inducement to such transfer, gave him, in addition, two income bonds amounting to $1500, and thirty shares of stock. Such a transaction is more in the nature of a negotiation and sale than an exchange, as contemplated by the original arrangement for an exchange of bonds.

In fact, there is nothing whatever to show, or even to indicate, that these six bonds were not part of the seventy bonds that were not exchanged, but were given a priority of lien by the foreclosure decree. On the contrary, the best of reasons exist for holding that they were not part of the one hundred and thirty bonds; for, according to the statement of counsel for appellant, which is borne out by the record in *Kneeland* v. *American Loan Co.*, 136 U. S. 89, those one hundred and thirty bonds were taken up and cancelled, whereas these six bonds do not appear to have ever been cancelled. They must have been, therefore, a part of the seventy bonds. The evidence shows clearly that Smith was a *bona fide* purchaser of them, and it does not show that the appellees are not *bona fide* holders of them. Coupon bonds like those in suit, payable to bearer, pass by delivery; and a *bona fide* purchaser of them before maturity takes them freed from any equities that might have been set up against the original holders of them. The burden of proof is on him who assails the *bona fides* of such purchase. *Murray* v. *Lardner*, 2 Wall. 110, 121, and cases there cited.

Tested by this rule, the appellant's case must fail. As already stated, there is nothing to show that these six bonds are not part of the seventy unexchanged Frankfort and Kokomo bonds, and nothing to show any *mala fides* on the part of Smith and the appellees in obtaining possession of them. *Decree affirmed.*

Mr. Justice Bradley was not present at the argument, and took no part in the decision of this case.

DWIGHT *v.* MERRITT.

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

No. 281. Argued April 2, 1891. — Decided May 11, 1891.

In an action against a collector to recover back an alleged excess of duties imposed upon an importation of iron rails, the duty having been imposed upon them as "iron bars for railroads" under Rev. Stat. § 2504, Schedule E, and the importer claiming that they were subject to duty as "wrought scrap iron" under the same schedule, the burden of proof is on the plaintiff to satisfy the jury that they had been in actual use before exportation, and that fact must be proved in order to recover.

The dutiable classification of articles imported must be ascertained by an examination of them, and not by their description in the invoice.

The statutes codified in the Revised Statutes and repealed with their enactment may be referred to in order to interpret the meaning of obscure and ambiguous phrases in the revision; but not when the meaning is clear and free from doubt.

The case is stated in the opinion.

Mr. Edwin B. Smith for plaintiffs in error.

Mr. Assistant Attorney General Maury for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

This was an action by an importer, the testator of the present plaintiffs in error, against a late collector of the port

of New York, to recover an alleged excess of duty exacted on a cargo of iron rails imported from Pillau, Russia, in June, 1880.

The collector assessed a duty on the merchandise at seventy cents per hundred pounds, under Schedule E, sec. 2504, Rev. Stat., as "iron bars for railroads or incline planes." The importer claimed that the merchandise was dutiable at only $8 per ton, under the following provision of the same schedule: "Wrought scrap iron of every description: eight dollars per ton. But nothing shall be deemed scrap iron except waste or refuse iron that has been in actual use, and is fit only to be remanufactured."

The importer paid the duties as assessed, duly protested against their exaction and appealed to the Secretary of the Treasury, who affirmed the ruling of the collector. Thereupon this action was brought to recover the difference between the duty exacted and what the importer claimed should have been exacted, amounting to $2880.65. The case was tried before Judge Shipman and a jury, resulting in a verdict and judgment in favor of the collector. To review that judgment this writ of error is prosecuted.

The bill of exceptions shows the following facts: The rails in question were completed rails and were imported from Russia by Waterman & Co., of Philadelphia, for the purpose of breaking them up and remanufacturing them in Waterman's mill, at Danville, Pennsylvania. They were in fact so disposed of. The rails were not suitable for use in this country, in the condition they were imported, being of too high a pattern to be safe, too short, and too heavy and expensive. They were fit in this country only for remanufacture. There was no evidence that they had ever been used for any purpose whatever, or had ever been laid on a railroad in Russia, although they had been sent to that country for that purpose; and were, when imported, somewhere from three to eight years old and rusty.

The evidence of the plaintiff's witnesses showed that the rails, as imported, were too expensive for profitable use on American railroads; and that at the time of their importation it

would have paid better to import a new rail of this character, provided it could be entered under the scrap iron schedule, and remodelled for the purpose of making railroad rails, than to buy pig iron and manufacture the rails from that, because, for the purpose of making new iron rails, these rails were three processes further advanced than pig iron would be. Those witnesses also testified that they could not say whether or not the rails in question had ever been in actual use prior to their importation.

The plaintiff offered to show by a witness who was familiar with the manufacture of iron, what the terms "scrap iron" and "waste iron" usually meant in the trade, or in commercial usage, but the defendant objected; and the court sustained the objection, on the ground that those terms were defined by the statute. Whereupon the plaintiff saved an exception.

Another witness called by the plaintiff was allowed to testify, describing the different varieties of scrap iron, the manner in which it originated and the purposes for which it was afterwards used.

The defendant's witnesses testified, in substance, that the rails in question were all of the same length and weight, and were not broken on the edges or elsewhere; but, on cross-examination, they admitted that they varied in weight somewhat, there being sixty-three pounds difference between the heaviest and the lightest.

The court charged the jury that, under the evidence and the law of the case, the only question was whether the iron had been in actual use prior to its importation, for the requirements of the statute, in respect to actual use, applied as well to waste as to refuse iron; that the burden of proof was on the plaintiff to satisfy the jury, by a fair preponderance of the evidence, that the rails had been in actual use; and that, unless that fact were so proven, their verdict should be for the defendant. Counsel for the plaintiff excepted to those portions of the charge above mentioned, and the only real question to be determined here is as to the correctness of those instructions; for if they were correct, the evidence offered as

to the commercial designation of the term "scrap iron" was immaterial, and there was no error in excluding it from the jury.

The provision of the statute invoked by the plaintiff is found in Schedule E, sec. 2504, Rev. Stat., and, with its punctuation, as published in the second edition of the Revised Statutes, is as follows: "Wrought scrap iron of every description: eight dollars per ton. But nothing shall be deemed scrap iron except waste or refuse iron that has been in actual use, and is fit only to be remanufactured."

It is clear that the rails were dutiable either under the clause claimed by the collector to embrace them, or under the scrap-iron clause above quoted, invoked by the plaintiff in error, since no other provision of the metal schedule appears to have, or is claimed to have, any application to the question, and they were confessedly not on the free list.

The plaintiff in error contends that the action of the collector was illegal in assessing as "iron bars for railroads or inclined planes," old iron rails which, it is admitted, were not adapted to any such use, nor imported for any such purpose, but which were manifestly imported solely for remanufacture. It is urged in support of this view, that as the law stood prior to the enactment by Congress of the Revised Statutes of the United States, as shown by the act of March 2, 1861, 12 Stat. 180, the provision corresponding to the one under discussion was in the following words: "On all iron imported in bars for railroads or inclined planes made to patterns *and fitted to be laid down upon such roads or planes without further manufacture* and not exceeding six inches high, twelve dollars per ton;" that this statute and phraseology were changed by the act of June 30, 1864, 13 Stat. 204, by omitting the limitation of height and substituting a rate by the pound for that of the ton, as follows: "On all iron imported in bars for railroads and inclined planes, made to patterns and *fitted to be laid down on such roads* or planes *without further manufacture, sixty cents per one hundred pounds;*" that an additional ten cents per one hundred pounds was imposed under the pressure of financial necessity, by the act of March 3, 1865, 13 Stat. 493, "on iron bars for railroads or inclined planes;" and it is in-

sisted that, as these two last-mentioned tariff acts are reproduced in this brief phrase of the Revised Statutes, no meaning should be attached to it different from that which obtains in those statutes. The argument is ingenious, but we cannot agree with the conclusion to which it conduces.

The Revised Statutes are not a mere compilation and consolidation of the laws of Congress in force on the 1st of December, 1873. The object of that revision was to simplify and bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, to expunge redundant and obsolete enactments, and to make such alterations as might be necessary to reconcile contradictions and amend imperfections in the original text of the preëxisting statutes. All those statutes were abrogated by section 5596, which provides that "all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

It is true that those statutes, though repealed simultaneously with the enactment of the Revised Statutes, may be referred to and considered, in order to interpret the meaning of obscure and ambiguous phrases in any section of said revision; but no such reference is necessary or proper in order to modify, under the color of interpretation, any phrases the meaning of which is clear and free from any doubt, except what the terms of the statute invoked may suggest.

The title of the Revised Statutes headed "Duties Upon Imports" is manifestly intended to be a complete system of tariff legislation, and to embrace and provide for every class of imported articles subject to import duties. The clause we are now considering in the provision of Schedule E, section 2504, is in clear, explicit and intelligible language. There is nothing in that clause, or in any other clause in that section, or in any other section in that title, which renders the meaning of this particular phrase doubtful or leaves room for interpretation or the interpolation of words taken from other preceding statutes upon the subject.

The next question is, was the merchandise, in any sense, dutiable under the "scrap iron" schedule? In other words, was the construction put upon that clause of the statute the correct one? The exact language of the court in its instruction to the jury on this question was as follows: "The statute defines scrap iron to be waste or refuse iron that has been in actual use and is fit only to be remanufactured. It is in proof that this importation was fit in this country only for remanufacture. The only question is, whether the iron had been in actual use, for the requirement that it should have been in actual use applies as well to waste as to refuse iron."

Looking to the language of the statute, it is clear that the grammatical construction of it authorizes the conclusion adopted by the court; and it is immaterial, in this connection, whether the terms "waste" and "refuse" be held to apply to two different classes of iron, as is claimed by the plaintiffs in error, or whether, as is most probably the case, they are used in the statute as synonymous terms to represent old iron generally. The language of the statute is plain and unambiguous in its definition of what shall constitute "scrap iron" under that schedule. The phrase "nothing shall be deemed scrap iron except," etc., clearly shows that there might be other classes or kinds of scrap iron known to the trade than those mentioned as dutiable under that clause of the statute, and, therefore, clearly indicates that not everything generally known as "scrap iron" was dutiable under that clause. The statute evidently contemplated that "scrap iron," as known to the trade and in commercial usage, was rather a broad term, embracing several varieties of iron; but it was only certain kinds of it that were dutiable under that clause. We think the construction adopted by the court a correct one, and that any other would be strained and unauthorized.

As persuasive of this view it may be well to state that it is the one adopted by the Treasury Department and always acted on in administering the tariff act; and it is the interpretation placed on the act by Attorney General Devens, January 24, 1880, 16 Opinions Attys. Gen. 445.

Moreover, looking at the clause of the statute under which

the duty was assessed, and taking into consideration the actual condition of the rails when imported, we think the importer's invoice improperly described the rails as "pieces iron rails, rusty;" and it would seem that the classification made by the collector was right. They were completed rails, and had never been in actual use, although they were several years old and somewhat rusty. Their condition was that of "iron bars for railroads or inclined planes." True, they may not have been made after the most approved style of the article in use on American railroads; but that does not alter their condition at that time, which is the test as to their dutiable classification. As was said by Mr. Justice Blatchford, speaking for the court in *Worthington* v. *Robbins*, decided at the present term, 139 U. S. 337: "In order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." In this case the rails were described in the invoice as "pieces iron rails, rusty;" by the appraiser as "iron railway bars;" and in the original entry and on the withdrawal as "pieces old iron rails." From these descriptions, which were somewhat variant, and from the completed condition of the rails as railroad rails, there was certainly nothing in the premises to show that they might not have been put into actual use in this country without undergoing the process of remanufacture. All the various questions of utility and adaptation of the merchandise imported are not supposed to enter into the decision of the collector in determining its dutiable classification, under the rule in *Worthington* v. *Robbins*.

Judgment affirmed.

UNIONTOWN BANK *v.* MACKEY.

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

No. 327. Submitted April 20, 1891. — Decided May 11, 1891.

A promissory note made by two persons, one as principal and the other as surety, was endorsed for the accommodation of the principal by the payee, who afterwards, by agreement in writing with the holder, "waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary." *Held*, that this authorized only an extension assented to by both makers of the note; that an extension by agreement between the holder and the principal, without the consent of the surety, discharged the endorser; but that no agreement for an extension of time was shown by the following facts: The holder having agreed with the principal "to extend the credit upon renewal notes made by the same parties who executed the original notes," and the surety being too sick to join in the execution of new notes, the holder, at the principal's request, sent him a statement of interest on the notes for four months, as well as blank renewal notes to be signed by both makers when the surety should be able to do so, and afterwards received such interest from the principal, after the surety's death, not knowing he was dead, and expecting the principal to procure and deliver renewal notes as before agreed.

This was an action brought September 14, 1886, by the Bank of Uniontown, a corporation of Kentucky, against David J. Mackey, a citizen of Indiana, as endorser of two promissory notes for $5000 each, one dated July 20, and the other July 29, 1885, signed by the Mount Vernon Mill and Elevator Company and by George Naas, and payable to the defendant's order at the plaintiff's bank in four months after date, with interest at the rate of eight per cent yearly after maturity until paid. The complaint contained four counts, two on each note.

The first and third counts alleged that the note was in fact signed by the company as principal and by Naas as surety, and was endorsed by Mackey for the accommodation of the company, and discounted by the plaintiff in July, 1885; that on November 20, 1885, Naas being then ill of what proved to

be his last sickness, and by reason thereof being unable to transact or consider any matter of business, as the defendant well knew, the company desiring to renew the note, procured the defendant to sign and deliver to the plaintiff an instrument in writing, (set forth in full, one of which is copied in the margin,[1] and the other differed only in the description of the dates when the note was made and payable,) by which he waived presentment for payment, protest and notice of protest of the note, and consented that the time for the payment thereof might be extended until he should give notice to the contrary in writing; *that on December* 29, 1885, *Naas not having recovered sufficiently to transact any business, or to renew the note, or to consent to an extension of the time of payment thereof, the interest on the note for four months after maturity was paid by the company, and the time for payment thereof was extended for those four months;* that Naas had died; and that by force of the statutes of Kentucky (set forth in the complaint and copied in the margin[2]) the note was placed on the footing of a foreign bill of exchange, and the plaintiff was entitled to maintain its action; *and that no part of the note had been paid but the interest thereon, as above stated.*

To each of these counts the defendant demurred, and the court sustained the demurrers.

The second and fourth counts were substantially like the

---

[1] This memorandum witnesseth that in the matter of a certain promissory note for five thousand dollars, dated July 20, 1885, and due November 20–23, 1885, wherein the Mount Vernon Mill and Elevator Company and George Naas are makers and D. J. Mackey is endorser, the undersigned hereby waives presentment for payment, protest, notice of protest, and consents that the payment thereof may be extended until he gives written notice to the contrary. Dated at Evansville, Indiana, this 20th day of November, 1885.

D. J. MACKEY.

[2] "Promissory notes payable to any person or persons, or to a corporation, and payable and negotiable at any bank incorporated under any law of this commonwealth, or organized in this commonwealth under any law of the United States, which shall be endorsed to and discounted by the bank at which the same is payable, or by any other of the banks in this commonwealth, as above specified, shall be, and they are hereby, placed on the same footing as foreign bills of exchange." Gen. Stat. c. 22, § 21.

first and third, except in substituting, for the words above printed in italics, an allegation (after setting forth the instrument of November 20, 1885) that "in consideration of the agreements therein contained, this plaintiff did not cause the said note to be protested for nonpayment, and consented that it might be renewed, and forebore to sue thereon until after the decease of said Naas," and an allegation that no part of the note had been paid but the sum of $136.65 paid on December 29, 1885.

To each of these counts the defendant filed an answer, admitting the making of the notes by the company as principal, and by Naas as surety, and the defendant's endorsement thereof for the accommodation of the company; and setting up that on December 21, 1885, Naas died, leaving children; that on December 24, 1885, an administrator of his estate was appointed and qualified; and that on December 29, 1885, the plaintiff, in consideration of the payment to it by the company of interest on the note for four months and three days from its maturity, agreed with the company to extend the time of payment of the note for that period, all of which was done without the knowledge or consent of the defendant or of the administrator of Naas. A replication was filed, a jury was duly waived in writing, and the case was submitted upon the issues of fact to the decision of the court, which made the following findings of fact:

"When the notes in suit were about to mature, to wit, November 20, 1885, the plaintiff having signified to the principal debtor, the mill and elevator company, its willingness to extend the credit upon renewal notes made by the same parties who executed the original notes, but the surety, Naas, being too sick to join in the execution of new notes, the officers of the mill and elevator company prepared and procured the defendant Mackey to sign the writings set out in the complaint, waiving presentment, protest, etc., of the notes in suit.

"From this time until December 29, 1885, various communications, verbal and written, passed between the officers of the plaintiff bank and the officers or agents of the mill and elevator company in respect to the renewal of these notes, includ-

ing a letter of the latter, dated December 2, 1885, which is of the tenor following: 'Owing to Mr. George Naas's continued illness we have not as yet presented to him the matter of the renewal of our paper. If you will kindly send us statement of interest for four months, we will remit the amount; also please send few blank notes, so that we can have them filled out at earliest opportunity.'

"In reply to said letter the plaintiff sent to the defendant the blank notes filled out for four months, ready for signature, and also a statement of the amount of interest, with the direction that the interest should be remitted along with the renewal notes.

"On December 21, Naas died intestate at his home in Mt. Vernon, Indiana, leaving children, and on December 30, 1885, William Louden was appointed administrator of his estate.

"On December 29, the mill and elevator company paid to the plaintiff and the plaintiff received the sum of $273.30, as and for the interest upon the notes in suit for four months on each from the date of maturity — that is to say, from the 23d and 29th days respectively of November, 1885, until the 26th day of March and the 1st day of April, 1886, and being interest in advance from December 29, 1885, until the last-named dates.

"When this interest was paid and received, the officers of the bank were ignorant of the death of George Naas, and still expected the mill and elevator company to procure and deliver renewal notes as theretofore had been proposed. Nothing was said, at the time, expressly in respect to an agreement for an extension of time, nor was anything said to qualify or affect the legal force of the payment and receipt of the interest in advance. Neither the heirs nor the legal representatives of Naas knew of or ever afterwards assented to this payment of interest, or to an extension of the time of payment on those notes.

"The defendant Mackey neither at nor before the time thereof had knowledge of this payment of interest, and never afterwards did he assent to or ratify the transaction with a knowledge that it had been done without the consent of the heirs and of the representative of Naas."

Upon the facts specially found, the court concluded, as matter of law, "that there was made an agreement for an extension of time, as alleged in the answer, whereby the heirs and representative of the estate of the surety, Naas, were released from liability on the notes in suit; and this having been done without the consent of the defendant Mackey, he is also released from liability, and is entitled to judgment in his favor upon the issues joined and for his costs."

Judgment was rendered accordingly for the defendant, and the plaintiff sued out this writ of error.

Mr. S. B. Vance for plaintiff in error.

Mr. G. V. Menzies for defendant in error.

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

It being alleged by the plaintiff, and admitted by the defendant, that Naas, one of the makers of the notes in suit, signed them as surety for the Mount Vernon Mill and Elevator Company, the other maker, and that the defendant, Mackey, endorsed the notes for the accommodation of that company, there can be no doubt that an agreement between the holder of the notes and the principal maker to extend the time of payment for a definite time, without the consent of the surety, would discharge him, and that such discharge of the surety, without the consent of the endorser, would discharge the endorser also.

The agreement in writing between the holder and the endorser, as to each note, by which the endorser "consents that the payment thereof may be extended until he gives written notice to the contrary," evidently contemplated and authorized only an extension of time which should neither discharge nor increase the liability of any party to the note. It looked to an extension consented to by both the makers of the note, and leaving them both liable to pay it at the end of the extended time; and not to an extension of time by agreement between the holder and the principal maker only, which would dis-

charge the second maker, being only a surety, and prevent the endorser, upon paying the amount of the note, from having recourse to him, as well as to the principal.

As the first and third counts alleged an extension of the time of payment of the note by the holder by agreement with the principal maker only, without any knowledge or consent of the surety, the demurrers to those counts were rightly sustained.

But upon the second and fourth counts the case is presented in a different aspect.

Each of these counts, without alleging either the receipt by the plaintiff of any interest or other consideration from the defendant, or any agreement to renew or extend the note for a definite time, simply alleged generally that the plaintiff did not cause the note to be protested for nonpayment, and consented that it might be renewed, and forbore to sue thereon until after the death of the surety. This was not an allegation of a definite agreement to forbear to sue, but only of an actual forbearance, which would not discharge a surety or an endorser.

The defendant evidently so understood the allegations of these counts, for, instead of demurring to them, (as he had to the other counts,) he answered, setting up a definite agreement between the plaintiff and the principal maker to extend the time of payment of the note for four months from its maturity, in consideration of the payment of interest on the note during such extension of time.

But the special findings of fact wholly fail to support this defence. From those findings it appears that, the plaintiff having signified to the principal maker its willingness "to extend the credit upon renewal notes made by the same parties who executed the original notes," and the surety being too sick to join in the execution of new notes, the plaintiff sent to the principal maker, at its request, a statement of the interest for four months, as well as blank renewal notes to be signed by both makers when the surety should be able to do so; and that such interest was paid by the principal and received by the plaintiff after the surety's death, the plaintiff at that time being ignorant of his death, and expecting that the principal

would procure and deliver renewal notes as before proposed, and nothing being then said as to an agreement for an extension of time, or as to the effect of the payment of interest. No present agreement for an extension of time can be inferred from the mere payment of interest under such circumstances. The necessary conclusion from the facts found is, that the plaintiff never agreed to extend payment of the old notes, except upon receiving new ones signed by both makers, which were never given; and that the payment of interest has no effect upon the case, except, as admitted in the complaint, by way of deduction from the amount that the plaintiff is entitled to recover.

Judgment reversed, and case remanded with directions to enter judgment for the plaintiff on the second and fourth counts.

EQUITABLE LIFE ASSURANCE SOCIETY *v.* CLEMENTS.

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

No. 340. Argued April 23, 24, 1891. — Decided May 11, 1891.

A policy of insurance, executed in New York by a New York corporation doing business in Missouri, upon an application signed in Missouri by a resident of Missouri, made part of the contract, and declaring that it "shall not take effect until the first premium shall have been actually paid during the life of the person proposed for assurance," and which is delivered, and the first premium paid, in Missouri, is, in the absence of evidence of the company's acceptance of the application in New York, a Missouri contract, and governed by the laws of Missouri.

The Revised Statutes of Missouri of 1879, §§ 5983–5986, establish a rule of commutation upon default in payment of premium after two premiums have been paid on a policy of life insurance, which cannot be varied or waived by express provision in the contract, except in the cases specified in those statutes.

THIS was an action brought by Alice L. Wall, a citizen of Missouri and widow of Samuel E. Wall, and prosecuted by

Benjamin F. Pettus, her administrator, against the Equitable Life Assurance Society of the United States, a corporation of New York and doing business in Missouri, on a policy of insurance executed by the defendant at its office in the city of New York on December 23, 1880, upon the life of Samuel E. Wall, by which, in consideration of the payment of $136.25 by him, and of the payment of a like sum on or before December 15 in each year during the continuance of the contract, it promised to pay to Alice L. Wall, his wife, $5000 at its office in the city of New York, within sixty days after satisfactory proofs of his death.

"And further, that if the premiums upon this policy for not less than three complete years of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of default of payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living," "for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies now published and in use by the society: Provided, however, that this policy shall be surrendered, duly receipted, within six months of the date of default in the payment of premium, as mentioned above.

"This policy is issued and accepted upon the condition that the provisions and requirements printed or written by the society upon the back of this policy are accepted by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

Among the provisions and requirements printed on the back of the policy were the following:

"4. All premiums are due in the city of New York, at the date named in the policy; but at the pleasure of the society suitable persons may be authorized to receive such payments at other places, but only on the production of the society's receipt therefor, signed by the president, vice-president, actuary, secretary or assistant secretary, and countersigned by the

person to whom the payment is made. No payment made to any person, except in exchange for such receipt, will be recognized by the society. All premiums are considered payable annually in advance; when the premium is made payable in semi-annual or quarterly instalments, that part of the year's premiums, if any, which remains unpaid at the maturity of this contract, shall be regarded as an indebtedness to the society on account of this contract, and shall be deducted from the amount of the claim; and if any premium or instalment of a premium on this policy shall not be paid when due, this policy shall be void; nevertheless nothing herein shall be construed to deprive the holder of this policy of the privilege to demand and receive paid-up insurance in accordance with the agreement contained in this policy.

"5. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing, signed by the president, vice-president, actuary, secretary or assistant secretary of the society, whose authority for this purpose will not be delegated.

"6. If any statement made in the application for this policy be in any respect untrue, this policy shall be void."

The application for the policy was dated at Windsor in the State of Missouri, December 15, 1880, addressed to the defendant, and signed by Samuel E. Wall and Alice L. Wall; and the parts of it relied on by the defendant were as follows:

"27. Does the person for whose benefit the assurance is effected, in consideration of the agreements contained in the policy hereby applied for, (providing for paid-up insurance in the event of surrender of the policy at certain periods and under certain conditions specified,) waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not?" "Yes."

"It is hereby declared and agreed that all the statements and answers written on this application are warranted to be

true, and are offered to the society as a consideration of the contract, which shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance."

The petition alleged that, in consideration of the sum of $136.25 paid to the defendant by Samuel E. Wall, and of the further agreement on his part to pay to the defendant an annual premium of $136.25 on or before December 15 in each year during the continuance of the contract, the defendant "made, executed and delivered to said Samuel E. Wall, who was then and all the times hereinafter mentioned a resident of the State of Missouri, and in which State the said policy was delivered and the said premiums paid," the policy of insurance, above stated.

The answer admitted that said Wall was a resident of the State of Missouri, and that the policy of insurance, "after being applied for to and executed by the defendant, was, at the request of the said Wall, transmitted to the State of Missouri and was delivered to said Wall in said State," and "that the annual premiums due on said policy on December 15, 1881, and December 15, 1882, were paid, as also the cash premium due when said policy was issued."

The plaintiff alleged in the petition, and proved at the trial, that Samuel E. Wall failed to pay the premium due December 15, 1883; that he died January 21, 1884; that the defendant, on notice of his death, denied its liability, and thereby waived further proof thereof; that on December 15, 1883, the policy had acquired a net value of $161.05, as computed upon the American experience table of mortality, with four and a half per cent annual interest; that neither Wall nor his wife was then indebted to the defendant, on account of past premiums on the policy, or otherwise; that his age at that time was thirty-nine years; and that three-fourths of such net value, applied and taken as a net single premium for temporary insurance for the full amount written in the policy, would continue the policy in force until August 30, 1886.

The plaintiff claimed the full amount of the policy, with

interest, by virtue of the provisions of the Revised Statutes of Missouri of 1879, which are copied in the margin.[1]

---

[1] SEC. 5983. No policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A.D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void, by reason of the non-payment of premium thereon; but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one-half per cent interest per annum; and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of the default of premium and the assumption of mortality and interest aforesaid.

SEC. 5984. At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and one-half per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company.

SEC. 5985. If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5983, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured.

SEC. 5986. The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore; or for the unconditional commutation of the policy to nonforfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5984; or if the legal holder of the policy shall, within sixty days after default of

The grounds of defence relied on were: 1st. That the policy was a contract governed by the laws of the State of New York and not by the laws of the State of Missouri. 2d. That if it was governed by the laws of Missouri, then the stipulations in the policy and in the application therefor were valid and binding on the plaintiff as a waiver of the provisions of § 5983 of the Revised Statutes of Missouri.

The court, on motion of the plaintiff, ordered the parts of the answer which set up these defences to be struck out, delivering the opinion reported in 32 Fed. Rep. 273; and afterwards, upon a submission of the case to its decision without a jury, declined to sustain these defences, and rendered judgment for the plaintiff in the sum of $6125. The defendant duly excepted to these rulings, and sued out this writ of error.

Mr. Henry Hitchcock for plaintiff in error. *Mr. G. A. Madill* and *Mr. G. A. Finkelnburg* were with him on the brief.

Mr. L. C. Krauthoff for defendant in error. *Mr. Matthew A. Fyke* was with him on the brief.

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

Upon the question whether the contract sued on was made in New York or in Missouri, there is nothing in the record, except the policy and application, the petition and answer, by which the facts appear to have been as follows: The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the defendant's office in New York, provides that "the contract between the parties hereto is completely set forth in this policy and

---

premium, surrender the policy and accept from the company another form of policy; or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof; then, and in any of the foregoing cases, this act shall not be applicable.

the application therefor, taken together." The application declares that the contract "shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance." The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums, and, by not controverting that they were paid in Missouri, admits that fact also, if material. Missouri Rev. Stat. 1879, § 3545. The petition further alleges that the policy was delivered in Missouri; and the answer admits that the policy was, "at the request of the said Wall, transmitted to the State of Missouri and was delivered to said Wall in said State." If this form of admission does not imply that the policy was at the request of Wall transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri.

By the Revised Statutes of Missouri of 1879, in force when this policy was made, it was enacted as follows: By § 5983, "no policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this State, shall, after payment upon it of two full annual premiums, be forfeited or become void, by reason of the nonpayment of premium thereon; but it shall be subject to the following rules of commutation, to wit:" The net value of the policy is to be computed, and the insurance is to continue in force for the full amount of the policy for such time as three-fourths of such net value will be a premium for, according to the rules of commutation prescribed in that section. By § 5984, the

holder of the policy, within sixty days from the beginning of such temporary insurance, may elect to take a paid-up policy for such amount as the net value aforesaid would be a premium for. By § 5985, if the assured dies within the term of temporary insurance, as determined by § 5983, and there has been no breach of any other condition of the policy, "the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding."

The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted, by which, in § 5983, "no policy of insurance" issued by any life insurance company authorized to do business in this State "shall, after the payment of two full annual premiums, be forfeited or become void, by reason of the nonpayment of premium thereon; but it shall be subject to the following rules of commutation;" and, in § 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, "the company shall be bound to pay the amount of the policy," "anything in the policy to the contrary notwithstanding."

This construction is put beyond doubt by § 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections "shall not be applicable," necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy.

Of the cases so specified, the only ones in which the terms of the policy are permitted to differ from the plan of the statute are the first and second, which allow the policy to

stipulate for the holder's receiving the full benefit, either in cash, or by a new paid-up policy, of the three-fourths of the net value, as determined by §§ 5983 and 5984. The other two cases specified do not contemplate or authorize any provision in the contract itself inconsistent with the statute; but only permit the holder to surrender the policy, either in lieu of a new policy, or for a consideration adequate in his judgment. In defining each of these two cases, the statute, while allowing the holder to make a new bargain with the company, at the time of surrendering the policy, and upon such terms as, on the facts then appearing, are satisfactory to him, yet significantly, and, it must be presumed, designedly, contains nothing having the least tendency to show an intention on the part of the legislature that the company might require the assured to agree in advance that he would at any future time surrender the policy or lose the benefit thereof, upon any terms but those prescribed in the statute.

It follows that the insertion, in the policy, of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid; as well as the insertion, in the application, of a clause by which the beneficiary purports to "waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State, or not;" is an ineffectual attempt to evade and nullify the clear words of the statute.

Judgment affirmed.

BLOCK *v.* DARLING.

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

No. 299. Argued April 22, 23, 1891.—Decided May 11, 1891.

When in an action for the recovery of a money demand, a counter-claim of the defendant exceeding $5000 in amount is entirely disallowed, and judgment rendered for the plaintiff on his claim, this court has juris-

Statement of the Case.

diction of a writ of error sued out by the defendant, without regard to the amount of the plaintiff's judgment.

Hilton v. *Dickinson*, 108 U. S. 165, affirmed and applied.

A general exception "to all and each part of the foregoing charge and instruction" suggests nothing for the consideration of this court.

Money deposited by the plaintiff with the defendant, in order to cheat and defraud plaintiff's creditors, may be recovered back by him.

DARLING, the defendant in error, brought this action against the plaintiffs in error, partners doing business under the name of Elias Block & Sons, to recover the sum of $7144.37, for and on account of the sum of $5636 alleged to have been deposited with them by plaintiff, and accepted and received by defendants, to be paid to him on his order, and for certain articles of personal property sold and delivered by him to them at their special instance and request, particulars of which are set out in an account filed with the petition, and for each and all of which, it is averred, the defendants promised to pay, but no part of which had been paid except the sum of $3103; leaving a balance due of $4041.37, for which amount, with interest, judgment was asked.

The defendants filed an answer and counter-claim, in the first paragraph of which they deny being indebted to the plaintiff in any sum whatever on account of the matters or any of them set forth in the petition. They allege that, on the 8th of March, 1882, they purchased from him a distillery and premises known as the A. W. Darling distillery, including certain merchandise and chattels, then on the premises, and being used in the operation of the distillery and the distillery business; also, the good will, brands, trade marks, trade names and other tokens connected with and belonging to such business and distillery, and certain whiskeys made at the distillery, the price of the whole being $20,450.82; that the merchandise and chattels so bought by them constituted part of the personal property mentioned in the petition, and were purchased by him at agreed prices, aggregating $1079.60; and that said sum of $20,450.82 was then and there paid to the plaintiff, except $5636. In respect to the latter sum the answer alleged that "the plaintiff was then and there, and still is,

largely indebted to others and wholly insolvent, and intending and designing to cheat and defraud his other creditors, and thereto to assert to them that he had been fully paid all of said purchase money, he then and there requested these defendants to retain said balance as a deposit, and thereupon the same was paid by these defendants to plaintiff and by him immediately returned to these defendants, and that this is the same transaction mentioned in the petition as a deposit."

The second paragraph asserted a counter-claim against the plaintiff for the sum of $9000, for which the defendants asked judgment. The counter-claim arose out of alleged misrepresentations and breach of warranty by the plaintiff in respect to certain whiskeys then on hand and made at his distillery, which the defendants had purchased with the distillery; such whiskeys, it was alleged, being falsely and fraudulently represented by the plaintiff to be sound and merchantable, and not made of rotten or musty material, and the purchase of them, as well as the distillery, constituting a part of the transaction out of which the demands of the plaintiff arose.

After the issues were fully made up — the burden, according to the pleadings, being upon the plaintiff to establish his demand, and upon the defendants to prove their counter-claim — there was a trial before a jury, resulting, December 22, 1886, in a verdict in favor of the plaintiff for "$3938.40, with legal interest from March 11, 1882." On the same day, a judgment in conformity with the verdict having been entered, the defendants moved for a new trial upon various grounds. Subsequently, December 24, 1886, the plaintiff moved the court to allow him to remit $100 of the judgment. This motion was disposed of on the day the defendants tendered their bill of exceptions, January 17, 1887, the court ordering that motion to be granted, the defendants being present by counsel and not objecting.

The bill of exceptions shows that certain letters received by the plaintiff, through the mail, from the defendants, were admitted in evidence against their objection, and that an exception was taken to the action of the court. It also shows that the defendants offered testimony conducing to show that the

debt of the defendants to plaintiff for unpaid purchase money on the transaction in controversy was changed in form to a deposit with defendants, for plaintiff's benefit, under the assumed name of Charles Adams, and that such change was at the plaintiff's instance, and for the purpose of concealing that indebtedness from his creditors, and with intent to defraud them. This testimony was excluded, and to this action of the court an exception was taken.

The bill of exceptions shows no other exceptions. It contains all the evidence introduced "bearing upon the exceptions to the charge." The charge was very full, concluding: "It is the duty of this court to tell you that the defendants have not made out any case for damages. You will, therefore, retire to consider the verdict and return what you find to be the balance due to the plaintiff, allowing him interest or not as you may see proper."

The defendants, at the close of the charge, "excepted to all and each part of the foregoing charge and instructions, and the same was all the charge or instruction given by the court."

Mr. T. F. Hallam for plaintiffs in error.

Mr. Orrin B. Hallam for defendant in error.

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

1. The judgment rendered December 22, 1886, was for $3938.40, with interest thereon at the rate of six per cent per annum from the 11th of March, 1882. The principal and interest amounted at that time to $5062.07. But on a subsequent day the court, the defendants being present by counsel and not objecting, allowed the plaintiff to remit one hundred dollars of the judgment. This reduced the amount in dispute on the plaintiff's demand to less than $5000. It is, consequently, contended that there is nothing before us on this writ of error in respect to the plaintiff's cause of action against the defendants. This view cannot be sustained. The defendants

not only disputed the whole of the plaintiff's demand, but claimed judgment over against him for the amount of their counter-claim. So that the amount in dispute here is the aggregate of the demands of the respective sides. As said in *Hilton* v. *Dickinson*, 108 U. S. 165, 175, this court has jurisdiction "of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter-claim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed." See also *Bradstreet Company* v. *Higgins*, 112 U. S. 227. The disallowance altogether of the defendants' counter-claim entitled them to a writ of error that would bring up the whole case, the original cause of action as well as the defence and counter-claim. This results from the fact that the defendants claimed that the plaintiff ought not to have judgment in any sum whatever, and that they were entitled to judgment for the amount of their counter-claim.

2. Although we have jurisdiction, so far as the value of the matter in dispute is concerned, the question is not properly before us as to whether the court erred in its charge to the jury upon the counter-claim. The general exception "to all and each part of the foregoing charge and instructions" suggests nothing for our consideration. It was no more than a general exception to the whole charge. The court below was entitled to a distinct specification of the matter, whether of fact or of law, to which objection was made. The charge covered all the facts arising out of the counter-claim, and clearly stated the law which, in the opinion of the court, governed the case. If its attention had been specifically called at the time to any particular part of the charge that was deemed erroneous, the necessary correction could have been made. An exception "to all and each part" of the charge gave no information whatever as to what was in the mind of the excepting party, and, therefore, gave no opportunity to the trial court to correct any error committed by it. *Harvey*

v. *Tyler*, 2 Wall. 328, 339; *Beckwith* v. *Bean*, 98 U. S. 266, 284; *Moulor* v. *American Ins. Co.*, 111 U. S. 335, 337.

3. The exception by the defendants to the admission in evidence of certain letters received by the plaintiffs through the mail from the defendants, is not well taken. Those letters had more or less bearing upon the transaction out of which the respective claims of the parties arose.

4. Nor did the court below err in excluding evidence offered by the defendants conducing to show that the money claimed by the plaintiff to have been deposited with them to be paid to him on his order was so deposited with the intent to cheat and defraud his creditors. The evidence, if admitted, would not have relieved the defendants from responsibility to account for it. The plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which the defendants claimed to have received it; and, if successful, would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been fully executed. The suit is necessarily a disavowal upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow the defendants to retain it upon the ground that he had originally the purpose to conceal it from his creditors would be inconsistent with the spirit and policy of the law. *Spring Co.* v. *Knowlton*, 103 U. S. 49, 58, and authorities there cited. Besides, the deposit was good as between the parties. The defendants do not represent the plaintiff's creditors, and the latter are not suing.

This disposes of all the exceptions arising upon the record.

Judgment affirmed.

MULLAN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 330. Argued and submitted April 21, 1891. — Decided May 11, 1891.

When the commander-in-chief of a squadron, not in the waters of the United States, convenes a court martial to try an officer attached to the squadron, more than half of whose members are juniors in rank to the accused, the courts of the United States will assume, when his action in this respect is attacked collaterally, and nothing to the contrary appears on the face of the order convening the court, that he properly exercised his discretion, and that the trial of the accused by such a court could not be avoided without inconvenience to the service.

The President has power by and with the advice and consent of the Senate to displace an officer in the army or navy by the appointment of another person in his place.

Blake v. *United States*, 103 U. S. 227, affirmed and followed.

On the 18th of February, 1883, the United States steamer Ashuelot — in charge of the appellant as Commander in the United States Navy, and attached to the Asiatic squadron under Rear Admiral Clitz — ran upon a rock and was lost, with eleven of the crew. The Navy Department received, March 16, 1883, from the Rear Admiral a message sent by cable from Hong-Kong, in these words: "Inquiry finished; Mullan culpable; others exonerated; court martial impossible; directions requested." In response to this message the department, on the 19th of March, 1883, issued orders to Captains William P. McCann and Joseph N. Miller and Master Samuel C. Lemly to proceed to Yokohama, Japan, and report to the commander-in-chief of the Asiatic station. These orders were issued to enable that officer to organize a court martial to try Mullan for the loss of the Ashuelot.

Subsequently, April 30, 1883, Rear Admiral Pierce Crosby, who had then assumed command of the United States squadron on the Asiatic station, ordered a general court martial to convene on board the flag-ship Richmond, at Hong-Kong, on the 2d of May, 1883, for the trial of Mullan. The court was

composed of the following persons, any five of whom were empowered to act: Captain William P. McCann, Captain J. N. Miller, Lieutenant Commanders G. B. D. Gleddin and E. S. Houston, Lieutenants J. J. Hunker, S. M. Ackley, and B. Noyes. In the order convening the court it was stated that "no other officers than those named can be assembled without manifest injury to the service."

When the court convened, the appellant filed the following protest: "I object and protest against the organization of the court as a whole, and for the following reasons: In case of an officer to be tried by a court martial, article 39 of the articles for the government of the United States Navy provides that in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. In time of war it might frequently occur that officers, particularly those of the higher grades, could not be detached from duty and ordered as members of a court without great injury to the service; but in time of peace, when large numbers of officers are either off duty or performing such duty as for the necessary time might be done by a subordinate, no such emergency can possibly arise. It cannot be claimed by any one that a sufficient number of officers senior to myself could not have been ordered upon this court without injury to the service. I have no desire to reflect on any individual member of this court; but since my professional reputation, my personal character and the prosperity and happiness of my family are at stake, I must emphatically protest against being tried by a court, five of whose seven members are junior to myself."

At the request of the appellant the court below found that at the time of the organization of the court there were twelve naval officers superior in rank to him, on waiting orders in the city of Washington; and that Medical Inspector Stephen D. Kennedy, of the Navy, was tried in November, 1883, on board the Hartford, at Panama, by a court composed of two commodores, two captains, one medical director, one medical inspector and one commander; all of those officers being detailed for that special duty, and directed to proceed from New York

to Panama, because deemed necessary by the Navy Department in view of the fact, of which it was informed by Rear Admiral Hughes, that there were not in the squadron under his command the requisite number of officers of sufficient rank to organize a court martial for the trial of Medical Inspector Kennedy.

The charges against appellant, for the trial of which the court at Hong-Kong was convened, were: drunkenness on duty; improperly hazarding the vessel under his command, in consequence of which it was run upon a rock and lost; and neglect of duty. Being found guilty, he was sentenced to dismissal from the service. The sentence was approved and confirmed by the President on the 6th of July, 1883.

In December, 1883, the President nominated to the Senate "Lieutenant Commander Francis M. Green to be a commander in the Navy, from the 7th of July, 1883, *vice* Commanders T. H. Eastman, retired, and Horace E. Mullan, dismissed." The Senate, January 18, 1884, advised and consented to this appointment of Green, from the latter date, "*vice* Commanders T. H. Eastman, retired, and Horace E. Mullan, dismissed," and on the 23d of January, 1884, the President commissioned him to be a commander in the Navy from the 7th of July, 1883.

The present action was brought by Mullan on the 3d of June, 1885, to recover pay as commander in the Navy since the 6th of July, 1883. It proceeds upon the ground that this action of the court martial was illegal and void, and that, notwithstanding its sentence of dismissal, he was at the time of bringing this action, and had been since the 6th of July, 1883, a commander in the Navy, legally entitled to the compensation provided by law.

The Court of Claims found the above facts, and, holding as a conclusion of law that appellant was not entitled to recover, dismissed his petition. 23 C. Cl. 34.

Mr. John Goode and *Mr. Eppa Hunton* for appellant.

Mr. Assistant Attorney General Maury for appellee.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

The principal contention of the appellant is, that the court martial convened under the order of Rear Admiral Crosby was an illegal body, without jurisdiction to try him. This contention is based upon the fact that of the seven members of the court participating in the trial, five were his juniors in rank. Our attention has been called to the clause of the 5th section of the army appropriation act of July 13, 1866, 14 Stat. 92, c. 176, preserved in § 1229 of the Revised Statutes providing that "no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court martial to that effect or in commutation thereof." And article 36, for the government of the Navy, Rev. Stat. § 1624, reads: "No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court martial or in mitigation thereof." Article 39 of section 1624 of the Revised Statutes provides: "A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried. The senior officer shall always preside, and the others shall take place according to their rank."

These provisions are cited by the appellant in support of his contention that the court martial at Hong-Kong was an illegal tribunal. He insists that it appears from the record before us that a court consisting of not less than five commissioned officers — more than one-half of them, exclusive of the President, being his seniors in rank — could have been convened without injury to the service, and therefore the court which tried him was unauthorized by the statute. This is supposed to be established by the fact that, at the time of the

organization of the court at Hong-Kong, there were twelve naval officers, superior in rank to the appellant, on waiting orders in the city of Washington. But this does not show that any of those officers could at that time have been sent from the national capital to the Asiatic station "without injury to the service." The public interests may have required them to be held at Washington for assignment to other duty than service upon the court martial to be convened for the trial of the appellant. Of that the Navy Department was necessarily the judge, and its discretion could not be controlled nor its action reviewed by the courts. The presence of those officers in Washington, on waiting orders, at the time the court martial at Hong-Kong was ordered, must be conclusively presumed to have been required by the Navy Department, and, therefore, by the exigencies of the naval service. Some stress is laid upon the circumstance, stated in the findings of the court below, that certain officers were detailed by the Navy Department, in November, 1883, to proceed from New York to Panama for service upon a court martial, ordered for the trial of a medical inspector; such detail being deemed necessary by reason of the fact that in the squadron to which the inspector was attached there were not "the requisite number of officers of sufficient rank to organize a court martial" to try him. But that only tends to show that a court martial, a majority of whose members, exclusive of the President, were senior in rank to the inspector could, at that time, be convened "without injury to the service." It does not show what were the requirements of the service at the time the court martial was ordered to be held at Hong-Kong in May, 1883, for the trial of the appellant. It results that there is no ground for the contention that the record shows that the organization of a court, with more than one-half of its members junior in rank to appellant, could have been avoided without injury to the service.

The statute permits an officer of the navy to be tried by a court-martial, more than one-half of whose members are his juniors in rank, if it cannot be avoided without injury to the service. Rear Admiral Crosby, being commander-in-chief

of a squadron not operating or stationed "in the waters of the United States," had the power, without express authority from the President, to convene a general court martial for the trial of the appellant. Rev. Stat. § 1624, Art. 38. That is not disputed. Whether the interests of the service admitted of a postponement of his trial until a court could be organized of which at least one-half of its members, exclusive of the President, would be his seniors in rank, or whether the interests of the service required a prompt trial, upon the charges preferred, by such officers as could be then assigned to that duty by the commander-in-chief of the squadron, were matters committed by the statute to the determination of that officer. And the courts must assume — nothing to the contrary appearing upon the face of the order convening the court — that the discretion conferred upon him was properly exercised, and, therefore, that the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided "without injury to the service." "Whenever," this court said in *Martin* v. *Mott*, 12 Wheat. 19, 31, "a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

The result of these views is that the sentence of the court martial, and its approval by the President, cannot be regarded as void.

But, independently of the question as to the legal character of the court martial, there is another ground upon which the affirmance of the judgment of the Court of Claims can rest. In *Blake* v. *United States*, 103 U. S. 227, 235, it was held, upon full consideration, that the fifth section of the army appropriation act of July 13, 1866, c. 176, 14 Stat. 92, above quoted, meant, "that whereas, under the act of July 17, 1862, as well as before its passage, the President alone was authorized to dismiss an army or naval officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service, he alone shall not, thereafter, in time of peace, exercise

such power of dismissal, except in pursuance of a court martial sentence to that effect or in commutation thereof." Again, in the same case: "Our conclusion is that there was no purpose, by the fifth section of the act of July 13, 1866, to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place. If the power of the President and Senate, in this regard, could be constitutionally subjected to restrictions by statute, (as to which we express no opinion,) it is sufficient for the present case to say that Congress did not intend by that section to impose them. It is, in substance and effect, nothing more than a declaration that the power theretofore exercised by the President, without the concurrence of the Senate, of summarily dismissing or discharging officers of the Army or Navy, whenever in his judgment the interest of the service required it to be done, shall not exist, or be exercised, *in time of peace*, except in pursuance of the sentence of a court martial, or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places."

These principles were affirmed in the subsequent case of *Keyes* v. *United States*, 109 U. S. 336, 339.

In view of these adjudications, the judgment below may be sustained without reference to the inquiry whether the court martial that tried Mullan was legally constituted, or whether he ceased to be an officer of the Navy in consequence of the approval of the sentence by the President. The fact appears that Francis M. Green, under the appointment of the President, by and with the advice and consent of the Senate, was commissioned commander in place of Eastman retired, and Mullan dismissed. The circumstance that Green was appointed in place of one commander retired, and another dismissed, is explained by the naval appropriation act of August 5, 1882, c. 391, 22 Stat. 284, 286, requiring a reduction of the number of officers in certain grades of the Navy, including the grade of commander. Green was appointed by the President,

by and with the advice and consent of the Senate, and was commissioned, in place of Mullan. This, under the above decisions, to which we adhere, put Mullan out of the Navy, even if the proceedings of the court martial had been void.

Judgment affirmed.

WOODWARD *v.* JEWELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 310. Argued April 15, 1891.—Decided May 11, 1891.

The amount involved in this case, when interest is properly computed, is sufficient to give the court jurisdiction.

A contract by a mortgagee, made on receiving the mortgage, that he will hold the securities, and that the mortgagor may "sell the property named in said deeds and make titles thereto, the proceeds of the sale to go to the credit of" the mortgagee, gives to the mortgagor power to sell for cash, free from the mortgage, but not to exchange for other lands; and does not cast upon the purchaser for cash the duty of seeing that the mortgagor appropriates the proceeds according to the agreement.

Such a contract is not a power of attorney to the mortgagor to sell land of which the title is in the mortgagee, but only the consent of a lien holder to the release of his lien in case a sale is made, and it is not required by the laws of Georgia to be executed before two witnesses.

The conveyance to the mortgagee in this case was a mortgage and not a deed conveying the legal title.

THE case is stated in the opinion.

Mr. Walter B. Hill for appellants.

Mr. Clifford Anderson for appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

On April 10, 1884, appellants filed their bill in the Circuit Court of the United States for the Southern District of Georgia, praying for the foreclosure of a mortgage. The mortgagor and debtor was Daniel A. Jewell. The other defendants were alleged to have interests in the mortgaged

property. On October 29, 1885, a decree was entered dismissing the bill. The opinion filed at the time is reported in 25 Fed. Rep. 689. On December 30, 1885, a petition for rehearing was filed, which was granted; but on the 17th of June, 1886, a second decree was entered reaffirming the ruling in the first. Some question was made on the argument as to whether the amount in controversy at the date of either of the two decrees was over five thousand dollars. The amount alleged to be due was $4099.13, "besides interest, all of which, together with said debits and credits, will more fully appear by a reference to a copy statement of account, hereto annexed and marked 'Exhibit C.'" On reference to such exhibit, an account appears stating a balance due May 4, 1883, of $24,882.46. Thereafter certain credits are shown of dates June 5, 1883, January 1, 1884, and March 20, 1884. These credits, applied on the balance, reduce the amount thereof to the sum stated, $4099.13; and that final balance is approved by the assignees of Daniel A. Jewell, as the amount due, "exclusive of interest on the account, which they are entitled to from May 4th, 1883." Now, if interest be computed on simply this balance of $4099.13, at seven per cent, the then legal rate in Georgia, from May 4, 1883, to the date of the last decree, the amount would be less than five thousand dollars; but that is not the true method of computation. The balance due on May 4, 1883, was $24,882.46. Interest on that amount should be computed to the time of first payment, then the payment applied, (it exceeding the interest up to that time,) and a computation made of the interest on the balance to the time of the second payment, and so on. By this method of computation the amount due at the date of either decree would be in excess of five thousand dollars. This court, therefore, has jurisdiction of the appeal.

Upon the merits, it appears that Daniel A. Jewell was the owner of a cotton mill in Georgia; that he consigned its products to the appellants, commission merchants in New York city. This business had been going on since 1870. On January 17, 1878, Jewell, having drawn on appellants largely in excess of his shipments, was indebted to them somewhere in

the neighborhood of thirty thousand dollars. To secure them for these advances, he executed mortgages on several pieces of property owned by him in Georgia. Among these mortgages was one covering a tract of land of about 760 acres, known as the Hurt Place, and another of about 750 acres, a part of the Myrick homestead tract. At the time of the execution of these mortgages a contract was entered into between the appellants and Jewell, by which the appellants agreed to hold the securities for three years; and also, among other things, stipulated that "the said Woodward, Baldwin & Co. further agree that the said Jewell shall have full right and permission to sell the property named in said deeds and make titles thereto, the proceeds of sale to go to the credit of the said Woodward, Baldwin & Co." This agreement was signed by both parties and witnessed before a notary public. In pursuance of the authority given by this stipulation, on February 8, 1879, Jewell conveyed to one Mary E. Daniel three hundred and fifty-three acres of the Hurt lands for the expressed consideration of one thousand dollars, and on February 1, 1882, conveyed the balance of the Hurt lands, as well as the Myrick tract, to Steth P. Myrick, for the expressed consideration of four thousand and thirty-nine dollars. The validity and effect of these two conveyances is the matter in dispute.

But one construction can be placed upon this stipulation. It gave to Jewell authority to sell and transfer title, discharged of the lien of the mortgage. It did not empower him to sell subject to the mortgage, that is, to transfer simply his equity of redemption, for that he had without the stipulation; and it cannot be supposed that a provision meaning nothing was deliberately inserted in the contract. Further, the provision that the proceeds should be applied to the credit of the appellants, makes it clear that they intended to give him power to transfer a full and unincumbered title. Neither can there be any doubt that Jewell understood that he could, and intended to convey a full, unincumbered title, and that the grantees supposed they were receiving such title. The deeds contain no suggestion of any incumbrance, and purport to transfer the title, notwithstanding the fact that there is no warranty

therein, and the parol testimony, so far as that is competent, establishes the fact that such was the purpose and understanding of all the parties. Nor was the duty cast upon the purchasers of seeing that Jewell appropriated the proceeds in accordance with the stipulation. That was a matter between Jewell and the appellants, and in respect to which they trusted him. Nor, further, can there be any substantial question that the parties acted in entire good faith. It is true that Jewell did not turn over the proceeds directly to the appellants, but, according to his testimony, he supposed that the appellants were abundantly secured by their mortgages on his other property. There was apparently good reason for this belief. He considered his factory, which was included in one of the mortgages, worth at least sixty thousand dollars, an amount sufficient to twice pay his entire indebtedness to appellants; and after he heard complaint from them in respect to the second conveyance, he shipped to them enough of the products of his mill to cover, as he thought, the money he had received.

As against this appellants urge that this contract was invalid as an authority to convey, because not executed before two witnesses; and in support of this two sections of the Code of Georgia are quoted, to wit, 2182 and 2690, Code 1873. The latter requires a deed to lands to be attested by at least two witnesses; and the former provides that "the act creating the agency must be executed with the same formality (and need have no more) as the law prescribes for the execution of the act for which the agency is created." But this contract was not the creation of an agency to sell lands belonging to the appellants. The title to the lands was all the while in Jewell. The instrument which Jewell executed was a mortgage, and, by section 1954 of the same code, "a mortgage" "is only a security for a debt, and passes no title." By section 1955 it is provided that "no particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect." The section also provides the mode of execution. All these matters are found in this instrument. It is true that in the middle of the instrument, after

the granting clause and the description, and before the warranty and defeasance clauses, is found this sentence: "This deed, made, executed, and delivered under the acts of the legislature of Georgia of 1871 and 1872, and found in the Code of 1873, sections 1969, 1970, 1971." Appellants contend that according to these sections the title passed to them; and that, therefore, the title being in them, the contract was, for the reasons above given, insufficient to authorize a sale by Jewell. But these sections are in an article entitled "Sales to secure debts;" and apply only to those cases in which an absolute deed is made of the property, and a bond taken for reconveyance. The first part of section 1969 discloses what instruments are referred to. It reads: "Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money, or to secure any other debt, and shall take a bond for title back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale, and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee." But although this instrument recites that it is executed under those sections, in fact it was not, for no bond for title back was taken, nor was the instrument signed by the grantees, and it was, notwithstanding the declaration in it, only a mortgage. In the case of *Lackey* v. *Bostwick*, 54 Georgia, 45, the instrument considered was a deed absolute on its face; and, while it was contended that it was in fact executed as security for an indebtedness, yet such a defence was cognizable only in equity, and on the face of the instrument the legal title passed. In *Woodson* v. *Veal*, 60 Georgia, 562, the instrument was a deed absolute on its face. It was, however, intended as security for a debt, and contained an agreement that the grantor might repurchase within a specified time; and that the grantee, on failure to so repurchase, might sell in a certain way. It also contained provisions as to possession and costs and expenses. This instrument was held effective to pass the legal title. The

court observed: "Where the parties do not intend a title, but only a legal mortgage, why should they adopt an absolute deed instead of a mortgage? It is precisely that they do intend, and deliberately intend, title to pass, that they eschew the mortgage and make use of a deed absolute." The converse of this is true in the case at bar. The appellants not only accepted this instrument in form a mortgage, but they understood and intended a mortgage. In the bill of complaint it is expressly averred that "the instrument is in legal effect a mortgage deed;" and, also, that "no bond to reconvey said property upon the payment of said indebtedness was executed." It is also alleged that the sales by Jewell to Myrick were made "subject to the lien of said mortgage to your orators." The contract, therefore, is not to be taken as a power of attorney to Jewell to sell land the title of which was in the appellants, but simply as a consent of lien-holders to the release of their lien upon a sale made by the mortgagor of the real estate described in the mortgage.

It is further urged by appellants that the considerations of these transfers were so far below the real value of the property, as to indicate bad faith on the part of Jewell and his vendees; or if not that, that the transfers are to be adjudged as made subject to the lien of appellants' mortgage. We cannot agree with this contention. The testimony as to the value is conflicting; but it is very far from making clear that there was a great disproportion between value and consideration, such a disproportion as would overthrow the evidence of good faith and the understanding and intent of the parties, furnished by the other and positive testimony respecting the same. Jewell had never seen the land; he bought it at a bankrupt sale in 1874; bought it partly to protect himself, as he had a claim against the bankrupt, though to perfect his title he was compelled to pay off certain liens, which made the property cost him perhaps double what he received for it. He wanted money; had been trying to sell the property ever since he purchased it; had advertised it for sale; and, so far as appears, finally disposed of it on the best terms he could get. So, although he lost money by the transaction, yet if he

and his vendees acted in good faith, and intended the one to transfer and the other to receive an unincumbered title, the disproportion between the value and the consideration does not justify the court in annulling the transfers, or in making a new agreement between the parties, or in compelling the vendees to pay more than they had agreed to.

Thus far we have considered these two transfers by Jewell as alike, and for the reasons indicated find no reason to differ from the conclusions reached by the trial court; but they were not alike. The consideration of the deed to Myrick was cash. It was a sale, and was within the authority given to Jewell. The consideration of the conveyance to Mrs. Daniel was a conveyance by her to Jewell of other lands. The transaction was an exchange, and not a sale. This was outside of the authority of Jewell. It is a general proposition that power to sell gives authority to sell for cash only, and does not uphold a mere exchange. *Morrill* v. *Cone*, 22 How. 75; Perry on Trusts, § 769; *Taylor* v. *Galloway*, 1 Hammond, (1 Ohio,) 232; *Cleveland* v. *State Bank*, 16 Ohio St. 236; *Russell* v. *Russell*, 36 N. Y. 581; 1 Devlin on Deeds, §§ 370, 373, 436; *Lumpkin* v. *Wilson*, 5 Heisk. 555.

This is the general rule where there is given simply a power to sell; and in this case, that the authority was limited to a sale for cash, is evident from this language of the provision: "The proceeds of sale to go to the credit of the said Woodward, Baldwin & Co." That which was due to these appellants was money, and the proceeds of the sale were to go to their credit. That implies that money was to be received and applied on their account. The mortgage from Jewell to appellants was recorded in the county in which the land was situated. Mrs. Daniel took the property subject to that recorded lien, and can claim no discharge therefrom, save as was authorized by the language of this stipulation. That permitted a sale, and a sale for cash only. The land which she conveyed to Jewell, he thereafter sold and conveyed to his nephew. It is, therefore, beyond the reach of the appellants. Nor is it shown that any money was ever applied on appellant's account, which could be considered as an equivalent of

the land sold; for while Jewell testifies to forwarding the products of his mill to them when he heard of their complaint, his testimony is that he forwarded what he supposed was enough to cover the money that he had received.

Our conclusion, then, in reference to this tract of three hundred and fifty-three acres is that Jewell had no authority to exchange it for other lands; and that a mere exchange did not divest the land from the lien of the recorded mortgage. On this ground, and on this alone, the decree must be reversed. The order, therefore, will be that the decree be

Affirmed so far as respects the parties interested in the land conveyed to Steth P. Myrick by the deed of February 2, 1882; that otherwise it be reversed, and the case be remanded with instructions to enter a decree against Jewell for the amount due from him, and a decree of foreclosure and sale of the three hundred and fifty-three acres of land conveyed to Mrs. Daniel by the deed of February 3, 1879.

One-half of the costs of this appeal will be paid by the appellants, and the other half charged as costs in the foreclosure against the last-named tract.

Mr. Justice Bradley was not present at the argument of this case and took no part in its decision.

REYNOLDS *v.* STOCKTON.

ERROR TO THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

No. 289. Argued April 7, 1891. — Decided May 11, 1891.

When a defendant appears in an action in a state court and responds to the complaint as filed, but takes no subsequent part in the litigation, and on those pleadings a judgment is rendered in no way responsive to them, he is not estopped by the judgment from setting up that fact in bar to a recovery upon it; and the Constitution of the United States is not violated by the entry of a judgment in his favor on such an issue, raised in an action on the judgment brought in a court of another State.

Statement of the Case.

A judgment in a state court against a person receiving an appointment as a receiver ancillary to an appointment as such by a court of another State, binds only such property in his custody as receiver as is within the State in which the judgment is rendered; the court in which primary administration was had, retaining the custody of the remainder.

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

This case comes to us on error from the Court of Chancery of the State of New Jersey, and the question presented is, whether that court gave full faith and credit to a judgment obtained in one of the courts of the State of New York.

The facts are these: In the year 1872 there were two life insurance companies; one the New Jersey Mutual Life Insurance Company, a New Jersey corporation, doing business at Newark, New Jersey, and the other the Hope Mutual Life Insurance Company, a New York corporation, doing business in the city of New York. In December of that year an agreement was made between the two companies by which the New Jersey company reinsured the risks of the New York company, took its assets and assumed its liabilities. From that time the business of the two companies was done in the name of the New Jersey company, until January, 1877, when that company failed, and its assets were taken possession of by the New Jersey Court of Chancery, which appointed Joel Parker receiver. Subsequently he was appointed ancillary receiver by the Supreme Court of New York, in a suit instituted therein by the attorney general of New Jersey, and William Geasa, a creditor; and as such ancillary receiver, received the sum of $17,040.59. Prior to 1886, he resigned his position as receiver under appointment of the Court of Chancery of New Jersey, and was succeeded by Robert F. Stockton, the present receiver. No substitution was made in New York in respect to the ancillary receivership. On March 22, 1886, an order was entered in the suit pending in the Supreme Court of New York, making certain allowances to counsel, referee, and receiver out of the funds in the hands of the ancillary receiver, and directing him to pay over the balance to the receiver appointed by the Court of Chancery of New Jersey, and dis-

charging him, and the sureties on his bond as ancillary receiver, from all further liability, on compliance with this order. This order was complied with, and the balance of the funds turned over to the New Jersey receiver. Subsequently to these proceedings, and on the 11th day of October, 1886, a judgment was entered in the Supreme Court of the State of New York as follows: "It is adjudged that the plaintiffs recover of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and against the New Jersey Mutual Life Insurance Company, the sum of one million and ten thousand four hundred and ninety-six dollars and twenty-nine cents, the money so recovered to be brought by the plaintiffs into court and distributed in accordance with the provisions of the original decree herein, and such further directions as may be made by the court herein on the application of any party in interest."

This is the judgment whose non-acceptance by the Court of Chancery in New Jersey produces the present controversy. The contentions of the defendant are that this judgment was entered in the absence of the defendant, and was not responsive to the issues presented by the pleadings, and therefore might rightfully be ignored by every other tribunal; and, secondly, that if by any strained construction of the pleadings it could be held responsive thereto, it was entered against a party who had ceased to have the right to represent the defendant's interest, and, because of the absence of the real representative of the defendant's interest, was a judgment in a suit *inter alios*, and not obligatory upon the defendant.

For a clear understanding of the questions presented by these defences a further statement of facts is necessary. Prior to the reinsurance, and when the New York company was acting as an independent company, it had, in obedience to the laws of New York, deposited with the superintendent of the insurance department of that State one hundred thousand dollars, in accepted securities, as a fund for the protection of its policy holders. After the contract of reinsurance, after the failure of the New Jersey company, and the appointment of Parker as its receiver, and after his appointment as ancillary

receiver by the court of New York, and on February 7, 1889, a suit was commenced in the Supreme Court of New York, entitled as follows:

"New York Supreme Court, Kings County.

"Henry E. Reynolds, individually, and Henry E. Reynolds as Executor, and Georgiana L. Reynolds as Executrix of the last will and testament of Moses C. Reynolds, deceased; Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

"John F. Smyth, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company; and the said The New Jersey Mutual Life Insurance Company; Defendants.

} Complaint."

The plaintiffs in that suit were policy-holders in the New York company, with one exception, and that is the last-named plaintiff, who was a stockholder therein. This suit was obviously *quasi in rem*, one to seize and appropriate to the claims of these various plaintiffs the securities deposited by the New York company, as a trust fund, with the superintendent of the insurance department.

The first paragraph of the complaint discloses the purposes and object of the suit. It is as follows:

"I. That the plaintiffs, the policy-holders hereinafter named, sue and bring this action on behalf of themselves and all others who are policy-holders in the Hope Mutual Life Insurance Company of New York, as well as all who are interested in the trust fund hereinafter mentioned, and who shall in due time

elect to come in and seek relief by contributing to the expenses of this action."

It is true that the second paragraph in the complaint, which is as follows: "That the plaintiff, the stockholder hereinafter named, sues and brings this action in behalf of himself and all others who are stockholders in the said The Hope Mutual Life Insurance Company of New York, as well as in behalf of all who are interested in the assets of the said company or the trust fund hereinafter mentioned, and who shall elect to come in and seek relief by contributing to the expenses of this action," suggests a broader field of inquiry and a larger demand; but the intimation therein contained of a proceeding in behalf of all interested in the assets of the New York company, (and it is only an intimation,) is so clearly limited by the subsequent wording of the complaint, that a general reading of the whole complaint makes manifest the fact that the scope and object of the suit was to reach and appropriate this fund deposited with the superintendent of the insurance department of the State of New York. After this, we find in paragraphs 13 and 14 these allegations, the intermediate paragraphs simply disclosing the respective interests of various plaintiffs:

"XIII. These plaintiffs, on information and belief, further show that when the said The Hope Mutual Life Insurance Company of New York commenced business as such it deposited with the superintendent of the insurance department of this State, as provided by the provisions of the act under which it was organized, one hundred thousand dollars in certain securities belonging to said company, as a fund for the protection of its policy-holders, said securities comprising, as the plaintiffs are informed and believe, United States bonds, bonds and mortgages, and cash, being of the value of one hundred thousand dollars.

"XIV. That the defendant John F. Smyth is the superintendent of the insurance department of the State of New York, and as such has the sole control and custody of the said securities and fund, and now has and holds the same and every part thereof as a fund for the protection and security of the

policy-holders in the said The Hope Mutual Life Insurance Company of New York, with the increase and accumulations thereof and interest thereon which has been collected by the superintendent of the insurance department, and that the said fund, together with the increase, interest, and accumulations thereof, belong to the plaintiffs, the policy-holders, to the extent of the value of their respective policies, issued by the said insurance company as aforesaid."

Paragraph 15 alleges the contract of reinsurance.

Paragraph 16 is as follows: "These plaintiffs further aver, on information and belief, that the said insurance companies had no power or authority to enter into said contract; that the said contract is, and at the date thereof was wholly, null and void, but that if valid it conveyed and transferred to the defendant, the New Jersey Mutual Life Insurance Company, no interest whatever in the fund and securities on deposit as aforesaid, nor in any of the assets or property of the said company, except such as may remain after all the claims of the policy-holders in the said The Hope Mutual Life Insurance Company of New York are satisfied and discharged;" and contains the averment that the contract of reinsurance gave to the New Jersey company no interest whatever in the funds deposited with the insurance commissioner.

Paragraphs 17 and 18 are in respect to the cessation of business by the New York company, and the assumption of its business by the New Jersey company.

Paragraph 19 is in these words: "The plaintiffs, the policy-holders, therefore claim and allege that they are entitled to receive the amount due on their respective policies of insurance issued to them by the said The Hope Mutual Life Insurance Company, out of the fund and securities in the hands of the defendant, the superintendent of the insurance department of the State of New York, and should be paid out of the said fund the value of their said respective policies, and that the respective amounts due to them on their said policies of insurance, so issued as aforesaid, are a lien on the fund and securities and on all the interest and accumulations thereof in the hands of the said superintendent of the insurance department to the

extent of the value of each of their said policies, as the same shall be ascertained and determined by this court;" and discloses the contention of the policy-holders, and their claims upon simply the fund deposited with the insurance commissioner.

Paragraphs 20 and 21 aver the appointment of the receiver by the Court of Chancery of New Jersey, and the lack of power in any one to collect the interest on the securities deposited with the insurance department since December 31, 1872.

Paragraphs 22 and 23 set forth the interest of Traver, the last-named plaintiff, as stockholder in the New York company.

Paragraph 24 alleges in behalf of said last-named plaintiff the invalidity of the reinsurance arrangement between the two insurance companies; the title of the plaintiff to his interest as stockholder in the New York company; and closes with the averment that he is "rightfully entitled to be paid therefor, as such owner and holder of said stock, his distributive share out of any surplus which may remain of the said trust fund and the accumulations thereof in the hands of the superintendent of the insurance department, after paying the policy-holders aforesaid in the said company."

Paragraph 25, 26 and 27 are in respect to some other proceedings, which do not affect the question in controversy here.

Paragraph 28 contains allegations in respect to the amount of the actual fund in the hands of the superintendent of insurance. And upon these various averments the complaint concludes with this prayer:

"Wherefore these plaintiffs demand judgment that the defendant John F. Smyth, the superintendent of the insurance department of the State of New York, be adjudged to account for all sums of money, bonds, and securities which were deposited in his hands by the defendant, the Hope Mutual Life Insurance Company of New York, and for all the interest, increase and accumulations of the said fund, and every part thereof; that the said securities be ordered to be sold by order of this court; that the proceeds thereof be distributed among the plaintiffs and other policy-holders of the said The Hope

Mutual Life Insurance Company in the proportion in which they are entitled to the same; that the said The Hope Mutual Life Insurance Company of New York may be dissolved and adjudged by this honorable court to have surrendered and abandoned all its rights, privileges and franchises as an incorporated life insurance company, and that, after the payment of the policy-holders and creditors of the said company, any surplus that may be left of the said trust fund and accumulations thereof may be distributed among the stockholders of the said company, and that the plaintiffs may have such other, further or different order or relief in the premises as may be just and equitable, and that the defendant, John F. Smyth, the superintendent of the insurance department, his officers, servants, agents and attorneys, and all other persons acting for or under him, be enjoined from converting the said securities, or paying or distributing or parting with the same, or any part thereof, except under and pursuant to an order or decree to be entered in this action."

While the New York company was made party defendant, it does not appear that it was served with process; and it made no appearance and filed no answer. The only answers filed were that of the superintendent of the insurance department and the joint answer of Parker, as receiver, and of the New Jersey company. The last answer, containing many denials and some admissions, did not assume to put in issue the question of the indebtedness of the New Jersey company to any of the plaintiffs; but, accepting the obvious purpose of the complaint, it met its allegations with an assertion of right in the New Jersey company to the fund in the hands of the superintendent of the insurance department. The answer of the superintendent of the insurance department, admitting the receipt of the fund, put in issue several of the allegations of the complaint; and rested his denial of the plaintiffs' right on the existence and validity of the proceedings referred to in paragraphs 25, 26 and 27 of the complaint.

Upon these pleadings the case proceeded to trial. The preliminary order was one of reference, on January 15, 1880, to James W. Husted. After some interlocutory proceedings, a

final report was made by the referee on February 24, 1885, and thereafter, on March 13, 1885, a decree was entered, which decree confirmed the report of the referee, and made final disposition of the funds in the hands of the superintendent of the insurance department, in partial payment of the various claims presented. It also, in paragraph 8, contained this reservation:

"And it is further ordered that either party to this action or any person interested in the subject matter thereof have liberty to apply for further directions on the foot of this decree, and the question of the indebtedness of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and the former superintendent, John F. Smyth, and William McDermott, and Messrs. Harris and Rudd, reported by referee Samuel Prentiss, be reserved."

Thereafter and on October 11, 1886, as heretofore noticed, and apparently on the reservation in paragraph 8, as above quoted, and on notice to the attorney, who had represented Parker, the receiver, and the New Jersey company, the judgment was entered in favor of the plaintiffs for one million and odd dollars, as heretofore stated. The Court of Chancery of New Jersey, when this judgment was presented, declined to recognize this as an adjudication against the existing receiver or the assets of the insurance company in his hands. On appeal to the Court of Errors and Appeals of that State, this decision of the Chancery Court was affirmed, and the case remanded to that court for further proceedings. The opinion of the Court of Errors and Appeals will be found in 43 N. J. Eq. 211.

Mr. A. Q. Keasbey and *Mr. Raphael J. Moses, Jr.*, for plaintiff in error.

The court had power, on issues contested before it as to which all parties in interest had been fully heard, to allow any judgment consistent with the case made by the complaint and embraced within the issue. Section 1207, Code of Civil Procedure of New York.

In *Hill* v. *Beach*, 1 Beasley (12 N. J. Eq.), Chancellor Wil-

Counsel for Defendant in Error.

liamson said: that if the facts which the complainant states are broad enough to give him relief, it matters not how narrow his prayer may be if his bill contains a prayer for general relief. And although he may claim a relief not at all warranted by his facts, or may be entitled to a relief upon very different principles of equity from what he supposed, such a misapprehension of his case cannot defeat his right to relief.

The following authorities are relied on as sustaining the New York judgment. *Six Nations* v. *Johnson*, 24 How. 195; *Grignon* v. *Astor*, 2 How. 319; *Voorhees* v. *Bank of the United States*, 10 Pet. 449; *Eldred* v. *Bank*, 17 Wall. 545; *Habich* v. *Folger*, 20 Wall. 1; *Muldowney* v. *Morris & Essex Railroad*, 42 Hun, 447; *Armitage* v. *Pulver*, 37 N. Y. 496; *Graham* v. *Read*, 57 N. Y. 683; *Madison Ave. Baptist Church* v. *Oliver St. Baptist Church*, 73 N. Y. 95; *Martha* v. *Curley*, 90 N. Y. 377; *Chatfield* v. *Simonson*, 92 N. Y. 216; *Peck* v. *Goodberlett*, 109 N. Y. 189.

In *Vanderbilt* v. *Little*, 43 N. J. Eq. 669, it was held that contracts made by one receiver can be enforced against his successor. The court said: These contracts are not personal, but representative. They are designed to bind, and may well bind the fund, not only through the receiver who makes them, but also through the receiver who succeeds to his responsibilities and duties. *A fortiori*, it must be true that as to the acts and obligations of the insolvent corporation itself, the funds are bound in the hands of its receiver — the agent appointed by the court, whoever he may be — and whatever number of successive agents may be named; and the plaintiffs in error whose claims are founded upon the unlawful transfer of their funds from New York to New Jersey, and are established by final judgment in the former State, should be ranked among the participants of the fund in New Jersey, which has been swelled by the wrongful abstractions, in whatsoever personal custody the court may have seen proper to place it, from time to time, in the course of its administration of the estate of the corporation which perpetrated the wrong.

Mr. Frederic W. Stevens for defendant in error.

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

We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented. The section of the Federal Constitution which is invoked by plaintiffs is section 1 of Article IV, which provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require. It does not demand that a judgment rendered in a court of one State, without the jurisdiction of the person, shall be recognized by the courts of another State as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State. The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State. The scope of this constitutional provision has often been presented to and considered by this court, although the precise question here presented has not as yet received its attention. It has been adjudged that the constitutional provision does not make a judgment rendered in one State a judgment in another State upon which execution or other process may issue; that it does not forbid inquiry in the courts of the State to which the judgment is presented, as to the jurisdiction of the court in which it was rendered over the person, or

in respect to the subject matter, or, if rendered in a proceeding *in rem*, its jurisdiction of the *res*. Without referring to the many cases in which this constitutional provision has been before this court, it is enough to notice the case of *Thompson* v. *Whitman*, 18 Wall. 457. The view developed in the opinion in that case, as well as in prior opinions cited therein, paves the way for inquiry into the question here presented. If the fact of a judgment rendered in a court of one State does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same State. If not there, the constitutional provision quoted gives no greater force to the same record in another State.

We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters contro-

verted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a State, as to all subsequent inquiries in the courts of the same State, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one State to judgments rendered in the courts of another State.

In the opinion of the Court of Errors and Appeals, the case of *Munday* v. *Vail*, 34 N. J. Law, 418, is cited. In that case, the proposition stated in the syllabus, and which is fully sustained by the opinion, is, that "a decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding." It appeared that on May 12, 1841, Asa Munday, the owner, with his wife, Hetty Munday, conveyed the premises for which the action (which was one of ejectment) was brought, to John Conger, upon the following trust, to wit: "For the use and benefit of the said Asa Munday and wife, and the survivor of them, with the remainder to the children of said Asa Munday and wife, in equal parts and shares, in fee." Plaintiff was the sole surviving issue of Asa Munday and Hetty

Munday, and took, under the facts, all the title which, on the 12th of May, 1841, was vested in Asa Munday. On January 16, 1844, Ephraim Munday filed his bill in the Court of Chancery, setting forth that he had loaned certain moneys to Asa Munday upon an agreement that he, the said Asa, would secure said loan by a mortgage upon his land, including the premises in question; and that Asa, in violation of his agreement, and to defraud him of his rights, had conveyed them away to John Conger, upon the trust already mentioned. The bill also showed that plaintiff had obtained judgment for his debt. The prayer was, "that the deed of conveyance of said lands so made by the said Asa Munday and Hetty, his wife, to the said John Conger, and the said deed and declaration of trust so made and executed by the said John Conger and wife as aforesaid, may, by the order and decree of this honorable court, be set aside and declared to be fraudulent and void against the said judgment and writ of execution of your orator, and that the said judgment and execution of your orator may be decreed a lien on said lands and tenements so conveyed to said John Conger," etc. Plaintiff was a defendant in that action, and, then an infant, appeared by her father as guardian. The decree, which was entered on the 15th of December, 1846, was generally that the said deed from Asa Munday and wife to Conger was fraudulent, null and void, and of no force whatever in law or equity; and ordered and adjudged that it be delivered up to be cancelled; and further, that the plaintiff's judgment is and was a lien. No proceedings were had under this decree, the money due plaintiff having been paid or secured to him. Subsequently, and on September 15, 1851, a decree for costs against Asa Munday, in another suit, was entered in the Chancery Court. Upon such decree the property in question was levied upon and sold to defendant. The validity of the title acquired by this proceeding was the matter in controversy. The title of plaintiff was good under the trust deed of May 12, 1841, unless defeated by this sale and the deed made thereon; and defendant's title, adverse to plaintiff's, depended on the question whether the decree of December 15, 1846, was valid to the extent of

its language, annulling absolutely the conveyance from Asa Munday and wife to John Conger, and directing the surrender of such deed, or, notwithstanding its general language, was to be limited to the matters of inquiry presented by the complaint and answer, and, therefore, simply an adjudication that the deed was voidable, and annulling it so far as it conflicted with the rights of plaintiff in that suit, leaving it to stand good as a deed *inter partes*, and valid as to all other parties. It was held that the latter was the true construction, and that the general language in the decree was limited by the matters put in issue by the pleadings. We quote from the opinion: "The inquiry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises." And again: "A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so

conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352 b. And in a note to the *Duchess of Kingston's Case*, in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question, or were not material.' For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale. *Giffard* v. *Hort*, 1 Sch. & Lef. 386, 408. See also *Gore* v. *Stacpoole*, 1 Dow, 18, 30; *Colclough* v. *Sterum*, 3 Bligh, 181, 186." Reference is made in the opinion to the case of *Corwithe* v. *Griffing*, 21 Barb. 9, in respect to which the court said: "Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, 'as the jurisdiction was confined to the subject-matter set forth and described in the petition.' In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented."

This case is very much in point. We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. See, also, *Unfried* v. *Heberer*, 63 Indiana, 67. In that case, the inquiry was as to the effect of a decree of foreclosure rendered upon default. In the complaint in the foreclosure proceedings the widow and children of the mortgagor were named as parties, he having died prior to the commencement of the suit. The allegation of the complaint was

that the defendants were interested as heirs, and the prayer was for a decree foreclosing such interests. It was not averred that the widow had joined in the mortgage, or even that she was a widow; but she was made a defendant, and alleged to be an heir. Subsequently she asserted rights in the premises as widow, and in respect to this decree upon default, the court observed: "A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When the said Anna made default in the action for foreclosure, nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint, and, as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure. This proposition we regard as too well founded in principle to need the citation of authorities to sustain it. See, however, *Helms* v. *Love*, 41 Indiana, 210; *Fletcher* v. *Holmes*, 25 Indiana, 458; *Minor* v. *Walter*, 17 Mass. 237." See also *Goucher* v. *Clayton*, decided by Vice-Chancellor Wood, and reported in 11 Jurist (N. S.) 107; *S. C.* 34 Law Journal (N. S.) Ch. 239.

In the case of *Packet Company* v. *Sickles*, 24 How. 333, 341, Mr. Justice Campbell, speaking for the court, declared, that, "the essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants." In the case of *Smith* v. *Ontario*, 18 Blatchford, 454, 457, Circuit Judge Wallace observed, that "the matter in issue" has been defined in a case of leading authority, as "that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading." *King* v. *Chase*, 15 N. H. 9. But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other

words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another State.

This proposition determines this case; for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that State to the satisfaction of claims against the New York company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey company subsequently to the filing of their answer. No valid judgment could, therefore, be rendered therein, which went beyond the subjection of this fund to those claims.

But another matter is also worthy of notice. At the time of the rendition of this judgment in the Supreme Court of New York, Parker had lost all authority to represent the New Jersey company. His authority in New Jersey, the State of primary administration, had been transferred to Stockton, the present receiver. By a decree in the very court, and in the very suit in the State of New York, in which he had been appointed ancillary receiver for that State, a decree had been entered discharging him from further power and responsibility. If it be said that the attention of the court in which the judgment in question was entered had not been called to this loss of representative power on the part of Parker, a sufficient reply is, that if the power was gone it is immaterial whether the court knew of it or not. Whatever reservation of power a court may have by *nunc pro tunc* entry to make its judgment operative as of the time when the representative capacity in fact existed, it is enough to say that no exercise of that power was attempted in this case. Suppose it had been, or suppose that Parker, as ancillary receiver, had not been dis-

charged by any order in the New York court, would the administration of this estate in the Chancery Court of New Jersey, through a receiver appointed by it, or the assets in the hands of such receiver, be bound by this decree entered in the court of New York? Clearly not. The idea which underlies this runs through all administration proceedings, and has been recently considered by this court in the case of *Johnson* v. *Powers*, 139 U. S. 156. If Parker had still remained the ancillary receiver in the State of New York, a judgment rendered against him as such would bind only that portion of the estate which came into his hands as ancillary receiver, and would not be an operative and final adjudication against the receiver appointed by the court of original administration. Where a receiver or administrator or other custodian of an estate is appointed by the courts of one State, the courts of that State reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a State in which ancillary administration is held are not conclusive upon the administration in the courts of the State in which primary administration is had. And this rule is not changed, although a party whose estate is being administered by the courts of one State permits himself or itself to be made a party to the litigation in the other. Whatever may be the rule if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced, and the estate is taken possession of by a tribunal of a State, that moment the party whose estate is thus taken possession of ceases to have power to bind the estate in a court of another State, either voluntarily or by submitting himself to the jurisdiction of the latter court. So, as Stockton, the receiver appointed by the Chancery Court of

New Jersey, the court having primary jurisdiction, was not a party to the proceedings in the New York court, and was not authoritatively represented therein, the judgment, even if responsive to the issues tendered by the pleadings, was not an adjudication binding upon him, or the estate in his hands.

For these reasons the decree of the court below was correct, and it is

Affirmed.

HALSTED v. BUSTER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 325. Argued April 17, 20, 1891. — Decided May 11, 1891.

The act of the legislature of Virginia of March 22, 1842, relating to lands west of the Allegheny Mountains which had become vested in the Commonwealth by reason of the non-payment of taxes, did not operate to transfer such forfeited lands to the holder of an "inclusive grant" within the limits of which grant they were situated, but whose patent was subsequent in date to that of the patentees of the forfeited lands.

Bryan v. *Willard*, 21 West Va. 65, is followed, not only because it settles the law of the highest court of a State upon a question of title to real estate within its boundaries, which is identical with the question involved here, but also because the decision is correct.

THE case is stated in the opinion.

Mr. Abram Burlew for plaintiff in error.

Mr. J. F. Brown for defendants in error. *Mr. W. Mollohan* was with him on the brief.

MR. JUSTICE BREWER delivered the opinion of the court.

This case has been in this court once before. A judgment in favor of the defendants was reversed on account of an error in pleading. *Halsted* v. *Buster*, 119 U. S. 341. On its return to the trial court the pleadings were amended, and the case

proceeded to trial before a jury. The judgment and verdict were a second time in favor of defendants, and again plaintiff alleges error.

The facts are these: Upon an entry made April 12, 1785, and a survey in pursuance thereof, August 24, 1794, a patent issued, on July 22, 1795, from the Commonwealth of Virginia, for two thousand acres, to Albert Gallatin and Savary De Valcoulon. Subsequently, upon entries made October 24, 1794, and January 25, 1795, and a survey in pursuance thereof, April 14, 1795, a patent was issued, on the first day of January, 1796, to Benjamin Martin, assignee of William Wilson, by the Commonwealth of Virginia, for eighty-five thousand six hundred acres. This patent was what is known as an inclusive grant, and contained this language: "But it is always to be understood that the survey upon which this grant is founded includes 6786 acres of prior claims, (exclusive of the above quantity of 85,600 acres,) which, having a preference by law to the warrants and rights upon which the grant is founded, liberty is reserved that the same shall be firm and valid and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same, as before mentioned and reserved, with its appurtenances." This form of grant was authorized by an act of the general assembly of Virginia passed June 2, 1788, as follows:

"Whereas sundry surveys have been made in different parts of this Commonwealth, which include in the general courses thereof sundry smaller tracts of prior claimants, and which in the certificates granted by the surveyors of the respective counties are reserved to such claimants; and the Governor or Chief Magistrate is not authorized by law to issue grants upon such certificates of surveys; for remedy whereof —

"I. Be it enacted by the General Assembly, that it shall and may be lawful for the Governor to issue grants, with reservations of claims to lands included within such surveys, anything in any law to the contrary notwithstanding." 2 Rev. Code Virginia, 434.

Grants of this character have been before this court as well

as the highest courts of Virginia, West Virginia and Kentucky, their validity sustained by each of those courts, and the construction to be given to them adjudged to be, that no title or right passes to the patentee to any surveyed lands thus reserved within the limits of the exterior boundaries. *Scott* v. *Ratliffe*, 5 Pet. 81; *Armstrong* v. *Morrill*, 14 Wall. 120; *Hopkins* v. *Ward*, 6 Munf. (Va.) 38; *Nichols* v. *Covey*, 4 Rand. (Va.) 365; *Trotter* v. *Newton*, 30 Gratt. (Va.) 582; *Patrick* v. *Dryden*, 10 W. Va. 387; *Bryan* v. *Willard*, 21 W. Va. 65; *Madison* v. *Owens*, 6 Litt. Sel. Cas. (Ky.) 281.

It appears that the Gallatin tract, whose survey was prior to the Martin survey and patent, was, partially at least, within the exterior limits of the latter grant. By the rule, therefore, established by these decisions, the land within the Gallatin survey was excluded from the Martin grant. No title thereto, not even a conditional or inchoate one, passed by the Martin patent. Subsequently, and before the year 1842, the Gallatin lands were forfeited to the Commonwealth of Virginia in consequence of the non-payment of taxes. On March 22, 1842, the general assembly of Virginia passed an act, the third section of which is as follows:

"*And be it further enacted*, That all right, title and interest, which shall be vested in the commonwealth in any lands or lots lying west of the Allegheny Mountains, by reason of the non-payment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioner of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted, in reference to delinquent and omitted lands, shall be and the same are hereby absolutely transferred to and vested in any person or persons, (other than those for whose default the same may have been forfeited, their heirs or devisees,) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the 1st day of January, 1843, who

shall have discharged all taxes, duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: *Provided*, That nothing in this section contained, shall be construed to impair the right or title of any person or persons, who shall *bona fide* claim said land by title, legal or equitable, derived from the commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively." Acts of 1841 and 1842, c. 13, p. 13.

The plaintiff claims under the Martin grant; and insists that by virtue of this statute and the prior forfeiture of the Gallatin lands, the title to so much of the latter as is within the exterior limits of the Martin survey was perfected in him. The defendants claim by virtue of tax deeds made by the Commonwealth of Virginia, through its proper officer. As the plaintiff must recover on the strength of his title, the single question presented is, whether the act of 1842 operated to transfer the forfeited Gallatin lands within the Martin survey to the holders of that grant? This question must be answered in the negative. It might be sufficient to refer to the case of *Bryan* v. *Willard*, 21 W. Va. 65. In that case the precise question was before the Supreme Court of Appeals of that State, and decided against those claiming under the Martin grant. The amount of land in controversy here is not the whole of the Gallatin tract of two thousand acres, or all of that within the Martin survey; but only a small portion thereof, to wit, about one hundred acres. And in the case of *Bryan* v. *Willard*, the controversy was between parties claiming under the Martin grant and others claiming under the Gallatin grant, in respect to another portion of the latter tract also within the Martin survey. The cases are, therefore, identical. The same points were made and the same questions presented, with one exception, to be hereafter noticed; and as the title to real estate and the construction of deeds and statutes in respect thereto is a matter of local law, this court, while exercising an independent jurisdiction, follows as a rule the decisions of

the highest court of the State. *Burgess* v. *Seligman*, 107 U. S. 20.

The opinion of Judge Snyder in the case of *Bryan* v. *Willard*, in which all the other judges concurred, reviews the authorities and fully discusses the question; and if it were a new and entirely open one, and no weight were to be given to the expression of opinion from the highest court of the State, it would be difficult to resist the force of his argument.

In view of this opinion we shall content ourselves with simply stating our conclusions. No title or claim of any kind, legal or equitable, passed to the patentee, Martin, to any portion of the Gallatin tract. In *Nichols* v. *Covey*, *ubi supra*, the syllabus is as follows: "Where a patent is issued in pursuance of the act of 1788," "which includes in its general courses, a prior claim, it does not pass to the patentee the title of the Commonwealth in and to the lands covered by such prior claim, subject only to the title, whatever it may be, in the prior claimant; but, if that title is only a prior entry, and becomes vacated by neglect to survey and return the plat, any one may lay a warrant on the same, as in other cases of vacant and unappropriated lands." *Patrick* v. *Dryden*, 10 W. Va. 387; *Armstrong* v. *Morrill*, 14 Wall. 120. The only parties entitled to the benefit of the act of 1842 are those who have "just title or claim," legal or equitable, under some grant of the Commonwealth. As the patentee had no title or claim, legal or equitable, to these excluded lands, it follows that the act was not one for his benefit.

In order to distinguish this case from that of *Bryan* v. *Willard*, and to avoid the force of that decision, counsel for plaintiff in error contends that by the Martin patent the area of excluded lands, as expressed therein, was 6786 acres; and that as there was nothing in evidence in that case to show the extent of prior claims, the presumption was that these Gallatin lands were excluded; while, in this case, he insists that he has shown other prior claims within the exterior boundaries amounting to eight or nine thousand acres, independently of the Gallatin lands; but the evidence does not sustain his contention. The survey of Thomas Edgar's claim,

to which he refers, (six thousand seven hundred and eighteen acres of which, according to the testimony, lie within the Martin grant,) was not completed until April 20, 1796, which was after the issue of the patent, and, therefore, that tract could not come within the description therein of excluded lands. There is nothing to distinguish the case from that of *Bryan* v. *Willard*.

Because the views expressed in *Bryan* v. *Willard* are correct, because it is the decision of the highest court of a State upon the question of the title to real estate within its boundaries, and because that case is identical with this, the judgment of the trial court is *Affirmed.*

THE CHIEF JUSTICE and MR. JUSTICE BRADLEY took no part in the consideration and decision of this case.

In re WOOD, Petitioner.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1581. Argued April 10, 1891. — Decided May 11, 1891.

When the statutes of a State do not exclude persons of African descent from serving as grand or petit jurors, a person accused in a state court of crime, who desires to avail himself of the fact that they were so excluded in the selection of the grand jury which found the indictment against him, or of the petit jury which tried him, should make the objection in the state court during the trial, and, if overruled, should take the question for decision to the highest court to which a writ of error could be sued out from this court; and failing to do so, he cannot have the adverse decision of the state court reviewed by a Circuit Court of the United States upon a writ of *habeas corpus.*

The question raised in this case could have been raised and determined by the trial court in New York, on a motion to set aside the indictment.

It was not intended by Congress that Circuit Courts of the United States should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the State through its own tribunals.

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

Statement of the Case.

The appellant, Joseph Wood, being held in custody by Augustus A. Brush, agent and warden of Sing Sing Prison in the State of New York, presented to the Circuit Court of the United States for the Southern District of that State, on the 29th day of September, 1890, a petition for a writ of *habeas corpus*, setting forth the facts concerning his detention. His application having been denied, an appeal was taken under sections 751, 753, 763, 764 and 765 of the Revised Statutes and the act of Congress of March 3, 1885, 23 Stat. 437, c. 353, giving an appeal to this court from the final decision of a Circuit Court, upon *habeas corpus*, in the case of a person alleged to be restrained of his liberty in violation of the Constitution or any law or treaty of the United States.

The petitioner stated that he was a citizen of the United States, of the African race; that he was convicted in the Court of General Sessions of the Peace for the city and county of New York, of the crime of murder in the first degree, and, being sentenced to death under chapter 489 of the Laws of 1888 of that State, was committed to the custody of the appellee to await the execution of the sentence, which was fixed to occur in the week beginning December 1, 1890; that the indictment upon which he was arraigned was found by a grand jury of that court at its October term 1889, and his conviction by a petit jury was at its March term 1890; "that from the panels and lists of jurors whence said grand jury and petit jury were drawn and from said juries all persons of African race and descent and black in color were excluded," because of their race, and in said city, county and State have always been excluded for a like reason; that upon his arraignment on the 28th day of October, 1889, he was then without counsel or means of procuring counsel, and was required to and did plead to the indictment in ignorance of his rights in the premises; that upon the trial he was ignorant of the above facts "without his fault, and was, therefore, unable to challenge or otherwise object to the lists, panels and array of grand and petit jurors for the ground aforesaid;" that after conviction, learning the facts in relation to such exclusion of persons of his race from the list of grand and petit jurors,

he moved, with due diligence, upon allegation and tender of proof of the facts aforesaid, for a new trial; that according to law and the practice of the court his motion should have been entertained and decided upon its merits, and upon due proof, should have been granted, but the court refused altogether to entertain it or to pass upon his said contention upon proofs tendered, and a time was thereupon fixed for his execution; that by reason of such facts "he has been deprived of all the privileges and just rights of citizens of the United States, and of the equal protection of the laws, and is in like manner deprived of his liberty, and about to be deprived of his life, without due process of law;" and that his commitment and detention under said conviction and sentence are void and of no validity. The petitioner prayed also for a writ of *certiorari* to the Court of General Sessions of the Peace and its clerk, commanding it or him to certify to the court below true copies of the lists of grand jurors for the October term 1889 of that court, of the lists and panels of trial jurors or additional trial jurors for its March term 1890, and of the indictment and other papers in the prosecution under and by virtue of which he was held in custody.

The above motion by the prisoner was in writing, and was to the effect that the verdict of guilty be vacated and set aside, the judgment of conviction stayed, and a new trial granted upon the following grounds: "*First.* That the defendant is of the African race and black in color, and that all persons of this race and color were excluded in the drawing of the panel of the petit jurors, from which the trial jury herein was selected. *Second.* That by reason of such exclusion the defendant was denied the equal protection of the laws and did not have the full and equal benefit thereof in the proceedings for the security of his life and liberty as is enjoyed by white persons, and to which he is and was justly entitled. *Third.* That all persons of the African race and of color were excluded from the grand jury, by which the indictment against the defendant was found and upon which he was tried, and consequently said indictment was illegal and void, and the defendant ought not to have been put upon trial upon said

indictment, as said trial court was without jurisdiction. *Fourth.* That persons of the African race and color have always been excluded from the list and drawings of both the grand and petit jurors in and for the city and county of New York, though there were and for many years last past have been many such persons qualified by law in all respects to sit as grand and petit jurors in this court and residing in the city and county of New York. *Fifth.* That the honorable recorder who presided at the trial, as a member of the board who selected the grand jury by which defendant was indicted, had judicial knowledge and notice of the exclusion of persons of said African race and color, and should have advised the defendant of such fact when called upon to plead, as defendant was without counsel and unable to procure the same. *Sixth.* That the honorable recorder, sitting as trial judge, had judicial knowledge and should have taken judicial notice of the fact of the exclusion in manner aforesaid, of persons of the African race and color from the panel of petit jurors in attendance at the term of court and from which the jury in defendant's case was selected. *Seventh.* That the entire proceedings herein were contrary to the just rights and interests of the defendant and not in accordance with the guaranteed rights of the defendant. This motion is based upon the affidavit of the defendant, herewith filed, all proceedings in said cause, and the request to subpœna and examine witnesses concerning the material allegations in the affidavit of said Wood contained."

There was a further motion at the same time that subpœnas be issued directed to the commissioners of "jurors of the city of New York and to all other officers, clerks and persons who are known to the court to possess personal knowledge of the facts relating to these matters alleged in the affidavit of defendant at this time filed, and whose testimony may enable defendant to establish the facts in said affidavit set forth, and that said commissioners and others be examined and their evidence be taken in support of this motion and before the court passes upon the same."

This motion was supported by the affidavit of Wood, which,

after reciting his conviction and stating that when arraigned he had no counsel, and was without means to procure any, and that the plea of not guilty was entered without an examination of the indictment by counsel for him, proceeded: "Deponent further says that he is a citizen of the United States and was born in the State of Virginia, and that he is of the African race and descent and black in color. Deponent further says that there are at least several thousand citizens of the African race and descent and black in color who are and were for more than ten years last past residents of the city, county and State of New York, and who are qualified in all respects to sit as grand and petit jurors in the court where this deponent was heretofore tried, convicted and sentenced to death; that the officers authorized by the laws of the State of New York to select the names of and the persons to serve as grand jurors and petit jurors to serve for and in the Court of General Sessions of the Peace of the city and county of New York, selected no persons of the African race or color to serve as such jurors, but, on the contrary, excluded all persons of such race and color from those to serve as and be drawn for jurors; that said officers in and for said city and county of New York drew from the list of those so selected to serve as grand jurors, the grand jurors by whom the indictment against the defendant was found, and drew from the list of those selected to serve as petit jurors the petit jurors before whom the defendant was to be and was tried for his life under said indictment, and that from both the grand and petit jurors sitting in said court by whom the deponent was indicted and tried all persons qualified by law to serve as jurors who were persons of the African race and color were excluded because of their race and color, and that no one person of said African race and color was drawn or summoned, but that said grand and petit jurors were composed exclusively of white persons, and that, in fact, all persons, as deponent is informed and believes, of the African race, although qualified to serve as jurors, have always in said city, county and State been excluded from serving upon juries because of their race and color, and that by reason of such exclusion the said juries have been composed wholly of the

white race, and the defendant, in the finding of the said indictment and the trial thereupon, was denied the equal protection of the laws and did not have the full and equal benefit of all laws and proceedings in the said State of New York for the security of his person, as is enjoyed by white persons. Deponent asks that said judgment and the verdict herein be set aside and a further hearing be granted and such proceedings had as may be consistent with defendant's just rights."

This was the case presented to the court below, and is the case presented on this appeal from the order refusing to grant the writ of *habeas corpus*.

Mr. R. J. Haire for the petitioner.

Mr. Isaac H. Maynard opposing.

Mr. Charles F. Tabor, Attorney General of the State of New York, filed a brief in opposition.

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

The ground upon which the appellant based his application for writs of *habeas corpus* and *certiorari* was that his trial and conviction were in violation of his rights under the Constitution and laws of the United States, in that the grand jurors who returned the indictment, and the petit jurors by whom he was tried, were drawn from lists from which were excluded, because of their race and color, all citizens of African race and descent. Certainly, such exclusion was not required by the laws of New York. By the act of July 1, 1882, known as the New York Consolidation Act, grand jurors in courts of Oyer and Terminer and of General Sessions, held in the city and county of New York, are required to be selected from the persons whose names are contained in the list of petit jurors for the time being for that city, and by a Board consisting of the Mayor, the Presiding Judge of the Supreme Court in the First Judicial District, the Chief Justice of the Superior Court of the city, the first Judge of the Court of Common Pleas, the

Recorder, and the City Judge of the city and county. It is the duty of that Board to select from the lists produced by the Commissioner of Jurors of persons qualified to serve as jurors in the city, the names of not less than six hundred nor more than one thousand persons to serve as grand jurors of the different courts of Oyer and Terminer and General Sessions; and the persons so selected are required to be "intelligent citizens of good character," and, "so far as the said Board may be informed, possessed of the qualifications required of persons to serve as jurors for the trial of issues of fact, and not exempted from serving as such jurors." Laws of N. Y. 1882, §§ 1638, 1641. A person, to be qualified to serve as a trial juror for a court in the city and county of New York, must be: "1. A male citizen of the United States, and a resident of that city and county. 2. Not less than twenty-one, nor more than seventy years of age. 3. The owner, in his own right, of real or personal property, of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value. 4. In the possession of his natural faculties, and not infirm or decrepit. 5. Free from all legal exceptions; intelligent; of sound mind and good character; and able to read and write the English language understandingly." § 1652; Code of Civil Procedure, § 1079. It is admitted, and, if it were not admitted, it is too clear to require discussion to prove, that these statutory regulations do not authorize, indeed, do not permit, the exclusion of any citizen from the lists of grand and petit jurors, because of his race and color. They apply equally to citizens of the United States resident in the city and county of New York, to whatever race they belong. So far as participation in the administration of justice by service upon grand and petit juries is concerned, they ignore all distinctions between citizens of the United States arising merely from race and color.

But it is contended that the present case is brought within former decisions of this court by reason of the alleged exclusion, in fact, from the lists of grand and petit jurors, of citizens of the African race, because of their race and color. The

decision upon which the appellant particularly relies in support of his application for the writ of *habeas corpus* is *Neal* v. *Delaware*, 103 U. S. 370, 394, which, it must be observed, came here from the highest court of the State upon writ of error. In that case this court — after remarking that a denial, by officers of the State charged with the duty of selecting jurors, of the right of the accused to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress — observed: "As said by us in *Virginia* v. *Rives*, 100 U. S. 313, the 'court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review. We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not, within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it *is* a right to which he is entitled, 'that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'"

We do not perceive that anything said in *Neal* v. *Delaware* would have authorized the Circuit Court to discharge the appellant from custody, even if, upon investigation, it had found that citizens of the race to which he belongs had been, in fact and because of their race, excluded from the lists of grand and petit jurors from which were selected the grand jurors who indicted and the petit jurors who tried him. That was a matter arising in the course of the proceedings against the appellant, and during his trial, and not from the statutes of New York, and should have been brought at the appropriate time, and in some proper mode, to the attention of the trial court. Whether the grand jurors who found the indictment, and the petit jurors who tried the appellant, were or were not selected in conformity with the laws of New York —

which laws, we have seen, are not obnoxious to the objection that they discriminate against citizens of the African race, because of their race — was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the Circuit Court of the United States, upon a writ of *habeas corpus*, without making that writ serve the purposes of a writ of error. No such authority is given to the Circuit Courts of the United States by the statutes defining and regulating their jurisdiction. It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the Constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a Circuit Court of the United States, upon a writ of *habeas corpus* sued out by the accused either during or after the trial in the state court. For "upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;" and "if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination." *Robb* v. *Connolly*, 111 U. S. 624, 637.

Of this right to have the action of the trial court reviewed in the highest court of the State, the appellant availed himself. His present application, it is true, does not show that his case was carried to the Court of Appeals of New York, and that the judgment of conviction was there affirmed, October 7, 1890. But we may, as doubtless the Circuit Court did, take judicial notice of those facts. That court said: "The record in this case discloses no exception that is not wholly frivolous. The counsel for the defendant frankly confessed that he had been unable to find an exception which he thought

fit for argument, but he submitted the case in the hope that, in our examination of it, we might find some ground on which to base a reversal of the judgment. The case has been carefully examined, because it involved human life, but we have been unable to find the slightest reason for disagreeing with the result arrived at in the trial court." *People* v. *Wood*, 123 N. Y. 632.

The highest court of the State having thus disposed of the case, and the appellant having failed to obtain from the trial court an order setting aside the conviction and granting a new trial, the present effort was made to secure his release by a writ of *habeas corpus* issued by the Circuit Court of the United States. The statute under which the appellant was prosecuted is not repugnant to the Constitution of the United States, and the court that tried him, we repeat, was competent to guard and enforce every right secured to him by that instrument, and which might be involved in his trial. The petition for the writ sets forth no ground affecting its jurisdiction either of the offence charged or of the person alleged to have committed it. If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the Court of General Sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. *Savin, Petitioner*, 131 U. S. 267, 279; *Stevens* v. *Fuller*, 136 U. S. 468, 478. Nor would that error, of itself, have authorized the Circuit Court of the United States, upon writ of *habeas corpus*, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege or immunity, specially claimed under the Constitution or laws of the United States, could have been reëxamined, and reversed, affirmed or modified, by this court as the law required. Rev. Stat. § 709.

Anticipating this view, the appellant insists that he was

not permitted by the laws of New York regulating the trial of criminal cases to avail himself of the objection that all persons of his race were excluded in the city and county of New York, from the lists of grand and petit jurors. Consequently, he contends, that during the period in which jurors were drawn from the lists in question the Court of General Sessions of that city and county "had no jurisdiction to indict and try a person of the African race." We cannot assent to this proposition, or to any interpretation of the Code of Criminal Procedure of New York, that withholds from the trial court authority to protect a person, upon trial for his life, in a right secured to him by the Constitution of the United States. While that Code may not permit "a defendant to challenge the body of the grand jury because irregularly or defectively constituted," *People* v. *Hooghkerk*, 96 N. Y. 149, 159, it is not clear that such challenge, if seasonably made, may not be allowed when "the defect in the constitution of the tribunal deprived it of the character of a grand jury in a constitutional sense," or was such as involved the violation of the constitutional rights of the accused. *People* v. *Petrea*, 92 N. Y. 128, 144, 145. Without expressing any opinion upon this point, we are satisfied that the question now made as to the exclusion of citizens of the African race from the lists of grand and petit jurors, because of their race, could have been raised and determined by the trial court, upon its merits, under a motion to set aside the indictment. Section 312 of the Code of Criminal Procedure provides that "in answer to the indictment, the defendant may either move the court to set the same aside, or may demur or plead thereto." The grounds upon which such a motion may be based are not enumerated, and a trial court is, therefore, at liberty to entertain it upon any grounds not forbidden by other sections of the Code, and which may be available under the established rules of criminal procedure. *People* v. *Clements*, 5 N. Y. Crim. Rep. 288, 294; *People* v. *Price*, 6 N. Y. Crim. Rep. 141. It is true that section 313 of the Code specifies certain cases (not embracing cases like the present one) in which an indictment, on motion of the defendant, "*must* be set aside."

But that section does not restrict the power of the court to set aside indictments, on motion, to those particular cases, nor include that large class of cases, in which a court, in its discretion, in order to subserve the ends of public justice or to protect the accused from wrong, may quash an indictment and direct a resubmission of his case to another grand jury. *United States* v. *Gale*, 109 U. S. 65.

Whether the appellant might not have availed himself, in other modes, and during the trial, of the objection now under consideration, we need not inquire; for, independently of the view we have expressed, and even if there were some room for a different construction of the New York Code, the Circuit Court might well have forborne to act until this question had been definitely determined either in the highest court of New York, or in this court upon a writ of error sued out by the appellant. While the courts of the United States have power, upon *habeas corpus*, to inquire into the cause of the detention of any one claiming to be restrained of his liberty in violation of the Constitution, or laws, or treaties of the United States, it was not intended by Congress that they should by writs of *habeas corpus* obstruct the ordinary administration of the criminal laws of the States, through their own tribunals. "Where," this court said in *Ex parte Royall*, 117 U. S. 241, 252, 253, "a person is in custody, under process from a state court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Consti-

tution of the United States." And we will add, that after the final disposition of the case by the highest court of the State, the Circuit Court, in its discretion, may put the party, who has been denied a right, privilege or immunity claimed under the Constitution or laws of the United States, to his writ of error from this court, rather than interfere by writ of *habeas corpus*. These principles have special application where, as in the present case, there is no pretence that the statute under which the prosecution of the appellant was conducted is repugnant to the Constitution or laws of the United States.

It is scarcely necessary to observe that the question of the power or duty of the Circuit Court to issue a writ of *habeas corpus* is not at all affected by the fact, alleged in the petition that the appellant was ignorant, until after his conviction, of the exclusion of citizens of his race, because of their race, from the lists of grand and petit jurors. That fact, if material, was for the consideration of the trial court.

In respect to the general objection that the Court of General Sessions should have considered and sustained the motion to set aside the verdict, stay the judgment and grant a new trial, upon the grounds stated in that motion and in the accompanying affidavit, it need only be further said that the action of that court in the matter did not affect its jurisdiction, and, therefore, cannot be reviewed or disregarded upon *habeas corpus*.

We are of opinion that the court below did not err in denying the application for writs of *habeas corpus* and *certiorari*, and the judgment must be

Affirmed.[1]

MR. JUSTICE GRAY was not present at the argument of this case, and took no part in its decision.

---

[1] MR. JUSTICE FIELD filed a concurring opinion of which the Reporter had no notice. To his great regret it reached him after this and subsequent pages were set up and cast. It will be found on p. 370, *post*.

In re SHIBUYA JUGIRO, Petitioner.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1632. Argued and submitted April 10, 1891. — Decided May 11, 1891.

After final judgment entered here, affirming a judgment of a Circuit Court of the United States denying an application for a writ of *habeas corpus*, in favor of a person convicted of murder by a state court, and held in custody by the authorities of the State, the restraint upon the jurisdiction of the state court terminates, and that court has power to proceed in the case without waiting for the mandate to be sent down from this court to the Circuit Court.

In re Wood, Petitioner, ante, 278, affirmed and applied.

Several other grounds set forth in the application and stated in the opinion raise no constitutional question.

THE case as stated by the court was as follows:

The appellant was convicted, December 3, 1889, by the name of Schihiok Jugigo, in the Court of Oyer and Terminer for the County of New York, State of New York, of the crime of murder, and, on the 16th day of the same month, was sentenced to suffer death. The sentence was stayed by an appeal to the Court of Appeals of New York until December 1, 1890. The judgment was affirmed on the 8th of October, 1890, that court saying: "The record does not contain a single exception, and we are unable to perceive any reason for bringing the appeal, except to delay the execution of the judgment. The evidence established beyond any doubt the commission of the crime, and the charge of the judge was fair and properly instructed the jury upon the law needful for their guidance. There can be no pretence for saying that the ends of justice require a new trial, and the judgment should be affirmed." *People* v. *Jugigio*, [*Qu.* Jugiro,] 123 N. Y. 630. Prior to such affirmance, namely, on the 9th of September, 1890, Jugiro filed in the Circuit Court of the United States for the Southern District of New York a petition for a writ of *habeas corpus* to inquire into the cause of his detention; claim-

ing that the judgment and sentence were void under the Constitution of the United States. The writ was refused, and, upon appeal, the judgment of that court was affirmed here, November 24, 1890, upon the authority of *In re Kemmler*, 136 U. S. 436.

On the 1st day of December, 1890, — the mandate of this court not having then been issued, — Jugiro was arraigned before the Court of Oyer and Terminer, and required to show cause why a day should not be fixed for the infliction upon him of the punishment of death. He objected that, "by force of section 766 of the Revised Statutes of the United States, any proceedings to carry out said judgment or sentence in said Court of Oyer and Terminer, or by or under the authority of the State of New York, before final judgment should be entered in said proceedings in said Circuit Court, were null and void." This objection was disregarded, and the court sentenced him to suffer death in the week commencing January 12, 1891, and accordingly remanded him for that purpose to the custody of the agent and warden at the state prison at Sing Sing.

On the 7th of January, 1891, he filed in the Circuit Court of the United States a second petition for a writ of *habeas corpus*, in which, after setting out most of the above facts, he stated that, whereas by the constitution and laws of New York he was entitled, upon his trial, to counsel, and appeared upon his arraignment without counsel, and was asked by the court if he desired the aid of counsel, and answered that he did, the court thereupon assigned him as counsel, who afterwards took part in all the proceedings upon the indictment, directing and controlling the defence, "one not admitted or qualified to practise as an attorney or counsellor at law in the courts of said State, of which petitioner was at all times in all the proceedings aforesaid ignorant, and thereby petitioner was deprived of due process of law for his defence;" that petitioner, being an alien subject of the Emperor of Japan, unacquainted with the laws of New York, and unable to speak or understand the English language, was obliged to rely wholly upon said counsel for his defence; that the indictment alleged that the wound inflicted by the petitioner was in the

breast of one Mura Commi, the person alleged to have been murdered; that the proof was that the wound was not in the breast, but in the neck, from behind; that having no notice by the indictment that he would be called upon to explain a wound from behind, such allegation was misleading; that the proof was a substantial variance from the indictment, "which petitioner is advised would have constituted a valid objection to the admission of evidence, the reception of a verdict and in arrest of judgment, had his rights in that behalf been duly asserted by lawful counsel;" but that "all the occasions having passed when, in the lawful course of procedure, the objection could be taken, not having been duly taken, reserved and presented, petitioner has suffered great prejudice, and in other respects his rights upon his trial were prejudiced and sacrificed by the said assignment of counsel;" and that "now, so it is, that neither by motion for a new trial nor by motion in arrest of judgment nor otherwise, under the limitations of the laws of the State of New York, can any court of said State take cognizance or afford petitioner any relief in the premises, and petitioner has no remedy or protection in respect thereto, except under the Fourteenth Amendment to the Constitution of the United States, as an additional guarantee to the constitution of the State of New York, for his protection upon an equality with all in the enjoyment of his right to the assistance of counsel, and to due process of law in that respect."

It also alleged that the judgment and sentence and his restraint under them were without due process of law in this: That the indictment "was found by a grand jury in the Court of General Sessions of the Peace in and for the city and county of New York, at the November term of said court, 1889; that from the list and panel of jurors from which said grand jury was selected and drawn, certain and all persons of the color and race of petitioner, who is a native-born subject of the Emperor of Japan and dark brown in color, were excluded on account of their said race and color, although many persons of said race and color, naturalized citizens of the United States, and in all respects qualified to serve as such jurors, were, at the time of the selection of said list and panel,

resident and being within said city and county, and who might otherwise have been drawn to serve upon said grand jury; and the same is true of the petit jury drawn to try the said indictment;" that "petitioner was ignorant of said facts in respect to said jurors at all the times aforesaid;" that "now, so it is, that neither by motion for a new trial nor by motion in arrest of judgment nor otherwise, under the limitations of the laws of the State of New York, can any court of said State take cognizance of or afford petitioner any relief in the premises, and petitioner has no remedy or protection in respect thereto, except under the Fourteenth Amendment of the Constitution of the United States, for his right to the equal protection and due process of law in the premises."

This application for the writ of *habeas corpus* was also denied, and the appellant claims, upon this appeal from the order denying the writ, that the indictment and the proceedings under it, as well as his detention, are in violation of the Constitution of the United States, and void.

Mr. Roger M. Sherman, for the petitioner, submitted on his brief.

Mr. Isaac H. Maynard opposing. *Mr. Charles F. Tabor*, Attorney General of the State of New York, was on the brief.

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

As Jugiro's first written application for a writ of *habeas corpus* alleged that he was restrained of his liberty in violation of the Constitution of the United States, no question is made, as, indeed, none could be made, as to his right under the existing statutes of the United States, relating to *habeas corpus*, to have prosecuted an appeal to this court from the order of the Circuit Court denying that application. Rev. Stat. §§ 751, 752, 753, 761, 762, 763, 764, 765; Act of March 3, 1885, c. 353, 23 Stat. 437. But it is contended that the

appeal from that order deprived the state court of all power to proceed, not only while the appeal was pending and undetermined here, but until the mandate of this court was sent down to the Circuit Court. This contention is supposed to be justified by section 766 of the Revised Statutes, limiting the power of the state court before and after an appeal from the final decision in a Circuit Court of the United States of an application for a writ of *habeas corpus* by one alleged to be restrained of his liberty in violation of the Constitution, or some law or treaty, of the United States. Rev. Stat. §§ 763, 764, 765. The latter section provides: "Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void."

Of the object of the statute there can be no doubt. It was — in cases where the applicant was held in custody under the authority of a state court or by the authority of a State — to stay the hands of such court or State, while the question as to whether his detention was in violation of the Constitution, laws or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. But the jurisdiction of the state court in the cases specified is restrained only pending the proceedings in the courts of the United States, and until final judgment therein. This court, on the 24th of November, 1890 — as we know from our own records — affirmed, with costs, the judgment of the Circuit Court denying the former application for a writ of *habeas corpus*. That was its final judgment in the premises, because it determined the whole controversy involved in the appeal. Upon its rendition, the appeal from the judgment of the Circuit Court was no longer pending in this court; and nothing remained that was "in process of being heard and determined." It was none the less a final disposition of the

case because, at a subsequent date, under the rules and practice of this court, a mandate would be sent down to the Circuit Court, showing the fact of the affirmance of its judgment. It is true that it would have been more appropriate and orderly if the state court had deferred final action until our mandate was issued and filed in the Circuit Court. But, in view of the words of the statute, we do not feel authorized to hold that the order in the state court of December 1, 1890, made after the final judgment here of November 24, 1890, was absolutely void. As Congress went no further than to stay the hands of the state court "until final judgment," we cannot superadd the condition that the filing of the mandate in the Circuit Court — in case of the mere affirmance of its judgment refusing a writ of *habeas corpus* — is absolutely necessary before the state court can proceed in the execution of the judgment of conviction. Of course, where, in such a case as this, the state court proceeds, after final judgment is entered here on the appeal of the person imprisoned or held in custody, but before our mandate goes down to the Circuit Court, it does so at the risk that its orders may be controlled and, if need be, annulled, if this court, during the term, should suspend or set aside its own judgment. While it is not difficult to perceive that serious complications may sometimes arise where the state court acts with undue haste, and proceeds before the mandate of this court is issued, and without any special application being made therefor, we do not feel at liberty to declare its action, taken after and in conformity with the final judgment here, to be void, simply because it was taken before the mandate was sent down. Nothing but an entire want of jurisdiction in the state court to make the order of December 1, 1890, could have justified the Circuit Court in interfering with its proceedings by writ of *habeas corpus*. We are of opinion that there was no such want of jurisdiction.

The remaining grounds set forth in the appellant's petition for his discharge from custody are substantially disposed of by the decision in *Wood* v. *Brush*, *ante*, 278, just rendered. The alleged assignment, at the trial of the appellant, of one as his

counsel who (although he may have been an attorney at law) had not been admitted or qualified to practise as an attorney or counsellor at law in the courts of New York; the misdescription in the indictment of the wound he was charged with having inflicted upon the deceased; and the exclusion from the list of grand and petit jurors of citizens of the United States of the same race with appellant, were all matters occurring in the course of the proceedings and trial in a court of competent jurisdiction, proceeding under statutes that do not conflict with the Constitution of the United States. The errors, if any, committed by that court in respect to any of those matters, did not affect its jurisdiction of the offence or of the person accused, and cannot be reached by *habeas corpus*.

It may be, as is claimed, that the appellant is unacquainted with our laws and language. But that fact, however material or important in support of an application to the proper authorities for a pardon, or for a commutation of the sentence, is immaterial upon this inquiry as to the authority of a court of the United States, by a writ of *habeas corpus*, to review and annul the judgment of a state court administering the criminal laws of a State.

It is equally immaterial that the appellant is the subject of a foreign government. That does not entitle him to exemption from responsibility to the laws of the State into which he may choose to go. The criminal laws of New York make no discrimination against him because of his nativity or race. They accord to him when upon trial for his life or liberty the same rights and privileges that are accorded, under like circumstances, to native or naturalized citizens of this country. Besides, no person, charged with a crime involving life or liberty, is entitled, by virtue of the Constitution of the United States, to have his race represented upon the grand jury that may indict him, or upon the petit jury that may try him. And so far as the Constitution of the United States is concerned, service upon grand and petit juries in the courts of the several States may be restricted to citizens of the United States. It rests with each State to prescribe such qualifications as it deems proper for jurymen, taking care only that no

discrimination, in respect to such service, be made against any class of citizens solely because of their race. The statutes of New York regulating these matters do not, in any way, conflict with the provisions of the Federal Constitution; and if, as alleged, they were so administered by the state court, in appellant's case, as to discriminate against him because of his race, the remedy for the wrong done to him was not by a writ of *habeas corpus* from a court of the United States.

For the reasons stated in this opinion, and in *Wood* v. *Brush*, the judgment is

Affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

ROGERS *v.* DURANT.

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

No. 318. Submitted April 16, 1891. — Decided May 11, 1891.

A bank check is a "bill of exchange" within the meaning of that term as used in the Statutes of Illinois prescribing the term of five years after the cause of action accrues, and not thereafter, as the time within which an action founded upon it must be commenced.

This was an action of assumpsit brought by Henry J. Rogers, January 26, 1884, against William F. Durant and others, as "surviving partners of the late firm of James W. Davis and associates," in the Circuit Court of the United States for the Northern District of Illinois, upon twenty instruments in writing, bearing various dates from April 12, 1869, to February 12, 1870. Durant alone was served with process.

The original declaration consisted of the common counts, and was subsequently amended by the addition of special counts upon each of the pieces of paper sued on, describing eighteen of them as bills of exchange and two as banker's

checks. All were payable at sight or on short time after date, and it was admitted that more than five years had elapsed after they became due before action was brought. The defendant filed eight pleas, which were ordered to stand as pleas to the amended declaration. The fourth plea was as follows: "And for a further plea in this behalf to said plaintiff's declaration and each of the counts thereof the said defendant, William F. Durant, says *actio non*, etc., because he says that the said several supposed causes of action, and each and all of them in said plaintiff's declaration, and each of the several counts thereof mentioned, are founded upon bills of exchange, and that no cause of action has accrued upon any or either of said bills of exchange, to the said plaintiff or the holder thereof, within five years next before the bringing of this suit, as the plaintiff hath above complained against him, the said defendant, but that each and all of said supposed causes of action accrued, if at all, after the tenth day of February, A.D. 1849, and prior to the fourth day of April, A.D. 1872; and this he is ready to verify. Wherefore he prays judgment," etc. To this plea plaintiff interposed a general demurrer, which was overruled by the court, and the plaintiff electing to abide by his demurrer, (the other pleadings being also at the same time disposed of,) judgment was rendered for the defendant, and the cause brought here on writ of error.

Mr. David J. Wile for plaintiff in error.

I. Banker's checks are not bills of exchange. *Merchants' Bank* v. *State Bank*, 10 Wall. 647; *In re Brown*, 2 Story, 502; *Morrison* v. *Bailey*, 5 Ohio St. 13; *S. C.* 64 Am. Dec. 632; *Hawley* v. *Jette*, 10 Oregon, 31; *Levy* v. *Laclede Bank*, 18 Fed. Rep. 193; *Champion* v. *Gordon*, 70 Penn. St. 474.

II. The Federal courts are not bound by the decisions of the State where a question of general commercial law arises. *Boyce* v. *Tabb*, 18 Wall. 546; *Hough* v. *Railway Co.*, 100 U. S. 213; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; *Robinson* v. *Comm. Ins. Co.*, 3 Sumner, 220; *Oates* v. *National Bank*, 100 U. S. 239.

III. Banker's checks, not being bills of exchange, are properly classed as "other evidence of indebtedness in writing" under the statute, and are not barred until the expiration of sixteen years from their date. Gross' Statutes of Illinois, Vol. 1, p. 430, Chapter 66, Sects. 17–20.

Mr. Charles H. Lawrence for defendant in error.

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

If the fourth plea was sufficient in law to bar the maintenance of this action, it is not necessary to set forth the other pleadings and the action of the court thereon.

The first and second sections of an act of the General Assembly of the State of Illinois, entitled "An act to amend the several laws concerning limitation of actions," approved November 5, 1849, (Laws Ill. 2d Sess. 1849, p. 44; 1 Gross' Ill. Stat. 1870, 3d ed. p. 430, §§ 17, 18,) provided:

"Section 1. That all actions founded upon any promissory note, simple contract in writing, bond, judgment or other evidence of indebtedness in writing, made, caused or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter.

"Sec. 2. All actions founded upon accounts, bills of exchange, orders, or upon promises not in writing, express or implied, made after the passage of this act, shall be commenced within five years next after the cause of action shall have accrued, and not thereafter."

An act revising the law as to limitations was passed by the Twenty-seventh General Assembly, April 4, 1872, (Laws Ill. 1871–72, p. 556,) and forms part of the Revised Statutes of Illinois of 1874, and the act of November 5, 1849, was expressly repealed, with a saving clause, thus expressed in the Revised Statutes: "When any limitation law has been revised by this or the Twenty-seventh General Assembly, and the former limitation law repealed, such repeal shall not be con-

strued so as to stop the running of any statute, but the time shall be construed as if such repeal had not been made." Rev. Stats. 1874, c. 131, §§ 5 and 6; *Dickson* v. *Chicago, Burlington & Quincy Railroad*, 77 Illinois, 331.

Conceding that the act of November 5, 1849, is applicable, it is contended that checks are not bills of exchange, and therefore that the fourth plea did not fully answer the declaration, and that, moreover, checks did not fall within the second section, which prescribed five years as the bar to actions "upon accounts, bills of exchange, orders, or upon promises not in writing, express or implied," but within the first section, which as to "any promissory note, simple contract in writing, bond, judgment or other evidence of indebtedness in writing," prescribed sixteen years.

In the view which we take, the demurrer, which was general, was properly overruled, if the checks were within the second section, as the eighteen bills or drafts confessedly were. *Simons* v. *Butters*, 48 Illinois, 226.

Daniel comprehensively defines a check to be "a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." 2 Dan. Neg. Inst. § 1566. And in a note to that section he gives these definitions and descriptions of checks from the text writers: "A check on a banker is, in legal effect, an inland bill of exchange, drawn on a banker, payable to bearer on demand." Byles on Bills, Sharswood's ed. 84. "A check is a written order or request, addressed to a bank or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." Story on Prom. Notes, § 487. "A check is a brief draft or order on a bank or banking house, directing it to pay a certain sum of money." 2 Parsons, Notes and Bills, 57. "A check drawn on a bank is a bill of exchange payable on demand." Edwards on Bills, 396.

The question presented is not one, however, of general commercial law, requiring a discussion of the distinctions existing between checks and bills of exchange, but merely whether checks were intended to be included within the words "bills of exchange," as used in the statute. In *Bickford* v. *First National Bank*, 42 Illinois, 238, and *Rounds* v. *Smith*, 42 Illinois, 245, it was held that a check might be regarded as substantially an inland bill of exchange, and many authorities were cited to the proposition that the rules applicable to such bills are applicable to checks. But the opinion of the court, by Mr. Justice Breese, did not proceed upon the ground that checks and domestic bills are identical, and the differences between them have been repeatedly recognized by the Illinois courts. *Bank* v. *Ritzinger*, 118 Illinois, 484; *Stevens* v. *Park*, 73 Illinois, 387; *Heartt* v. *Rhodes*, 66 Illinois, 351; *Willetts* v. *Paine*, 43 Illinois, 432; *Allen* v. *Kramer*, 2 Brad. App. 205.

It has also been decided that an instrument is not less a check because it orders payment "on account of A," *Bank* v. *Patton*, 109 Illinois, 479; and that its character as a check is not changed by the fact that it is payable in another State than the one in which it is drawn. *Bank* v. *Banking Co.*, 114 Illinois, 483; *Union National Bank* v. *Oceana County Bank*, 80 Illinois, 212. And the settled rule in that jurisdiction is, that where a depositor draws his check on a banker who has his funds to an equal or greater amount, it operates to transfer the sum named in the check to the payee, who can sue for and recover the amount from the banker; and that a transfer of the check carries with it the title to the sum named in the check to each successive holder. *Brown* v. *Leckie*, 43 Illinois, 497; *Munn* v. *Burch*, 25 Illinois, 35; and cases *supra*.

Without pausing to examine the points of resemblance and the points of difference between these instruments, it is enough that the result of the decisions in Illinois puts them so far on the same footing as to involve the conclusion that checks were fairly embraced under the description, "bills of exchange," in the second section of the statute under consideration.

In *Moses* v. *Franklin Bank*, 34 Maryland, 574, it was held that checks were embraced within the description, "inland

bills of exchange," in the article of the Maryland Code relating to protests, and the court said: "According to all the text writers on bills and notes, as well as in numerous decisions, a check is denominated a species of inland bill of exchange, not with all the incidents of an ordinary bill of exchange, it is true, but still it belongs to that class and character of commercial paper. The same reason, therefore, that would authorize the protest of an inland bill of exchange for non-payment would authorize the protest of a check, the payment of which had been refused on presentment." See also *Lawson* v. *Richards*, 6 Phila. 179.

So in *Eyre* v. *Waller*, 5 Hurls. & Norm. 460, the Court of Exchequer decided that checks were within the "Summary Procedure on Bills of Exchange Act," 18 and 19 Vict. c. 67; not only within the mischief, but within the words of the act.

And while these cases are referred to by way of illustration merely, it seems to us clear that whatever the legislative reason for the discrimination between the subjects of the first and of the second section, that reason manifestly requires checks to be placed in the same category as bills of exchange.

Again we are of opinion that checks might properly be held comprised in the word "orders," as associated with bills of exchange, rather than otherwise. Orders are frequently a kind of informal bills of exchange, and a check is of course an order for the payment of money; and we do not consider that by any reasonable construction checks should be included in the term "other evidence of indebtedness in writing," as used in the first section, rather than in "bills of exchange," or "orders," as used in the second.

Counsel ingeniously argue that the first section specified obligations of a higher class than those mentioned in the second, and that checks, as contradistinguished from orders, belonged to the former; but it is difficult to perceive why checks should be classified with bonds, judgments, and promissory notes, rather than with bills of exchange, or why the simple contract or evidence of indebtedness in writing, of the first section, should necessarily be regarded as of higher dignity than a draft or an order for money.

Statement of the Case.

The fourth plea was inaccurate in its reference to a former statute of limitations, approved February 10, 1849, but that is immaterial; and, stripped of surplusage, it averred that the cause of action set forth in each of the twenty special counts as well as the common counts did not accrue within five years next before the bringing of the suit. The court properly held that, such being the fact, the drafts and checks were barred, and, as there was no pretence that there was any other cause of action, the judgment was right, and it is

Affirmed.

HUMPHREYS *v.* McKISSOCK.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *v.* McKISSOCK.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

Nos. 296, 991. Argued April 8, 1891. — Decided May 11, 1891.

Several railroad companies combined to construct an elevator, to be connected with their respective roads, each to contribute an equal sum towards its costs, and each to receive corresponding certificates of stock in a corporation organized to take title to the elevator and to construct it. This arrangement was carried out. *Held*,

(1) That the interest of each company in it was as a stockholder in the company which constructed it;

(2) That no company had an interest in the property itself which it could mortgage;

(3) That such stock would not pass to a mortgagee of one of the railroads under a general description as an appurtenance to the road.

A railroad company joining in the construction of an elevator on land not belonging to it, and situated at some distance from its road, does not acquire an interest in it which will pass as an appurtenance under a mortgage of its railroad as constructed or to be constructed, and the appurtenances thereunto belonging.

THE two appeals in these cases are from the same decree. Both will be disposed of by the same decision, which will turn upon the effect of a mortgage, executed by a railroad corpora-

tion of railroad property, upon a subsequently acquired interest of the mortgagor in the stock of an elevator company. The material facts out of which the controversy arises are very fully and clearly set forth in the briefs of counsel. They are substantially as follows:

On the 15th of February, 1879, the St. Louis, Kansas City and Northern Railway Company, a corporation created under the laws of Missouri, owned a railroad extending in a northeasterly direction from Elm Flats in Davies County of that State, through the counties of Davies, Gentry, Nodoway and Atchison, to the boundary line between Missouri and Iowa. It was also the lessee for a term of years of a railroad extending from Council Bluffs, in Iowa, in a southeasterly direction, through the counties of Pottawatomie, Mills, Fremont and Page to a point on the boundary line, where the railroads connected.

On that day, for the purpose of securing the payment of 250 bonds, each for the sum of $1000, the railway company mortgaged its leasehold estate in the railroad in Iowa, and its title in fee to its railroad in Missouri, to the United States Trust Company of New York, as trustee. The property described in the mortgage is as follows:

"All and every part and parcel of the continuous line of railroad, and all right, title and interest therein, as now owned, leased and held by said St. Louis, Kansas City and Northern Railway Company, commencing at Elm Flats, near Pattonsburg, in the State of Missouri, and extending through the counties of Davies, Gentry, Nodoway and Atchison in the State of Missouri, and through the counties of Page, Fremont, Mills and Pottawatomie in the State of Iowa, to the city of Council Bluffs in said State, *as said railroad now is, or may be hereafter constructed, maintained, operated or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars and other appurtenances thereunto belonging.*"

On the 10th of November, 1879, the St. Louis, Kansas City and Northern Railway Company was consolidated with the Wabash Railway Company of Illinois, Indiana and Ohio, and

the corporation thus formed took the name of the Wabash, St. Louis and Pacific Railway Company.

Afterwards, on the 17th of December, 1880, a corporation was formed under the laws of Iowa by certain parties named Dillon, Hopkins, Keep, Riddle and Perkins, known as the Union Elevator Company. Its articles of incorporation provided that its principal place of business should be at Council Bluffs; that its stock should be $500,000; and that the subscriptions to the stock should be paid in when called for by the board of directors. The parties who formed this corporation were officers of different railway companies doing business at Council Bluffs. Immediately after its organization the Elevator Company, as party of the first part, entered into a written contract with the Union Pacific Railway Company as party of the second part; the Wabash, St. Louis and Pacific Railway Company, as party of the third part; the Chicago, Rock Island and Pacific Railway Company, as party of the fourth part; the Chicago, Burlington and Quincy Railway Company, as party of the fifth part; the Chicago and Northwestern Railway Company, as party of the sixth part; and the Chicago, Milwaukee and St. Paul Railway Company, as party of the seventh part; in which each of the companies agreed to subscribe $100,000 to the capital stock of the Elevator Company, and to contribute equally thereto; and the Elevator Company agreed that in conducting its business it would not discriminate in favor of or against either of the companies, but would at all times serve them on equal terms.

In 1881 these companies subscribed for an equal amount of stock in the Elevator Company, and in 1881 and 1882 the elevator was erected at a cost of $280,000. When completed it was leased by the Elevator Company to certain parties, who afterwards operated it as tenants of that company. The different companies subscribed equal amounts for the construction of the elevator, which subscription was in reality only one-sixth of $280,000, and not one-sixth of $500,000, the authorized amount of its capital stock. Each, therefore, paid $46,666.66, and received its stock, except the Wabash, St. Louis and Pacific Railway Company, which paid only $41,666.66,

leaving $5000 due. For want of this last payment no stock has been issued to that company. It will be entitled to receive its proportional part of the stock upon the payment of that sum.

In 1884 the Wabash, St. Louis and Pacific Railway Company became insolvent, and on the 29th day of May of that year Solon Humphreys and Thomas E. Tutt were, in proceedings before the Circuit Court of the United States for the Eastern District of Missouri, appointed receivers of all its property, including the railroad from Elm Flats, Missouri, to Council Bluffs, Iowa.

In June, 1885, a bill was filed in the Circuit Court of the United States for the Southern District of Iowa, Western Division, by the United States Trust Company of New York, against the Wabash, St. Louis and Pacific Railway Company, to foreclose the mortgage of February 15, 1879, executed by the St. Louis, Kansas City and Northern Railway Company, (afterwards merged into the Wabash, St. Louis and Pacific Railway Company,) covering the road from Elm Flats to Council Bluffs. On March 3, 1886, that court appointed Thomas McKissock receiver of the premises and property described in the mortgage, with power and instructions to take possession thereof.

Previously to this, on January 6, 1886, the Circuit Court of the United States for the Eastern District of Missouri had made an order directing the receivers, Humphreys and Tutt, to transfer and surrender to the trustee of the mortgage, the United States Trust Company, or to any person or receiver appointed, at its instance, by the Circuit Courts of the States of Iowa or Missouri, in which the foreclosure suits brought by the trustee might at the time be pending, the entire line of railroad known as the Omaha Division of the Wabash, St. Louis and Pacific Railway Company, by which was meant the line extending from Elm Flats to Council Bluffs; and also all property, real and personal, pertaining to that division then in their possession and control.

Under the facts as thus stated the situation of the case was this: Humphreys and Tutt, as receivers of all the property of the

Wabash, St. Louis and Pacific Railway Company, appointed by the Circuit Court of the United States for the Eastern District of Missouri, claimed possession and the right to hold the interest of that company in the stock of the Elevator Company. On the other hand, McKissock, as receiver of the property described in the mortgage to the Trust Company, claimed the stock in the Elevator Company as covered by that mortgage, and demanded its transfer to him by Humphreys and Tutt. This being refused, he filed the present petition to enforce the demand. The court directed its reference to a special commissioner to take proofs and report the same with his findings of law and fact. He found the facts substantially as stated: and also that the elevator was immediately connected with the main line of the Wabash, St. Louis and Pacific Railway Company; that that company shipped large quantities of grain out of Council Bluffs over the Omaha Division; that the elevator was erected for the sole purpose of storing and handling grain to be transported over the six railroads; that the erection of an elevator by the Wabash, St. Louis and Pacific Railway Company at Council Bluffs was necessary to the conduct of its business as a shipper of grain; and that the handling and shipping of grain could not be successfully carried on at Council Bluffs without one. As a conclusion of law he held that the elevator was a common appurtenance to the railways, and that the one-sixth interest therein of the Wabash, St. Louis and Pacific Railway Company was an appurtenance belonging to its line of railway, and was covered by the mortgage of February 15, 1879, and formed a part of the mortgage security. He, therefore, recommended the entry of an order directing that company and its receivers to execute and deliver to McKissock a proper assignment of the interest of that company and of the receivers in the elevator. Exceptions were taken to this report, but they were overruled by the court; the report was confirmed, and a decree entered that Humphreys and Tutt execute and deliver to McKissock, as receiver, a proper assignment of all the interest of the Wabash, St. Louis and Pacific Railway Company, or of themselves as receivers, in the Union Elevator. From that decree appeals were taken to this court.

Argument for Appellee.

Notwithstanding the decree speaks of the interest of the Wabash, St. Louis and Pacific Railway Company in the Union Elevator, it was stipulated that the company had no interest otherwise than as a stockholder in the property of the Union Elevator Company. The evidence before the commissioner also showed that the elevator was not immediately on the main line of the Wabash Company, as found by him, but was distant more than half a mile from it, and was only reached by passing over the tracks of another company.

Mr. F. W. Lehmann for appellants. *Mr. Wells H. Blodgett* filed a brief for same.

Mr. Edward W. Sheldon (with whom was *Mr. Theodore Sheldon* on the brief) for appellee.

That the acquisition and use of grain elevators by railway companies for storing and handling grain to be carried over their lines, are within the corporate powers of such companies, recent decisions leave no room for doubt. *New York & Harlem Railroad* v. *Kip*, 46 N. Y. 546; *Ill. Cent. Railroad* v. *Wathen*, 17 Brad. App. 582. The right of eminent domain may be used to acquire land for them. *In re N. Y. Central &c. Railroad Co.*, 77 N. Y. 248; *N. Y. Central &c. Railroad Co.* v. *Metropolitan Gas Light Co.*, 63 N. Y. 326; *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251; *Miss. Valley Railroad* v. *Chicago &c. Railroad*, 58 Mississippi, 846, 896. When constructed, such elevators may be exempted from taxation, as part of a taxed railroad. *Pennsylvania Railroad* v. *Jersey City*, 49 N. J. Law, 540. Regarding the present case in the light of these adjudications, it would seem to be a necessary sequence that the interest of the Wabash Railway Company in the Union Elevator was acquired and used for railroad purposes. It is not disputed that the elevator in question was erected, and has ever since been exclusively used by its owners, the six railway companies and their successors, for the sole purpose of storing and transshipping grain carried over these companies' lines. They alone have made use of its facilities, and the witnesses are unanimous that the erection and main-

tenance of the elevator were indispensable to the conduct of the companies' grain traffic.

The interest of the Wabash Company in the elevator in question, was embraced in the mortgage of the "Omaha Division," under the description "other appurtenances." In presenting this case to the court below, the appellants' counsel laid much stress upon the technical rule that in the construction of deeds, land cannot be regarded as appurtenant to land. Even in its strict signification, this rule is subject to the qualification that land or other property essential to the beneficial use and enjoyment of the property granted, will pass as an appurtenance. *Whitney* v. *Olney*, 3 Mason, 280; *Sparks* v. *Hess*, 15 California, 186.

What is appurtenant to a railway, however, with its manifold purposes and complicated needs is, of course, a question having a far wider range and demanding a much more liberal treatment. Had the elevator in question been erected, owned and used by the Wabash Company alone, the conclusion seems clear that the lien of the mortgage would, under the foregoing authorities, have attached.

We are thus brought to determine whether a different conclusion is authorized by the fact that the property as a whole was owned equally by six separate railway companies, and their title thereto evidenced by equal amounts of the capital stock of the Union Elevator Company.

The form of the railway company's ownership does not affect the rights of the mortgagee. A mortgage by a railway company may cover stock of another corporation subsequently acquired by it. *Williamson* v. *New Jersey Southern Railway*, 26 N. J. Eq. 398.

But the interest involved in the present suit is more than naked shares of stock. When the six railway companies, in 1881, for the necessary purpose of storing and handling grain to be shipped over their lines, agreed, in order to avoid unnecessary expense in erecting and operating six separate grain elevators, to erect and operate one large elevator in common, there were several methods by which the ownership of their respective interests could have been evidenced. The title to the whole

property might have been held in common by the six companies. It could not be contended, we submit, that had that method been adopted, the one-sixth interest of the Wabash Company would not have become subject to the lien of the Omaha Division mortgage. *Toledo, Delphos &c. Railroad* v. *Hamilton*, 134 U. S. 305; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414.

But the question involved here is *res judicata*. The identity of the interest of the Wabash Company in the elevator, with the interest claimed by petitioner, and of the deed of trust described in the decree of sale with the mortgage to complainant herein, is established.

As against the appellants, therefore, this decree of sale is a conclusive adjudication upon the following points:

1. That the interest in the elevator was acquired and used by the Wabash Company for railroad purposes.

2. That being so acquired and used, it passed both by the "general mortgage" and the prior mortgage to the complainant.

3. That the fact that the interest of the Wabash Company was that of a stockholder in the Elevator Company as well as that of an owner of the right to forever use the elevator, did not prevent the lien of both the "general mortgage" and the mortgage to the complainant from attaching thereto.

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

The commissioner in his report committed a manifest error in holding that the Wabash Company possessed any interest in the property of the Elevator Company. The facts found by him as to the organization of the latter, the subscription to its stock, the construction of the elevator and its lease to others, show beyond controversy the independent existence of that corporation, and that the railway company had no specific interest in its elevator or other property which it could mortgage. It was a mere stockholder in the Elevator Company. If there had been any doubt on this point, from the

evidence before that officer on which he found the facts stated, it must have been removed by the stipulation of the parties.

The court below, therefore, erred in confirming the commissioner's report in that particular and entering a decree that Humphreys and Tutt, as receivers of the Wabash Company, execute and deliver to the petitioner, McKissock, an assignment of an interest supposed to be held by it, or by them as such receivers, in the Union elevator. That railway company had no interest which it could assign, the building belonged to the Union Elevator Company, and the railway company was entitled by its subscription, when paid, only to a certain proportion of its stock. Both the commissioner, and the court, in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation — the artificial being created — holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law.

In *Smith* v. *Hurd*, 12 Met. 371, 385, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the Chief Justice: "The individual members of a corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security, or chose in action; could not collect a debt, or discharge a claim, or release damage arising

from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined."

The commissioner also committed a manifest error in his report in holding that the elevator was a common appurtenance to the railroads of the several companies having the stock of the Elevator Company; and that one-sixth interest therein was an appurtenance to the railroad of the Wabash Company. It is difficult to understand the course of reasoning by which a certificate of stock in an independent corporation can be an appurtenance to a railroad. If stock in the company in question could be considered an appurtenance to a railroad, by the same rule stock in a bank, or in any other corporation, with which the railroad did business, might be so considered.

But were we to consider the Wabash Company as possessing a separable legal interest in the elevator, it would not be appurtenant to its railroad. That building is situated at some distance from the railroad — more than half a mile — and is erected on land not belonging to that company, but leased from the Union Pacific Railway Company, and can only be reached by crossing the tracks of another company. Had the elevator been constructed upon property covered by the mortgage, it might have been contended that it fell, to the extent of the one-sixth interest, under the mortgage, as one of the depots of the company. The term "depot" in the mortgage is not necessarily limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains. It applies also to buildings used for the receipt and storage of freight, which, when received, is to be safely kept until forwarded by the cars of the company or delivered to the owner or consignee. Such a building, whether existing at the time of the mortgage, or constructed afterwards upon the property of the company covered by it, may pass under the mortgage as one of its depots, but will not pass as an appurtenance to the property previously existing. A thing is appurtenant to something else only when it stands in the relation

of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter. *Harris* v. *Elliott*, 10 Pet. 25, 54; *Jackson* v. *Hathaway*, 15 Johns. 447, 455; *Linthicum* v. *Ray*, 9 Wall. 241. Of two parcels of land one can never be appurtenant to the other, for though the possession of the one may add greatly to the benefit derived from the other, it is not an incident of the other or essential to the possession of its title or use; one can be enjoyed independently of the other. As said by the Court of Appeals of New York, in *Woodhull* v. *Rosenthal*, 61 N. Y. 382, 390: "A thing 'appurtenant' is defined to be a thing used with and related to or dependent upon another thing *more worthy*, and agreeing in its nature and quality with the thing whereunto it is appendant or 'appurtenant.' It results from this definition that land can never be appurtenant to other land or pass with it as belonging to it. . . . All that can be reasonably claimed is, that the word 'appurtenances' will carry with it *easements* and *servitudes* used and enjoyed with the lands for whose benefit they were created. Even an easement will not pass unless it is necessary to the enjoyment of the thing granted."

Under the term "appurtenances," as used in the mortgage in question, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made in such cases between what is indispensable to the operation of a railway and what would be only convenient. *Bank* v. *Tennessee*, 104 U. S. 493, 496. The elevator in question was at all times under an independent management and was used in the same manner as any other warehouse not on the premises of the railway company to which it sent cars for freight.

The court, therefore, erred in confirming the report of the commissioner in the particular mentioned, and in passing its decree upon the assumption that the Wabash Company had a legal separate interest in the elevator, and that the mortgage attached to such interest. That company, as already stated, possessed only stock in the Elevator Company; and the owner-

ship of stock in one company has never been adjudged to be an appurtenance to a line of railroad belonging to another company.

There is no merit in the position that the question involved in these appeals was adjudicated by the decree foreclosing a subsequent mortgage of the Wabash Company. It appears that on June 1, 1880, a general mortgage was executed by that company to the Central Trust Company of New York upon different lines of railroad, including the Omaha Division. When this was foreclosed the decree declared that the mortgage was a lien on the interest of the Wabash Company in the elevator at Council Bluffs, the court erroneously assuming that the company was possessed of an interest therein. That supposed interest was ordered to be sold, together with other property covered by the mortgage, without affecting the lien of numerous other contracts, leases and senior divisional mortgages. The object of the suit was to have a sale of the property covered by that mortgage, without in any manner affecting the rights of other mortgage creditors. The decree itself declared that neither it, nor any sale under it, should in any way prejudice or affect the rights of parties or persons interested in certain mortgages, deeds of trust, leases and contracts, which were set forth, among which was the mortgage of February 15, 1879, and that all the rights of such persons and parties were thereby reserved to them. It is plain, therefore, that the rights of parties to this proceeding were not determined by that decree.

From the views expressed we are of opinion that the stock held by the Wabash Company in the Union Elevator Company at Council Bluffs was not covered by the mortgage executed on February 15, 1879, such stock not being in any sense an appurtenance to the property covered by the mortgage. The decree on the petition of intervention must therefore be

Reversed, and the case remanded to the Circuit Court, with a direction to dismiss the petition, and it is so ordered.

LENT *v.* TILLSON.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 144. Argued January 8, 9, 1891. — Decided May 11, 1891.

The Statute of California of March 23, 1876, entitled "An act to authorize the widening of Dupont Street in the city of San Francisco" provides for a due process of law for taking the property necessary for that purpose, and is not repugnant to the Fourteenth Amendment to the Constitution of the United States.

Mere errors in the administration of a state statute which is not repugnant to the Constitution of the United States will not authorize this court, in its reëxamination of the judgment of the state court on writ of error, to hold that the State had deprived, or was about to deprive a party of his property without due process of law.

The board of commissioners and the county court had jurisdiction to proceed in the execution of that statute.

A publication in a "supplement" to a newspaper of a notice ordered to be published, is a compliance with the order.

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

This suit, which was commenced April 5, 1879, arises out of an act of the legislature of California, approved March 23, 1876, entitled "An act to authorize the widening of Dupont Street in the city of San Francisco." An assessment was made to meet the cost incurred in its execution. Provision was made in the act to issue and sell bonds to meet such cost in the first instance, and for the levy of an annual tax on the lands benefited, in proportion to benefits, to pay the interest on the bonds, and to create a sinking fund for the payment of the principal debt. Bonds, dated January 1, 1876, to the amount of one million dollars, were issued in the name of the city and county of San Francisco, and made payable to the holder in gold coin of the United States, twenty years after date, with interest, payable half yearly, at the rate of seven per cent per annum. The bonds recited that they were issued under the above act, were to be paid out of the fund raised by taxation as therein provided, and were taken by the holder subject to the conditions expressed in its 22d section to

be hereafter referred to. They were signed by the mayor, auditor, and county surveyor, and attested by the official seal of the city and county. The plaintiffs in error, who were the plaintiffs below, being owners of lots or parcels of land within the district subject to the assessment, and claiming that the statute was unconstitutional and void, brought this suit to obtain a decree perpetually enjoining the defendant in error, tax collector of the city and county of San Francisco, from selling their property under the assessment. Holders of the bonds to a large amount intervened and were made defendants. The court of original jurisdiction — the Superior Court of the city and county of San Francisco — rendered a decree giving the relief asked. Upon appeal to the Supreme Court of California that decree was reversed and the cause remanded with directions to dissolve the injunction and dismiss the complaint.

The statute in question contains many provisions. The first section provides that, subject to the provisions of the act, Dupont Street in San Francisco should be increased to the uniform width of 74 feet (measuring westerly from its then easterly line) from the northerly line of Market Street to the southerly line of Filbert Street, the grades of the intersecting cross streets to be adjusted by the Board of Supervisors so as to make them conform to the grade of the west line of Dupont Street to be established by the Board of Supervisors, which was empowered to pass all necessary orders for that purpose. The second section provides that the value of the land taken for the widening of the street, and the damages to improvements thereon or adjacent thereto, which may be injured thereby, and all expenses whatsoever incident to such widening, "shall be held to be the cost of widening said street, and shall be assessed upon the district hereinafter described as benefited by said widening, in the manner hereinafter provided." The district declared to be benefited, and upon which the cost of making the improvement was directed to be assessed, is defined in the act, and it was provided in section 3 that in case Dupont Street be not widened further north than Bush Street, then the districts to be benefited

"shall be bounded on the north by the southerly line of Bush Street, and on the south by the northerly line of Market Street." The majority in value of the property owners fronting on Dupont Street, between Market and Bush streets, were allowed to defeat the proposed improvements between those streets, and to relieve that portion of the assessment district from any burden on account of it, by filing a written protest at any time within thirty days after the notice provided for in section 6 of the act to be presently referred to. No such protest was filed. The act also provided that unless within that time a majority of property owners fronting on Dupont Street, between Bush and Filbert streets, should petition for it, there should be no widening north of Bush Street, and that portion of the assessment district should be excluded. No such petition was filed, and the widening was limited to the four blocks between Market and Bush streets. (Section 12.)

The mayor and auditor of the city and county of San Francisco, together with the city and county surveyor, and their successors in office, were constituted by section 4 a "Board of Dupont Street Commissioners," the mayor to be *ex officio* president of the board. The Board of Supervisors of the city and county were authorized, if they deemed it expedient that Dupont Street be widened in the mode prescribed, to express such judgment by resolution or order within sixty days after the passage of the act, and if they failed to do so no further proceedings were to be had or taken, under the act, for any purpose, and the street was not to be widened. (Section 21.) As soon as convenient after the passage of such a resolution or order by the Board of Supervisors, the Dupont Street Commissioners were directed to "publish a notice, for not less than ten days, in two of the daily papers printed in the city of San Francisco, informing property owners along the line of said street that the board is organized, and inviting all persons interested in property sought to be taken, or which would be injured by said widening, to present to the board maps and plans of their respective lots, and a written statement of the nature of their claim and interest in such lots." (Section 6.) The Board of Commissioners, having prepared and adopted suitable

maps, plans and diagrams, were required to ascertain and determine and separately state in a written report, to be signed by at least a majority of its members, the description and actual cash value of the several lots and subdivisions of land and buildings included in the land taken for the widening of Dupont Street, and the damage done to the property along the line of the street, specifying and describing in their report each lot and subdivision or piece of property taken or injured by the widening of the street, as far as an accurate description thereof was furnished by the owners, and setting down against each lot, subdivision or piece of property the names of the owners, occupants and claimants thereof, or of the persons interested therein, as lessees, incumbrancers or otherwise, and the particulars of their interest, as far as they could be ascertained, and the amount of value or damage determined upon for the same, respectively. If, in any case, the board found that conflicting claims of title existed, or were in ignorance or doubt as to the ownership of any lot of land, or of any interest therein, the lot was to be set down as belonging to unknown owners. The board was also directed to embody in a written report a description of the subdivisions or lots of land included in the districts designated in section three of the act, and to set against each lot or subdivision the amount in which, according to the judgment of the board, such lot will be benefited by reason of the widening of the street, relatively to the benefits accruing to other lots of land within the designated districts; also setting against each lot or subdivision the names of the owners, lessees and claimants thereof, so far as the same can be ascertained conveniently, and if not ascertained, setting them down to unknown owners. Error, however, in the designation of the owner or owners of any lot taken or assessed was not to affect the validity of the assessment. Suitable maps, plans or diagrams, showing the property taken and assessed for the improvement, in lots and subdivisions, with the names of the owners, lessees and claimants, as far as known to said board, were to be attached to the report. "Such report," the act provided, "as soon as the same is completed, shall be left at the office of said board daily, during ordinary business hours, for thirty days, for the

free inspection of all parties interested, and notice that the same is so open for inspection for such time and such place shall be published by said board daily, for twenty days, in two daily newspapers printed and published in said city and county." (Section 7.)

Any person interested in any piece or parcel of land situated within the district defined and described in section three of the act, or in any of the lands taken for Dupont Street, or in any improvements damaged by the opening of that street, feeling himself aggrieved by the action or determination of the board, as shown in its report, was entitled, at any time within the thirty days mentioned in section seven of the act, to apply by petition to the County Court of the city and county of San Francisco, setting forth his interest in the proceedings had before the board, and his objections thereto, for an order requiring it to file with that court its report, and such other documents or data as may be pertinent thereto, in its custody and used by it in preparing the report. "Said court is hereby authorized and empowered to hear said petition, and shall set the same down for a hearing within ten days from the date of the filing thereof; and the party filing said petition shall, on the day he files the same, serve a copy thereof on at least one of the members of the Board of Commissioners; and said board may appear by counsel, or otherwise, before said court, in response to said petition. Said board may file a written answer to said petition with said court. Testimony may be taken by said court upon said hearing, and the process of the court may be used to compel the attendance of witnesses, and the production of books, or papers or maps in the custody of said board, or otherwise. It shall be in the discretion of said court, after hearing and considering said application, to allow said order or deny the same; and if granted, a copy thereof shall be served on said board, and it shall proceed to obey the same according to the terms of the order to be prescribed by the court. But in case no such petition shall be filed with said county court within the time above limited for the filing thereof, the said report shall be presented by the said board to the said county court, with a petition to the

court that the same be approved and confirmed by the court. The court shall have power to approve and confirm said report, or refer the same back to said board, with directions to alter or modify the same in the particulars specified by the court in the order referring the same back, and thereupon the said board shall proceed to make the alterations and modifications specified in the order of said court. The alterations and modifications aforesaid being made, the report shall be again submitted to the said court, and if the court, upon examination, shall find that the alterations and modifications have been made according to the directions contained in said order, the said court shall approve and confirm the same by an order to be entered on its minutes; but if the said board shall have neglected or failed to make the alterations and modifications set forth in the order of reference, the court may again refer the report back to said board, and so on until its original order of alteration and modification shall have been complied with by said board, and the said court shall then approve and confirm said report." (Section 8.)

All damages, costs and expenses arising from, or incidental to, the widening of the street, being fixed and determined by the final confirmation of the report, as in the act provided, the board was to issue bonds of the city and county of San Francisco, in such form as they might prescribe, in sums of not less than one thousand dollars each, for such an amount as shall be necessary to pay and discharge all such damages, costs and expenses; the bonds to be known and designated as the "Dupont Street Bonds," and payable in twenty years from their date, unless sooner redeemed, as in the act provided, bearing interest at seven per cent per annum, payable semi-annually at the office of the treasurer of the city and county, such interest being evidenced by coupons attached to each bond, and signed by the president of the board. (Section 9.) Any person or persons to whom damages were awarded, according to the provisions of the act, upon tendering to the board a satisfactory deed of conveyance to the city and county of the land for which damages were so awarded, was entitled to have bonds in an amount equal to the sum of

the damages awarded for the lands so conveyed, together with damages for the improvements thereon or affected thereby; and the bonds so issued and delivered were to be in full compensation for all damages for lands and improvements taken and improvements injured, as contemplated in the act. (Section 10.)

The mayor, auditor and treasurer were authorized to sell bonds sufficient to realize money enough to meet and discharge all expenses and damages arising from the widening of the street, established by the report as finally confirmed. The money arising from their sale was to be known and designated as the "Dupont Street Fund." As soon as the bonds were converted into money, as in the act provided, the Board of Commissioners were required to give public notice, in two daily newspapers published in the city and county, for at least ten days, that they were prepared to pay in full all damages and liabilities fixed by the final report of the board (not then already discharged); and upon receiving from the parties entitled thereto the proper deeds or proper acquittances from those entitled to compensation, the board were to give to such party an order upon the treasury for the amount shown to be due, payable out of the "Dupont Street Fund." (Section 11.) Provision was made by the act for the levy and collection annually, at the same time and in the same manner as other taxes are levied and collected in the city and county, of taxes upon the lands described in the third section sufficient to pay the interest on the bonds as it matured, and, also, sufficient to raise one-twentieth of the principal, and to constitute a sinking fund for the redemption of the bonds; such taxes to be collected out of the land only, to be adjusted and distributed according to the enhanced values of the lands as fixed in the final report of the board, and to go into the hands of the treasurer of the city and county, as part of the "Dupont Street Fund." (Section 13.) It was made the duty of the Board of Commissioners to cause block books to be prepared, exhibiting the district declared by the act to be benefited by the opening of Dupont Street, according to the blocks or fractional parts of blocks thereof, and the subdivisions, according to which

the benefits were fixed and determined; also, in convenient book form, descriptions of the several subdivisions shown on such books — the amount of benefits or enhanced value to the subdivision, as established by the confirmed report, by reason of the opening of the street, being set opposite to each description of the several subdivisions. The block books and description note books, being certified by the board, were to be held by the assessor of the city and county of San Francisco as a part of the records of his office until all the bonds issued in pursuance of the act were redeemed. (Section 14.)

In case any person to whom, or in whose favor, damages were awarded by the board should fail or neglect, for the period of twenty days after there were funds to the credit of the "Dupont Street Fund" sufficient to pay such damages, to ask for and receive from the board a warrant for the sum so awarded, it could draw a warrant upon the treasurer in favor of such owner or owners, and deposit the same with the clerk of the city and county, accompanied by a certificate of the treasurer that the warrant so drawn and deposited had been registered by him, and that there were funds in his hands to pay the same; and thereupon the board, on demand, was entitled to an order of the county court authorizing it to enter upon such piece of land and remove obstructions therefrom, and to throw open the lots so described as part of the street, and an execution could issue to the sheriff, commanding him to put the board in possession of such lot for the city and county; and thereafter, upon delivering to the county court a sufficient deed conveying said lot of land to the said city and county, the party so dispossessed was entitled to receive the value of the land so conveyed, or the warrant of the board therefor. (Section 16.) If the owners of any lands taken for the street failed or neglected, within the space of thirty days after the money was in the treasury to pay the same, to remove the buildings and improvements from such lands, and deliver possession of said lands to said board, on tender to them respectively of the sums awarded as the value of such lands, buildings or improvements, then the board could, at any time thereafter, sell such buildings and improvements at

public auction to the highest bidders, to be removed by the respective purchasers thereof; the sums bid at such sales to be paid in cash or in the warrants of the board; and if at such auction there shall be no responsible bidder for such improvements, with the obligation to remove them within the time specified in the terms of sale, the board was to remove the same at the cost of the "Dupont Street Fund." (Section 17.) The street, when widened, was to be sewered, graded, sidewalked and paved by the municipal authorities, the expense of such work to be assessed upon the adjacent property, or borne by the city and county, in the same manner as if the street remained of its original width. (Section 18.) The railway tracks in the street were required to be removed and changed to the centre of the same by the street railroad companies then using tracks therein. (Section 19.)

The last section of the act, section 22, provided that the completion of the work should be deemed an absolute acceptance, by the owners of all lands affected by the act and by their successors in interest, of the lien created by it upon the several lots so affected, and operate as an absolute waiver of all claim in the future upon the city and county of San Francisco, and their successors in interest, for any part of the debt created by the bonds authorized to be issued. "This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds." Stat. California, 1875–6, c. 326, p. 433.

Mr. Joseph H. Choate for plaintiffs in error. *Mr. John Garber* and *Mr. T. B. Bishop* also filed a brief for same.

Mr. A. H. Garland (with whom were *Mr. John Mullan* and *Mr. H. J. May* on the brief) for defendant in error.

Mr. Justice Harlan, after making the above statement, delivered the opinion of the court.

The Chief Justice of the Supreme Court of California, under its order, made his certificate to the effect that in this suit and

appeal there was drawn in question the validity of the above act of March 23, 1876, and the authority exercised and the proceedings taken under it, on the ground that the statute and said authority and proceedings were repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the decision of that court was in favor of their validity.

The provisions of the statute, to which we have referred, sufficiently indicate its scope and effect, and enable us (without referring to others that relate to matters of mere detail) to determine whether or not the act, upon its face or by its necessary operation, is repugnant to that clause of the Constitution declaring that no State shall deprive any person of property without due process of law.

We have seen that the statute defined the district benefited by the widening of Dupont Street, and upon which the assessment to meet the cost of the work was to be imposed; made it a condition precedent to the proposed improvement that it should be declared by resolution or order of the Board of Supervisors of the city and county to be expedient; directed that, after the passage of such a resolution or order, the Dupont Street Commissioners should publish, for not less than ten days, in two daily papers in San Francisco, a notice informing property owners along the line of the street of its organization, and inviting all persons interested in property sought to be taken, or that would be injured by the widening of that street, to present descriptions of their respective lots, and a statement in writing of their interest in them; allowed the majority in value of owners of property within the district embracing the lands of the plaintiffs, at any time within thirty days after the last publication of the above notice, by written protest filed with the Board of Commissioners, to defeat altogether the proposed widening of Dupont Street; required the board to prepare a written report showing the description and actual cash value of the several lots and subdivisions of land and buildings included in the land proposed to be taken for the widening of the street, the value and damage determined upon for the same respectively and the amount in which,

according to its judgment, each lot had been or would be benefited by reason of the widening of the street, relatively to the benefits accruing to other lots of land within the designated district; and directed such report, as soon as completed, to be left at the office of the board daily, during ordinary business hours, for the free inspection of all persons interested, and notice of the same being open for inspection at such time and place published by the board daily, for twenty days, in two daily newspapers printed and published in the city and county.

But this was not all. For any person interested, and who felt himself aggrieved by the action or determination of the board, as indicated by its report, was permitted, at any time within the above thirty days, to apply by petition to the county court of the city and county, showing his interest in the proceedings of the Board of Commissioners, and his objections thereto, for an order that would bring before that court the report of the board, together with such pertinent documents or data as were in its custody, and were used in preparing its report. It was made the duty of the party filing the petition to serve, on the same day, a copy thereof on at least one of the members of the Board of Commissioners, who were at liberty to appear by counsel, or otherwise, and make answer to it. The court was also empowered to hear the petition, and set it down for hearing within ten days from its being filed. Provision was made for the taking of testimony upon the hearing, and the court was authorized to use its process to compel the attendance of witnesses and the production of books, papers or maps in the custody of the board, or otherwise. The discretion given to the court, after hearing and considering the application, to allow or to deny the order prayed for was, of course, to be exercised judicially, according to the showing made by the petitioners. And that complete justice might be done, the court was invested with power, not simply to approve and confirm the report of the board, but to refer it back with directions to alter or modify the same in the particulars specified by the court. Until such alterations and modifications were made, the court was under no duty to

approve or confirm the report; and until it was approved and confirmed, the board was without authority to proceed at all in the work committed to it by the statute.

Were not these provisions in substantial conformity with the requirements of "due process of law" as recognized in the decisions of this court? In *Davidson* v. *New Orleans*, 96 U. S. 97, 104, it was said that "whenever, by the laws of a State, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." So in *Hagar* v. *Reclamation District*, 111 U. S. 701, 708: "Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But, where the taking of property is in the enforcement of a tax, the proceeeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. . . . As stated by Mr. Justice Bradley in his concurring opinion in *Davidson* v. *New Orleans*, 'in judging what is due process of law, respect must be had to the cause and object of the taking, whether the taxing power, the power of eminent domain or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.'" Of the different kinds of taxes which a State may impose, and of which from their nature no notice can be given, the court, in that case, enumerates poll taxes,

licenses (not dependent upon the extent of business) and specific taxes on things, persons or occupations. p. 709.

These principles were reaffirmed in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, and in *Spencer* v. *Merchant*, 125 U. S. 345, 355, in the latter of which cases it was said that "the legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading or repairing [and, equally, the widening] of a street, to be assessed upon the owners of lands benefited thereby;" and that, "the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;" also, that, "if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Tested by these principles, the statute providing for the widening of Dupont Street cannot be held to be repugnant to the constitutional requirement of due process of law. The notice by publication to all who owned property liable to be assessed for the cost of that improvement was appropriate to the nature of the case, and was reasonable in respect to the length of time prescribed for the publication. And ample opportunity was given to all persons interested to test in a court of competent jurisdiction the fairness and legality of any assessment proposed to be made upon their property for the purposes indicated by the statute. That court had power to require such alterations or modifications of the report of the Board of Commissioners as justice demanded. It was not bound to approve any report that did not conform to its judgment as to what was right; and without such confirmation the board could not proceed in the execution of the work contemplated by the legislature.

If we had any doubt of the correctness of these views, we should accept the interpretation which the highest court of the State places upon the statute. When the inquiry is whether a state enactment under which property is proposed

to be taken for a public purpose accords full opportunity to the owner, at some stage of the proceedings involving his property, to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of the State will give effect to such enactment as interpreted by the highest court of that State. The Supreme Court of California, speaking by Mr. Justice Temple, in this case, has said: "We are not considering here a statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard, without which the law would be void. To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And I must confess, it seems to me, it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section, [§ 8,] but it would not have provided so elaborately for a thorough investigation for grievances if it were not intended that redress should be awarded. The statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the court may alter and modify. And it seems that such action is to be based upon the hearing provided for. The word 'discretion' is used in various meanings, but here, evidently, it was intended to submit the whole matter to the sound judgment of the court to be exercised according to the rules of law." 72 California, 404, 421.

It is said that the county court was without power to adjudge the statute to be unconstitutional, and had no discretion, except to confirm the report, or to require it to be altered or modified. We do not perceive that this is a material inquiry, so long as the statute is not repugnant to the constitution. But we do not admit that the county court was without power to hold it to be unconstitutional and void — if such was its view — and to decline, upon that ground alone, to confirm any report that the Board of Commissioners might have filed. The judge or judges of that court were obliged, by their oath

of office, and in fidelity to the supreme law of the land, to refuse to give effect to any statute that was repugnant to that law, anything in the statute or the constitution of the State to the contrary notwithstanding. Upon this subject, as well as in respect to the power of the county court to consider objections of every nature that might be made to the confirmation of any report from the Board of County Commissioners, the Supreme Court of the State said: "The statute does not expressly authorize the court to pass upon the validity of the act, or whether the Board of Supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the court to act at all. It may be that the court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a constitutional court, invested with jurisdiction by the constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard." Again: "The statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the board as shown in the report. As all their determinations which could affect any person were required to appear in the report, this would seem to include all possible objections. The determination, for instance, might have been objected to, because, the act being invalid or the notices not having been given, the board had no right to proceed to act at all. If this contention were sustained, the result would have been that the court would not have confirmed the report, and the proceedings would have ended without fixing a charge upon the property of plaintiffs. They could have complained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much, or for any misconduct of the commissioners which could affect them, or that the cost exceeded the estimated benefits, and it does not seem to me that the court would have found any difficulty in granting relief." 72 California, 404, 422.

It is contended, however, that the act was so *administered* as to result in depriving the plaintiffs of their property with-

out due process of law. This contention is material only so far as it involves the inquiry as to whether the tribunals charged by the statute with the execution of its provisions acquired jurisdiction to proceed in respect to the lots or lands in question and the owners thereof. Jurisdiction was, of course, essential before the plaintiff's property could have been burdened with this assessment. But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court, in its reëxamination of the judgment of the state court, upon writ of error, to hold that the State had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont Street, or whether the Board of Supervisors should have so declared, or whether the Board of Commissioners properly apportioned the costs of the work or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are, none of them, issues presenting Federal questions, and the judgment of the state court, upon them, cannot be reviewed here.

Upon the issue as to whether the Board of Commissioners and the county court acquired jurisdiction to proceed in the execution of the statute, the evidence is full and satisfactory. The Board of Supervisors of the city and county, by resolution within sixty days after the passage of the act, declared it to be expedient and necessary that Dupont Street should be widened in accordance with the statute. § 2. In conformity with this declaration the mayor, auditor and county surveyor of the city organized as a Board of Dupont Street Commissioners, and by notice, published for not less than ten days, in two daily papers printed in San Francisco, informed prop-

erty owners along the line of that street of such organization, and invited all persons interested in property sought to be taken, or which would be injured by the widening of Dupont Street, to present to it maps and plans of their respective lots, and a written statement of the nature of their claim or interest in such lots. § 6. The Board of Commissioners caused to be prepared and adopted maps, plans and diagrams, and made the written report required by section 7 of the act; and such report was left at the office daily, during ordinary business hours, for thirty days, for the free inspection of all interested, notice that such report was so open for inspection for such time and at such place being published by the board daily, as required by that section, in two daily newspapers printed and published in the city and county of San Francisco. Various parties who were interested in and affected by the widening of the street brought before the county court of the city and county, by petition filed in due time, the written report of the commissioners and all documents in their possession. The hearing of these petitions resulted in certain alterations and modifications of the report, and, on the 20th of December, 1876, the county court made its final order of confirmation. That order, after reciting in detail the performance of all the acts required by the statute in execution of its provisions, proceeded: "And it further appearing to the court that all the proceedings taken by said board have been duly and legally taken, and that each and all of the acts, matters and things provided by said act to be done and performed by said board in the premises, have, on the part of said board, been duly and regularly done and performed in the form, at the times and in the manner prescribed by said act, and said board having this day brought the said report, as so modified, into this court, and duly filed a petition in this court praying that said report, as so modified by this court, be confirmed and approved: Now, therefore, after hearing all the proofs in the said matter, and on motion of Wm. Pierson, Esq., attorney for said Board of Dupont Street Commissioners, and no one objecting thereto, and after full consideration thereof, it is ordered, adjudged and decreed that the said report of the said

Board of Dupont Street Commissioners, in the matter of the widening of Dupont Street, filed in this court on the 27th day of October, A.D. 1876, as modified by said board under the orders of this court heretofore made herein, and as the same now exists on file herein, be and the same is hereby fully and in all respects approved and confirmed. And it is further ordered, adjudged and decreed that the lands described in the volume of said report, entitled 'Report Damages Widening Dupont Street,' be, and the same are hereby taken and dedicated for an open and public street, and for the widening of said Dupont Street, between Bush and Market streets, and that the title thereto, and every part thereof, as particularly described in said volume of said report, is vested in the city and county of San Francisco for the purpose of said street forever, upon the payment in the manner prescribed by said act, to the owners of each piece or parcel of such land, and to the owners of the improvements thereon, or upon the deposit or tender as prescribed by said act, of the amounts fixed and determined in and by said volume of said report." Subsequently to this order, the street was widened in accordance with the report, and, as widened, is in public use, the special benefits of the improvement, whether more or less, being enjoyed by the plaintiffs, and by others in like situation.

It is contended that the notices required by the different sections of the act to be published for a designated number of days were not so published. This contention rests, principally, upon the ground that the notices, on some of the days, appeared in a "Supplement" of some of the newspapers, and not in the body of the paper where reading matter was usually found. There is no force in this objection, and it does not deserve serious consideration.

Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the Board of Commissioners, was himself the owner of a lot on Dupont Street, and, for that reason, was incompetent to act as one of the Board of Street Commissioners; that some of the alterations and modifications of the report of the com-

missioners made upon the hearing in the county court of the petitions filed by different parties were so made under private arrangements between the commissioners and those parties, of which other property owners along Dupont Street had no notice, and by which such owners were injuriously affected; that the Board of Commissioners selected experts to "assist" it in estimating the damages for property taken and injured by the proposed improvement and the benefits accruing therefrom, and that the report of those experts was accepted by the commissioners, without themselves making or attempting to make an appraisement of damages or an assessment of benefits under the statute; and that such appraisement and assessment were not in fact correct, fair or just, but were fraudulent. In respect to all these and like objections, it is sufficient to say that they do not necessarily involve any question of a Federal nature, and, so far as this court is concerned, are concluded by the decision of the Supreme Court of California.

We are of opinion, upon the whole case, that the Supreme Court of California correctly held that the plaintiffs had not been, or were not about to be, deprived of their property, in violation of the Constitution of the United States.

Decree affirmed.

MR. JUSTICE FIELD. I dissent.

ESSEX PUBLIC ROAD BOARD *v.* SKINKLE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 262. Submitted March 25, 1891. — Decided May 11, 1891.

An executive agency, created by a statute of a State for the purpose of improving public highways, and empowered to assess the cost of its improvements upon adjoining lands, and to put up for sale and buy in for a term of years for its own use any such lands delinquent in the payment of the assessment, does not, by such a purchase, acquire a con-

Statement of the Case.

tract right in the land so bought which the State cannot modify without violating the provisions of the Constitution of the United States.

Such a transaction is matter of law and not of contract, and as such is not open to constitutional objections.

Even as to third parties an assessment is not a contract in the sense in which the word is used in the Constitution of the United States.

THE case is thus stated in the opinion of the Court of Errors and Appeals of New Jersey, delivered by Mr. Justice Parker, and reported in 49 N. J. Law, (20 Vroom) 641, 664:

"'The Essex Public Road Board' was created by an act of the legislature, approved March 31st, 1869. The object of the act was to create a body charged with the duty of constructing and maintaining a better class of public carriage roads in the county of Essex.

"The fifth section of the act provides for the assessment of damages sustained by owners of lands taken for roads, and also for assessment upon other lands benefited by such roads.

"The fifteenth section provides that the assessments laid for benefits shall be and remain liens upon the lands benefited until paid; and where the assessments are not paid, authority is given to the board to sell such lands at public sale to any person who will take it for the shortest period of time, not exceeding fifty years, and pay the full amount due on the assessment.

"The section last named also enacts that the road board shall give to the purchaser of the lands a certificate of sale, describing the premises so sold, and the length of time for which they were purchased; and also contains the further provision that if at the end of three years from the day of sale the lands shall not have been redeemed, the board, upon surrender of said certificate, shall execute and deliver to the purchaser a declaration of sale of said lands, with the provision that the time for redeeming the same shall remain open (notwithstanding the term of three years may have expired) until the term for which the purchaser agreed to take the same shall be ended.

"By a supplement, approved March 31st, 1875, it was provided that such lands as were not bid off, when offered at the

original sale, or at a resale, when the first purchaser failed to comply, should be struck off to the road board by its corporate name, for the term of fifty years, and that it might be held and sold or assigned and disposed of by said board for the use of the county, with all the rights and privileges of a purchaser at such sale, and subject to the same conditions and limitations.

"On the 31st day of March, 1882, an act was passed which gives power to compound, adjust and compromise any tax or assessment which may have been laid, or might thereafter be laid by virtue of the powers conferred by the acts concerning the road board, between the board and the owner or mortgagee of any land which may have been or thereafter might be taxed or assessed for benefits, and to discharge the land from the lien of such tax or assessment, upon payment of the sum agreed upon.

"The said last-mentioned act also provides that in case of an application by any owner or mortgagee for an adjustment, with the road board, of any tax or assessment laid, and their failure to agree, or in case of neglect or refusal of the board to act upon the application, the owner or mortgagee who made the application to the board for adjustment may petition the justice of the Supreme Court who holds the circuit court of the county where the land lies, for the appointment of arbitrators to settle and adjust the matter in difference between the petitioner and the board.

"The third section of the act last mentioned provides that the said justice of the Supreme Court, if in his discretion he deems it a proper case for arbitration, shall appoint arbitrators, who, after notice and hearing, shall fix and adjust a specific sum to be paid by the owner or mortgagee so petitioning, in full settlement and discharge of the tax or assessment; provided, that said act shall not apply to cases where the land had been sold for taxes or assessments and bought by a *bona fide* purchaser, other than the board or its representative.

"The said act also requires that the arbitrators shall report in writing to said justice of the Supreme Court, who will order it filed with the clerk of the county, and that upon service of

a certified copy of such report on the road board, with the tender of the amount named therein, together with interest, to the board, it shall, by its proper officers, receipt the tax or assessment against such land in full and give a release and acquittance of the same from the lien of any such tax or assessment, and that the said land shall, by operation thereof, be freed, released and discharged from the lien and incumbrance thereof.

"Under the act of 1882, Jacob Skinkle, the defendant in error, presented a petition to the justice of the Supreme Court who holds the circuit court of Essex County, asking for the appointment of arbitrators to settle and adjust the matter in difference between him and the Essex Public Road Board, in reference to certain assessments for benefits, which had been imposed on certain lands of his, under the act incorporating the Essex County Road Board and supplements thereto.

"It appears by the petition that the title to the lands on which the assessments for benefits had been laid, at the time they were laid, and at the time the improvements were made, stood in the name of Caleb B. Headley, and that the said Jacob Skinkle held a mortgage thereon; and that subsequently (but before the filing of the petition) said Skinkle became the owner thereof by purchase, under foreclosure proceedings on his mortgage.

"The petition of Skinkle states that he had applied in writing to the road board for an agreement and compromise of the assessments on said land, laid for benefits, and that said board had declined to entertain the same.

"After presentation of the petition, duly verified, to the justice, and after testimony had been taken, the said justice certified to the Supreme Court for its advisory opinion, a number of questions of law, which had been raised before him, on the motion to appoint arbitrators. The Supreme Court heard argument upon the questions which had been certified, and returned to said justice its advisory opinion, in which the legal position of the petitioner on all the questions certified was sustained. Whereupon the justice proceeded under the petition and appointed arbitrators to settle and adjust the matter, and

to hear parties and their witnesses, and to fix the sum to be paid by the petitioner in full settlement and discharge of said assessments laid by the Essex Public Road Board upon said land.

"The arbitrators reported that they fixed and adjusted a specific sum (naming the amount) to be paid by said Skinkle to the road board, in full settlement and discharge of the assessments which had been made on said land, in order to make said assessment conform in amount to the benefits conferred upon said property by the improvements. Upon coming in of the report the justice ordered it filed. Then the road board, by writ of *certiorari*, brought all the proceedings to the Supreme Court, where it was decided that there was no error.

"The writ of error to this court, therefore, brings before us all the questions which were raised before the justice and by him certified as aforesaid, as well as the legality of the action of the arbitrators in fixing the amount to be paid by the petitioner in discharge of the assessments on the lands."

The opinions of the Supreme Court are to be found in 47 N. J. Law (18 Vroom) 93, and 49 N. J. Law (20 Vroom) 65.

The Court of Errors and Appeals held that the act entitled "An act to authorize the compromising or settling by arbitration of any tax or assessment laid by any public road board in this State," approved March 31, 1882, was constitutional; that it was retrospective in its character; that either the owner of the land or the mortgagee might apply; that a case was made which justified the justice in appointing abitrators; that the proceedings and report of the arbitrators were legal; and that there was no difficulty in carrying out the provisions of the act. The judgment of the Supreme Court of New Jersey was affirmed, and the record remitted to that court, and the cause brought here on writ of error.

Mr. J. W. Taylor for plaintiff in error. *Mr. Joseph A. Beecher* was with him on the brief.

Mr. J. Frank Fort for defendant in error.

Opinion of the Court.

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

Was the obligation of a contract impaired, or plaintiff deprived of property without due process of law, by the act of March 31, 1882?

The argument is that, because the real estate assessed might, in the absence of purchasers at the sale to enforce the assessment, be struck off to the board for the term of fifty years, under the 5th section of the act of 1875, (Laws of N. J. 1875, 420,) and might "be held and sold, assigned and disposed of by said board, for the use of the county, with all the rights and privileges of a purchaser at such sale," the board, whenever this happened, became vested with a term in the real estate so struck off to it by the same title, and subject to the same protection, which any other *bona fide* purchaser at such sale would have acquired under section 15 of the act of 1869. Laws of N. J. 1869, 957. And that, therefore, the act of 1882, (Laws of N. J. 1882, 256,) in providing a mode by which the assessment might be compounded, compromised and discharged, and that this might be done where the real estate had not been sold to a *bona fide* purchaser other than the public road board or its representative, impaired and annulled an executed contract, and took for the defendant's private use property vested in the board.

We do not concur in this view. The public road board was an involuntary *quasi* corporation, created to construct a public work and authorized to procure the means to accomplish the improvement by the imposition of assessments upon private property. It was purely a governmental agency, existing wholly for public purposes, and whose interests belonged exclusively to the public. The power of the legislature over it was plenary. It held, and could hold, no real estate in a proprietary or private sense, and after it was empowered to bid in at its own sale, it acquired no more proprietary interest in the real estate struck off to it, than it had had in the assessment. Its purchase was in perpetuation of the lien and in aid of collection, and it was as competent for the legislature,

as between it and its own agent, to prescribe terms upon which the land owner might redeem, as to abolish the board and rescind the assessment altogether; as it might do, saving any vested rights of third parties.

The entire transaction was matter of law and not of contract, and as such, open to no constitutional objection. *Commissioners* v. *Lucas*, 93 U. S. 108; *Newton* v. *Commissioners*, 100 U. S. 548; *Maryland* v. *Balt. & Ohio Railroad Co.*, 3 How. 534.

Even as to third parties an assessment is not a contract in the sense in which the word is used in the Constitution of the United States; and whether rights arising thereon have become vested depends upon circumstances. *Garrison* v. *New York*, 21 Wall. 196; *Balt. & Susquehanna Railroad* v. *Nesbit*, 10 How. 395.

In *Garrison* v. *New York*, this court decided that the New York act of 1871, authorizing the Supreme Court of the State to vacate an order made in 1870, confirming the report of the commissioners respecting property taken for a public improvement, if error, mistake, irregularity or illegality appeared in the proceedings, or the assessments for benefits or the awards for damage had been unfair and unjust, or inequitable or oppressive, and to refer the matter back to new commissioners to amend or correct the report, or to make a new assessment, was not unconstitutional.

Mr. Justice Field, delivering the opinion of the court, said: "In the proceeding to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city. The State, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose, upon making to him just compensation. All that the constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure. The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the State, and is

necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain particular facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property. . . . Until the property is actually taken, and the compensation is made or provided, the power of the State over the matter has not ended. Any declaration in the statute that the title will vest at a particular time, must be construed in subordination to the constitution, which requires, except in cases of emergency admitting of no delay, the payment of the compensation, or provision for its payment, to precede the taking, or at least to be concurrent with it."

In *Balt. & Susquehanna Railroad* v. *Nesbit*, the State of Maryland granted a charter to a railroad company, in which provision was made for the condemnation of land by the assessment of damages by a jury and the confirmation of the award by the county court. The charter further provided that the payment or tender of payment of such valuation should entitle the company to the property as fully as if it had been conveyed. In 1836 there was an inquisition by a jury condemning certain lands, which was ratified and confirmed by the county court. In 1841 the legislature passed an act directing the court to set aside the inquisition and order a new one. On the 18th of April, 1844, the railroad company tendered the amount of the damages, with interest, to the owner of the land, which offer was refused, and on the 26th of April, 1844, the owner applied to the county court to set aside the inquisition and make a new one, which the court directed to be done. It was held that the law of 1841 was not a law impairing the obligation of a contract; and that it neither changed the contract between the company and the State, nor did it divest the company of a vested title to the land.

Undoubtedly the distinction exists, as counsel urges, between regulation and appropriation, and under the Constitution of New Jersey, as under those of the other States, the legislative power is not so transcendent that it may at its will do that which amounts to an arbitrary divestiture of the private property of a municipal corporation.

In *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 172, which involved the right of the city of New Orleans to erect and maintain wharves within its limits and to collect wharfage under its charter and the statutes of Louisiana, it was held that no right of the city was infringed by a subsequent enactment of the general assembly of that State granting to a railroad company the authority to enclose and occupy for its purposes and uses a specifically described portion of the levee and batture and maintain the wharf it had theretofore erected upon its property within those limits, and exempting it from the supervision and control which the municipal authorities exercised in a matter of public wharves. And Mr. Justice Matthews, delivering the opinion of the court, said: "Neither would this be in derogation of any vested right of the city. Whatever power the municipal body rightfully enjoys over the subject is derived from the legislature. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration."

But no question involving that distinction arises here. There is no contract with or grant to the public road board, which the State could not resume; and in no aspect can the board be regarded as acting in a private capacity, or as having acquired a private interest in real estate struck off to it for want of purchasers.

We may properly consider the case in another aspect, equally decisive. The road board act prescribed that assessments should be made in proportion to, and not in excess of, the benefits conferred by the improvement; and by the law under consideration the road board was enabled to compound, adjust and compromise any tax or taxes, assessment or assessments, that might have been, or might thereafter be, laid or imposed

by virtue of the road board acts, and in case of application by the owner or mortgagee for a compromise and adjustment, and on the failure of agreement between the board and the applicant, the applicant could apply on notice for the appointment of arbitrators; and the statute provided for a hearing of all the parties in interest, and for a full review of the proceedings through the judicial tribunals of the State. The record clearly shows that the legislature intended by the act of 1882 to correct the results of previous action, which had been so mistaken and oppressive as to call for interference.

In *Commissioners* v. *Lucas*, 93 U. S. 108, it was ruled that unless restrained by the provisions of its constitution, the legislature of a State possesses the power to direct a restitution to taxpayers of a county, or other municipal corporation, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in the possession of the municipality, and that the exercise of this power infringed upon no provision of the Federal Constitution.

The Supreme Court of New Jersey was manifestly right in holding that the object of the law was to give an appeal to the land owner, where the judgment against him would otherwise be final, and to so far review previous action as to secure the result of an assessment made in proportion to, and not in excess of, the benefits conferred by the improvement; and the learned judge who delivered the opinion well said: "Restoration to the injured party, by the judgment of the tribunal established by this law, of the sum taken from him in excess of the benefits conferred, cannot constitute an illegal taking of property from the road board." *Skinkle* v. *Essex Road Board*, 47 N. J. Law, 93, 99.

It is unnecessary to pursue the subject further. We concur with the views expressed by the courts of New Jersey, and the judgment is

Affirmed.

MARSH *v.* NICHOLS, SHEPARD & CO.

ERROR TO THE CIRCUIT COURT OF CALHOUN COUNTY, STATE OF MICHIGAN.

No. 136. Argued January 6, 1891. — Decided May 11, 1891.

A bill in equity in a state court, with jurisdiction over the parties, brought to enforce the specific performance of a contract whereby an inventor who, having taken out letters patent for his invention, agreed to transfer an interest therein to the plaintiff; and proceedings thereunder involving no question arising under the patent laws of the United States, and not questioning the validity of the patent, or considering its construction, or the patentability of the device, relate to subjects within the jurisdiction of that court; and its decree thereon raises no Federal question for consideration here.

In 1880, Elon A. Marsh had devised and applied for a patent upon a valve gear for steam engines; and Nichols, Shepard & Co., which is a corporation of the State of Michigan, contended in this action, as hereafter set forth, that in that year, while his application was pending in the Patent Office, Marsh agreed with Nichols, an officer of the corporation, that Nichols was to do certain things in exploiting the invention, in return for which Marsh was to allow a shop right to the use of it, and that Nichols performed his part of the agreement. Marsh assigned an interest in the patent, before it issued, to Minard La Fever, and they assigned an interest to one Scott. All the parties were citizens of Michigan.

December 25, 1880, the patent issued, No. 236,052, but through an oversight it was not then signed by the Secretary of the Interior. February 11, 1881, Nichols, Shepard & Co. was notified of the issue of the patent, and a demand made upon it to sign a license and pay a royalty if it desired to continue the use of the invention. June 9, 1881, Marsh, La Fever and Scott filed their bill against Nichols, Shepard & Co. in the Circuit Court of the United States for the Eastern District of Michigan, alleging the issue of the patent and title in complainants; that they had granted a large number of licenses for the use of the invention; and that the public, with the

exception of Nichols, Shepard & Co., had acquiesced in complainants' rights; and charging infringement of the letters patent "without the license or allowance and against the will of your orators and in violation of their rights."

The defendant answered, denying that Marsh was the first and original inventor of the improvement described in the letters patent; and asserting that, in the specific form described, it was of little or no value, and had been long known to the general public; that defendant had instructed one of its workmen to overcome a defect in it, which had been done, and had procured the improvement to be patented, and was making use of the same, though not in large quantities; and set up various alleged anticipating patents.

During the progress of this suit, it appeared that the supposed patent had not been signed by the Secretary of the Interior, and the Circuit Court on final hearing, March 5, 1883, held that, for that reason, the patent was a nullity, though the omission of the signature of the Secretary was accidental. The patent had been signed pending the suit, February 24, 1882, but whether it was validated from that time was not decided. *Marsh* v. *Nichols*, 15 Fed. Rep. 914. A decree was accordingly entered, April 16, 1883, dismissing the bill. From this decree Marsh and La Fever prosecuted an appeal to this court on February 26, 1885, and Nichols, Shepard & Co. a cross-appeal on March 11, 1885. The case was heard here November 9, 1888, decided December 10, 1888, the cross-appeal dismissed, and the decree of the Circuit Court affirmed. *Marsh* v. *Nichols*, 128 U. S. 605.

On the 23d of April, 1883, Marsh, La Fever and Scott filed a second bill of complaint in the same court, to which Nichols, Shepard & Co. pleaded the former decree in bar, and on April 8, 1884, complainants dismissed the bill.

On November 25, 1884, a second patent, No. 308,567, was issued relative to the same invention. March 21, 1885, Marsh and La Fever filed a bill in the Circuit Court of the United States for the Eastern District of Michigan against Nichols, Shepard & Co., counting on the patents of 1880 and 1884, and alleging infringement of both.

Statement of the Case.

Prior to this and on April 16, 1884, Nichols, Shepard & Co. filed its bill in the Circuit Court for the County of Calhoun, Michigan, against Marsh, La Fever and Scott, which in substance alleged that it was a corporation doing business in said county; that it was building a certain class of engines, called traction engines, upon which a reverse gear was desirable, and many devices therefor had been invented; that one of the defendants, Marsh, claimed to have made an invention for a reverse gear, for which he had applied for a patent, and that in the spring and early summer of 1880, he (Marsh) applied to the treasurer of said company, and exhibited to him this device; that Marsh was desirous of introducing his device, and that after some negotiations a contract was made whereby the complainant, for certain outlays of labor and money and other consideration, was, if the device proved successful in actual use, thereafter to have the right to use the device on any steam engine made by it, or under its direction, without any further claim by Marsh against it, and that the agreement was carried out by the complainant; that said Marsh, having claimed to have obtained a patent thereon, had assigned one-half of the same to Minard La Fever, and that thereafter the two had assigned one-third interest to James Scott, and that Marsh and La Fever and Scott, claiming that the agreement did not secure Nichols, Shepard & Co. the rights hereinbefore stated, had previously filed their bill in the Circuit Court of the United States for the Eastern District of Michigan, in equity, praying for an injunction to restrain complainant from manufacturing, using or selling said invention as secured by the letters patent; that complainant had answered the bill, and denied the validity of the patent; that considerable testimony was taken thereon showing the prior state of the art; that it appeared therein that the paper which the defendants claimed as a patent was not valid as such, and was not signed by the Secretary of the Interior at the time said suit was begun, but had been signed subsequently thereto, and that the Circuit Court of the United States for the Eastern District of Michigan, in equity, had entered a final decree in said cause dismissing said bill of complaint. Com-

plainant also charged that defendants had caused to be introduced into the Congress of the United States bills granting them a patent, but that no such bills had become laws, "and that said defendants have no valid patent, and have no right to prevent any person whatsoever from manufacturing said device. Nevertheless, the said defendants represent to the public that they have secured letters patent upon said device and threaten to bring suits against this complainant and those persons purchasing from it, and they further affirm that this complainant has no right under and by virtue of the said agreement between it and said Marsh to manufacture, use or vend said device, and they thereby injure and harass complainant, and their said action, in so claiming to hold such patent as aforesaid, and in claiming that complainant has no right under and by said agreement, prevents persons desiring engines of the class manufactured by complainant from purchasing the same of complainant; that defendants' claim to the exclusive right to said device is wholly without foundation, and, even should the pending application for a patent be granted, (now pending in the shape of bills before the Houses of Congress,) complainant would still be entitled to manufacture and vend the same, and would be entitled to the protection and aid of this court to compel said defendants to carry out and perform the said contract and refrain from interfering with the acts of complainant done in pursuance of said contract; and that until such patents shall have been granted complainant is entitled to the protection of this court to prevent and restrain said defendants from falsely and maliciously representing that complainant is violating rights secured to them by patent right, and from falsely and maliciously representing that complainant did not in good faith enter into a contract with said Marsh, by which it became entitled to employ said device on all engines thereafter manufactured by it, even though said Marsh should procure a patent and become entitled to protection in the exclusive use of said device as against all other persons."

Plaintiff thereupon prayed for answer, but not on oath, answer under oath being expressly waived; that defendants

might be ordered to refrain and desist from asserting that complainant had not the full and complete right to make, use, vend or put into practice or operation and use on any engine made, sold, used or operated by it, the said device, in the same form or style, or substantially the same form or style, as that exhibited on an engine made in 1880, at the time of its agreement with Elon A. Marsh; that defendants might be ordered to desist and refrain from publishing or asserting that it has any right to the exclusion of this complainant in and to the said device; that defendants might be ordered and decreed to specifically carry out the said original contract made between complainant and Elon A. Marsh, by which complainant was to be permitted, if defendant Marsh should obtain a patent on said device, to use, vend and employ said device on any or all engines made at defendant's shop without molestation or interference on the part of said Marsh, or any one who may have become interested with him in the device or the patent thereafter to be procured therefor; that an injunction might be issued to Elon A. Marsh, Minard La Fever and James Scott, directing them to abstain from interfering with complainant's use of said device at the present time, or in the future, if a patent should hereafter be granted to them; for process and general relief.

Defendants filed their answer admitting the invention and the application for a patent; that complainant was a corporation engaged in business as alleged, and that Marsh desired to place one of said devices on an engine to demonstrate its superiority; but denied each and every allegation that any contract for license was ever made, and alleged that Nichols, Shepard & Co. refused to make such contract at that time, and subsequently notified defendants that it would use the invention regardless of any rights they might have by virtue of any patent. Defendants admitted that they claimed a valid patent, and averred that complainant had no rights against it; admitted the litigation in the United States Circuit Court, and alleged that the defence therein interposed by Nichols, Shepard & Co. was the lack of novelty of the invention, and that the company did not allege any defence on the

ground of license; and that the claim of Nichols, Shepard & Co. of a license was not set up and alleged for a long period nor until after that cause had been brought.

June 22, 1885, defendants filed a supplemental answer, alleging as to the proceedings in the Circuit Court as follows:

"And these defendants, for further answer, say that the cause heretofore mentioned in their answer having been heard in the Circuit Court of the United States for the Eastern District of Michigan, in equity, between these defendants and James Scott as complainants, and the said Nichols, Shepard & Co., in which a decree was entered against these defendants, has been by the defendants herein duly appealed to the Supreme Court of the United States, and that the said court has, according to the rules of practice in such case, allowed said appeal, and that thereby all of the questions involved in the decision of said cause, including the validity of the letters patent on which the same was founded, are now pending the decision of the Supreme Court of the United States; and they further say that the defendant in the said cause, Nichols, Shepard & Co., has also filed its claim of appeal in said cause to the said Supreme Court of the United States, in the Circuit Court of the United States for the Eastern District of Michigan, in equity, which said appeal has been allowed by the said Circuit Court."

Defendants also alleged the pendency of another suit brought in equity by them in the said Circuit Court on the same and another patent. They also demurred for want of equity. Defendant Scott answered that he had no interest in the matter. When the cause came on for hearing, counsel for defendants objected to the jurisdiction of the court on the ground that the bill and answer raised the question of the validity of certain letters patent of the United States, over which the court had no jurisdiction, but the objection was overruled. A certified copy of the record of the proceedings in the United States Circuit Court, including the allowance of the appeals by both parties to the Supreme Court, and the letters patent Nos. 236,052 and 308,567, were introduced in evidence among other things. And also the proceedings on an

interference declared in 1882 between an application of Marsh, September 28, 1881, and a reissued patent to Hoag, who was Nichols, Shepard & Company's superintendent, of November 27, 1881, for improvement in reversing gear for steam engines, and finally determined September 5, 1884, in Marsh's favor.

On the 14th of September, 1885, the Calhoun Circuit Court filed its findings, and on October 31, 1885, entered its decree as follows: That "the said court now here finds that the said defendant Marsh, in the month of September, 1880, entered into a contract with the said complainant, by the terms of which contract complainant was to be permitted thereafter to use, without claim on the part of said Marsh, on steam engines manufactured by it, a certain invention relating to the valve gear, which was thereafter, pursuant thereto, placed under the superintendence of Marsh, upon an engine then in the yards of the complainant, which was thereafter sent for exhibition to the state fairs of both Illinois and Missouri.

"And the court further finds that defendants La Fever and Scott, as assigns of said Marsh, have become interested in said invention since said contract was entered into, but that the rights of complainant under said contract, according to its tenor and effect, are superior and paramount to the rights of said La Fever and Scott.

"And the court further finds that by the terms of the said contract complainant was to do and perform in and about the said device certain things and conditions, all of which have been done and performed by it; but that, on the contrary, the said Marsh (and his assigns, the other defendants) have not carried out and performed the same, in that they have denied the existence of said contract and asserted rights and interfered with and molested the complainant in the prosecution of its business, contrary to the tenor and effect of the said contract.

"And therefore the court doth now order, adjudge and decree that the said contract ought to be carried out and performed on the part of the said defendants, and doth order and decree that the said defendants, Elon A. Marsh, Minard La Fever and James Scott, do refrain and desist from asserting that complainants have not the full and complete right to make,

use, vend and put into practice or operation the said invention substantially in the same form and style as that exhibited on the said engine made in 1880, about the time of the making of said agreement and according to its terms.

"It is further ordered, adjudged and decreed that the said defendants do desist and refrain from publishing or asserting, contrary to the terms of said contract, that they have any right to the exclusion of said complainant in and to the said device.

"It is further ordered, adjudged and decreed that the said contract made between complainant and Elon A. Marsh, by the tenor and effect of which complainant was to be permitted to use, vend and employ said device on all the engines made by the complainant without molestation or interference on the part of said Marsh or his assigns, by them and each of them be specifically carried out and performed.

"It is further ordered and decreed, therefore, that the writ of injunction of this court may issue to the said Elon A. Marsh, Minard La Fever and James Scott, directing them to abstain, and perpetually enjoining them and each of them, from in anywise interfering with complainant's manufacture, sale and use of said device according to the terms of said contract."

Thereupon the defendants appealed to the Supreme Court of the State of Michigan, and that court on June 10, 1886, affirmed the decree of the court below, with costs. A motion for a rehearing having been made, the Supreme Court, July 21, 1886, entered a further order, in the following terms:

"This cause having been heretofore brought to this court by appeal from the Circuit Court for the county of Calhoun, in chancery, and the decree of the Circuit Court for the county of Calhoun, in chancery, having been heretofore affirmed, and a motion having been made for a rehearing, and this court having further considered the same, it is now here further ordered, adjudged and decreed that such rehearing be denied, but that the decree be amended so that the defendants shall make, execute and deliver to the said complainant, within forty days after the entry of this order in the Circuit Court

for the county of Calhoun, a release releasing the said complainant, Nichols, Shepard & Company, from all claim, right or demand on the part of them, the said Elon A. Marsh, Minard La Fever and James Scott, by reason of the manufacture, use or sale heretofore of the said invention relating to valve gear in the form and style as exhibited on the said engine described in the decree in this cause, and also releasing the said Nichols, Shepard & Company from all claims, rights or demands on behalf of them, the said Elon A. Marsh, Minard La Fever and James Scott, arising from their making, using or vending the said device hereafter. It is further ordered, adjudged and decreed that this order be remitted to the Circuit Court for the county of Calhoun, in chancery, and be there made a decree of said cause in that court."

The record having gone down, the Calhoun Circuit Court entered the following decree:

"This cause having been heretofore taken by appeal to the Supreme Court, and the decree heretofore rendered in this court having been affirmed and amended in the Supreme Court, and the cause having been remitted to this court with an order directing the said amendment be entered by this court as a decree of this court, it is now here, in pursuance of the said order of the Supreme Court, ordered, adjudged and decreed that the said defendants make, execute and deliver to the complainant, within forty days after the entry of this order, a release releasing the said complainant, Nichols, Shepard & Co., from all claim, right or demand on the part of them, the said Elon A. Marsh, Minard La Fever, and James Scott, by reason of the manufacture, use or sale heretofore of the said invention relating to valve gear in the form and style as exhibited on the said engine described in the decree in this cause, and also releasing the said Nichols, Shepard & Co. from all claims, rights or demands on behalf of them, the said Elon A. Marsh, Minard La Fever and James Scott, arising from their making, using or vending the said device hereafter."

A writ of error was then sued out from this court, the following errors being assigned in the petition for the writ:

"(1.) That it appears therein that the exclusive jurisdiction

of the Supreme Court of the United States, on the appeal by these defendants, over the same question and the same parties, was drawn in question and was denied.

"(2.) That full faith and credit, at the request of these defendants, was not given to the proceedings, record and appeal appearing in the Circuit Court of the United States for the Eastern District of Michigan concerning the same issues and between the same parties.

"(3.) That the right and authority under the Constitution and laws of the United States of the defendants to prosecute their said appeal from the said Circuit Court of the United States was drawn in question and denied.

"(4.) That the right and authority under the Constitution and laws of the United States authorizing the issue of letters patent to inventors, and especially the right and authority exercised by said defendants under letters patent No. 236,052, issued in pursuance of said laws, was drawn in question and denied."

The opinion of the Supreme Court of Michigan will be found reported in 61 Mich. 509.

Mr. Don M. Dickinson for plaintiffs in error. *Mr. R. A. Parker* was with him on the brief.

Mr. Charles F. Benton for defendant in error.

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

The bill was filed in the Circuit Court of Calhoun County for the specific performance by defendants below, of an alleged contract between Marsh and the plaintiff below, by which the latter was to be permitted, if Marsh obtained a patent on the improvement in question, to make, use, vend and employ said device on any or all engines made at its shops without molestation or interference, and to restrain the defendants below from asserting that plaintiff did not have the full and complete right to make, use, sell or operate the device, or that they had any right in the device to the exclusion of plaintiff;

and the decree granted the relief accordingly, which decree was subsequently amended by the Supreme Court of Michigan so as to require the defendants below to make, execute and deliver to plaintiff a release from all claim, right or demand on their part, by reason of the manufacture, use or sale of the said invention by the plaintiff theretofore or thereafter.

The Supreme Court held that the agreement set up by the plaintiff was convincingly established by the evidence; and that the suit not being brought to determine any question arising under the patent laws, but merely to enforce a contract to transfer an inventor's right, was not one in which the courts of the United States had particular jurisdiction; that the bill filed in the United States Circuit Court, March 21, 1885, being later than the one in hand, needed not to be considered; that as to the bill filed June 9, 1881, in the United States Circuit Court, and which had been dismissed before this suit was brought, but was afterwards taken to this court on appeal, which appeal was then pending, there was nothing in it to prevent the maintenance of this suit, since it was strictly a bill under the patent laws and nothing else, while this bill could not have been filed in that court between these parties, who were citizens of Michigan, and it was very questionable whether it could have been framed as a proper cross-bill in that case; and the court further held that the plaintiff was not estopped by that litigation, for if the defendants had not a good patent, plaintiff was not called upon to put in any defence which admitted one, and could not be deprived of the right to vindicate in another suit such right as could not have been adequately enforced in that litigation.

It is settled that in order to justify a writ of error from this court to review the judgment of a state court, the record must show that the judgment rested upon the disposition of a Federal question.

In this case the state court did not decide any question arising under the patent laws, nor did the judgment require, to sustain it, any such decision. Neither the validity of the patent, nor its construction, nor the patentability of the device, was brought under consideration, even collaterally.

In the language of Mr. Chief Justice Taney, *Wilson* v. *Sandford*, 10 How. 99, 101, the dispute "does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles."

Under such circumstances the correctness of a decision of the highest court of a State upon the merits, based upon the existence and effect of an agreement such as that set up in this case, and not necessarily passing upon any question under the patent laws, cannot be reviewed by this court on writ of error. *Dale Tile Company* v. *Hyatt*, 125 U. S. 46. In that case it was held that an action upon an agreement in writing, by which, in consideration of a license from the patentee to make and sell the invention, the licensee acknowledges the validity of the patent, stipulates that the patentee may obtain the reissue thereof, and promises to pay certain royalties so long as the patent shall not have been adjudged invalid, is not a case arising under the patent laws of the United States, and is within the jurisdiction of the state courts; and reference is made by Mr. Justice Gray, delivering the opinion of the court, to a series of decisions sustaining that conclusion. Thus in *Brown* v. *Shannon*, 20 How. 55, it was decided that a bill in equity in the Circuit Court of the United States by the owner of letters patent to enforce a contract for the use of the patent, and in *Wilson* v. *Sandford*, 10 How. 99, to set aside such a contract because the defendant had not complied with its terms, was not within the acts of Congress by which an appeal to this court was allowable in cases arising under the patent laws, without regard to the value of the matter in controversy.

So in *Albright* v. *Teas*, 106 U. S. 613, where a suit was brought in a state court, the parties thereto being citizens of the same State, for moneys alleged to be due to the plaintiff under a contract, whereby certain letters patent granted to him were transferred to the defendant, it was held that the

suit, not involving the validity or the construction of the patents, was not one arising under a law of the United States, and could not be removed to the Circuit Court.

In *Machine Company* v. *Skinner*, 139 U. S. 293, in an action for breach of contract in refusing to account and pay for a certain patented invention, the Supreme Court of New York adjudged upon the trial that plaintiff in error had agreed to use defendant in error's device upon all its machines, and also that it had in fact used them or their mechanical equivalent; but the court in general term, in affirming the judgment, found it unnecessary to determine whether the plaintiff in error had actually made use of the device or its equivalent, and held it to be liable upon the ground that it had agreed to use it upon all the machines, and was therefore bound to pay its value as fixed by the referee. The judgment was affirmed by the Court of Appeals without an opinion, and the writ of error from this court was dismissed, because it was apparent that the case might properly have been determined on a ground broad enough to sustain the judgment without resort to a Federal question.

It has also been decided that an action in the Circuit Court by a patentee for breach of an agreement of the licensee to make and sell the patented article and to pay royalties, in which the validity and the infringement of the patent are controverted, is a case "touching patent rights," of which this court has appellate jurisdiction, under section 699 of the Revised Statutes, without regard to the sum or value in dispute. *St. Paul Plow Works* v. *Starling*, 127 U. S. 376. And attention was in that case called to the fact that the language applied to this subject in the patent act of 1836, under which the cases of *Wilson* v. *Sandford* and *Brown* v. *Shannon*, *supra*, were decided, was that used in that act in defining the jurisdiction of the Circuit Court in patent cases, namely, "actions, suits, controversies and cases arising under any law of the United States granting or confirming to inventors the exclusive rights to their inventions or discoveries" (5 Stat. 124), while by the act of 1870, the words were, "in any action, suit, controversy or case, at law or in equity, touching patent

rights" (16 Stat. 207); and that this language was carried forward into the corresponding section of the Revised Statutes.

The contract in controversy did not involve the existence nor the scope of the monopoly conferred by the letters patent. The decree might indeed furnish a defence to an action for the unauthorized appropriation of the invention, but that would not bring a case lying purely in contract within the rule applicable when the validity or extent of the patent is directly in issue. The restraint granted by the decree was the consequence of sustaining the contract, and the effect it might have did not in itself deprive the state court of jurisdiction over the subject matter.

But it is argued that the writ of error should be maintained in view of the original litigation in the Circuit Court and the pendency of the appeal in this court when the decree of the state court was rendered. It is said that the interference sought to be enjoined was the suit which, though then determined, was afterwards appealed and the prosecution of the appeal itself, and that the state court had no jurisdiction to compel a settlement of an infringement case brought in a United States court prior to the action of the state court, or to enjoin further proceedings in the nature of an appeal to this court, and that the validity of an authority exercised under the United States was decided against, or a right claimed under the laws of the United States was denied, by the decree. We do not think the position tenable.

At the time this bill was filed it had been decided by the Circuit Court of the United States that the alleged patent was void, and no appeal had then been taken. We do not understand that Nichols, Shepard & Co. set up the fact of the institution and disposal of the prior suit as a ground on which it sought relief, but that it claimed that whether the patent was or was not valid, it had bought and paid for the right to use the device in question. The subject matter of this suit differed from the subject matter of that suit, and nothing in this suit prevented plaintiffs in error from prosecuting their appeal, which they did with the result that this court held

their patent to be void. *Marsh* v. *Nichols*, 128 U. S. 605. And it was not only held that the patent was void, because of the omission of the signature of the Secretary of the Interior, but as the signature was attached after the commencement of the suit, that no accounting for profits earned subsequently could be claimed therein, as such accounting could be demanded only where the infringement complained of took place previously and continued afterwards.

The bill in the Circuit Court had been dismissed. So long as that decree stood the bill could have no operation upon the suit in the state court. If the decree were vacated by reason of the appeal, the pendency of the latter could not in itself exclude the state court from the right to adjudicate upon the matters over which it had jurisdiction and award the relief it was competent to administer.

What the state of case might have been if this court had reversed the decision of the Circuit Court, sustained the patent and directed an accounting, we are not called upon to consider, nor to define the extent of the risk incurred by the appellee in proceeding to a decree before the appeal was disposed of.

Plaintiffs in error had the right to take their appeal from the final decree of the Circuit Court, and this right was not denied or attempted to be denied by the state court, although it is ingeniously argued that the decree of that tribunal may be so construed as to produce that result. But so far from this being intended, the Supreme Court of Michigan held that the subject matter of the two suits was so different that the prosecution of the one did not interfere with the prosecution of the other. The view thus entertained was wholly inconsistent with any attempt to interfere with the plaintiffs in error in the prosecution of their appeal, or any denial of their rights in respect thereof.

Whether or not a release given by plaintiffs in error under the state court decree before the appeal had been heard would have been allowed to operate as a release of errors, is a question that does not arise. That decree was not brought forward on the hearing of the appeal, and was not considered

by the court in arriving at its conclusions. If such would have been the effect of this release if given as directed, and if in the opinion of this court that effect could properly have been recognized, then the appeal might have been disposed of on that ground; but if the contention of counsel were correct, it is not to be doubted that the judgment of this court would have been such as the circumstances and the law required.

Undoubtedly, Nichols, Shepard & Co. might have set up the contract as a defence to the charge of infringement, and it was for the state court to determine what weight the circumstance that it did not do so had upon the question whether any such contract had ever been made. Moreover, it is claimed by defendant in error that to use the license as a defence would not have given it the affirmative relief to which it was entitled, because the contract covered a subject matter broader in its scope than either the first or second patent. At all events, it was not set up and was not passed upon by the Circuit Court or by this court, and requires no further mention, as we are not considering the case upon the merits. And the same remark may be made as to the interference proceedings, which are referred to in argument as not showing the assertion of the alleged contract.

In our judgment this suit was not one arising under the patent laws of the United States, nor did the decree involve the denial of an authority exercised, or of any title, right, privilege or immunity claimed, under the Constitution or laws of the United States; and therefore, there being no Federal question, the writ of error must be

Dismissed

THE E. A. PACKER, SCULLY Claimant.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 286. Argued April 3, 6, 1891. — Decided May 11, 1891.

The general rule, which prevails in cases tried by a Circuit Court without a jury, that the trial court is bound to find every fact material to its conclusion of law, and that a refusal to do so, if properly excepted to, is ground for reversal, prevails also in admiralty causes.

The libel in this case set forth, as ground for recovery, a collision between the barge Cross Creek in tow by the tug Packer, and the barge Atlanta, in tow by the tug Wolverton, whereby the latter barge and its cargo suffered material injury. The main question at issue was as to which tug was in fault. After the Circuit Court had made its findings of fact, the claimant submitted requests for several additional findings, which the judge declined to find otherwise than as he had already found. Among these was the following: "The porting of the Wolverton's wheel, when she was about 200 feet from the Packer, was a change of four or five points from her course." It appeared from the evidence brought up with the exceptions that such was the fact. *Held,* that the claimant was entitled to a finding in regard to this point.

This was a suit in admiralty instituted by the New Jersey Lighterage Company, appellee, owner of the barge Atlanta, against the steam tug Dr. John Wolverton, which had the Atlanta in tow, and also against the steam tug E. A. Packer, to recover damages for a collision between the Atlanta and a barge lashed alongside and in tow of the Packer, on her port side, known as Cross Creek Barge, No. 5, which occurred in the afternoon of October 25, 1880, near the mouth of the East River in the harbor of New York. Service never having been obtained upon the Wolverton, the case proceeded against the Packer, and in the District Court a decree was granted dismissing the libel upon the ground that the Wolverton was solely at fault for the collision. 20 Fed. Rep. 327. Upon appeal to the Circuit Court, this decree was reversed upon the ground that the collision was partly at least the fault of the Packer, and that, under the rulings of this court, the libellant

was entitled to recover its entire damages against her, which amounted, with interest, to $5404.31, for which a decree was rendered against her.

Pursuant to the act of February 16, 1875, 18 Stat. 315, c. 77, the following facts were found by the Circuit Court:

"First. That on the 25th day of October, 1880, the libellant was the owner of the barge Atlanta and was a common carrier of a cargo on said barge, as alleged in the libel.

"Second. That on that day, in the afternoon, a collision occurred between said barge and the barge Cross Creek, No. 5, then in tow of the steam tug Packer.

"Third. That the barge Atlanta and her cargo were on that day taken in tow by the steam tug Wolverton at Roberts' Stores in the East River, to be towed to the Long Dock, Jersey City, and were towed astern of said tug by a hawser of one hundred and fifty feet in length between the tug and barge.

"Fourth. That on that day the tug Packer was bound from the North River into the East River, having in tow on her port side the barge Cross Creek, No. 5, loaded with about 450 tons of coal, the barge projecting beyond the bow of the tug.

"Fifth. As the Wolverton, with her tow, was crossing the mouth of the East River the Packer, with her tow, was heading around the Battery into the East River, passing the New York shore opposite the Barge Office, nearly two hundred yards away.

"Sixth. That the tide in the East River was ebb and at about full strength. The Wolverton and her tow were going with the tide about seven miles an hour and the Packer and her tow were proceeding against the tide at a speed of about two miles an hour.

"Seventh. That the Packer and her tow had come so far around from the North River before seeing the Wolverton as to be in the ebb tide coming out of the East River, and when she saw her was heading up against that tide and was about 200 yards out from the shore opposite the Barge Office.

"Eighth. The vessels saw each other when about 500 yards apart, and at that time the course of the Wolverton was about N. W. by N. and the course of the Packer was E. by N., and

as they approached each other the Packer had the Wolverton on her starboard bow and the Wolverton had the Packer on her port bow, the Wolverton being further out in the river from the New York shore than the Packer, and the vessels being upon crossing courses converging toward the New York shore.

"Ninth. As soon as the Packer saw the Wolverton she blew two blasts of her steam whistle. She was then under a starboard wheel and making in somewhat towards the end of the piers, but upon signalling the Wolverton she starboarded her wheel still more. The Wolverton made no reply to the Packer's signals, but kept on her course without abating speed until within about 200 feet. The Packer then blew two more whistles and reversed her engines, and the Wolverton ported her wheel. The Wolverton passed the bow of the Packer and her tow, but the libellant's barge was unable to do so, and her port side came into collision with the bow of the Packer's tow.

"Tenth. At the time the Wolverton ported her wheel danger of collision was imminent and a collision seemed unavoidable.

"Eleventh. There was nothing in the river to interfere with the navigation of either vessel. The collision occurred about 400 or 500 feet off the ends of the piers and just below the slip of the South Ferry.

"Twelfth. There was no local usage of navigation applicable to the situation of the vessels when they discovered each other.

"Thirteenth. That between the tide of the East River and the North River there is an eddy which extends out about 400 feet from the Barge Office, and the Packer had passed through this eddy and reached the ebb tide, which struck on the port bow of her tow and swung the vessels still further off shore before her pilot saw the Wolverton.

"Fourteenth. The libellant's barge was in all respects properly navigated. By reason of the collision the barge and cargo sustained serious injury."

The following conclusions of law are found:

"First. The two tugs being on crossing courses, it was the

duty of the Packer, having the Wolverton on her starboard hand, to keep out of the way, and the duty of the Wolverton to keep her course.

"Second. It was the duty of the Packer to port her wheel and stop and reverse her engine in time to avoid the collision.

"Third. The libellant is entitled to recover against the Packer the damages sustained by the collision."

The course of the Wolverton, as stated in the eighth finding, was subsequently changed by the Circuit Judge from N.W. by N. to W.N.W.

From the decree entered upon this finding an appeal was taken by the owner of the Packer to this court.

Mr. Edward D. McCarthy (with whom was *Mr. de L. Berier* on the brief), for appellant.

Mr. Robert D. Benedict for appellee.

Mr. Justice Brown delivered the opinion of the court.

This court has repeatedly held that under the act of February 16, 1875, 18 Stat. 315, "to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," we are no longer at liberty to pass upon disputed questions of fact, but are bound to accept the findings of the Circuit Court as conclusive, and are limited to a determination of questions of law and to the validity of such rulings, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 U. S. 214; *The Clara*, 102 U. S. 200; *The Adriatic*, 103 U. S. 730; *The Connemara*, 108 U. S. 352, 360; *Watts* v. *Camors*, 115 U. S. 353, 363; *The Gazelle and Cargo*, 128 U. S. 474. In the case of *The Abbotsford* it was held that the only rulings which could be presented for review here by bill of exceptions were those made upon questions of law, following in this particular a multitude of prior rulings under analogous statutes. This was also affirmed in *The Annie Lindsley*, 104 U. S. 185, with an additional remark

by Mr. Justice Woods, that "where the Circuit Court has *passed on all the issues* we cannot listen to complaints that it has refused to find certain facts which it was asked to find, or has found certain other facts which the weight of the testimony did not warrant."

It does not, however, necessarily follow that this court is bound to determine the case upon the precise facts found by the Circuit Court, if, in its opinion, such findings are ambiguous, contradictory or incomplete, or fail to establish a satisfactory basis for a decision. The Circuit Court is bound to pass upon and find every material and ultimate fact necessary to a proper determination of the question of liability, and, in case of refusal to make such finding, an exception may be taken thereto, which can be considered by this court upon appeal. It cannot be that this court is concluded by a finding, for instance, of a single material fact tending to show fault on the part of one vessel, when there is uncontradicted evidence of other facts, which show either that this fault did not contribute to the collision, or that there were contributing faults upon the part of the other vessel which might make a case for a division of damages. If a Circuit Court could find *as a fact* that a collision was due to the fault of one vessel, an appeal to this court would be useless, and unless the findings set forth all the material facts, the ultimate finding of fault becomes more or less a finding of a fact, when it should be a legal inference from other facts.

The question is by no means a new one in this court. In *The Francis Wright*, 105 U. S. 381, 387, it was said by Chief Justice Waite that "if the Circuit Court neglects, or refuses, on request, to make a finding one way or the other on a question of fact, material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find

would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court." It was indicated that the bill of exceptions "must be prepared as in actions at law" where it is used, "not to draw the whole matter into examination again," but only separate and distinct points, and those of law. This practice was approved in *Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67. In *The John H. Pearson*, 121 U. S. 469, the question arose as to what was meant by the term "Northern Passage" from Gibraltar to New York, and it was held that the court below should have ascertained from the evidence what passages there were which vessels were accustomed to take, and then determine which of them the vessel was allowed by its contract to choose as the northern, and the decree was reversed and the case remanded for further proceedings upon this ground.

There is no practice under this statute which is peculiar to courts of admiralty. The rule is general, that wherever the trial court finds the facts and the conclusions of law therefrom it is bound to find every fact material to its conclusion, and a refusal to do so, if properly excepted to, is a ground for reversal. Thus, in cases tried by the court without a jury, under Rev. Stat. sections 649 and 700, the findings of the Circuit Court are conclusive upon this court, and the power of this court to review extends only to the sufficiency of the facts found to support the judgment, *Tyng* v. *Grinnell*, 92 U. S. 467; and if not sufficient, the case may be remanded for trial upon other issues involved therein. *Ex parte French*, 91 U. S. 423. The findings of the court under these sections are treated as a special verdict, and are gauged by the rules applicable to them, *Norris* v. *Jackson*, 9 Wall. 125; *Copelin* v. *Insurance Co.*, 9 Wall. 461, 467; *Supervisors* v. *Kennicott*, 103 U. S. 554; and, as was said in *Graham* v. *Bayne*, 18 How. 60, 63, "if a special verdict be ambiguous or imperfect — if it find but the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others, it is a mistrial,

and the court of error must order a *venire de novo.* They can render no judgment on an imperfect verdict, or case stated."

Under a similar method of procedure in several of the States it is held that the findings must contain all the facts and circumstances necessary to a proper determination of the questions involved; and in default thereof, the judgment of the court below will be reversed, and the case sent back for a new trial. *Wood* v. *La Rue*, 9 Michigan, 158; *Howerter* v. *Kelly*, 23 Michigan, 337; *Adams* v. *Champion*, 31 Michigan, 233; *Briggs* v. *Brushaber*, 43 Michigan, 330; *Bates* v. *Wilbur*, 10 Wisconsin, 415; *Addleman* v. *Erwin*, 6 Indiana, 494.

The facts found in the present case are substantially, that the Wolverton and her tow were bound from Roberts' Stores, in the East River, upon the Brooklyn side, to the Long Dock, in Jersey City, upon a W.N.W. course, and at a speed of about seven miles an hour. The Packer, with her barge alongside, constituting in fact one vessel, was heading around the Battery into the East River, and at the time she first saw the Wolverton was upon a course E. by N., and heading against a strong tide, at a speed of about two miles an hour. The two vessels made each other about five hundred yards apart. From this statement of their respective headings it is quite evident, and the court also finds as a fact, that they were upon crossing courses; that the Packer had the Wolverton on her starboard side, and was bound, under the 19th Rule of § 4233, to keep out of her way.

In fulfilling this obligation, however, she was entitled to act, within the limitations imposed by the requirements of good seamanship, upon the judgment of her master, and to put her helm to port or starboard; and there was a correlative duty, no less imperative, on the part of the Wolverton "to keep her course." Rule 23. *The Sea Gull*, 23 Wall. 165, 176; *New York &c. Steamship Co.* v. *Rumball*, 21 How. 372, 384; *The Adriatic*, 107 U. S. 512, 518. While this duty of avoidance is ordinarily performed by porting and passing under the stern of the other vessel, and while this is evidently, under ordinary circumstances, the safer and more prudent course, cases not infrequently occur where good seamanship

sanctions, if it does not require, that the manœuvre shall be executed by starboarding and crossing the bows of the approaching vessel. Of course, in doing this the steamer takes the risk that the approaching vessel, while fulfilling her own obligation of keeping her course, may reach the point of intersection before she has passed it herself; and hence at night, or in thick weather, the manœuvre would be likely to be attended with great danger. In the present case, however, there were circumstances which indicate that the selection of this course may have been such an exercise of discretion upon the part of the master as was not inconsistent with sound judgment and good seamanship. It was broad daylight, the weather was clear, and a careful lookout could not fail to hear the signals of an approaching vessel, and to estimate properly her course, her bearings and her distance. There was a strong tide ebbing out of the East River, and the Packer was making her way slowly and with some apparent difficulty against it. It was obviously to her advantage to keep as near to the piers, heading as she was directly against the tide, as it was possible to do, since such a decided porting as would be necessary to avoid the Wolverton and her tow would have compelled her to take the full force of the tide upon her port side, and exposed her to a strong outward drift, as well as to the probability of the Atlanta sagging down upon her. Whether the starboarding of the Packer was a fault or not would depend largely upon the question whether, assuming that the Wolverton kept her course and maintained her then rate of speed, either vessel would pass the point of intersection before the other reached it. If it were clear that no collision would have occurred had the Wolverton kept her course, then the starboarding of the Packer was not a fault, since the point of intersection would either be ahead or astern of the Packer. But if such starboarding was likely to involve risk of a collision, then of course it was a fault.

It was suggested upon the argument that there was a rule of the supervising inspectors, making it obligatory upon a crossing steamer to avoid the one having the right of way by porting her helm in all cases. But no such rule is incorporated

in the record or in the briefs, and it is not a regulation of which we can take judicial notice. But even if such rule were proved, it is by no means clear that the circumstances of this case would not bring it within the exception contained in the 24th Rule of "special circumstances" requiring a departure from the general regulations.

Whether the Packer was guilty of fault in starboarding or not, the duty of the Wolverton was clear. She was bound (1) to keep her course, and (2) to check her speed, if there was apparent risk of a collision, and, if necessary to avoid immediate danger, to stop. She did neither. The 8th finding is that "the vessels saw each other when about 500 yards apart;" and the 9th, that "as soon as the Packer saw the Wolverton she blew two blasts of her steam whistle. She was then under a starboard wheel and making in somewhat toward the end of the piers." There is no finding whether the signals of the Packer were heard by the Wolverton or not; but it is fairly inferable that if the whistles were blown at a distance of 500 yards they would be or ought to have been heard, and under such circumstances the porting of the Wolverton was a gross fault, unless it can be excused by the imminence of the peril. *The Corsica*, 9 Wall. 630. The 10th finding bears upon this point and is as follows: "At the time the Wolverton ported her helm, danger of collision was imminent and a collision seemed unavoidable." It is difficult to give a satisfactory interpretation to this finding. While it is a familiar law of collision that a wrong order given *in extremis*, or, as some of the authorities say, "to ease the blow," will not be treated as a fault, such principle manifestly has reference to a collision between the vessel guilty of the wrong order and the approaching vessel. Now no such collision took place in this case, since it was the Atlanta and not the Wolverton which received the blow. It would seem, too, the finding that the collision "seemed unavoidable" could not have had reference to a collision between the Packer and the Atlanta, since the latter was 150 feet astern of the Wolverton, and to bring about a collision between her and the Packer, or the Packer's tow, (which being lashed alongside may be treated as identi-

cal with the Packer,) it was necessary for the Wolverton to cross from the starboard to the port bow of the Packer, and to drag the Atlanta under the bow of the latter. Indeed, it seems impossible to exonerate the Wolverton in view of the other finding, that the vessels saw each other when about 500 yards apart, and that, as soon as the Packer saw the Wolverton, that is, at this distance of 500 yards, she blew two blasts of her steam whistle. Hearing this signal as she did, or as she was bound to do, the porting of the Wolverton must almost of necessity have brought about a collision. The whistle was a signal to her that porting was the one thing she must not do. If, in fact, as testified by her pilot, the Wolverton ported four or five points before the collision took place, it not only disposes of the 10th finding but shows that the collision was largely, if not wholly, the fault of the Wolverton.

The Wolverton seems also to have been at fault for excessive speed. If the officer in charge were satisfied that the signals of the Packer and her apparent starboarding were an error and involved a risk of collision, it was his duty, under Rule 21, to slacken speed before crossing her bows, or, if necessary, to stop, or even to reverse, if it could be done without danger to tow. This rule was applied by the House of Lords to a collision between crossing vessels in the recent case of *The Memnon*, 62 Law Times (N. S.), 84; *S. C.* 6 Asp. Mar. Law Cases, 488, wherein it was declared to be the duty of the vessel entitled to keep her course to comply with the rule as to slackening speed, or stopping and reversing, if necessary, and if she does not do so, the burden is upon her to show that to continue her speed was in fact the best and most seamanlike manœuvre under the circumstances. It is not easy to see how, under any view of the facts, the Wolverton can be exonerated from fault in this particular.

It appears from the bill of exceptions that, after the Circuit Court had made its findings of fact in this case, eight additional findings were submitted by the claimant, which the Circuit judge declined to find otherwise than he had already found, except with regard to the compass course of the Wol-

verton, which he had found to be N.W. by N. by mistake. We have already held that the Circuit Court is bound to find all such facts as are material and necessary to a correct determination of the question of liability involved. Upon examination of these proposed findings in connection with the evidence set out in the bill of exceptions, we think that most of them are immaterial, or are covered by the findings actually made. The sixth, however, is important, and reads as follows: "The porting of the Wolverton's wheel when she was about 200 feet from the Packer was a change of four or five points from her course." We think the claimant was entitled to a finding in regard to this point. It would also have been more satisfactory if the court had found the number of points the Packer swung under the order to starboard given "upon signalling the Wolverton," as found in the ninth finding. But as no request was made for a finding upon this point, and no exception taken to the omission, it is now too late for the claimant to demand it.

The decree of the court below will be reversed, and the case remanded for further proceedings in conformity with this opinion.

In re WOOD, Petitioner.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1581. Decided May 11, 1891, and reported *ante*, page 278.

Concurring opinion of Mr. Justice Field.

I CONCUR in the judgment in this case, but not in all the views expressed in the opinion. I adhere to what I said in my dissent in the case of *Neal* v. *Delaware*, 103 U. S. 370, 405, 409, that there is nothing in the late amendments to the Constitution, the Thirteenth, Fourteenth and Fifteenth, which requires that colored citizens shall be summoned on juries,

grand or petit, in order to secure to persons of their race justice and equality in the administration of the law; and, further, that the manner in which jurors to serve in the state courts shall be selected, and the qualifications they shall possess, are matters entirely of state regulation.

HARDIN *v.* JORDAN.

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

No. 161. Argued January 23, 26, 27, 1891. — Decided May 11, 1891.

In ejectment a plaintiff must stand or fall by his own title, and cannot avail himself of a defect in the title of the defendant.

Grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the State in which the lands lie.

It depends upon the laws of each State to what extent the prerogative of the State to lands under water shall extend. The cases reviewed.

A judicial decision of the present day, made by the court of highest authority in Great Britain, is entitled to the highest consideration on a question of pure common law.

By the common law, under a grant of lands bounded on a lake or pond which is not tide-water and is not navigable, the grantee takes to the centre of the lake or pond, ratably with other riparian proprietors if there be such: and this rule prevailed in Illinois when the patent to the plaintiff's ancestor was granted in 1841, and is still the law of that State, notwithstanding the opinion of its highest court in *Trustees of Schools* v. *Schroll*, 120 Illinois, 509.

The ruling of the Supreme Court of Illinois in its opinion in *Trustees of Schools* v. *Schroll*, 120 Illinois, 509, that a grant of lands bounded by a lake or stream does not extend to the centre thereof, was not necessary to the decision of the case, and, being opposed to the entire course of previous decisions in that State, it is disregarded.

The adverse decision of the land department does not estop plaintiff, because it had no jurisdiction over the case.

EJECTMENT. Judgment for the defendant. The plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. Thomas Dent for plaintiff in error.

Mr. W. C. Goudy for defendant in error.

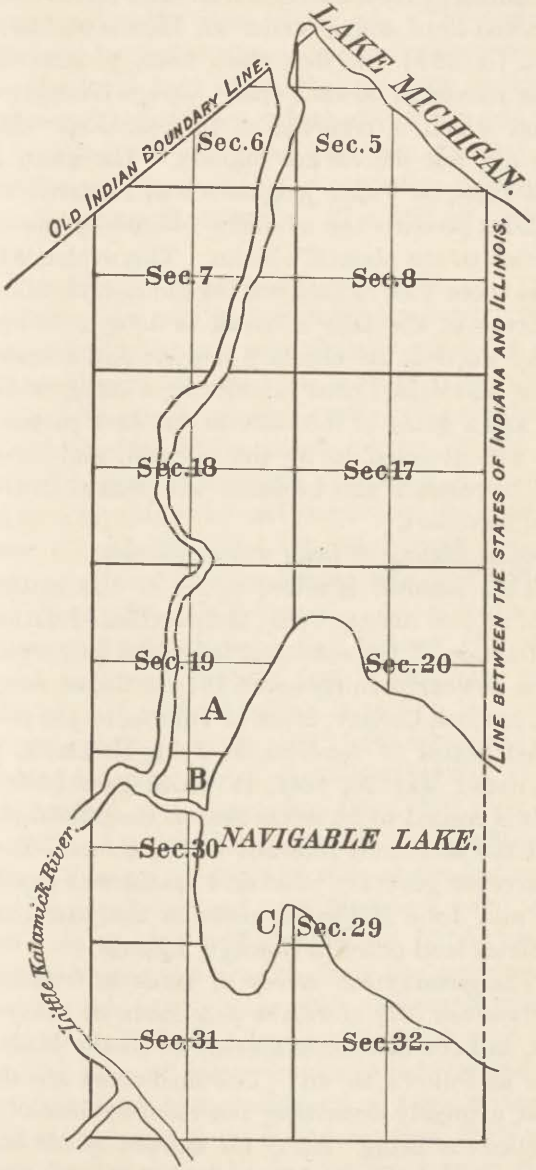
Mr. Justice Bradley delivered the opinion of the court.

This is an action of ejectment brought by Gertrude H. Hardin, the plaintiff in error, to recover possession of certain fractional sections of land lying on the west and south sides of a small lake in Cook County, Illinois, situate about a dozen miles south of Chicago, and two or three miles from Lake Michigan; and also to recover the land under water in front of said fractional sections and land from which the water retires at low water. The lake is two or three miles in extent, and the main question in the cause is, whether the title of the riparian owner on such a lake extends to the centre of the lake, or stops at the water's edge. The court below decided that the plaintiff's title only extended to low-water mark, and to that extent gave judgment for the plaintiff, but as to all the land under permanent water, gave judgment for the defendant. The question is of much importance, and deserves a careful consideration. Some question was made in the argument whether the pleadings presented the points at issue with sufficient distinctness. We think they do, and shall not waste any time on that point.

The annexed diagram shows the situation of the property, as delineated on the plat of the government survey, made in 1834–5. The plaintiff claimed under a patent from the United States, granted to her ancestor, John Holbrook, in 1841, for the following fractional quarter sections, to wit: S.E. fractional quarter of section 19, N.E. fractional quarter of section 30 and east part of S.E. fractional quarter of section 30, designated by the letters A, B and C on the plat. The defendant disclaimed any interest in the fractional quarter sections themselves, but claimed all the land in front of them, whether covered with water or not, by virtue of various patents granted in 1881.

The cause was twice tried before the court without a jury;

Outline of official plat of the Fractional Township 37 North, Range 15 East, as per government survey of 1834–5.



Holbrook's patent, under which plaintiff claims, was for S.E. fractional ¼ Sec. 19; N.E. fractional ¼ Sec. 30; East fraction S.E. ¼ Sec. 30, designated by the letters A, B, C.

first, before Judge Blodgett in 1883; and, secondly, before Judge Gresham in 1885, a second trial in an action of ejectment being allowed as of course under an Illinois statute. Hurd's Rev. Stat. Ill. 599; Ill. Rev. Stat. 1845, p. 208. The same result was arrived at on each trial. Judge Blodgett delivered an opinion which is reported in 16 Fed. Rep. 823. Judge Gresham did not deliver an opinion. He made a special finding of facts, on which judgment was rendered, and a bill of exceptions presents the evidence offered by the defendant in opposition to the plaintiff's claim. This evidence tended to prove that there was, in fact, within the meander lines of the public survey of the lake a streak or tongue of upland not covered by water at its ordinary height; and showed the action of the land department in ordering a survey of the bed of the lake, and a grant of the same to different parties — which evidence was objected to by the plaintiff, and an exception taken. The result of this evidence is expressed in the special finding of the court.

The special finding of facts was as follows:

"(1.) That plaintiff is seized in fee of the southeast fractional $\frac{1}{4}$ of section nineteen (19), the northeast fractional $\frac{1}{4}$ and the east fraction of the southeast fractional $\frac{1}{4}$ of section thirty (30), all in township thirty-seven (37) north, of range fifteen (15) east, in Cook County, State of Illinois, as per patent from the United States of America to John Holbrook, plaintiff's ancestor, dated May 20, 1841, in which patent the grant of said lands is recited to be 'according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general;' that said patent was based upon an entry by said John Holbrook, made in the year 1838, at the United States land office in Chicago, Illinois.

"(2.) The government survey of lands in fractional township thirty-seven (37) aforesaid was made in the years 1834 and 1835, and the field-notes thereof as to the lands in question were as follows, to wit: [The field-notes are then given *in extenso*, expressly describing the meander line of the fractional sections as being "*along the margin of the lake*," from the intersection of the south margin thereof with the Indiana

state line, and thence going westwardly, northwardly and eastwardly, around the entire contour of that portion of the lake which is situated in the State of Illinois. The finding of the court then introduces the plat made from said survey and field-notes for the local land office, the surveyor general's office, and the General Land Office, which shows the said fractional sections bounded on said lake, and the words "Navigable lake" written on the body of the portion representing the lake, as in the annexed diagram. The finding then proceeds as follows:]

"(4.) The body of water shown upon the plat referred to as a navigable lake was in fact meandered by the surveyor, the meander line being run substantially upon the margin of said lake, as shown by said plat, save as follows, viz.: That the said line was carried across a certain ridge of land extending from the centre of fractional sec. 20, in said township, in a southerly direction towards the point of land shown in said plat as comprising the east fraction of the southeast quarter of sec. 30 and fractional sec. 29, in said township, said ridge or strip of land thus projecting into said body of water southerly about 220 rods, being of varying width and elevation and covered with timber — oak, hickory, elm, ash, poplar, linden and hackberry — three feet in diameter and under; the width of said ridge, limiting it to dry land at ordinary stage of water, being over 28 rods at the north and of varying width, being in some places slightly wider and at some narrower, extending to a depression about 140 rods south, and thence south of a general character but slightly narrower and lower a distance of about 80 rods, at the last-named point said ridge disappearing, and from there to a point south about 80 or 90 rods the bed and growth are of the same general character as the bed and growth along the margin of the lake, and on either side of the ridge reeds and coarse grass growing in the water and there being nothing but such growth to obstruct the flow of water from one side to the other, the depth at this point being sufficient at high water to enable skiffs and small boats to be rowed through from one side to the other, the water west having for many years been known

as Hyde Lake, in ordinary speech, while that to the east has been currently known as Wolf Lake, said space or distance last described being marsh land at low water; that at the south limit of the tract last described is a small body of land known as Elm Island or Fogli's Place, of the extent of $1\frac{1}{2}$ or 2 acres, upon which timber grows of the same character as that on said ridge, to the south of which for about 50 rods there is water at high stages and marsh at medium stages, at which point or distance the ridge appears again as dry land about 30 rods to a little east of north from the north point of the meander line of the point of land comprising fractional section 29, etc., before referred to, there being also a small knoll bearing a number of small trees or bushes about 20 rods northwest from the northerly point of the ridge last mentioned.

"Upon the entire western margin of the water shown on the plat and extending some 20 or 25 rods east from the meander line, and also on the east and west margin of the dry land of said ridge to the north, as well as in the space between said ridge and Elm Island and in the space above described south of said Elm Island, the vegetation is solely a marsh growth of reeds and coarse or swamp grass growing in the water and of a uniform character, and the same is true as to the southerly portion of the lake west of plaintiff's land in the east fraction of the southeast fractional $\frac{1}{4}$ of said section 30. The physical condition west of the meander of said east fractional, etc., is the same for a distance of 91 or more rods westerly as it is generally at and along said meander line, the same character of growth as aforesaid appearing in the water at ordinary and high stages for said distance west of said line, the greater part of plaintiff's said land in said east fraction of the southeast fractional quarter of said section 30 being wet and unfit for cultivation and only slightly higher than that to the west, there being $2\frac{4}{100}$ acres in said east fraction, treating the meander line as a boundary, in the form of a right-angle triangle, with its base resting on the south section line with the meander line as a western boundary thereof. The point at which to the south the open water of said lake

ceases and marsh grass begins is several rods north of the south line of said section 30. The physical conditions of the land and water are substantially what they were at the time of the original survey; that said lake or lakes are not navigable waters.

"(5.) At the time of said government survey there was a natural outlet for said lake towards the northeast into Lake Michigan through Wolf River, said river being about 1½ miles long and from 6 to 14 feet in depth; but such outlet was and has continued to be subject to interruption by the formation of a sand bar across the mouth thereof upon the shore of Lake Michigan. There was also an outlet from the westerly portion of said lake into the Calumet River, shown on said plat as Little Kalamick, said outlet into the Calumet River running in a westerly direction through the fractional north ½ of said section 30 to its connection with said Calumet River.

"(6.) The level of water in said lake or lakes is subject to fluctuations alike from the operation of the change of the level of Lake Michigan from storms, winds, etc., and also from the operation of rains, thaws, evaporations, etc.; but said 'lake' or lakes is or are occupied by permanent water, and substantially the entire bottom thereof is below the mean level of Lake Michigan, and the greater portion of it is below extreme low water in said Lake Michigan, so that said 'lake' or lakes never become entirely dry, nor has any considerable portion thereof within its margin, as shown by the said government plat, ever been fit for cultivation except as to said Elm Island and said ridge hereinabove described.

"(7.) That at times of high water, however produced, the water in said lake or lakes extends to and beyond the limits that it occupied at the time of said government survey.

"That a level of Lake Michigan has been adopted in all surveys in Cook County called datum; that the extreme rise and fall of Lake Michigan is from 5 feet above datum to one foot below datum; that the average level of water in Lake Michigan is about 1.8 feet above datum.

"That the level of water in said lake or lakes when the same reaches the level existing at the time of the government sur-

vey of 1834 and 1835 is 2.2 above datum and .4 ($\frac{4}{10}$) foot above the average level of Lake Michigan.

"(8.) That defendant and those under whom defendant claimed, constituting the defendants in said original causes which were consolidated into the present case, entered into and took possession of the lands described in the plaintiff's declaration, except so much of the southeast fractional $\frac{1}{4}$ of section 19, the northeast fractional $\frac{1}{4}$ of section 30 and the east fraction of the southeast fractional $\frac{1}{4}$ of said section 30 as lay beyond and outside of the meander line as run upon the margin of said lake by said government survey, and defendant was so in possession at the time of said suit and trial thereof. Upon the facts shown in evidence the plaintiff asked the court to hold and adjudge that, under the grant to plaintiff's ancestor, plaintiff, as a riparian proprietor, took to the centre of said so-called 'navigable lake,' and all the said lands granted to plaintiff's ancestor bordered upon said so-called 'navigable lake;' but the court refused to so hold, and, on the contrary thereof, held that the plaintiff's lands in said sections 19 and that part of 30 west of said lake were bounded by said lake, the right of possession extending to low-water mark in said lake; but as to said east fraction of the southeast $\frac{1}{4}$ of section 30 the court held that the plaintiff was bounded by the meander line run by the U. S. surveyor and not entitled to claim said lake as her boundary; to which plaintiff excepts, etc."

Judgment was entered in conformity with this finding as follows, to wit:

"That as to the east fraction of the fractional southeast quarter of section thirty (30), township thirty-seven (37) north, range fifteen (15) east, of the third P. M., Cook County, Illinois, the defendant is not guilty.

"It is further adjudged and determined that the plaintiff is seized in fee of the southeast fractional quarter of section nineteen (19) and the northeast fractional quarter of section thirty (30), both in township thirty-seven (37) north, range fifteen (15) east, of the third P. M., Cook County, Illinois; that by the terms of the patent of said lands to John Holbrook, plaintiff's ancestor, the grant of said last-described lands

was bounded by and extends to a body of water along the easterly line shown on the government map or plat of the government survey as a 'navigable lake;' that plaintiff is entitled to claim to low water as her eastern boundary of said lands last described; that defendant, as to the parts of said last-described lands lying between the meander line run in the government survey and the margin of said lake at low water, is guilty of unlawfully withholding the possession thereof from the plaintiff; and it is therefore ordered and adjudged that the plaintiff have and recover of said defendant the possession of said lands so unlawfully withheld as aforesaid, including the dwelling-houses erected thereon by Andrew Ferrand and Chester B. Rushmore and any other structures thereon, and as to costs in this behalf they are apportioned at two-thirds (⅔) of all costs taxed in this cause to be paid by defendant and the remaining one-third by plaintiff, and that plaintiff have execution therefor and a writ of possession, etc. As to the residue of the lands described in plaintiff's declaration defendant is adjudged not guilty; to which judgment plaintiff, by her counsel, duly excepts."

The question to be determined on this writ of error is, whether the facts found by the court authorized the judgment rendered. According to the settled course in actions of ejectment, the court did not inquire into the validity of the title claimed by the defendants, as compared with that of the plaintiff, but confined itself to the question of the validity of the plaintiff's title to the land in dispute, on the assumption that the plaintiff must stand or fall by his own title, and not by reason of any defect in the title of the defendant. Recognizing this as the governing rule in the case, we are called upon to decide whether the title of the plaintiff, under the patent granted to her ancestor in 1841, extended beyond the limits of the actual survey, under the permanent waters of the lake in front of the land described in the patent, and not merely to the line of low-water mark, as held by the court below. It will be observed that the government surveys made in 1834–5 upon which the patent was issued, not only laid down a meander line next to the lake, but also described

said lines as running "along the margin of the lake;" and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words "Navigable lake," although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh-water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.

Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the state, extending either to the margin or centre of the stream, according to the rules of that law. It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Jefferis* v. *East Omaha Land*

Co., 134 U. S. 178; *Middleton* v. *Pritchard*, 3 Scam. 510; *Canal Trustees* v. *Haven*, 5 Gilm. 548, 558; *Houck* v. *Yates*, 82 Illinois, 179; *Fuller* v. *Dauphin*, 124 Illinois, 542; *Boorman* v. *Sunnuchs*, 42 Wisconsin, 233, 235; *Père Marquette Boom Co.* v. *Adams*, 44 Michigan, 403; *Clute* v. *Fisher*, 65 Michigan, 48; *Ridgway* v. *Ludlow*, 58 Indiana, 248; *Kraut* v. *Crawford*, 18 Iowa, 549; *Forsyth* v. *Smale*, 7 Bissell, 201; Rev. Stat. §§ 2395, 2396. Mr. Justice Clifford in the case first cited says: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water course, and not the meander line, as actually run on the land, is the boundary." It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters.

With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State — a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery — and cannot be retained or granted out to individuals by the United States. *Pollard* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471; *Weber* v. *Harbor Commissioners*, 18 Wall. 57. Such title being in the State, the lands are subject to state regulation and control, under the condition, how-

ever, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. See *Manchester* v. *Massachusetts*, 139 U. S. 240; *Smith* v. *Maryland*, 18 How. 71; *McCready* v. *Virginia*, 94 U. S. 391; *Martin* v. *Waddell*, 16 Pet. 367; *Den* v. *Jersey Co.*, 15 How. 426.

This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised. In the case of *Barney* v. *Keokuk*, 94 U. S. 324, we held that it is for the several States themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the State of Iowa with regard to land on the banks of the Mississippi, in the city of Keokuk, and it appearing to be the settled law of that State that the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the State, this court accepted the local law as that which was to govern

the case. The same view was taken in quite a recent case with regard to titles on the Sacramento River under the law of California. *Packer* v. *Bird*, 137 U. S. 661. On the east side of the Mississippi, in the States of Illinois and Mississippi, a different doctrine prevails, and in those States it is held that the title of the riparian proprietor extends to the middle of the current, in conformity to the rule of the common law, that the beds of all streams above the flow of the tide, whether actually navigable or not, belongs to the proprietors of the adjoining lands. *Middleton* v. *Pritchard*, 3 Scammon, 510; *Morgan* v. *Reading*, 3 Sm. & Marsh. 366; *St. Louis* v. *Rutz*, 138 U. S. 226. In the one case, that of Iowa, the government grant was held to extend only to high-water mark; in the other cases, of Illinois and Mississippi, it was held to extend to the centre of the stream; being governed in both cases by the respective laws of the States, affecting grants of land bordering on the river. In the one case, the State, by its general law, does not allow the grant to enure to the individual farther than to the water's edge, reserving to itself the ownership and control of the river bed; in the other cases, the States allow the full common law effect of the grant to enure to the grantee, reserving to themselves only those rights of eminent domain over the waters and the land covered thereby which are inseparable from sovereignty. As was well said by the Supreme Court of Illinois in *Middleton* v. *Pritchard*, (*qua supra*), "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass then by a grant bounded by a stream of water? At common law, this depended upon the character of the stream, or water. If it were a navigable stream, or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the centre thread of the current. . . . At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide

water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership in the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. And this latter, Chancellor Kent says, bears a perfect resemblance to public highways. The consequence of this doctrine is, that all grants bounded upon a river not navigable by the common law, entitle the grantee to all islands lying between the main land and the centre thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right. . . . The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant."

These views are referred to with strong approval by Chancellor Kent in a note to the third volume of his Commentaries, p. 427, sixth edition, being the last edition prepared under his own supervision.

We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.

The next question for consideration, therefore, is what is the law of Illinois with regard to such grants. If it were not for the decision of the Supreme Court of that State in the case of *Trustees of Schools* v. *Schroll*, 120 Illinois, 509, we should not have the slightest hesitation on the subject. And we cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous,

and opposed to the entire course of previous decisions in the State. It is our judgment that the law of Illinois, in this regard, is the common law, and nothing else; and that the opinion of the court in *Trustees &c.* v. *Schroll*, is not in accordance with the common law. We say the opinion of the court; for a reference to the report of the case will show that the decision did not necessarily rest on the question whether a grant of lands bounded by a lake or stream does or does not extend to the centre thereof; for the court before whom the case was tried without the intervention of a jury, declared that there was no proof to show that the lots conveyed bordered on a lake or stream. The lands in question in that case were part of a 16th section granted to the State as school lands, and the school trustees of the township brought ejectment to recover them. They embraced certain land covered with the water of a portion of Lake Meredosia — a lake five or six miles long near the Illinois River. The defendants claimed the premises by virtue of certain patents from the State for lots which they alleged were bounded by the lake. But the patents contained no such intimation, and there was no proof of the fact. The lots were conveyed by a plat, and that did not show that they were situated on the lake. Under these circumstances the judgment was necessarily given for the plaintiffs, who stood in the place of the State. The court, however, without, as it seems to us, being required to do so, undertook to lay down the law as to the rights of grantees of lands bordering on lakes and ponds, as distinguished from running streams, holding to the Massachusetts doctrine that such waters belong to the State and are held for the use of the public, and do not pass to the riparian proprietors. Nearly all of the authorities referred to in support of this position are decisions of the courts of Massachusetts and of other New England States which follow their lead — the court not adverting to the fact that the law of Massachusetts stands on a peculiar colonial ordinance adopted more than two centuries ago, and referred to hereafter.

That the common law is the true and only law of Illinois on the subject of land titles, and especially as to the rights of

riparian owners, and the construction of deeds and grants of land bounded by streams and permanent bodies of water (except the great navigable lakes before referred to) is so clearly shown by the statutes and by the whole course of the decisions of the Supreme Court of that State, that it hardly needs any argument to support the proposition. Illinois was a portion of the Northwest Territory which Virginia always claimed as a part of her domain until she ceded it to the United States, and which received from that State many of its original settlers, who regarded Virginia as their parent State, and had a strong attachment for its institutions and laws, and may be said to have carried those laws with them. The very first enactment of the legislature of Illinois after it became a State was almost an exact copy of an ordinance adopted by the Virginia Convention of Delegates in May, 1776, declaring what laws should be in force under the new order of things. It was approved February 4th, 1819, and was entitled "An act declaring what laws are in force in this State." It enacted "that the common law of England, all statutes or acts of the British Parliament made in aid of the common law prior to the 4th year of the reign of King James the I, excepting the 2d section of the 6th chapter of 43 Elizabeth, the 8th chapter of 13 Elizabeth and 9th chapter of 37 Henry VIII, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority."

This statute, as far as we are able to learn, has never been repealed, and no supplementary or amendatory statute relating to the subject in hand has ever been passed by the legislature. Except with regard to Lake Michigan, which is a navigable lake and one of the internal seas of the country, it cannot be pretended that the common law relating to grants of land abutting on streams and permanent bodies of water, and to the rights of riparian owners, are of such a local character peculiar to England as to be inapplicable to the State of Illinois. At all events, the courts of that State from its origin to the present time have adhered to the rules of the common

law in reference to the matters referred to. So strictly has this principle been followed that even in the case of lands bordering on the Mississippi River, acknowledged to be one of the most important of navigable streams in the world, the rules of the common law, which extend the title of the riparian owner to the centre of the stream, have been sedulously observed; and we believe that there was never any departure from this course of decision until the case of the *Trustees of Schools* v. *Schroll*, which we regard as altogether exceptional, and insufficient to effect a change in the general rule. If anything can be deemed settled in the jurisprudence of a State, we think that until the decision of that case it was absolutely settled in Illinois that the rule of the common law was the law of that State in regard to the rights of riparian owners. See *Middleton* v. *Pritchard*, 3 Scam. 510; *Canal Trustees* v. *Haven*, 11 Illinois, 554; *Beckman* v. *Kreamer*, 43 Illinois, 447; *Chicago* v. *Laflin*, 49 Illinois, 172; *Chicago & Pac. Railroad* v. *Stein*, 75 Illinois, 41; *Houck* v. *Yates*, 82 Illinois, 179; *Washington Ice Co.* v. *Shortall*, 101 Illinois, 46; *Fuller* v. *Dauphin*, 124 Illinois, 542. The last of the above cited cases was decided in May, 1888, and reaffirmed in all things the case of *Middleton* v. *Pritchard*. The land in question was an island of five acres in what is called Plum River Slough, a large running slough or arm of the Mississippi River, marked on the original plat and survey as "Navigable Plum River Slough." The defendant claimed title under a patent from the United States, dated in 1845, for a fractional quarter section of land bounded on the west by a meander line according to the survey, but by the slough itself according to the plat of the survey referred to in the patent. The court held that the fractional section granted was bounded by the slough, and that the title extended to its centre, and included the island in question. The case of *Washington Ice Co.* v. *Shortall* was a contest about the right to cut ice on the Calumet River within the limits of the plaintiff's land. The ice company claimed such a right because, as they contended, the plaintiff had no private ownership in the water of which the ice was formed. But the court held that as the plaintiff was the

owner of the bed of the river, which flowed through his premises, he was the owner of the ice which became attached thereto. Mr. Justice Sheldon, delivering the opinion of the court, after stating the common law rule as to the title of a riparian owner on a stream above tide water, said: "This rule of the common law has been adopted in this State, and is here the settled doctrine." He then discussed the question as to the right to the ice, which was decided to be in the owner of the land.

The disposal of the present case, therefore, seems to us to require, further, only an answer to the single question, "What is the common law in regard to the title of fresh-water lakes and ponds?" And on this subject we think there can be but very little difference of opinion.

Of course, as already stated, there is no question where the land abuts and bounds upon a fresh-water stream or river. In such cases the law is perfectly plain. Sir Matthew Hale says: "Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the propriety of the soil, and consequently of the right of fishing, *usque ad filum aquæ;* and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And, if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length." De Jure Maris, P. I, c. 1. And whilst Hale speaks of rivers and streams, he probably means to include, certainly does not mean to exclude, all fresh waters, including lakes and ponds as well. But in England proper there are so few lakes and ponds of large size, and so many fresh-water streams and rivers, that in speaking of interior or fresh waters it was natural to refer to the latter without mentioning the former. Lord Coke, however, when enumerating the different things that are comprehended under the term "land" as a subject of ownership, mentions land covered with water. His words are: "Also the waters that yield fish for food and sustenance of man are not by that name demandable in a *præcipe;* but

the land whereupon the water *floweth* or *standeth* is demandable; as for example, *viginti acras terræ aquâ coopertas*— twenty acres of land covered with water." Co. Litt. 4 a. And after showing that the right of fishery may be granted by the owner distinct from the right of soil, he adds: "If a man grant *aquam suam*, the soil shall not pass, but the fishery within the water passeth therewith." But where a collection of water has acquired a specific name he says that the land may be included under that name, as "*Stagnum*, a poole, doth consist of water and land, and therefore by the name of *stagnum* or poole, the water and land shall pass also." So of a gorse or gulf, for which a *præcipe* will lie with the esplées in taking of fish therefrom. Co. Litt. 5 b. This shows that still water as well as rivers and streams was the subject of private ownership by the old English law.

It may also be observed that the whole doctrine of common and several fisheries is corroborative of this view. The cases are innumerable in which actions of trespass have been sustained for fishing in a several fishery, (which is the exclusive right to fish in one's own waters, or is derived therefrom by grant); or in which the action of trespass has been defended by the plea of common of fishery (which is the right to fish in the waters of another). The right of public fishery is never mentioned except in connection with tide waters where the title to the land is in the Crown. It is never said that this right exists in lakes or ponds, or in any other fresh waters.

An expression used by Sir Francis Moore, in his reading on the Statute of Uses, has been supposed to indicate that common ponds are royalties of the Crown. But attention to the context will show that this inference is without foundation. He is speaking of different things that would be proper objects of charity under the several heads enumerated in the act; and under that of "*ports and harbors*," after showing the benefits of ports and harbors, and that an imposition of duties for their support would be a charitable use, he adds, "*Common ponds* or watering places are within the equity of these words." That is, a donation made for establishing and maintaining a pond or watering place would be a good charity, and within

the equity of gifts for ports and havens. This certainly is very far from intimating that ponds and watering places belong to the Crown. It only shows that, like churches, schools and other good institutions, they are calculated to subserve the public benefit.

In Scotland, where there are many lakes, often of large extent, there has never been any doubt on the subject. It is true their system of laws is founded on the civil law, by which lakes and ponds are regularly of private ownership. Lord Selborne, in *Mackenzie* v. *Bankes*, 3 App. Cas. 1324, 1338, says: "It is to these facts that the law of Scotland with respect to the rights of riparian proprietors in inland lakes has now to be applied. Under titles such as those by which both the competitors in the present case hold (and when nothing turns upon any evidence of exclusive possession) the entire lake, if surrounded by the land of a single proprietor, belongs to that proprietor as a 'pertinent' of his land. If there are more riparian proprietors than one, it belongs 'ratably' to them all. So far as relates to the *solum* or *fundus* of the lake, it is considered to belong in severalty to the several riparian proprietors, if more than one; the space enclosed by lines drawn from the boundaries of each property *usque ad medium filum aquæ* being deemed appurtenant to the land of that proprietor, exactly as in the common case of a river." But as to the rights of boating, fishing and fowling, Lord Selborne added: "These are to be enjoyed over the whole water space by all the riparian proprietors in common, subject (if need be) to judicial regulation." See also, to the same purport, Burge, Col. & For. Law, vol. 3, p. 425; Justinian's Digest, lib. 8, tit. 3, f. 23, § 1. And centuries before Justinian, Cicero spoke of the many lands, houses, *lakes*, *ponds*, places and possessions confiscated by Sylla and conferred upon his own favorites. Agra. Law, Orat. 3, c. 2: 7.

As many features of the common law with regard to the rights of riparian owners were borrowed directly from the civil law, Hale De Jure Maris, P. I, c. 6, page 28, it would not be strange if the rule relating to lakes and ponds came from the same source. It was recommended by the same reasons

that applied to fresh-water rivers and streams. When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides, a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equidistant from the land on either side. If the margin is named as the boundary the case is different; the land under the water being then expressly excluded. Of course, these observations do not apply to our great navigable lakes, which are really inland seas, and to which all those reasons apply which apply to the sea itself.

But we are not without express authority, in addition to that of Lord Coke, as to the rule of the common law. As before observed, the small number in England of the bodies of water of the kind now under consideration, would lead us to expect but few decisions on the subject compared with those relating to rivers and streams. But the precise question has been brought before the courts in recent times, and has been decided as from the reason of the thing we should anticipate it would be. *Bristow* v. *Cormican*, 3 App. Cas. 641, is directly in point, and received the consideration of the best legal minds of England. It related to riparian rights in Lough Neagh, a lake in the North of Ireland, about fifteen miles in length (north and south) and about ten miles in breadth, situated some fifteen miles west of Belfast, and having the town of Antrim near its northeastern extremity. The plaintiff sued the defendants in trespass for fishing in the lake, and deraigned title from the Crown by a grant made in the time of Charles II of all the fishings in Lough Neagh; and the question was whether the Crown had the right to make such a grant. The decision was unanimous that it had not. Lord Cairns, then Lord Chancellor, said: "The Crown has no *de jure* right to soil or fisheries of a lough like Lough Neagh. Lough Neagh is,

as your Lordships are aware, the longest inland lake in the United Kingdom, and one of the largest in Europe. It is from fourteen to sixteen miles long, and from six to eight miles broad. It contains nearly 100,000 acres; but though it is so large, I am not aware of any rule which would, *prima facie*, connect the soil or fishings with the Crown, or disconnect them from the private ownership either of riparian proprietors or other persons." Lord Hatherley said: "This is an inland lake, and, therefore, it is not a portion of land belonging to the Crown by reason of its being on the shore of the sea, or a navigable strait or river." Lord Blackburn added: "The first question that I shall discuss is whether it is conclusively shown that Charles II had in 1660 and 1661, title to the property he purported to . . . convey. I think he had not. The property in the soil of the sea and of estuaries, and of rivers in which the tide ebbs and flows is, *prima facie*, of common right, vested in the Crown; but the property of dry land is not of common right in the Crown. It is clearly and uniformly laid down in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake." Then, after taking notice of a hesitating remark on the subject made by Justice Wightman in *Marshal* v. *Ulleswater Nav. Co.*, 3 Best & Smith, 732, 742, and of the apparent inconvenience of adjoining owners of small holdings on the borders of a lake going out to the centre, he adds: "It is, however, necessary to decide whether the Crown has of common right a *prima facie* title to the soil of a lake; I think it has not. I know of no authority for saying it has, and I see no reason why it should have it."

Of course this decision has not the controlling authority which it would have had if it had been made before our revolution. But it is the judicial decision of the highest authority in the British empire, and is entitled to the greatest consideration on a question like this, of pure common law.

In this country there has been a diversity of opinion on the subject. The colonial ordinance of Massachusetts, adopted in 1641, provided that great ponds containing more than ten acres of land, and lying in common, though within the bounds of a town, should be free for fishing and fowling. As amended by the ordinance of 1647, it prohibited the towns from granting away great ponds, but affirmed their power to regulate the fisheries therein as well as in tide waters, and affirmed the power of the legislature to dispose of great ponds, tidal bays, coves and rivers, or of the common rights of fishing and fowling in them. Gould on Waters, § 84; *Paine* v. *Woods*, 108 Mass. 160, 169; *Commonwealth* v. *Vincent*, 108 Mass. 441, 445. These ordinances seem to have been the foundation of a local common law in Massachusetts (including Maine) which has led to a course of decisions with regard to the title of lakes and ponds at variance with the general common law, and which have been followed in New Hampshire and some other States. It is there held that the land under water in such lakes and ponds belongs to the State, and not to the riparian owners; and that when land is conveyed bounding upon a natural lake or pond, the grant extends only to the water's edge. The leading cases to this effect are collected in Angell on Water Courses, secs. 41, 41a, etc. For later decisions see Encyclopædia of Law, vol. 12, tit. "Lakes and Ponds."

In other States the rule of the common law has prevailed as enunciated in *Bristow* v. *Cormican*, as in New York, New Jersey, Ohio, Michigan, Indiana, etc. See *Ledyard* v. *Ten Eyck*, 36 Barb. 102; *Smith* v. *City of Rochester*, 92 N. Y. 463; *Cobb* v. *Davenport*, 3 Vroom (32 N. J. Law) 369; *S. C.* 4 Vroom, 223; *Lembeck* v. *Nye*, 47 Ohio St. 336; *Clute* v. *Fisher*, 65 Michigan, 48; *Ridgway* v. *Ludlow*, 58 Indiana, 248.

In *Ledyard* v. *Ten Eyck* a large tract of land was granted to A, the bounds of which included the south end of Cazenovia Lake, a body of water five miles long and three-fourths of a mile wide. A granted to B (under whom the defendant claimed) a piece of the land bordering on the lake. It was held that by the common law, which was in force in New York,

both grants conveyed the title of the land under the water. "The premises of the defendant," said the court, "are not bounded on the west by the *bank* of the lake, but are bounded by the lake itself. . . . The deed would have the usual legal effect, and as an appurtenance would carry along the land under water to the centre." It was assumed that the same law applied to inland unnavigable lakes as to rivers. As to the Great Lakes, (Lake Champlain for example,) and the navigable rivers of the State, the Hudson and Mohawk, the courts of New York hold that the title of their beds is in the State and not in the riparian owners. *The People* v. *Canal Appraisers*, 33 N. Y. 461; *Smith* v. *City of Rochester*, 92 N. Y. 463. The latter case related to Hemlock Lake, which is seven miles long and half a mile wide, and navigated by scows, steamboats and other craft. The legislature of the State authorized the city of Rochester to take the water of the lake for the use of the inhabitants of the city, subject to the payment of damages for injury to private property. The plaintiff owning mills which were driven by the waters of the lake applied for an injunction to restrain the city authorities from taking the water; and the defence was that the lake was the property of the State, and that the State had a right to dispose of the water. The opinion of the Court of Appeals by Chief Justice Ruger exhibits a careful and able examination of the law on the subject. After adverting to the constitution of the State, framed in 1777, by which the common law, and the statutes of England and the colony were continued as the law of the State, subject to such alterations as the legislature might make; and also adverting to the peculiar action of the legislature in assuming the ownership of the lands under the waters of the Mohawk and the Hudson above tide water; he takes up the case upon the general principles of the common law, and comes to the conclusion that Hemlock Lake is not such a body of water as under any rule entitles the State to claim the ownership of the bed, and that its only right was that of eminent domain by virtue of its sovereignty.

The case of *Cobb* v. *Davenport*, in New Jersey, was an action of trespass brought to assert the plaintiff's exclusive

right of fishing in Green Pond, a lake three miles in length by one mile in breadth. The plaintiff had a grant, from the board of proprietors of East Jersey, of a tract of land which included the lake. The defendant contended that the lake belonged to the State and was not subject to private ownership. The decision was in favor of the plaintiff. Mr. Justice Depue delivered the opinion of the court, and discussed the case on common law principles. "In this State," said the learned judge, "there is nothing in topography or location that requires a departure from the rules of the common law. Unlike some of our sister States, we have no large inland lakes, which are, in fact, inland seas, upon which an extensive commerce is carried on, or which are the boundaries with a foreign nation. . . . Our system of land titles, and the decisions of our courts, have been in conformity with the common law on this subject, and whatever departure has been therefrom, has not been to enlarge the public domain at the expense of private ownership." The rules of the common law propounded for the decision of the case were thus stated: "By the common law, all waters are divided into public waters and private waters. In the former the proprietorship is in the sovereign; in the latter, in the individual proprietor. The title of the sovereign being in trust for the benefit of the public — the use, which includes the right of fishing and of navigation, is common. The title of the individual being personal in him, is exclusive — subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact. . . . And all the cases in which waters above the ebb and flow of the tide, such as great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation, are confessedly a departure from the common law."

In corroboration of the conclusion arrived at from the general principles of the common law, Justice Depue also referred to a charter granted by the legislature of New Jersey to the Morris Canal Company in 1824, by which the company was authorized to use the waters of Lake Hopatcong and

Green Pond for the purposes of the canal, subject to this provision, namely, "all loss and damages to the owners of said ponds, or the lands flowed or otherwise used in obtaining water for the same, being paid for, agreeably to the previous provisions of this act." This was regarded as a legislative recognition of the private ownership of these bodies of water. That ownership depended, however, not on the statute, but on the principles of the common law.

But we forbear to quote further the reasonings of the cases. There are many more to the same effect, all going to demonstrate what the rule of the common law is with regard to the ownership of the beds of inland lakes, not of such size or importance as to be classed with the great navigable lakes and rivers of the country. We need not depend upon the English case of *Bristow* v. *Cormican* alone, great as its authority necessarily is; but are surrounded by a cloud of witnesses in our own country whose testimony is in harmony with that decision. We will only refer to a single other case, decided in Illinois itself in 1867, *Beckman* v. *Kreamer*, 43 Illinois, 447, which, with the cases as to riparian rights on rivers and streams, ought to be conclusive as to the common law in that State. The case arose with regard to the right of fishing in a small lake in Kankakee County, with an outlet to Kankakee River, seven miles distant. From the state map we infer that the lake was two or three miles in length. It abounded in choice fish and was claimed by the plaintiffs as their private property, they owning the surrounding lands. A party came with teams, boats and a seine, which last they dragged in the lake against the will and protest of the owners of the land. The latter brought an action of trespass and recovered damages. Mr. Justice Breese, in announcing the decision of the court, laid down the following principle of law: "By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water, where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only."

The reason for departing from the common law in cases of this kind is well and clearly stated by Judge Gresham in the case of *State of Indiana* v. *Milk*, 11 Bissell, 197; 11 Fed. Rep. 389. He there says: "Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or confusion, and without serious injustice to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when this rule is attempted to be applied to lakes and ponds practical difficulties are encountered. They have no current, and, being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore owners in the beds. Beaver Lake is seven and a half miles east and west, and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. I do not think the mere proprietorship of the surrounding lands will, in all cases, give ownership to the beds of natural non-navigable lakes and ponds, regardless of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts — the mere rim."

We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: "We think the common law might be improved, and we will, therefore, improve it." As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the sub-

merged bottoms of flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends. But whatever mode of determining the outgoing lines, as between adjoining owners, should be adopted in special cases, (which may be left for determination when they arise,) there can be no difficulty in the present case as between the plaintiff and the defendant. The latter is not an adjoining owner. The controversy here is between a riparian owner and a party claiming the land under water in front of him; and as between them, we think there is no question as to the riparian owner's right.

The Supreme Court of Michigan in a recent case (*Clute* v. *Fisher*, 65 Michigan, 48, since followed by *Stoner* v. *Rice*, 121 Indiana, 51) held that the riparian owner of a fractional lot bounded by a non-navigable lake only takes so much of the lake bottom as is required to fill out the section or quarter section of which he owns the fraction; in other words, that his common law right is limited by the sectional lines of the survey. It was conceded, however, that if the lake were so large that the lines of the granted sections would not embrace the whole lake bottom, then the riparian ownership would be extended to the centre so as to include the whole bottom. In this case the sectional lines included all that was in dispute, the question being raised upon the cutting of the ice on the surface. In the other case (*Stoner* v. *Rice*,) the rule so adopted gave to the riparian owner the whole of the lake bottom as against a subsequent grantee of the government; a result identical with that which would have been produced by the unmodified common law rule. These decisions, however, are interesting because they are founded on the principle that the government surveys form a system or network of lands in block, whose sectional and subsectional lines, whether actually surveyed on the land, or projected by the imagination through

standing bodies of water, constitute lines of limitation which arrest and restrict any extension of a grant by implication beyond them. This is substantially the principle by which the Roman *agri limitati* were governed. These consisted, generally, of districts or territories acquired by conquest, and assigned and set apart for the benefit of veteran soldiers, when retired from active service in the army. The method of surveying such a territory was to draw lines towards the four quarters of the heavens, parallel and crosswise, in order to effect a uniform division of the lots, and to fix immutable boundaries between them. These boundaries, called *limites*, were marked by a slip of land left for the purpose untouched by cultivation, as balks or highways. The squares of land contained either thirty-three or a hundred and thirty-three acres; that is, they were either ten or twenty *actus* square. Lands thus surveyed and appropriated were called limited lands — *agri limitati* — and when they bordered on streams or other waters they were not entitled, as other riparian lands were, to any accretion or alluvion, or to islands in the stream, but were strictly confined to the lines by which they were actually or theoretically limited. See Dig. Lib. 41, tit. 1, frs. 7, 16; Lib. 43, tit. 12, fr. 1 §§ 6, 7; Gronovius, in note to Grotius, De Jure Bel. ac Pac., Lib. 2, cap. 3, sec. 16; Niebuhr's Hist. of Rome, vol. 2, App. I.

This method of disposing of the subject might be convenient and attended with some advantages if it were sanctioned by the law; but we do not see any greater reason for adopting this departure from the common law than that followed in the case of *State of Indiana* v. *Milk*, before referred to.

As to the narrow tongue of land which, according to the finding of facts, projects into the lake from the north side, we do not think that it can have any effect upon the decision of this case. It does not appear to have extended far enough southerly, at least during high water, to be opposed to the property of the plaintiff. Besides, the plat of the lake and the land surrounding it, referred to in the patent granted to Holbrook, exhibits the various fractional sections surrounding the lake as immediately bordering upon it; and this, as shown

by the authorities already cited, constitutes the lake itself the real boundary of the land, without regard to the meander line. There should be some extraordinary proof of mistake on the part of the surveyor in order to interfere with the passing of the land as riparian land. In the case of *Forsyth* v. *Smale*, 7 Bissell, 201, decided in the Circuit Court of the United States for the district of Indiana in 1876, the same circumstance of a gore or tongue of land running into the water beyond the meander line was shown by the proofs to exist. The plaintiffs claimed by patent from the United States certain fractional lots of land binding on Lake George, a small lake in Indiana, about two miles in length and three-fourths of a mile in width, connected with the lake now in question. The government plat referred to in the patents showed no such projection, but showed the fractional lots binding on the lake. The defendant claimed the gore or tongue of land under a subsequent patent, and contended that it was not embraced in the plaintiffs' title. But Judge Drummond held that the case was governed by the principles announced by this court in *Railroad Company* v. *Schurmeir*, and that as the plat referred to in the patent showed that the land conveyed was bounded by the lake, the patent should be so construed, and gave judgment for the plaintiff.

A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and, by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the right of the government to survey and grant the lands under Wolf Lake in 1874. Both Hardin and DeWitt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the government. It is contended that by this decision the question became *res judicata*, and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the land department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of *Davis* v. *Weibbold*, 139 U. S.

507, decided at the present term of this court, "if the lands patented were not at the time public property, *having been previously disposed of*, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void." So that, if the lands had been "previously disposed of," the department has no jurisdiction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the executive department, except for the purpose of governing its own conduct in the administration of its functions. The same principle is involved in *Moore* v. *Robbins*, 96 U. S. 530, 533, 534, where it is said by Mr. Justice Miller, speaking for the court: "With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course." Again, referring to the power of the Secretary of the Interior after patent, it is said: "He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title."

On the whole, our conclusion is, that the court below ought to have given judgment for the plaintiff, as against the defendant, to the centre of Wolf Lake, instead of to low-water mark, in front of the southeast fractional quarter of section 19, and

in front of the northeast fractional quarter of section 30; and to the middle of the bay or projection of said lake in front of the east part of the southeast fractional quarter of said section 30. If there should arise any question between the plaintiff and other riparian owners of lands situated on the margin of the lake, as to the convergence of the side lines of the plaintiff's land in the lake, it can be disposed of by the parties themselves by a resort to equity or to such other form of procedure as may be proper.

The judgment must be

Reversed, and the cause remanded with instructions to enter judgment for the plaintiff in conformity with this opinion.

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

Mr. Justice Gray, Mr. Justice Brown and myself are unable to concur in the foregoing conclusions. Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnished the best and the final authority. In the case of *St. Louis* v. *Rutz*, decided at the present term, 138 U. S. 226, 242, it was said by Mr. Justice Blatchford, speaking for the court: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois. *Barney* v. *Keokuk*, 94 U. S. 324, 338; *St. Louis* v. *Myers*, 113 U. S. 566; *Packer* v. *Bird*, 137 U. S. 661. In *Barney* v. *Keokuk*, it is said that if the States 'choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.'" The cases referred to in this quotation affirm the same doctrine.

If we turn to the decisions of the Supreme Court of Illinois, we find one rule laid down for running water and another for

lakes and ponds. In the former case the riparian owner owns to the thread of the current; in the latter to the water line. No distinction is made on account of the size of either stream or pond. Without noticing the authorities in reference to rivers or other running water, it is enough to refer to the decisions in reference to lakes and ponds. In the case of *Seaman* v. *Smith*, decided in 1860, 24 Illinois, 521, 525, it was held that a riparian owner on a large lake, Lake Michigan, took title only to the water line. The reason of that decision was thus expressed in the opinion of the court: "These great bodies of water, having no currents, like rivers and other running streams, cannot present the same reasons why the boundary should be extended beyond the water's edge, where it is ordinarily found, that apply to running bodies of water. Where such streams are called for as a boundary, the thread of the current is held to be the line from each side. Such a rule could not, for the want of a current, be adopted in this case. It would not be sanctioned either by analogy to the rule or by reason. And if the outer edge of the water be passed, owing to the approximation of these bodies to a circular shape, it would be found exceedingly difficult, if not impossible, to ascertain where the boundary should be fixed, or the shape it should assume." It will be perceived that the same reasoning applies whether the lake be a large or a small one. There is no decision or intimation by the Supreme Court of that State questioning the rule thus laid down.

Again, in 1886, in a later case, *Trustees of Schools* v. *Schroll*, 120 Illinois, 509, the question arose as to a small lake, no larger than the one in controversy, and the same rule was applied there as in the case of Lake Michigan; and it was held that the title of the riparian owner stopped at the water line, and the case of *Seaman* v. *Smith*, *supra*, was cited as furnishing the authority and reasoning for the rule. Nor was this a mere casual or incidental remark in the course of an opinion. The opinion is some seven pages in length, and over four pages are devoted to a discussion and decision of this question. It was the principal and paramount question, fully reasoned out and obviously carefully considered. We quote as follows: "It is

equally well settled that grants of land bounded on streams or rivers above tide water carry the exclusive right and title of the grantee to the centre of the stream, *usque ad filum aquæ*, subject to the easement of navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. 3 Kent's Com. 427; 2 Hilliard on Real Prop. 92; Angell on Water-courses, sec. 5; *Jones* v. *Soulard*, 24 How. 41; *State of Indiana* v. *Milk*, 11 Fed. Rep. 389; *Canal Appraisers* v. *The People*, 17 Wend. 571, 596; *Child* v. *Starr*, 4 Hill, 369; *Seaman* v. *Smith*, 24 Ill. 521; *Rockwell* v. *Baldwin*, 53 Ill. 19; *Braxon* v. *Bressler*, 64 Ill. 488; *Washington Ice Co.* v. *Shortall*, 101 Ill. 46. But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge. Angell on Water-courses, secs. 41, 42; 3 Kent's Com. 439, note a, citing *Bradley* v. *Rice*, 13 Maine, 198, 201, and *Waterman* v. *Johnson*, 13 Pick. 261. See also *Warren* v. *Chambers*, 25 Arkansas, 120; *State of Indiana* v. *Milk*, U. S. Cir. Ct. Dist. Ind., Gresham, J., 11 Fed. Rep. 389, citing *Wheeler* v. *Spinola*, 54 N. Y. 377; *Mansur* v. *Blake*, 62 Maine, 38; *State* v. *Gilmanton*, 9 N. H. 461; *Paine* v. *Woods*, 108 Mass. 160; *Fletcher* v. *Phelps*, 28 Vermont, 257; *Austin* v. *Rutland Railroad Co.*, 45 Vermont, 215; *Boorman* v. *Sunnuchs*, 42 Wisconsin, 233; *Delaplaine* v. *Chicago & Northwestern Ry. Co.*, 42 Wisconsin, 214, and *Seaman* v. *Smith*, 24 Illinois, 521. See also *Nelson* v. *Butterfield*, 21 Maine, 229; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Canal Co.* v. *The People*, 5 Wend. 423; *Jakeway* v. *Barrett*, 38 Vermont, 316; *Primm* v. *Walker*, 38 Missouri, 94, 99; *Wood* v. *Kelley*, 30 Maine, 47." And again: "Indeed, the controlling distinction between a stream and a pond or lake is, that in the one case the water has a natural motion — a current — while in the other the water is, in its natural state, substantially at rest. And this is so, independent of the size of the one or the other. The flowing rivulet of but a few inches in width is a stream as certainly as the Mississippi. And when lands are granted by the proprietor of both land and stream, bounding such grant upon the stream, the grantee

acquires right and title to the thread or middle of the stream. This right is grounded upon the presumption that the grantor, by making the stream the boundary, intended his grantee to take to the middle of the stream; and this presumption will prevail until a contrary intent is made to appear. *Rockwell* v. *Baldwin*, 53 Illinois, 19. The right spoken of does not rest upon the principle that when a grant is bounded on a stream the bed of the stream to the thread or middle passes as incident or appurtenant to the bordering land, for the bed of the stream is land, though covered with water, and land cannot pass as appurtenant to land. As is said in *Child* v. *Starr*, 4 Hill, 369: 'A conveyance of one acre of land can never be made, by any legal construction, to carry another acre by way of incident or appurtenance to the first.' The riparian proprietor claiming to the thread or middle of the stream must show the bordering water to be a stream, and that his grant, in terms or legal effect, is bounded upon or along such stream — that the stream is made the boundary."

These quotations show that there was no mere inadvertent or casual remark, but that it was the distinct and well considered as it was also the unanimous decision of the highest court of the State. We do not think it sufficient to overthrow the force of this decision to say that the common law of England was different, a proposition which, in passing, we may say we doubt; nor that there was another question in the case also referred to in the opinion, which fully justified the decision; and that therefore the discussion and decision of this question were unnecessary, for that other question was put after this in the opinion, and was evidently intentionally made subordinate to this.

Believing that the law of Illinois has been determined by its Supreme Court, we think that determination is conclusive on this court. As strengthening the views we have expressed, may also be noticed the opinions of the Circuit and District Judges, in this very case, on separate trials, (see 16 Fed. Rep. 823,) both announced before the decision in 120 Illinois, and agreeing that under the laws of Illinois the title of the riparian owner stopped with the water. The long judicial experience

of those judges and their familiarity with the laws of Illinois give to these opinions great weight. We, therefore, dissent from the conclusions of the court.

MITCHELL *v.* SMALE.

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

No. 167. Argued January 23, 26, 27, 1891. — Decided May 11, 1891.

Plaintiff, a citizen of Illinois, sued in ejectment to recover possession of lands in that State claimed to have been granted to plaintiff's ancestor by a patent of the United States, making the tenant a citizen of that State, defendant. The owner, under whom the tenant claimed, a citizen of New York, appeared and, on his motion, was made party defendant. He then set up title under another patent from the United States, and moved for a removal of the cause, *first*, upon the ground of diverse citizenship, which was abandoned, and then, *secondly*, that there was a controversy involving the authority of the land department to grant a patent. *Held*, that the case was removable for the second cause.

Hardin v. *Jordan*, *ante*, 371, affirmed to the point that in Illinois, under a grant of lands bounded on a lake or pond which is not tide water and is not navigable, the grantee takes to the centre of the lake or pond ratably with other riparian proprietors, if there be such; and that the projection of a strip or tongue of land beyond the meandering line of the survey is entirely consistent with the water of the pond or lake being the natural boundary of the granted land, which would include the projection, if necessary to reach that boundary.

EJECTMENT. Judgment for the defendant. Plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. William Prescott and *Mr. S. S. Gregory* for plaintiff in error. *Mr. William M. Booth* and *Mr. James S. Harlan* were with them on the brief.

Mr. W. C. Goudy for defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The decision of this case depends upon the same general principles which have just been discussed in the case of *Hardin* v. *Jordan*, the two cases being in all essential respects much alike, both of them relating to land on the margin and under the waters of Wolf Lake. But before adverting to the supposed distinction between them, it is necessary to examine a question of jurisdiction.

The action was ejectment, and was commenced in the Circuit Court of Cook County, by Mitchell, the plaintiff in error, against three defendants, Jabez G. Smale and John I. and Frank I. Bennett, and summons was duly served on them. The Bennetts, being attorneys, appeared specially for Conrad N. Jordan, and moved that he be substituted as sole defendant. The motion was made upon an affidavit of Jordan that the Bennetts had no interest, having conveyed the property to him before the suit was commenced, and that Smale was a mere tenant under him, Jordan, and had no other interest. The court denied the motion, and thereupon Jordan, on his own motion, was admitted to defend the cause as landlord and as codefendant. Afterwards, and in due time, Jordan filed a petition under the act of 1875 for the removal of the cause into the Circuit Court of the United States, alleging as a ground of removal that the plaintiff was a citizen of Illinois, and that he, Jordan, was a citizen of New York, and sole owner of the property, and that the sole controversy in the cause was between him, Jordan, and the plaintiff, stating the facts previously affirmed in his affidavit as to the want of interest in the Bennetts, and the tenancy of Smale. Objections to the removal being made by the plaintiff, Jordan asked and obtained leave to amend his petition, and filed an amended petition setting out, in addition to the facts stated in his original petition, the following matter, to wit:

"Your petitioner states that said suit is one arising under the laws of the United States in this, to wit, that plaintiff seeks in and by said suit to recover lands embraced in a survey of public lands made by the government of the United States in 1874, embracing a part of said section twenty (20), t'p 37 N., R. 15 E., 3d P. M., in Illinois, and patents issued under

said survey under which your petitioner deraigned title in fee simple before the commencement of said suit and in him then vested by conveyance from the patentee.

"That the plaintiff claims that he is seized of the fractional tract described in the declaration as the grantee of one Horatio D. DeWitt; that the said survey, patents and deeds of petitioner are not made in pursuance of the acts of Congress and laws of the United States relating to the surveying and disposition of the public lands of the United States, and that said act of Congress and laws have been misconstrued by the said land department and disregarded, and that said survey, patents, deeds and the proceedings of the land department are illegal and void and in violation of the contract rights of said Mitchell under the laws of the United States; that by virtue of the alleged ownership of said fractional tract described in the declaration he, the plaintiff, under and in pursuance of said act of Congress and laws of the United States, is also the owner of said lands so owned by your petitioner by virtue of said survey of 1874 and patents and deeds thereunder. This petitioner claims title in fee to said lands other than said fractional tract by virtue of said survey of 1874, said patents and deeds issued thereunder in pursuance of the act of Congress aforesaid and laws of the United States, and therefore states that said suit is one arising under the laws of the United States entitling this petitioner to a removal of the suit under the act of Congress entitled 'An act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes,' in force March 3, 1875, for that cause alone."

Whether the facts stated in the original petition for removal were sufficient for that purpose, may perhaps admit of some question. The plaintiff was alleged to be a citizen of Illinois, and the defendant, Jordan, a citizen of New York. The citizenship of the other defendants was not mentioned, though it is understood they were residents of Illinois. It is clear, therefore, that the case was not removable unless the interest of Jordan was so separate and distinct from that of the other defendants that it could be fully determined, as between him

and the plaintiff, without the presence of the others as parties in the cause. As he alone, according to his statement, had the title, and as Smale was merely his tenant, if this relation was admitted by Smale, (as it was,) there would seem to be no good reason why the contest respecting the title might not have been carried on between him and the plaintiff alone, so far as Smale was concerned. This was done in the case of *Ayers* v. *Watson*, 113 U. S. 594; but no objection to the removal on that ground was made, though objections were made on other grounds, which were not sustained by the court. Still, as the fact appeared on the record, if it had been sufficient to divest the Circuit Court of jurisdiction altogether, this court could hardly have omitted to pass upon it. We do not see that the statute of Illinois would make any difference in the result. It merely declares that in ejectment the occupant of the land shall be named as defendant, and that all other persons claiming title or interest to or in the same may be joined as defendants. Starr & Curtiss' Stat. 981, § 6. This is merely declarative of the common law rule, and makes no change in the character of the action or the principles of procedure therein. True, it was decided in the case of *Phelps* v. *Oaks*, 117 U. S. 236, that the tenant is a proper party, and that if the cause is removed by reason of his citizenship, the Circuit Court will not be deprived of jurisdiction by the subsequent admission of the landlord as a defendant, though a citizen of the same state with the plaintiff. But this does not prove that a landlord may not become the primary and only contestant, where the tenant's interests are subordinated to and made dependent on his.

As to the other defendants, the Bennetts, there may have been greater difficulty in sustaining a removal. They were made defendants, apparently in good faith, and were not acknowledged to be tenants of Jordan; and the plaintiff might well insist on prosecuting his action against them, as well as against Jordan, in order that, if he should be successful, there might be no failure of a complete recovery of the land claimed by him. We have held that a defendant cannot make an action several which the plaintiff elects to make joint. *Little* v. *Giles*, 118 U. S. 596.

But be this as it may, we think that the additional ground of removal, stated in the amended petition, was sufficient to authorize the removal to be made. It states very clearly that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party under the authority of the government of the United States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy, it is true, the laws of the State of Illinois might be invoked by one party or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are, therefore, of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and so within the purview of the act of 1875. The amendment was properly allowed, and no valid objection exists in regard to the time of the application.

The plaintiff's declaration as finally amended contained two counts on which he relied, to wit:

1. A count claiming the fractional S.W. quarter of fractional section 20, in township 37 north, range 15 east, according to the official plat of the survey thereof filed in the land office at Chicago, Illinois, prior to the year 1848.

2. A count claiming so much of the S.W. quarter of said section 20 as lies between Wolf Lake and Hyde Lake. (This is the land immediately in front of that described in the first count, and, in the original plat, shown to be covered by water.)

The defendants pleaded not guilty, and a jury being waived, the cause was tried by the court before Judge Gresham, in July, 1885, at the same time with the case of *Hardin* v. *Jordan*. The judge made a special finding of facts, and gave judgment for the plaintiff for the S.W. fractional quarter of fractional section 20, in township 37 north, range 16 east, as patented by the United States to Horace B. DeWitt under patent dated

March 1, 1850, and described in the first count, but limited by the meander line of the original survey on the side next to the lake; and as to all the rest of the land in dispute, found the defendants not guilty. The fractional quarter section thus found to belong to the plaintiff was one of the fractional lots on Wolf Lake surveyed in 1834–5, as mentioned in the case of *Hardin* v. *Jordan*, lying on the north side of the lake, and on the plat of the survey it was shown as bordering on and bounded by the lake.

The difference between this case and that of *Hardin* v. *Jordan* is supposed to arise from the fact that the strip or tongue of land running into the lake from the north side beyond the meander line (as mentioned in *Hardin* v. *Jordan*) was immediately in front of the fractional quarter section belonging to the plaintiff. In the special finding of facts the court sets out so much of the original survey as describes the meander line running around the north end of the lake and eastwardly as far as the Indiana line, and also a copy of the plat of the survey, an outline of which is shown in the report of *Hardin* v. *Jordan*. As stated in that case, the meander line is described in the survey as running along the margin of the lake, and the plat shows all the fractional lots to be adjoining the lake. The finding then states that in March, 1850, Horatio B. DeWitt purchased from the United States and received a patent for the lot described as "the S.W. fractional quarter of fractional section 20, in township 37, range 15, in the district of lands subject to sale at Chicago, Illinois, containing $4\frac{53}{100}$ acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general;" and that the plaintiff by mesne conveyances had acquired and held the title in fee simple conveyed to DeWitt by said patent. The finding then describes the lake and the tongue of land projecting into it from the north side substantially as shown in the report of *Hardin* v. *Jordan*, to which reference may be made. The finding then proceeds as follows:

"Eighth. That the lakes and lands not embraced in the original survey — that is to say, all the lands, swamp as well as those covered by water, including the ridge, which are out-

side the meandered line run around said lake or lakes — the Commissioner of the General Land Office caused to be surveyed in 1874; that after such survey was made the United States, by its proper officers, sold to Alice A. Condit the west half of the southwest quarter, the south half of the east half of the southwest quarter, and lot 2 of the southwest quarter, of fractional section 20, T. 37 N., R. 15 E., of this P. M., and issued to said Alice A. Condit patents in the usual form for said lands, and that the defendant, Conrad N. Jordan, is the owner, by mesne conveyances, of the lands so patented to said Condit; that Horatio B. DeWitt, owner of the fractional S.W. ¼ of fractional section 20 in the original survey, contested before the proper officers of the land department the right of the United States to sell and convey title to said lands under said second survey, which contest was decided against the said DeWitt by the Secretary of the Interior on appeal, and in favor of the right of the United States to sell said lands under said survey.

"Ninth. That said meandered line as it was originally run across said ridge from a point one chain east of the meander corner on the west and as is now adopted by the court as a line of boundary is entirely above the water, except where said line intersects the east line of the fractional quarter section, to which point the water of Wolf Lake may possibly reach at high stages, and that in ordinary stages the waters approach to within four or five chains of said point."

Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin* v. *Jordan*, and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of

its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretence for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. Nor do we mean to say that, in granting lands bordering on a non-navigable

lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this cannot be done.

In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed, by the surveyor who made the survey in 1834–5. It is apparent from the finding of facts that the lake in question is subject to considerable changes in the height and depth of the water therein. A *datum*, or bench mark, is used in Cook County, Illinois, (where the premises in question are situated,) as a standard of comparison for the height of water in Lake Michigan. Of course the height of water in Wolf Lake is affected by that of Lake Michigan, since they are connected by two different outlets. The finding of facts states that the level of water in the lake in question, when the government survey was made in 1834–5, was 2.2 feet above the *datum*, and four-tenths of a foot above the average level of Lake Michigan, which is 1.8 feet above *datum*. But it also states that Lake Michigan, at times, rises to five feet above *datum*, which would cause the lake in question to rise to a level of 2.8 feet (or nearly 3 feet) higher than it was when the government survey was made. At such times, of course, very little of the said projecting tongue of land would be visible. But whether so or not, it would not alter the case. The existence of such projecting tongue is entirely consistent with the water or lake being the natural boundary of the plaintiff's land, which would include the said projection, if necessary, in order to reach the said boundary. It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; *Middleton* v. *Pritchard*, 3 Scam. 510; *Canal Trustees* v. *Haven*, 5 Gilm. 548, 558; *Houck* v. *Yates*, 82 Illinois, 179; *Fuller* v. *Dauphin*, 124 Illinois, 542; *Boorman* v. *Sunnuchs*, 42 Wisconsin, 235; *Père*

Dissenting Opinion: Brewer, Gray, Brown, JJ.

Marquette Boom Co. v. *Adams*, 44 Michigan, 403; *Clute* v. *Fisher*, 65 Michigan, 48; *Ridgeway* v. *Ludlow*, 58 Indiana, 249; *Kraut* v. *Crawford*, 18 Iowa, 549; *Forsyth* v. *Smale*, 7 Bissell, 201. The case last cited, *Forsyth* v. *Smale*, presented the very case of a tongue of land projecting beyond the meander line into Lake George, a small lake in Indiana, situated to the east of Wolf Lake and connected therewith. It is cited and commented on in the opinion in *Hardin* v. *Jordan*. In conclusion, our view on this part of the case is that the patent to DeWitt conveyed, and the plaintiff is entitled to, all of the fractional S.W. quarter of section 20 from its northern boundary line extending southwardly to the actual water line of the lake, wherever that may be, with the riparian rights incident to such position.

The other points raised in the case have been discussed in the opinion in *Hardin* v. *Jordan*, and do not require further notice. In conclusion, our opinion is that the judgment of the Circuit Court should be reversed, and that a general judgment should be rendered for the plaintiff for the property described in both additional counts of his declaration.

The judgment is reversed accordingly, and the cause is remanded with instructions to enter judgment in conformity with this opinion.

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

Mr. Justice Gray, Mr. Justice Brown and myself dissent in this case also, as in the preceding, on the merits: for the reason stated therein. This further fact is worthy of notice. The tract originally patented consisted of a fractional quarter section, containing only four and $\frac{53}{100}$ acres. It appears that at the time of the survey and patent, and now, there was and is a tongue of land extending out beyond the surveyed land into the lake, containing about twenty-five acres; so that by purchasing this little piece of four acres and a fraction, at the government price, the purchaser, as it is held, took title not merely to the land surveyed, but to the twenty-five acres of

dry land outside of the survey, as well as the large area of land under the lake and in front of the bank. This result is certainly suggestive.

On the question of removal it appears that in this action, one of ejectment, there were present as defendants a tenant and his landlord, the latter coming in on his own motion, after suit was commenced. The tenant and the plaintiff were citizens of the same State. The Illinois statute of ejectment bearing upon the question of parties defendant is as follows: "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the suit, and all other persons claiming title or interest to or in the same may also be joined as defendants." Starr & Curtiss' Stat. 981, sec. 6. The defendant was therefore a necessary party. In *Phelps* v. *Oaks*, 117 U. S. 236, which was also an action of ejectment, tenant and landlord being parties defendant, the latter coming in as here after the commencement of the suit, this court held that "the plaintiff has a real and substantial 'controversy' with the defendant (the tenant) within the meaning of the act for removal of causes from state courts, which continues after his landlord is summoned in and becomes a party for the purpose of protecting his own interests." This decision seems to us to forbid a removal on the ground of citizenship.

So far as a Federal question is concerned, it is familiar law that ejectment turns on the plaintiff's title. If that be good, he is entitled to recover; if it fails, then it is immaterial what claim or title defendant may have, the verdict must be in his favor. "If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title and that the defendant in possession can lawfully say, until you show *some* title, you have no right to disturb me, it has not been pointed out to us." *Reynolds* v. *Mining Company*, 116 U. S. 687, 692.

If plaintiff's first grantor, by his patent from the government for the land on the bank, took title to the centre of the lake, he was entitled to judgment for possession; and no act of the officers of the land department, subsequently thereto,

could divest or limit his right or prevent his recovering judgment. On the other hand, if the patent only carried title to the water line, then it is entirely immaterial to the plaintiff what action the officers of the land department may have taken in reference to the premises beyond; the defendant would be entitled to judgment; and that irrespectively of the question whether he had any title, or though it was vested in the State.

It is a novel proposition, that in an action of ejectment, a party defendant can, by setting up some claim under the laws of the United States, a claim which cannot be inquired into on the trial, because it in no manner affects the plaintiff's title, which is the subject of dispute, make such unnecessary and irrelevant claim a ground of removal from the State to the Federal court.

We think the case should have been reversed and remanded to the state court; and in that way an early reëxamination might have been had in the Supreme Court of the State on the merits of the principal question.

QUOCK TING v. UNITED STATES.

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

No. 638. Submitted April 10, 1891. — Decided May 11, 1891.

Uncontradicted evidence of interested witnesses to an improbable fact does not require judgment to be rendered accordingly.

The petitioner, who is also the appellant, is a member of the Chinese race, but claims to have been born within the United States, and consequently to be a citizen thereof. He is sixteen years of age, and arrived at the port of San Francisco in the steamship City of New York, in February, 1888. The officers of customs refused to allow him to land, holding that he was a subject of the emperor of China, and within the restrictions of the act of May 6, 1882, and the supplemen-

tary act of 1884. He was accordingly detained by the captain of the steamship on board; and he applied, through a friend, to the Circuit Court of the United States for the Northern District of California for a writ of *habeas corpus* to obtain his discharge from such detention, alleging that he was not within the restrictions of the acts of Congress, but was a citizen of the United States, having been born therein. The writ was issued and the petitioner brought before the court, when his testimony and that of his father was taken in support of his pretension. He testified as to his birth, as counsel observe, with surprising particularity. His story was that he was sixteen years old; that he was born in San Francisco, "on Dupont Street, upstairs," and remained in that city until he was ten years of age, when he went to China with his mother. He also mentioned the names of three persons on the ship whom he knew. When asked how he remembered their names, he answered, "When I got to China, my mother told me very often of those people and their names; she repeated them to me, and I remember them." When reminded that that was six years before, he responded: "My mother sometimes speaks those names to me very frequently." His mother was in China, and he knew nothing of the three men named. Although in the city, according to his statement, for ten years, he did not, upon his examination, show any knowledge of any places or streets therein, or of the English language. The following is a specimen of his testimony:

"Q. Can you count in English? A. I do not understand English.

"Q. Can you count in English? A. I can count in Chinese, but not in English.

"Q. Do you know the names of the days of the week in English? A. I am too small; I did not learn it.

"Q. You do not know anything at all in English? A. No, sir; not a word."

Nor did he mention any circumstance, incident or occurrence, except being born in Dupont Street, upstairs, which would lead one to suppose that he had ever been in the city. His only memory seemed to be of the names of the three men

who accompanied him back to China, whom he had not seen since, and whose names he only knew from having heard his mother repeat them. The father, who was examined, stated that he worked on a sewing machine; that the petitioner was his boy, and that he was born "at 1030 Dupont Street, upstairs," and went to China with his mother, and one of the witness's friends; and that he wanted his boy to come back to learn English. He also produced what he called his "store-book," in which he had entered the purchase of a ticket for the boy and his mother. He gave no particulars of his residence in San Francisco, of his having a family there, or of his being known among his neighbors or others as having any children.

The court, after hearing these witnesses, held that the petitioner was not illegally restrained of his liberty, but was a Chinese person forbidden by law to land within the United States, and had no right to be or remain therein. It accordingly discharged the writ, and ordered that the petitioner be remanded to the marshal to be returned to the captain of the steamship. From this judgment an appeal is taken to this court.

Mr. J. J. Scrivener for appellant.

Mr. Assistant Attorney General Parker for appellee.

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

The question presented is whether the evidence before the court below was sufficient to show that the petitioner was a citizen of the United States.

The testimony given by himself amounted to very little; indeed, it was of no force or weight whatever. The particularity and positiveness with which he stated the place of his birth in San Francisco was evidently the result of instruction for his examination on this proceeding, and not a statement of what he had learned from his parents in years past. And his failure to mention any particulars as to the city of San

Francisco, which he certainly ought to have been able to do if he resided there during the first ten years of his life, was surprising. A boy of any intelligence, arriving at that age, would remember, even after the lapse of six years, some words of the language of the country, some names of streets or places or some circumstances that would satisfy one that he had been in the city before. But there was nothing whatever of this kind shown. He gave the name of no person he had seen; he described no locality or incident relating to his life in the city, nor did he repeat a single word of the language, which he must have heard during the greater part of several years, if he was there.

The testimony of the father was also devoid of any incident or circumstance corroborative of his statement. The production of the so-called store-book, in which there was an entry of passage-money paid for the boy and his mother, does not strike us as at all conclusive. The accounts of a mere worker on a sewing machine would not be likely to occupy much space; and the alleged entry could as easily have been made as the manufacture of the story repeated. If we could not believe the story in the absence of the book we should hesitate to yield credence to it upon the exhibition of the entry. If the petitioner was really born in the United States, and had lived there during the first ten years of his life, the fact must have been known to some of the father's neighbors, and incidents could readily have been given which would have placed the statement of it beyond all question. It is incredible that a father would allow the exclusion of his son from the country where he lived, when proof of his son's birth and residence there for years could have been easily shown, if such in truth had been the fact.

Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as com-

pletely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.

In *Kavanagh* v. *Wilson*, 70 N. Y. 177, 179, where the action was by a real estate broker against the personal representatives of a deceased customer to recover an alleged agreed compensation for effecting a sale, and the only witness as to the contract was the son of the plaintiff, whose own compensation depended upon the plaintiff's success, and the compensation alleged to have been agreed upon was more than double the usual compensation, it was held that the statement of the witness, under those circumstances, was not so entirely free from improbability as to justify a direction of the court to the jury to find a verdict for the plaintiff, although there was no direct contradictory testimony presented. The court said: "It is undoubtedly a general rule that when a disinterested witness, who is in no way discredited, testifies to a fact within his own knowledge, which is not of itself improbable, or in conflict with other evidence, the witness is to be believed, and the fact is to be taken as legally established, so that it cannot be disregarded by court or jury. . . . But this case is not fairly brought within this rule. Here the witness was not wholly disinterested. He was a son of the plaintiff, engaged in his business, and thus biassed and interested in feeling. His compensation for drawing the contracts (and how large that was to be does not appear) depended, I infer from the evidence, upon his father's success in getting his compensation as the broker." The court then went on to observe that the story told by the witness was not entirely free from some improbability, and that it did not appear why the broker was promised more than double the usual price for the sale of country property, nor why the compensation was never spoken of before or after, in the numerous conversations heard by witness,

nor what could have induced the promise of the large sum, when the usual commission would seem to have been ample compensation for any service to be rendered, nor why the party made the unusual promise to pay the absolute sum in no way dependent upon the amount for which the property might be negotiated. These circumstances, the court thought, presented a sufficient case for the consideration of the jury, and it held that the court below erred in refusing to submit it to them.

In *Koehler* v. *Adler*, 78 N. Y. 287, it was held that a court or jury was not bound to adopt the statements of a witness simply for the reason that no other witness had denied them, and that the character of the witness was not impeached; and that the witness might be contradicted by circumstances as well as by statements of others contrary to his own, or there might be such a degree of improbability in his statements as to deprive them of credit, however positively made. The case of *Elwood* v. *Western Union Telegraph Co.*, 45 N. Y. 549, was cited in support of this position, where, in delivering the opinion of the court, the rule and its exceptions are stated by Judge Rapallo with great clearness and precision; so also was the case of *Kavanagh* v. *Wilson*, above referred to.

In *Wait* v. *McNeil*, 7 Mass. 261, the Supreme Court of Massachusetts held that a verdict was not to be set aside, although it was given against the positive testimony of a witness, not impeached, where there were circumstances in evidence tending to lessen the probability that such testimony was true. Numerous other cases might be cited in support of the same general doctrine.

For the considerations mentioned, and the fact that the court below had the witnesses before it, and could thus better judge of the credibility to which they were entitled, we are not prepared to hold that its finding was not justified.

Its judgment is, therefore, *Affirmed.*

Mr. Justice Brewer dissenting.

I am unable to agree with the conclusions reached by the court. They seem to me to be in the face of positive, unim-

peached and uncontradicted testimony. The single question is one of fact, whether the petitioner was born in this country or not? On the hearing he was represented by counsel; so was the government. He testified that he was sixteen years old, was born on Dupont Street in San Francisco, and named the place on that street; that he lived there until he was ten years of age; and that he then went with his mother, on the steamer Rio de Janeiro, to China. With them on the steamer were three friends of the family, whose names he gave. His father, who was also a witness, testified that the boy was born in San Francisco, at the place named, No. 1030 Dupont Street; that he remained there until he was ten years of age; and that at that time he sent the petitioner, with his mother, back to China. He gave the day and the year on which the boy sailed. He gave as a reason for sending his wife and son back to China, that his parents were old, and as he could not go himself, sent her to attend on them. He produced his store-book on which appeared an entry of the purchase of the tickets for the boy and his mother, an entry of date the day before that on which the steamer named sailed. No witness was called to contradict this testimony. They were the only witnesses. The only thing which makes against the boy's testimony, is the fact that he did not know a word of English. But is it strange that a boy born and brought up in a Chinese family, and living until he was ten years old in that part of San Francisco which is practically a Chinese town, and then taken back to China, should know only the Chinese language? It is true he did not give the details of his boyhood in San Francisco; but no question was asked of him in respect to them. If the government, through its counsel, wished to discredit his positive testimony it was its province, on cross-examination, to question him as to his knowledge of various localities in San Francisco, and of events which happened during the time he claimed to have resided there. The books of the steamer, if accessible, were not produced to show that no such passengers sailed on the trip named. No attempt was made to contradict either father or son, or impeach either, unless the ignorance of the English language is to be con-

sidered as impeachment. The government evidently rested on the assumption that, because the witnesses were Chinese persons, they were not to be believed. I do not agree with this.

WAN SHING *v.* UNITED STATES.

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

No. 1414. Submitted April 10, 1891. — Decided May 11, 1891.

The result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be viséd by a representative of the government of the United States.

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

The petitioner, who is also appellant here, is a subject of the Emperor of China, and came from that country to the port of San Francisco, California, in the steamship Arabic, arriving there August 7, 1889. The officers of the customs refused to allow him to land in the United States, holding that he was a Chinese laborer and as such within the provisions of the exclusion act. The captain of the steamship therefore detained him on board, and he applied through a friend to the Circuit Court of the United States for the Northern District of California for a writ of *habeas corpus* to obtain his discharge from such detention; alleging that it was claimed by the master that he could not land under the provisions of the act of Congress of May 6, 1882, and the act amendatory thereof, whereas he was a resident of the United States on

the 17th of November, 1880, and departed therefrom prior to the 6th day of June, 1882, and that at all the times mentioned he was a merchant, doing business on Dupont Street, San Francisco, having only temporarily left the United States on April 19, 1882.

Upon the petition the writ was issued, the petitioner brought before the court and the matter referred to a commissioner to take testimony in the case and find the facts and his conclusions of law and report a judgment therein. Thereupon the petitioner was sworn before the commissioner; so also was the partner in business of his father. The commissioner made a report, transmitting to the court the testimony taken, finding that the petitioner had not established by sufficient evidence his right to reënter and remain in the United States, and recommending a judgment that he was not illegally restrained of his liberty and should be returned by the marshal to the custody of the master of the steamship. Subsequently the case was brought to a hearing before the Circuit Court upon this report and it held that the petitioner was not at the date of his petition illegally restrained of his liberty, but was a Chinese person forbidden by law to land within the United States or to remain therein. It was accordingly ordered that he be remanded by the marshal to the custody of the master of the steamship. From this judgment an appeal was taken to this court.

Mr. J. J. Scrivener for appellant.

Mr. Assistant Attorney General Parker for appellee.

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

The refusal of the officers of the customs at the port of San Francisco to allow the petitioner to land, and his consequent detention by the master of the steamship in which he was brought to this country, were not founded upon the act of May 6, 1882, and the act amendatory thereof, as erroneously

alleged in his petition. They were based upon the provisions of the act of October 1, 1888, which declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then, or might thereafter be, a resident within the United States and who had departed or might depart therefrom, and should not have returned before its passage, to return to or remain in the United States. And it further declared that no certificates of identity, under which by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued, and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue thereof.

The petitioner, if a laborer, could not therefore have been permitted to land except in violation of this statute, without reference to the question whether or not he was in the country on November 17, 1880, and had departed therefrom before the passage of the act of June 6, 1882.

His right to land, therefore, rested upon his establishing the fact that he was not a laborer, within the provisions of the act of October 1, 1888, and that could only have been shown by a certificate of identity issued under the authority of the Chinese government. The sixth section of the act of May 6, 1882, 22 Stat. 58, 60, c. 126, § 6, provides that, for the faithful execution of the treaty of November 17, 1880, every Chinese person, other than a laborer, who may be entitled by it and by that act to come within the United States, and who is about to come, "shall be identified as so entitled by the Chinese government in each case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language, or, (if not in the English language,) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title or official rank, if any, the age, height and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued, and that such person is entitled

conformably to the treaty in this act mentioned to come within the United States. Such certificate shall be *prima facie* evidence of the fact set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district in the United States at which the person named therein shall arrive." From this provision diplomatic and other officers of the Chinese government travelling upon the business of that government are exempted, their credentials being taken as equivalent to the certificate.

By the act of July 5, 1884, 23 Stat. 115, c. 220, this section six of the act of 1882 was amended and enlarged, so as to provide for the permission to be obtained from the Chinese government, or such other foreign government of which at the time the Chinese person shall be a subject; and declaring that the certificate provided for shall, before he goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic or consular representative of the United States in the foreign country from which such certificate issues, whose duty it is made to examine into the truth of the statements therein before indorsing it, and if they are found to be untrue to refuse such indorsement. The section then declares that "such certificate, viséd as aforesaid, shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States, at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, *and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States;* but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

This clause disposes of the case before us. No certificate was presented by the petitioner under the statute, showing that he was entitled to enter the United States, nor was any attempt made to account for its absence. The evidence offered to show that the petitioner was a merchant was weak and unsatisfactory, but the statute itself does away with the

necessity for any investigation by the court as to its sufficiency, for it declares that, while the certificate may be controverted by the authorities of the United States, and is to be taken by them only as *prima facie* evidence, it shall constitute the only evidence permissible on the part of the person producing the same to establish his right to enter the United States.

The result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be visèd by a representative of the government of the United States.

Judgment affirmed.

HIGGINS *v.* KEUFFEL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 290. Argued April 7, 8, 1891. — Decided May 11, 1891.

A label placed upon a bottle to designate its contents is not a subject for copyright.

In order to maintain an action for an infringement of the ownership of a label, registered under the provisions of the act of June 18, 1874, 18 Stat. 78, 79, c. 301, it is necessary that public notice of the registration should be given by affixing the word "copyright" upon every copy of it.

THE complainants were citizens of the United States, and residents of Brooklyn in the State of New York. They were engaged in the manufacture of various articles, among others

of inks, in that city and in the city of New York, and have been since 1885. They claimed to be entitled to the exclusive use of a label containing the words "water-proof drawing ink," and that the defendants had infringed upon their rights by the use of the label on bottles of ink manufactured and sold by them. The present suit was brought to compel the defendants to account for the profits made by them from the use of this label, and to restrain them from its further use.

The bill alleged that some time prior to 1880 one of the complainants, Charles M. Higgins, invented a liquid drawing ink possessing the quality of being insoluble and indelible, or proof against water, when dried; that since its invention either he or the complainants as copartners had been exclusively engaged in its manufacture and sale; that subsequently to the invention he devised and adopted as a name or title for the ink, and as a label for the same in the commerce and sale thereof, the words "water-proof drawing ink;" that since then the ink had become widely and favorably known, and been extensively sold by that name or title; that, being desirous to secure to himself and assigns the sole and exclusive right to the use of the same, he, on the 27th of October, 1883, entered and registered the said label in the United States Patent Office, pursuant to the act of Congress of June 18, 1874, "to amend the law relating to patents, trade marks and copyrights," 18 Stat. c. 301, and complied with all its requirements; that thereafter, on November 20, 1883, the Commissioner of Patents issued to him a certificate of the registration of the label, designated No. 3693; that this was done before the label was used by the complainants, or either of them; that by the registration he secured to himself and assigns the exclusive right to the use of the label for twenty-eight years; and that on May 1, 1885, he sold to the firm of which he was a member that right for the term of five years from date, with all the gains, profits and advantages arising therefrom. The bill further averred that this right of the complainants to the exclusive use of the label thus registered had been violated by the defendants, who had used it upon bottles of ink manufactured and sold by them, to the great damage and detriment of

the complainants, and that they threatened to continue such infringement. The complainants, therefore, prayed for an injunction against the further use of the label by the defendants, and that they be decreed to render an account of the number of bottles sold by them, and to pay to the complainants the profits arising from such sales.

The material allegations of the bill were denied by the defendants in their answer, to which a replication was filed. Evidence being taken, the case was heard on the pleadings and proofs, and on April 27, 1887, a decree was rendered dismissing the bill. 30 Fed. Rep. 627. From that decree an appeal was taken to this court.

Mr. William A. Redding for appellants. *Mr. Charles B. Alexander* filed a brief for same.

Mr. Louis C. Raegener for appellees.

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

The complainants found their claim to an injunction restraining the use of their registered label by the defendants, and to an accounting for the profits made by them on the sales of bottles of ink with such labels, upon the ground that one of their number had secured a copyright of the same for the period of twenty-eight years from the time it was registered, and had transferred to them his exclusive right to its use for five years from May 1, 1885. On the other hand, the defendants contest the claim upon the ground that the Constitution does not authorize a copyright of labels, which are simply intended to designate the articles upon which they are placed; and also on the ground that, if labels are within the copyright law, the conditions of that law were not complied with.

The clause of the Constitution under which Congress is authorized to legislate for the protection of authors and inventors is contained in the eighth section of article one, which declares that "the 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."

This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor. It was so held in *Trade-mark Cases*, 100 U. S. 82, where the court said that "while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are *original*, and are founded in the creative powers of the mind." It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles; and no possible influence upon science or the useful arts. A label on a box of fruit giving its name as "grapes," even with the addition of adjectives characterizing their quality as "black," or "white," or "sweet," or indicating the place of their growth, as Malaga or California, does not come within the object of the clause. The use of such labels upon those articles has no connection with the progress of science and the useful arts. So a label designating ink in a bottle as "black," "blue," or "red," or "indelible," or "insoluble," or as possessing any other quality, has nothing to do with such progress. It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached. This was held substantially in *Scoville* v. *Toland*, 6 Western Law Journal, 84, which was before the Circuit Court of the United States for the District of Ohio as early as 1848. There, application was made for an injunction to restrain the use of a label containing the words: "Doctor Rodgers' Compound Syrup of Liverwort and Tar. A safe and certain cure for consumption of the lungs, spitting of blood, coughs, colds, asthma, pain in the side, bronchitis, whooping-cough, and all pulmonary affections. The genuine is signed Andrew Rodgers," which the complainant had entered in the clerk's office of the District Court of the United States for the

District of Ohio, and in other respects complied with the law. It was shown by several affidavits that the medicine prepared by the complainant was efficacious in diseases. The defendants insisted that the label was not the subject of copyright. In considering this question Mr. Justice McLean, presiding in the Circuit Court, referred to the act of Congress of 1831, giving a copyright to the author of any book or books (4 Stat. c. 16, p. 436) and held that the label was not a book within its meaning, although it had been decided under the English statute that a composition upon a single sheet might be considered as a book. *Clementi* v. *Goulding*, 2 Camp. 25, 32. But Mr. Justice McLean, distinguishing the case before him, said: "The label which the complainant claims to be a book refers to a certain medicinal preparation, and was designed to be an accompaniment of it. Like other labels, it was intended for no other use than to be pasted on the vials or bottles which contained the medicine. As a composition distinct from the medicine, it can be of no value. It asserts a fact that 'Doctor Rodgers' Compound Syrup of Liverwort and Tar' is a certain cure for many diseases, but it does not inform us how the compound is made. In no respect does this label differ from the almost numberless labels attached to bottles and vials containing medicines, and directions how they shall be taken. Now these are only valuable when connected with the medicine. As labels they are useful, but as mere compositions, distinct from the medicine, they are never used or designed to be used. This is not the case with other compositions which are intended to instruct and amuse the reader, though limited to a single sheet or page. Of this character would be lunar tables, sonata, music, and other mental labors concentrated on a single page." The court was, therefore, of opinion that the statute could not bear a construction admitting the label within its protection, and the injunction was refused.

The law of 1831, so far as books or compositions in writing are concerned, was as broad as the law now in force, and the label there rejected as not within the statute was more extended and full than the one now before us. The rule applied in that case is as applicable now.

A trade mark may, sometimes, it is true, in form, serve as a label, but it differs from a mere label in such cases in that it is not confined to a designation of the article to which it is attached, but by its words or design is a symbol or device which, affixed to a product of one's manufacture, distinguishes it from articles of the same general nature, manufactured or sold by others, thus securing to the producer the benefits of any increased sale by reason of any peculiar excellence he may have given to it. *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 53. A mere label is not intended to accomplish any such purpose, but only to indicate the article contained in the bottle, package or box, to which it is affixed. The label here is not claimed as a trade mark. If the complainants have any right to its words as a trade mark, it is not in any manner involved in this case, as was stated by the court below.

But, assuming that the Constitution authorizes legislation for the protection of mere descriptive labels as properly the subjects of copyright, and that the statute relating to copyright of books and other compositions in writing includes such labels, the proceedings taken to secure a copyright of the label in the present case were insufficient and ineffectual for that purpose.

The Revised Statutes of the United States secure to the author, inventor or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, and to the executors, administrators or assigns of such person, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same, upon complying with certain provisions. Sec. 4952.

One of those provisions is, that the person seeking a copyright shall, before publication, deliver at the office of the Librarian of Congress, or deposit in the mail addressed to such librarian, a printed copy of the book or other article for which he desires a copyright, and within ten days from the publication thereof deliver at the office of such librarian, or deposit in the mail addressed to him, two copies of such copyright book or other article. Sec. 4956.

They also provide that no person shall maintain an action

for the infringement of his copyright unless he has given notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving or photograph, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress at Washington." Sec. 4962.

The act of June 18, 1874, 18 Stat. c. 301, p. 78, changes the previous law in some respects. It allows, in place of the statement of entry in the office of the librarian, the simple use of the word "copyright," with the addition of the year it was entered and the name of the party by whom it was taken out. It also declares that the words "engraving," "cut" and "print" shall be applied only to pictorial illustrations or works connected with the fine arts; and also that no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is charged with the supervision and control of the entry or registry of such prints or labels in conformity with the regulations provided by law as to copyright of prints. This statute does not, however, make any change in the requirement of notice; it only permits the form of it to be changed. The copyright is secured when the registration is complete, and a certificate of the registration is given by the commissioner; just as under the former law it was secured when the proper filing had been made with the Librarian of Congress and his certificate was issued. But in this case notice of the copyright obtained has not been given as required. The law in that respect has not been followed. The fact of registration alone is placed upon the label. The word "copyright" is not used, and, of course, with its omission the essential facts respecting any copyright are omitted also. The law, therefore, has not been complied with, and by its very terms no action can be maintained for the infringement of the alleged copyright with-

out such compliance, and, of course, no suit in equity to restrain any future use of the label. Rev. Stat. § 4962; *Wheaton* v. *Peters*, 8 Pet. 591; *Callaghan* v. *Myers*, 128 U. S. 617, 652.

Decree affirmed.

GLEESON *v.* VIRGINIA MIDLAND RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 287. Argued April 6, 1891. — Decided May 11, 1891.

A land slide in a railway cut, caused by an ordinary fall of rain, is not an "act of God" which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway.

It is the duty of a railway company to so construct the banks of its cuts that they will not slide by reason of the action of ordinary natural causes, and by inspection and care to see that they are kept in such condition; and the failure to do so is negligence, which entails liability for injuries to passengers caused by their giving way.

An accident to a passenger on a railway caused by the train coming in contact with a land slide, raises, when shown, a presumption of negligence on the part of the railway company, and throws upon it the burden of showing that the slide was in fact the result of causes beyond its control.

THIS is an action for damages brought in the Supreme Court of the District of Columbia. It appears from the bill of exceptions that at the trial the evidence introduced by the plaintiff tended to show that in January, 1882, he was a railway postal clerk, in the service of the United States Post Office Department; that on Sunday, the 15th of that month, in the discharge of his official duty, he was making the run from Washington to Danville, Virginia, in a postal car of the defendant, and over its road; that in the course of such run the train was in part derailed by a land slide which occurred in a railway cut, and the postal car in which the plaintiff was at work was thrown from the track upon the tender, killing the engineer and seriously injuring the fireman; and that the

plaintiff, while thus engaged in performing his duty, was thrown violently forward by the force of the collision, striking against a stove and a letter-box, three of his ribs being broken, and his head on the left side contused, which injuries are claimed to have permanently impaired his physical strength, weakened his mind and led to his dismissal from his office, because of his inability to discharge its duties.

Defence was made by the company under these propositions: that the land slide was caused by a rain which had fallen a few hours previous, and therefore was the act of God; that it was a sudden slide, caused by the vibration of the train itself, and which, therefore, the company was not chargeable with, since it had, two hours before, ascertained that the track was clear; and that the injury resulted from the plaintiff's being thrown against the postal car's letter-box, for which the company was not responsible, since he took the risk incident to his employment.

At the close of the testimony, the court having given to the jury certain instructions in accordance with the requests of the plaintiff, charged the jury at defendant's request, as follows:

"I. The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury.

"II. The jury are instructed that the plaintiff, when he took the position of a postal clerk on the railroad, assumed the risk and hazard attached to the position, and if, in the discharge of his duties as such, he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury unless the same were caused by the negligent conduct of the company or its employés.

"III. The court instructs the jury that, whilst a large degree of caution is exacted generally from railway companies in order to avert accidents, the caution applies only to those accidents which could be prevented or averted by human care and foresight, and not to accidents occurring solely from the act of God. If they believe that the track and instruments

of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in any of these requirements, but from a slide of earth caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant.

"IV. If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train, then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant."

The counsel for the plaintiff objected to the granting of the first of these prayers, and asked the court to modify it by adding the words "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima facie* evidence of the company's liability." But the court refused to modify the said prayer, and the plaintiff duly and severally excepted to the granting of each one of said prayers on behalf of the defendant, and to the refusal of the court to modify the said first prayer, as requested. The jury, so instructed, found for the defendant and judgment was rendered accordingly. That judgment having been affirmed by the court in general term, (5 Mackey, 356,) this writ of error was taken.

Mr. Guion Miller (with whom was *Mr. Isaac H. Ford* on the brief) for plaintiff in error.

Mr. Linden Kent for defendant in error.

There can be no question about the correctness of the law as laid down by the court in the prayer as given. Does the

modification requested by the counsel for the plaintiff, as a separate and independent proposition, correctly state the law applicable to this case?

We say that it does not and there was no error in refusing it.

In other words, it was contended that notwithstanding the fact that the proximate cause of the accident was an act of God, still the burden of proof was upon the defendant to show that it was not liable for the injury sustained by the plaintiff.

It is true that the presumption of negligence, from the simple happening of the accident in which a passenger is injured, may arise where the accident results from any defective arrangement, mismanagement or misconstruction of the thing over which the defendant has immediate control and for the management, service and construction of which it is responsible, or where the accident results from any omission or commission on the part of the railroad company with respect to those matters entirely under its control. According to the current of authorities the presumption of negligence on the part of the defendant arises in such cases. *Le Barron* v. *East Boston Ferry Co.*, 11 Allen, 312, 316; *S. C.* 87 Am. Dec. 717; *Western Transportation Co.* v. *Downer*, 11 Wall. 129; *Clarke* v. *Barnwell*, 12 How. 272; 2 Redfield on Railways, 256; *Shoemaker* v. *Kingsbury*, 12 Wall. 369; *Railroad Company* v. *Reeves*, 10 Wall. 176.

The injury in this case having resulted from an act of God established as a *fact*, the *presumption* of negligence from the simple occurrence of the accident cannot arise. *Railroad Co.* v. *Reeves*, 10 Wall. 176; *Gillespie* v. *St. Louis & Kansas City Railroad*, 6 Missouri App. 554.

We submit that the immediate and proximate cause of the accident having been disclosed as an act of God, it was not error for the court to refuse to modify the first prayer of the defendant by adding to it as applicable to this case the words: "*But that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is prima facie evidence of the company's liability.*"

To have given the modification asked in the light of the plaintiff's testimony would have been practically to have said

to the jury, "It is true that the plaintiff has shown by his testimony that the act of God was the proximate cause of the injury, but I direct you to ignore these circumstances of this case. It is only sufficient for you to know in this case that an accident happened and the injury resulted, and that the defendant is not only negligent but is liable for such injuries, unless he can and has shown affirmatively that he was not negligent." In this view the case is distinguished from the cases of *Stokes* v. *Saltonstall*, 13 Pet. 181; *Railroad Co.* v. *Pollard*, 22 Wall. 341.

Mr. Justice Lamar, having made the foregoing statement, delivered the opinion of the court.

It will be most convenient in the decision of this case to consider the third instruction first. The objections made to it are three:

(1.) "It assumes that the accident was caused by an act of God, in the sense in which that term is technically used." It appears that the accident was caused by a land slide, which occurred in a cut some fifteen or twenty feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be "acts of God"; but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In *Dorman* v. *Ames*,

12 Minnesota, 451, it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case. *Ewart* v. *Street*, 2 Bailey (S. C.) 157, 162; *Moffat* v. *Strong*, 10 Johns. 11; *New Brunswick Steamboat Co.* v. *Tiers*, 4 Zabr. (24 N. J. Law) 697; *Great Western Railway* v. *Braid*, 1 Moore P. C. (N. S.) 101.

(2.) The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary and both are intended for one result; which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause land slides and consequent dangerous obstructions to the track itself, from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature, is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the travelling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

In a late case in the Queen's Bench Division, *Tarry* v. *Ashton*, 1 Q. B. D. 314, two out of three judges declared in substance that a man who, for his own benefit, suspends an object, or permits it to be suspended, over the highway, and puts the public safety in peril thereby, is under an absolute duty to keep it in such a state as not to be dangerous. The facts of the case were these: The defendant became the lessee and occupier of a house, from the front of which a heavy lamp projected several feet over the public foot pavement. As the plaintiff was walking along in November, the lamp fell on her and injured her. It appeared that in the previous August the defendant employed an experienced gas-fitter to put the lamp in repair. At the time of the accident a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron or bracket, from which the lamp hung; and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination, it was discovered that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that if the lamp had been in good repair, the slipping of the ladder would not have caused the fall. Upon this it was held by Lush and Quain, JJ., that the plaintiff was entitled to a verdict on the ground that if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it. 1 Thomp. on Negligence, 346–7.

The case of *Kearney* v. *London &c. Railway*, L. R. 6 Q. B. 759, 762, 763, (in the Exchequer Chamber,) cited in the brief of counsel for plaintiff in error, is directly in point. In that case the plaintiff had been injured while walking along a pub-

lic highway, by a brick which fell from a pier of the defendant's bridge. A train had just passed, and the counsel for the defendant submitted that there was no evidence of negligence. The court (Kelly, Chief Baron,) says: "There can be no doubt that it was the duty of the defendants, who had built this bridge over the highway, to take such care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is, whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The Lord Chief Justice, in his judgment in the court below, said, *res ipsa loquitur*, and I cannot do better than to refer to that judgment. It appears, without contradiction, that a brick fell out of a pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. . . . The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brickwork was in good order and all the bricks well secured."

The principle of these decisions seems to us to be applicable to this case. If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, *a fortiori* must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung, from considerations of economy or through negligence.

We think the case of the *Virginia Central Railroad Co.* v. *Sanger*, 15 Grattan, 230, 237, to which we are referred by counsel for plaintiff in error, is strongly illustrative of the principle in this case, to which it bears a close resemblance. Some rocks had been piled up alongside of the track for the purpose of ballast, and some of them got upon the track, causing the injury. In rendering its opinion the court says:

"Combining in themselves the ownership, as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of the passengers. And as accidents as frequently arise from obstructions on the track, as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions." See also *McElroy* v. *Nashua & Lowell Railroad*, 4 Cush. 400; Hutchinson on Common Carriers, 524; *Bennett* v. *Railroad Co.*, 102 U. S. 577.

This view of the obligation of the company of course makes it immaterial that the slide was suddenly caused by the vibration of the train itself. It is not a question of negligence in failing to *remove* the obstruction, but of negligence in allowing it to get there.

We are also of the opinion that it was error to refuse to modify the first instruction for the defendant as requested by the plaintiff.

Since the decisions in *Stokes* v. *Saltonstall*, 13 Pet. 181, and *Railroad Company* v. *Pollard*, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that, (the passenger being himself in the exercise of due care,) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551.

The defendant seeks to uphold the action of the court in refusing the modification prayed for, by distinguishing the case at bar. It attempts to make two distinctions:

1. That the operation of the rule is confined to cases "where

the accident results from any defective arrangement, mismanagement or misconstruction of things over which the defendant has immediate control, and for the management, service and construction of which it is responsible, or where the accident results from any omission or commission on the part of the railroad company with respect to these matters entirely under its control."

2. That the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise.

Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made.

The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defence. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defence, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the *prima facie* case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident and how far those facts were or were not within the control of the defendant. This is error.

Statement of the Case.

Judgment reversed, and cause remanded with direction to order a new trial, and to take further proceedings not inconsistent with this opinion.

Mr. Justice Brewer dissented from the opinion and judgment in this case, on the ground that it is in contravention of the long established rules as to what may be considered on an incomplete record.

LEWISBURG BANK *v.* SHEFFEY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 338. Argued April 23, 1891.—Decided May 11, 1891.

An application for rehearing, made after the adjournment of the term at which the final decree was entered, is made too late.

A decree which determines the whole controversy between the parties, leaving nothing to be done except to carry it into execution, is a final decree for the purpose of appeal; and none the less so that the court retains the fund in controversy, for the purpose of distributing it as decreed.

On the 11th of October, 1875, Robert J. Glendy executed a deed of trust to Alexander F. Mathews on a tract of land in Greenbrier County, West Virginia, to secure his two certain promissory notes for $10,000 and $5000, respectively, held by the Bank of Lewisburg, and also "any and all other debts which the said Glendy may at any time hereafter owe to said bank, either by the renewal of the said negotiable notes or by original loans made to him by the said Bank of Lewisburg, with this express provision and stipulation, however, that the said indebtedness shall not at any one time exceed the sum of fifteen thousand dollars ($15,000)."

On the 20th of November, 1876, Glendy executed another trust deed to Hugh W. Sheffey and James Bumgardner, Jr., of the county of Augusta, State of Virginia, covering the same lands, and also several tracts or parcels of land situated

in the counties of Augusta, Bath and Highland, in the State of Virginia, and certain specified articles of personal property, in trust and with the hope of paying all of said Glendy's just debts; and providing for the sale by the trustees of the real and personal property in the manner and on the terms named; the care of the proceeds; the keeping of an account of the collections and disbursements, to be at all times open to the inspection of any of the creditors; the convening of the creditors by publication before a master commissioner, to state and determine in each case how much is justly due; the payment of dividends to the creditors from time to time; and upon the further trust "that, after discharging the amounts due from said Robert J. Glendy on judgments against him and on vendor's and other paramount liens now binding said lands hereby conveyed, the trust fund shall be distributed ratably among the creditors of said Robert J. Glendy who may come forward and prove their debts before said master commissioner within ninety days after publication of notice requiring them so to do, etc."

This deed was recorded in the clerk's office of the county court of Greenbrier County on the 21st of November, 1876, at twenty minutes before eleven o'clock, A.M. Five hours later on the same day, the deed to Mathews was filed for record. Mathews having advertised the real estate for sale on May 9, 1877, Sheffey and Bumgardner filed their bill of complaint on the 3d of May, in the District Court of the United States for the District of West Virginia, against Mathews and the bank, setting up the deed to them; the subsequent record of the deed to Mathews, of the existence or contents of which they denied any knowledge prior to its being spread upon the record; alleging the priority of their lien; that the deed to Mathews was not properly acknowledged; and that the notice of sale was invalid; and praying for an injunction and for general relief.

A preliminary injunction was thereupon granted, as prayed. The bank demurred on the ground, among others, of want of parties, and also answered alleging that at the time the deed to plaintiffs was executed they had actual notice of the exist-

ence of the conveyance to Mathews, and certainly before their own deed was recorded; that by the terms of the deed to plaintiffs the debt due the bank had priority; that the bank's deed was recorded before the beneficiaries under plaintiffs' deed had accepted its provisions or had notice of its existence; that the certificate to plaintiffs' deed was insufficient; and that the deed was void as to the bank, upon its face, etc.

Evidence was subsequently taken in the case.

On the 10th of November, 1877, by consent of the parties, it was ordered that the land be sold by the trustees in both deeds and the proceedings reported to the court, and the cause was referred to Gallaher, one of the masters of the court, to ascertain and report the creditors of Glendy secured by the deed of trust to plaintiffs, the master to take any report made by any court sitting in Augusta County, Virginia, as to Glendy's creditors, as *prima facie* true.

On the 26th of March, 1878, the bank recovered a judgment by confession against Glendy for the sum of $15,900.75, with interest from February 13, 1878, and costs.

On the 4th of May, 1878, the cause came on for hearing, and the bank tendered an amended and supplemental answer setting forth that Glendy executed the trust deed to the plaintiffs before any of the lands had been conveyed to him, having only an equitable title; the acquisition of the legal title on the 7th of March, 1878; and the rendition of the judgment of the 26th of March; that the trust deed to Mathews was after due proof admitted to record in the clerk's office of the county court of Greenbrier County on the same 27th of March; that the deed to plaintiffs was a mere assignment of an equity without any warranty whatever; that plaintiffs took subject to the prior conveyance, and their deed did not operate as notice to the prior grantee by being recorded before the deed to the latter was; and that in law and equity the lien created by the deed to plaintiffs, if any, must be postponed and held subject to the liens of the trust deed and the judgment of the bank; and thereupon the court entered the following decree:

"This cause came on again to be heard upon the papers formally read and upon motion of the defendants to file the

amended and supplemental answer of the Bank of Lewisburg and the objection of the plaintiffs to the filing of said amended answer, the plaintiffs waiving formal and technical notice of same, and was argued by counsel. On consideration whereof, the court being of opinion that the facts stated in said amended and supplemental answer cannot properly be set up by way of amended answer, and that they are, if properly pleaded, wholly immaterial to the issues involved in the cause, and, if true, can have no bearing upon the rights of the parties as asserted in the cause, it is therefore adjudged, ordered and decreed, that leave to file said supplemental and amended answer be denied to said defendants, and that said answer be rejected.

"It is further adjudged, ordered and decreed that the injunction awarded by former order entered in this cause be perpetuated, and that the fund arising from the sale of the M'Clung farm, situate in the county of Greenbrier, be brought into this court, to be by it distributed in accordance with the provisions of the deed of Robert J. Glendy to Hugh W. Sheffey and James Bumgardner, Jr., bearing date on the 20th day of November, 1876.

"It is further ordered that the commissioners heretofore appointed by the order of this court proceed to sell said M'Clung farm, as directed in said decree, and if when said land is offered for sale no bid is made for same adequate in the opinion of said commissioners, that said commissioners shall by private contract or public auction rent said land for the term of one year or less, upon such terms as said commissioners shall deem expedient."

On the 7th of May the report of the sale was made.

On the 2d of August, 1878, which was after the adjournment of the May term, the record states that the bank appeared in court by counsel and tendered its petition for a rehearing "of the order made in this cause at the last term, except so far as it directs a sale of the trust property, for errors in law apparent on its face," to the filing of which petition plaintiffs objected, and the court "without passing upon the matters, ordered the same to be set for hearing at the next term of

this court, to which time this cause is continued." This petition averred that the court had rested its action upon the ground that the legal title when subsequently acquired by Glendy enured to plaintiffs; alleged that that view had not been asserted or argued, and that it was not well founded; and prayed "that its motion to file said amended and supplemental answer may be heard, etc." On the 12th of November, 1878, the report of the trustees and commissioners of the 7th of May, as amended and modified as suggested by them, was confirmed; and it was further ordered "that the consideration of the petition of the defendants for a rehearing of the decree in said cause at the last term of this court be postponed until the next term of this court." In 1885 further evidence was taken against the objection of the plaintiffs, and on the 13th of November, 1885, the following decree was entered:

"This cause came on to be further heard at this term and was argued by counsel, and the court being of opinion that the decree rendered May 4th, 1878, having been rendered before the master commissioner had executed the order of reference made at the November term, 1877, was premature, it is therefore adjudged, ordered and decreed that the said decree of the May term, 1878, be, and it is hereby set aside and held for naught; and it is further adjudged, ordered and decreed that the exceptions taken by the Bank of Lewisburg to the report of Commissioner Gallaher, dated September 20th, 1883, and filed October 1st, 1883, because the said commissioner failed to mention and report in any way the debts asserted and claimed in this cause by the said bank be sustained, and that the said report be recommitted to the master without the court at this time passing further upon said exceptions, with instructions to inquire into, ascertain and report the following matters and accounts," etc., etc.

The master made a report November 4, 1886, to which the bank filed exceptions, because he had not reported the indebtedness due the bank as a preferred debt under the trust deed to Sheffey and Bumgardner, and had reported that the bank was only entitled to share *pari passu* with the other creditors: and because he had not reported that the bank was entitled to

preference by reason of being secured by the deed of trust of October 11, 1875, and had reported that Sheffey, trustee in the deed of November 20, 1876, did not have notice, prior to the execution and record of the latter deed, of the execution by Glendy of the former deed. On the 30th of November, 1887, a decree was entered rejecting the petition for rehearing tendered August 2, 1878, and not allowing it to be filed; overruling the exceptions to the report of November 4, 1886; directing the register of the court to pay over to the plaintiffs for distribution, the money which had been deposited with the bank to the credit of the suit, with its accrued interest; and ordering the distribution of the fund in such manner as to secure a *pro rata* payment upon the claims proved, including such payments to the bank as would make its dividends equal to those received by the other creditors. From this decree the bank prayed an appeal to this court. The opinion of Judge Jackson will be found reported in 33 Fed. Rep. 315. He held that the decree of May 4, 1878, was final and its subsequent vacation unauthorized, and also that plaintiffs were *bona fide* purchasers without notice.

Mr. A. C. Snyder for appellant.

Mr. James Bumgardner, Jr., and *Mr. A. B. Browne* for appellees. *Mr. A. T. Britton* was with them on the brief.

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

Describing the decree of May 4, 1878, as "interlocutory," and that of November 30, 1887, as "final," appellant assigns errors as follows: That the decree of May 4 is erroneous, because it in effect overruled the demurrer to the bill; and denied appellant's motion to file its amended and supplemental answer; and that the decree of November 30, 1887, is erroneous, because (1) it rejected the petition for a rehearing; (2) held the deed of November 20, 1876, valid; (3) overruled appellant's exceptions to the master's report; (4) held that the deed to plaintiffs had priority over that of October 11, 1875;

(5) held that the debt of appellant was not entitled to priority under the provisions of the deed to plaintiffs; and because (6) it should have held that the appellant was entitled to the fund in controversy, if for no other reason, upon the ground of its judgment obtained after Glendy had acquired the legal title to the land. If the decree of May 4, 1878, were final, no errors can now be assigned to it or considered upon this appeal. And if that decree, being final, covered all the grounds of error urged to the decree of November 30, 1887, then the latter decree must necessarily be affirmed. The application for a rehearing was confessedly made after the adjournment of the May term, at which the prior decree was entered, and too late if that decree were final. Equity Rule 88; *McMicken* v. *Perin*, 18 How. 507, 511; *Roemer* v. *Simon*, 91 U. S. 149; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, 224.

The controversy raised by the pleadings and to be determined by the court was whether the property passed under the deed to plaintiffs, or under that to Mathews and whether the bank was entitled to priority. The effect of the sale by consent was merely to substitute the fund in place of the real estate and did not change the issues. On behalf of the bank it was claimed that the trust deed to the plaintiffs was void on its face, and that by the terms of that deed, if valid, the debt of the bank was preferred. By the amended and supplemental answer, which it sought to file, the bank raised the question that Glendy, not having the legal title when he executed the deed to the plaintiffs, and having by his prior deed to the bank divested himself of his equitable title, the plaintiffs did not, as Glendy's grantees, under a conveyance "without any warranty whatever," occupy the position of *bona fide* purchasers, nor were they protected by the recording statutes of the State; and the facts set forth therein involved, moreover, the position urged in the petition for rehearing, that the deed to the plaintiffs being simply a grant without covenants, Glendy's after-acquired legal title did not enure to them and that the bank became entitled to the fund by virtue of its judgment, which was recovered after Glendy acquired the legal title.

So that all these matters were necessarily passed upon by the court and the decree in terms declared that the facts stated in the amended and supplemental answer did not change the rights of the parties in the cause, made the injunction perpetual and directed the fund to be brought into court for distribution "in accordance with the provisions of the deed of Robert J. Glendy to Hugh W. Sheffey and James Bumgardner, Jr., bearing date on the 20th day of November, 1876." This finally determined the entire controversy litigated between the parties and nothing remained but to carry the decree into execution. The bringing of the fund into court was for the final distribution as decreed, and not to be held pending the ascertainment of the principles upon which it should be distributed. *Hill* v. *Chicago & Evanston Railroad Co.*, *ante*, 52, and cases cited.

The subject was much considered and many cases referred to and classified and the distinctions indicated, in *Keystone Iron Co.* v. *Martin*, 132 U. S. 91. It is there shown that where the entire subject matter of a suit is disposed of by a decree, the mere fact that accounts remain to be adjusted and the bill is retained for that purpose, does not deprive the adjudication of its character as a final and appealable decree.

It is true, as pointed out by Mr. Justice Field in *Hill* v. *Chicago & Evanston Railway*, *supra*, that an appeal may be taken from a decree in an equity cause, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which may have originated in the subsequent proceeding. This was so held in *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, 83, and was the rule sanctioned and adopted in *Forgay* v. *Conrad*, 6 How. 201, and *Blossom* v. *Milwaukee &c. Railroad Co.*, 1 Wall. 655. An appeal will lie from such decrees according to the nature of the subject matter and the rights of the parties affected.

But the errors assigned here relate solely to matters included within the adjudication of May 4, 1878, except as the refusal to permit the petition for rehearing to be filed may be otherwise regarded, though that petition was itself predicated upon one of the aspects of the controversy. And as to that allega-

tion of error, we have already seen that the objection is not well taken, even if open to consideration at all. *Brockett* v. *Brockett*, 2 How. 238.

Decree affirmed.

In re ROSS, Petitioner.

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

No. 1683. Argued April 30, May 1, 1891. — Decided May 25, 1891.

By the Constitution of the United States a government is ordained and established "for the United States of America," and not for countries outside of their limits; and that Constitution can have no operation in another country.

The laws passed by Congress to carry into effect the provisions of the treaties granting exterritorial rights in Japan, China, etc. (Rev. Stat. §§ 4083–4096), do no violation to the provisions of the Constitution of the United States, although they do not require an indictment by a grand jury to be found before the accused can be called upon to answer for the crime of murder committed in those countries, or secure to him a jury on his trial.

The provision in Rev. Stat. § 4086, that the jurisdiction conferred upon ministers and consuls of the United States in Japan, China, etc., by §§ 4083, 4084 and 4085, shall "be exercised and enforced in conformity with the laws of the United States," gives to the accused an opportunity of examining the complaint against him, or of having a copy of it, the right to be confronted with the witnesses against him, and to cross-examine them, and to have the benefit of counsel, and secures regular and fair trials to Americans committing offences there, but it does not require a previous presentment or indictment by a grand jury, and does not give the right to a petit jury.

The jurisdiction given to domestic tribunals of the United States over offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of a consular tribunal in Japan, China, etc., to try for a similar offence, committed in a port of the country in which the tribunal is established, when the offender is not taken to the United States.

Article IV of the treaty of June 17, 1857, with Japan is still in force, notwithstanding the provisions in Article XII of the treaty of July 29, 1858.

When a foreigner enters the mercantile marine of a nation, and becomes one of the crew of a merchant vessel bearing its flag, he assumes a temporary allegiance to the flag, and, in return for the protection afforded

him, becomes subject to the laws by which that nation governs its vessels and seamen.

A law or treaty should be construed so as to give effect to the object designed, and to that end all its provisions must be examined in the light of surrounding circumstances.

The fact that a vessel is American is evidence that seamen on board are Americans also.

When a person convicted of murder accepts a "commutation of sentence or pardon" upon condition that he be imprisoned at hard labor for the term of his natural life, there can be no question as to the binding force of the acceptance.

THE petitioner below, the appellant here, was imprisoned in the penitentiary at Albany in the State of New York. He was convicted on the 20th of May, 1880, in the American consular tribunal in Japan, of the crime of murder, committed on board of an American ship in the harbor of Yokohama in that empire, and sentenced to death.

On the 6th of August following his sentence was commuted by the President to imprisonment for life in the penitentiary at Albany, and to that place he was taken and there he has ever since been confined. Nearly ten years afterwards, on the 19th of March, 1890, he applied to the Circuit Court of the United States for the Northern District of New York for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence and imprisonment were unlawful, and stating the causes thereof and the attendant circumstances. The writ was issued, directed to the superintendent of the penitentiary, who made return that he held the petitioner under the warrant of the President, of which a copy was annexed, and was as follows:

"Rutherford B. Hayes, President of the United States of America, to all to whom these presents shall come, Greeting:

"Whereas John M. Ross, an American seaman on board of the American ship 'Bullion,' was, on the 20th day of May, 1880, convicted of the crime of murder, committed on board the said ship 'Bullion,' then in the harbor of Yokohama, Japan, before Thomas B. Van Buren, Esquire, consul general

of the United States at Kanagawa, Japan, holding court at that place, and was by said consul general on such conviction aforesaid, in pursuance and by authority of the statutes of the United States to that end made and provided, sentenced to be hanged, 'at such time and place as the United States minister in Japan may direct, according to law;'

"And whereas Mr. Bingham, the United States minister aforesaid, on the 22d of May following, approved the proceedings, verdict and sentence;

"And whereas the said minister has postponed the execution of sentence, believing the ends of justice demand it, and has submitted the record of the case to the Department of State for the President's consideration and for commutation of sentence or pardon, if deemed advisable;

"And whereas the President, upon a careful consideration of the facts and circumstances of the case as they were presented in the record of the proceedings and by a report from the Secretary of State, has arrived at the conclusion that the ends of justice will be fulfilled by the infliction of a less severe punishment than that of death:

"Now, therefore, be it known that I, Rutherford B. Hayes, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons also me thereunto moving, do hereby pardon the said John M. Ross on condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York.

"This order will be carried into effect under the direction of the Secretary of State.

"In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

"Done at the city of Washington this sixth day of August, A.D. 1880, and of the Independence of the United States the one hundred and fifth.

"[SEAL.] R. B. HAYES.

"By the President:

"WM. M. EVARTS, *Secretary of State.*"

To this warrant was annexed a copy of the petitioner's acceptance of the conditional pardon of the President, certified to be correct by the United States consul general at Japan. It was as follows:

"I, John M. Ross, the person named in the warrant of conditional pardon granted to me by the President of the United States of America, dated the sixth day of August, 1880, and of which the foregoing is a correct copy, do hereby acknowledge the delivery of said original warrant of conditional pardon to me, and do hereby voluntarily and without qualification accept said conditional pardon with the condition thereof as therein stated, to wit, that 'I, Rutherford B. Hayes, President of the United States of America, etc., etc., do hereby pardon the said John M. Ross on the condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York.'

"John M. Ross.

"Kanagawa, Yokohama, Japan, February 28th, 1881.

"Witness: Thos. B. Van Buren,

U. S. Consul General."

The case was then heard by the Circuit Court, counsel appearing for the petitioner and the assistant United States attorney for the government. On the hearing, a copy of the record of the proceedings before the consular tribunal, and of the communications by the consul general to the state department respecting them, on file in that department, was given in evidence. No objection was made to its admissibility.

The facts of the case as thus disclosed, so far as they were deemed material to the decision of the questions presented, were substantially as follows:

On the 9th of May, 1880, the appellant, John M. Ross, was one of the crew of the American ship Bullion, then in the waters of Japan, and lying at anchor in the harbor of Yokohama. On that day, on board of the ship, he assaulted Robert Kelly, its second mate, with a knife, inflicting in his neck a mortal wound, of which in a few minutes afterwards he died

on the deck of the ship. Ross was at once arrested by direction of the master of the vessel and placed in irons, and on the same day he was taken ashore and confined in jail at Yokohama. On the following day, May 10, the master filed with the American consul general at that place, Thomas B. Van Buren, a complaint against Ross, charging him with the murder of the mate. It contained sufficient averments of the offence, was verified by the oath of the master, and to it the consul general appended his certificate that he had reasonable grounds for believing its contents were true. The complaint described the accused as one "supposed to be a citizen of the United States."

On the 18th of that month an amended complaint was filed by the master of the ship with the consul general, in which the accused was described as "an American seaman, duly and lawfully enrolled and shipped and doing service as such seaman on board the American ship Bullion." The complaint was also amended in some other particulars. It was as follows:

"U. S. Consular General Court, Kanagawa, Japan.

"*Amended Complaint.*

"John P. Reed, master of the American ship 'Bullion,' on oath complains that John Martin Ross, an American seaman, duly and lawfully enrolled and shipped and doing service as such seaman on board the American ship 'Bullion,' did on the early morning of the 9th day of May, 1880, on board of said ship, while lying in the harbor of Yokohama, Japan, and within the jurisdiction of this court, with force and arms, maliciously, feloniously, deliberately, wilfully and of his malice aforethought, make an assault upon one Robert Kelly, the mate of said ship, and did then and there feloniously, maliciously, deliberately and of malice aforethought, strike and cut the said Robert Kelly with a knife, from which said Robert Kelly died on board said ship a short time thereafter. Wherefore affiant charges that said John Martin Ross wilfully and maliciously killed and murdered the said Robert Kelly,

and affiant further says that said John Martin Ross is still a seaman on said ship.

"J. P. Reed.

"Sworn and subscribed before me this 18th day of May, 1880.

"Thos. B. Van Buren,

"*U. S. Consul General.*"

To this amended complaint was annexed a certificate of the consul general that he had reasonable grounds for believing its contents to be true, similar to the one to the original complaint.

Previously to its being filed the accused appeared with counsel before the consul general, and the complaint being read to him, he presented an affidavit stating that he was a subject of Great Britain, a native of Prince Edward's Island, a dependency of the British Empire, and had never renounced the rights or liabilities of a British subject or been expatriated from his native allegiance or been naturalized in any other country. Upon this affidavit he contended that the court was without jurisdiction over him, by reason of his being a subject of Great Britain, and he prayed that he be discharged. His contention was termed in the record a demurrer to the complaint.

The court held that as the accused was a seaman on an American vessel, he was subject to its jurisdiction, and overruled the objection. The counsel of the accused then moved that the charge against him be dismissed, on the ground that he could not be held for the offence except upon the presentment or indictment of a grand jury, but this motion was also overruled.

Four associates were drawn, as required by statute and the consular regulations, to sit with the consul general on the trial of the accused, and, being sworn to answer questions as to their eligibility, the accused stated that he had no questions to ask them on that subject. They were then sworn in to try the cause "in accordance with court regulations." A motion for a jury on the trial was also made and denied. The

amended complaint was then substituted in place of the original, to which no objection was interposed, and to it the accused pleaded "not guilty," and asked for the names of the witnesses for the prosecution, which were furnished to him. The witnesses were then sworn and examined, and they established beyond all possible doubt the offence of murder charged against the accused, which was committed under circumstances of great atrocity. The court found him guilty of murder, and he was sentenced to suffer death in such manner and at such time and place as the United States minister should direct. The conviction and sentence were concurred in by the four associates, and were approved by Mr. Bingham, the minister of the United States in Japan. The minister transmitted the record of the case to the Department of State for the consideration of the President, and for commutation of the sentence or pardon of the prisoner, if deemed advisable. The President subsequently directed the issue to the prisoner of a pardon on condition that he be imprisoned at hard labor for the term of his natural life in the penitentiary at Albany, and it was accepted by him on that condition. His sentence was accordingly commuted, and he was removed to the Albany penitentiary.

The Circuit Court, after hearing argument of counsel and full consideration of the subject, made an order on January 21, 1891, denying the motion of the prisoner for his discharge, and remanding him to the penitentiary and the custody of its superintendent. 44 Fed. Rep. 185. From that order the case was brought here on appeal.

Mr. George W. Kirchwey, for appellant, made the following points:

I. The crime having been committed on board an American vessel, although such vessel was lying in the harbor of Kanagawa, Japan, was not committed within the territorial jurisdiction of the Consular General Court of Kanagawa, but within that of the United States. It was cognizable only by the domestic tribunals of the United States.

First. The Consular General Court, being a court of special and limited jurisdiction, has no powers save such as are expressly conferred by the treaty and statutes to which it owes its origin. These expressly confine its jurisdiction to the territorial limits of Japan.

Second. The domestic jurisdiction of the modern State extends to crimes committed upon private as well as public vessels of the State upon the high seas. For the purposes of this jurisdiction, a foreign port is regarded as being within the high seas, and the ship as a part of the territory of the State to which she belongs.

Third. The original and domestic jurisdiction of the Federal courts being adequate to deal with cases of this kind, it will not be presumed that the Congress intended to set up a novel jurisdiction of limited and inferior character, to supersede or compete with the former.

Fourth. The mode in which the jurisdiction of the United States in such cases must be exercised is prescribed by statute. It is expressly provided that all crimes committed on American vessels on the high seas shall be tried within the United States.

II. If it be claimed that the offence in question was committed in Japan, and not upon the high seas, the consular jurisdiction of the United States is wholly excluded by the fact that the record does not disclose facts conferring jurisdiction under the treaties and laws.

First. The treaties of the United States with Japan, and the laws passed by Congress in pursuance thereof, expressly restrict the jurisdiction of the consular courts to citizens of the United States. It does not appear that Ross was a citizen of the United States.

Second. The statutes creating the consular courts, as well as the treaties under which they are instituted, and from which they derive such authority and jurisdiction as they possess, expressly subject that jurisdiction to the laws of the United States.

Third. The claim that the Constitution has no extraterritorial force is disproved by the existence and operation of the consular court itself.

III. The refusal to allow the accused a trial by jury was a fatal defect in the jurisdiction exercised by the court, and renders its judgment absolutely void.

First. The jury contemplated by the Constitution (Art. III, § 2, subd. 3; amendments, Art. VI), and demanded by the appellant, is a common law jury of twelve men.

Second. There appears to be nothing in the legislation of Congress relating to the exercise of this consular jurisdiction to preclude compliance with the constitutional requirement.

Mr. Assistant Attorney General Parker for appellee.

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

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive, administrative and legislative departments of the government in the validity of the legislation. Nor did the Circuit Court consider whether the status of the petitioner as a citizen of the United States, or as an American within the meaning of the treaty with Japan, could be questioned, while he was a seaman of an American ship, under the protection of the American flag, but simply stated the view taken on that subject by the Minister to Japan, the State Department, and the President. Said the court: "During the thirty years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offences before these officers, without preliminary indictment or a common law jury, and convicted and punished. These trials have been authorized by the regulations, orders and decrees of ministers, and it

must be presumed that the regulations, orders and decrees of ministers prescribing the mode of trial have been transmitted to the Secretary of the State, and by him been laid before Congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States, his trial and sentence were in all respects modal, as well as substantial, regular and valid under the laws of Congress, according to the construction placed upon these statutes by the acquiescence of the executive, administrative and legislative departments of the government for this long period of time."

Under these circumstances the Circuit Court was of opinion that it ought not to adjudge that the sentence imposed upon the petitioner was utterly unwarranted and void, when the case was one in which his rights could be adequately protected by this court, and when a decision by the Circuit Court setting him at liberty, although it might be reversed, would be practically irrevocable.

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese* v. *Hale*, 91 U. S. 13.

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Mid-

dle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad.

In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* v. *United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully

aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun of September 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Exterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41.

We turn now to the treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offences in that country. Article IV of that treaty is as follows:

"Art. IV. Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese laws." 11 Stat. 723.

The treaty with Japan of July 29, 1858, in some particulars changes the phraseology of the concession of judicial authority

to the American consul in Japan, but, as we shall see subsequently, without revocation of the concession itself. Its sixth article is as follows:

"ART. VI. Americans committing offences against Japanese shall be tried in American consular courts and when guilty shall be punished according to American law. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese." 12 Stat. 1056.

As will be seen, the language of the fourth article of the treaty of 1857 is that "Americans committing offences in Japan shall be tried," etc.; while the language of the sixth article of the treaty of 1858 is that "Americans committing offences against Japanese shall be tried," etc. Offences committed in Japan and offences committed against Japanese are not necessarily identical in meaning. The latter standing by itself would require a more restricted construction. But the twelfth article of that treaty obviates that. It is as follows:

"ART. XII. Such of the provisions of the treaty made by Commodore Perry and signed at Kanagawa on the 31st of March, 1854, as conflict with the provisions of this treaty are hereby revoked; and as all the provisions of a convention executed by the consul general of the United States and the governors of Simoda, on the 17th of June, 1857, are incorporated in this treaty, that convention is also revoked."

It will thus be perceived that the revocation of the treaty of 1857 was made upon the assumption and declaration that all its provisions were incorporated into the treaty of 1858. The revocation must, therefore, be held to be limited to those provisions and those only which are thus incorporated, that treaty still remaining in force as to the unincorporated provisions. This has been the practical construction given to the alleged revocation by the authorities of both countries — a

construction which, in view of the erroneous statement as to the incorporation into the new treaty of all the provisions of the former one, is reasonable and just.

Our government has always treated Article IV of the treaty of 1857 as continuing in force, and it is published as such in the United States Consular Regulations, issued in 1888. Appendix No. 1, p. 313. Its official interpretation is found in Article 71 of those regulations, which declares that "consuls have exclusive jurisdiction over crimes and offences committed by citizens of the United States in Japan." Mr. Bingham, our minister to that country for several years after the treaty of 1858, always assumed the incorporation into that treaty of all the provisions of the treaty of 1857, or that they were saved by it. When the prisoner reached San Francisco, on his way from Japan to Albany, he applied to the Circuit Court of the United States for a writ of *habeas corpus*, and cited the sixth article of the treaty of 1858, insisting that it only provided for the trial of Americans by American consular courts in Japan for offences committed against Japanese, and therefore he could not be held to answer for the murder of the second officer of the American ship Bullion, when in Japanese waters, because he was not a Japanese subject. In a communication made under date of June 8, 1881, by the minister to the Secretary of State, reference is made to this position, and the following language is used: "Nothing, in my opinion, could more strongly testify to the utter weakness of the claim made for Ross against the government than this attempt to limit the jurisdiction of our consuls in Japan over Americans, guilty of crimes by them committed within this empire, to such crimes only as they should commit upon the persons of Japanese subjects. According to this logic, Americans may in Japan murder each other and the citizens or subjects of all lands save the subjects of Japan with impunity — as it is admitted by this government that it cannot try an American for any offence whatever — and it must also be conceded that the tribunals of no other government than our own can try Americans for crimes by them committed within this empire. In giving my reasons to the department for sustain-

ing the jurisdiction of the United States in this case, and for approving as I did the conviction of Ross, in which the consul general and the four associates who sat with him had concurred, I cited Article IV of our convention of 1857 with Japan, to wit: 'That Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American law.' This provision of the convention of 1857 and all other provisions thereof were saved and incorporated in our treaty of 1858 with Japan, Article XII, [quoted above.] You will observe that Mr. Townsend Harris was the consul general of the United States who negotiated both of these treaties with Japan, and that the treaty of 1858 was ratified April 12, 1860, and that thereafter, to wit, June 22, 1860, Congress passed the act to carry into effect this treaty with Japan, and provided that the minister and consuls of the United States in Japan be 'fully empowered to arraign and try in the manner (in said statute provided) all citizens of the United States charged with offences against law committed' (by them in Japan;) [sec. 4084, Rev. Stat.]; and also by section 4086 provided that the jurisdiction in both civil and criminal matters in Japan shall '*in all cases* be exercised and enforced in conformity with the laws of the United States, which so far as necessary to execute such treaty are extended over all citizens of the United States therein, and over *all others* to the extent the terms of the treaty justify or require.' Here was the construction above stated by me asserted by the same Senate which ratified the treaty, and by the same President who approved both the treaty and the act of Congress. The President and the department have always construed the treaty of 1858 as carrying with it and incorporating therein the fourth article and all other provisions of the convention of 1857."

The legislation of Congress to carry into effect the treaty with Japan is found in the Revised Statutes, in sections most of which apply equally to treaties with China, Siam, Egypt and Madagascar (secs. 4083–4091). Confining ourselves to the treaty with Japan only, we find that the legislation secures a regular and fair trial to Americans committing offences within that empire.

It enacts that the minister and consuls of the United States, appointed to reside there, shall, in addition to other powers and duties imposed upon them respectively, be invested with the judicial authority therein described, which shall appertain to their respective offices and be a part of the duties belonging thereto, so far as the same is allowed by treaty; and empowers them to arraign and try, in the manner therein provided, all citizens of the United States charged with offences against law committed in that country, and to sentence such offenders as therein provided, and to issue all suitable and necessary process to carry their authority into execution. It declares that their jurisdiction in both criminal and civil matters shall in all cases be exercised and enforced in conformity with the laws of the United States, which, so far as necessary to execute the treaty and suitable to carry it into effect, are extended over all citizens of the United States in Japan, and over all others there to the extent that the terms of the treaty justify or require. It also provides that where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others; and that if neither the common law, nor the law of equity, or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the minister shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies. Each of the consuls is authorized, upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offence against law; and to arraign and try any such offender; and to sentence him to punishment in the manner therein prescribed.

The legislation also declares that insurrection or rebellion against the government, with intent to subvert the same, and murder, shall be punishable with death, but that no person

shall be convicted thereof unless the consul and his associates in the trial all concur in the opinion, and the minister approves of the conviction. It also provides that whenever in any case the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or that a severer punishment than previously specified in certain cases will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which has been previously submitted to and approved by the minister, and shall be persons of good repute and competent for the duty.

The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the consular court.

It is further objected to the proceedings in the consular court that the offence with which the petitioner was charged, having been committed on board of a vessel of the United States in Japanese waters, was not triable before the consular court; and that the petitioner, being a subject of Great Britain, was not within the jurisdiction of that court. These objections we will now proceed to consider.

The argument presented in support of the first of these

positions is briefly this. Congress has provided for the punishment of murder committed upon the high seas, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; and has provided that the trial of all offences committed upon the high seas, out of the jurisdiction of any particular State, shall be in the district where the offender is found or into which he is first brought. The term "high seas" includes waters on the sea coast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, high seas. Therefore it is contended that, although the ship Bullion was at the time lying in those waters, the offence for which the appellant was tried and convicted was committed on the high seas and within the jurisdiction of the domestic tribunals of the United States, and is not punishable elsewhere. In support of this position it is assumed that the jurisdiction of the consular court is limited to offences committed on land, within the territory of Japan, to the exclusion of offences committed on waters within that territory.

There is, as it seems to us, an obvious answer to this argument. The jurisdiction to try offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offence when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port when he can be turned over to a consular court having jurisdiction of similar offences committed in the foreign country. 7 Opinions Attys. Gen. 722. The provisions conferring jurisdiction in capital cases upon the consuls in Japan, when the offence is committed in that country, are embodied in the Revised Statutes, with the provisions as to the jurisdiction of domestic tribunals over such offences committed on the high seas; and those statutes were reënacted together, and, as reënacted, went into operation at the same time. To both effect must

be given in proper cases, where they are applicable. We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of Japan — meaning within the territorial jurisdiction of that country — which includes its ports and navigable waters as well as its lands.

The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the consular court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship Bullion. By such enlistment he becomes an American seaman — one of an American crew on board of an American vessel — and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance, and must be held to all its responsibilities. The question has been treated more as a political one for diplomatic adjustment, than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain.

The position taken by our government is expressed in a

communication from the Secretary of State, to the British government, under date of June 16, 1881. It was the assertion of a principle which the Secretary insisted "is in entire conformity with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. If, therefore," he continued, "the government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction which by such treaty has been transferred to the government of the United States."

"If Ross had been a passenger on board of the Bullion, or if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different. But, as it was, he was part of the crew, a duly enrolled seaman under American laws, enjoying the protection of this government to such an extent that he could have been protected from arrest by the British authorities; and his subjection to the laws of the United States cannot be avoided just at the moment that it suits his convenience to allege foreign citizenship. The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey, and it is difficult to see by what authority the British government can assume the duty or claim the right to vindicate that law or protect that officer."

"The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national navy. It is an organized service, gov-

erned by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons and punishing their offences. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves. This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme."

The Secretary concluded his communication with the following expression of the determination of our government:

"So impressed is this government with the importance and propriety of these views, that while it will receive with the most respectful consideration the expression of any different conviction which Her Britannic Majesty's government may entertain, it will yet feel bound to instruct its consular and diplomatic officers in the East, that in China and Japan the judicial authority of the consuls of the United States will be considered as extending over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person. And all offences which would be justiciable by the consular courts of the United States, where the persons so offending are native born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiciable by the same consular courts in the case of seamen of foreign nationality."

The determination thus expressed was afterwards carried out by incorporating the doctrine into the permanent regulations of the department for the guide of the consuls of this country. 72d regulation.

The views thus forcibly expressed present in our judgment the true status of the prisoner while an enlisted seaman on the American vessel, and give effect to the purpose of the treaty

and the legislation of Congress. The treaty uses the term "Americans" in speaking of those who may be brought within the jurisdiction of the consular court for offences committed in Japan. The statute designates them as "citizens of the United States," and yet extends the laws of the United States, so far as they may be necessary to execute the treaty and are suitable to carry the same into effect, not only over all citizens of the United States in Japan, but also over "*all others* to the extent that the terms of the treaty justify or require."

Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government. It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

In *Geofroy* v. *Riggs*, 133 U. S. 258, which was before this court at the last term, it was held that the District of Columbia, as a political community, is one of "the States of the Union," within the meaning of that term as used in the consular convention of 1853 with France; such construction being necessary to give consistency to the provisions of the convention, and not defeat the consideration given by France for her concession of certain rights to citizens of the United States. And in the present case, to carry out the intention of the treaty and statute in question, they will be construed to apply to all parties who are by public law, or the law of the country, entitled to be treated for the time, from their employment and service, as citizens. There are many adjudications to the effect that such character will be ascribed to parties and they

be held liable to all its consequences, and entitled to all its benefits, on other grounds than birth or naturalization.

A statute of Henry VIII enacted that if anybody should rob or take "the goods of the king's subjects within this realm," and be found guilty, the party robbed should have restitution of the goods. Of this statute Sir Matthew Hale said that "though it speaks of the king's subjects, it extends to aliens robbed; for though they are not the king's natural born subjects, they are the king's subjects when in England, by local allegiance." 1 Hale's Pleas of the Crown, p. 542.

In *United States* v. *Holmes*, 5 Wheat. 412, which is in point in the case before us, certain parties were indicted in the Circuit Court of the United States for the District of Massachusetts and convicted of murder on the high seas. It appeared that a vessel, apparently Spanish, was captured by privateers from Buenos Ayres, and a prize crew was put on board, of whom the prisoners were a part. One of them was a citizen of the United States and the others were foreigners. The crime was committed by drowning the person, whose death was charged, by the prisoners driving or throwing him overboard. On motion for a new trial certain questions arose on which the judges were divided in opinion. One of these was, whether it made any difference as to the point of jurisdiction, whether the prisoners or any of them were citizens of the United States, or that the offence was committed, not on board of any vessel, but on the high seas. The court said that the question contained two propositions; one as to the national character of the offender and the person against whom the offence was committed; and second as to the place where it was committed. In respect to the first the court was of the opinion that it made no difference whether the offender was a citizen of the United States or not; adding, "if it (the offence) be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hâc vice*, and in respect to this subject, as belonging to the nation under whose flag he sails."

The case of *The Queen* v. *Anderson*, L. R. 1 Crown Cases

Reserved, 161, is still more in point. There one James Anderson, an American citizen, was indicted at the Central Criminal Court in England for murder on board a vessel belonging to the port of Yarmouth, in Nova Scotia; she was registered in London, and was sailing under the British flag. At the time the offence was committed the vessel was in the river Garonne, within the boundaries of the French Empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half way up the river, and was at the time of the offence about 300 yards from the nearest shore, the river at that place being about half a mile wide. The tide flows up to the place and beyond it. The prisoner was convicted, and the case was reserved for the opinion of the court. It was contended on behalf of the prisoner that the court had no jurisdiction in the case because he was an American citizen and in a foreign country at the time the offence was committed; and also that section 267 of the Merchant Shipping Act, which it was said the Crown relied upon at the trial, applied only to British seamen. Mr. Justice Blackburn in regard to this last statement observed: "The expression, British seamen, may mean one who, whatever his nationality, is serving on board a British ship," and also that it had been decided "that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island." Counsel answered that if it floated into the territory of another nation it would cease to be so, and the jurisdiction of the flag would then be excluded, and that the man might have been tried in France; to which Chief Justice Bovill replied: "Even if he might, why should not this country legislate to regulate the conduct of those on board its own vessels, or so as to have concurrent jurisdiction?" All the judges concurred in sustaining the conviction. In giving his opinion the Chief Justice said:

"There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that

vessel as a part of the crew, and, as such, he must be taken to have been under the protection of the British law, and also amenable to its provisions. It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship, and was at the time a portion of its crew. There are many observations to be found in various writers to show that in some instances, though subject to American law as a citizen of America, and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle, that the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation." p. 165.

Mr. Justice Blackburn said: "Where a nation allows a vessel to sail under her flag, and the crew have the protection of that flag, common sense and justice require that they should be punishable by the law of the flag." p. 170.

The views expressed by the Department of State, quoted above, are in harmony with the doctrine uniformly asserted by our government against the claim by England of a right to take its countrymen from the deck of an American merchant vessel and press them into its naval service. It is a part of our history that the assertion of this claim, and its enforcement in many instances, caused a degree of irritation among our people which no conduct of any other country has ever produced. Its enforcement was deemed a great indignity upon this country and a violation of our right of sovereignty, our vessels being considered as parts of our territory. It led to the War of 1812, and although that war closed without obtaining a relinquishment of the claim, its further assertion was not attempted. At last, in a communication by Mr. Webster, then Secretary of State, to Lord Ashburton, the special British minister to this country, on the 8th of August, 1842, the claim was repudiated, and the announcement made that it would no longer be allowed by our government and must be abandoned. The conclusion of Mr. Webster's communication bears upon the question before us. After referring to the claim of Great

Britain, and demonstrating the injustice of the position and its violation of national rights, he said: "In the early disputes between the two governments, on this so long-contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared, that 'the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.' Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration now had of the whole subject at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have convinced this government that this is not only the simplest and best, but the only rule which can be adopted and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them." Webster's Works, Vol. VI, p. 325.

This rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country; and in support of it there is with the American people no diversity of opinion and can be no division of action.

We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English government, and that the action of the consular tribunal in taking jurisdiction of the prisoner Ross, though an English subject, for the offence committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born. As an American seaman he could have demanded a trial before the consular court as a matter of right, and must therefore be held subject to it as a matter of obligation.

We have not overlooked the objection repeatedly made and

earnestly pressed by counsel, that the consular tribunal is a court of limited jurisdiction. It is undoubtedly a court of that character, limited by the treaty and the statutes passed to carry it into effect, and its jurisdiction cannot be extended beyond their legitimate meaning. But their construction is not, therefore, to be so restricted as to practically defeat the purposes to be accomplished by the treaty, but rather so as to give it full operation, in order that it may not be a vain and nugatory act.

It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property.

We have not considered the objection to the discharge of the prisoner on the ground that he accepted the conditional pardon of the President. If his conviction and sentence were void for want of jurisdiction in the consular tribunal, it may be doubtful whether he was estopped, by his acceptance of the pardon, from assailing their validity; but into that inquiry we need not go, for the consular court having had jurisdiction to try and sentence him, there can be no question as to the binding force of the acceptance.

Order affirmed.

Counsel for Parties.

CLARK THREAD COMPANY *v.* WILLIMANTIC LINEN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 31. Argued October 22, 23, 1890. — Decided May 25, 1891.

The invention for winding thread upon spools, patented in Great Britain to William Weild by letters patent granted January 22, 1858, the specification being filed July 22, 1858, was published by the filing of the specification before Hezekiah Conant discovered and invented the improvement in machines for winding thread on spools, secured to him by letters patent of the United States, of December 13, 1859, (but antedated June 22, 1859,) and numbered 26,415; and, consequently, the use of Weild's invention in the United States does not subject the person using it to liability to pay damages to the owners of Conant's patent for such use, or to being restrained in equity from further using it.

A copy of a patent was attached to a deposition as an exhibit, and the deposition was read at the trial and was returned in the transcript as part of the record by the clerk of the Circuit Court, certified under the seal of the court: *Held* that, although the deposition contained no express minute that the patent was offered in evidence, it must be received as so offered.

The evidence of a patentee offered by the owner of the patent in a suit for an infringement of it, as to the actual day when his invention was made, when that becomes material, must be taken most strongly against those who offer it.

When the defendant in a suit for infringement of a patent shows that the machine which he is using, and which is claimed to be an infringement, was patented and in use before the date of the plaintiff's patent, the burden of proof is on the latter to show that his invention preceded that of the machine which the defendant is using.

IN EQUITY for the infringement of letters patent. Decree for the complainant. Defendants appealed. The case is stated in the opinion.

Mr. Edmund Wetmore (with whom was *Mr. Livingston Gifford*) for appellant.

Mr. Clarence A. Seward and *Mr. W. C. Witter* for appellees. *Mr. Benjamin F. Thurston* and *Mr. W. H. Kenyon* were with *Mr. Witter* on his brief.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit brought by the appellees against the appellants on a patent issued to Hezekiah Conant for an improvement in machines for winding thread on spools. The patent was issued December 13, 1859, but antedated 22d June, 1859, and at its expiration was renewed for seven years from 22d June, 1873, finally expiring in 1880. Its number was 26,415. The bill was filed in February, 1872, charging the defendants with infringement, and praying for injunction, damages, etc. The defendants promptly answered, and the cause lay until February, 1874, when the complainants filed a supplemental bill setting up the extension of the patent, and repeating the charge of infringement. The defendants answered, and the parties went into proofs. In May, 1879, the Circuit Court, held by District Judge Nixon, rendered a decree in favor of the validity of the patent, adjudged that the defendants had infringed the first and third claims thereof, granted an injunction, and ordered a reference to a master to take an account of profits and damages against the defendants. 4 Bann. & Ard. 133. After a long contest in the master's office, a report was filed in October, 1884, awarding damages to the complainants in the sum of $159,035.22. The defendants filed exceptions, which were overruled by the court, and a final decree for the amount awarded was entered on the 17th of June, 1886. The present appeal was taken from that decree.

One of the principal points of controversy on which the case turns was indicated by the complainants themselves in their original bill. They say:

"And your orators further represent that the said defendants sometimes pretend that they have a right to make use of their said machines for winding thread on spools and to make sale of like machines to others to be used, because they say that such machines are described in letters patent of Great Britain granted to William Weild on the 22d day of January, A.D. 1858, upon a specification filed July 22, 1858, and that the same invention was subsequently patented to the said Weild in the United States on the 2d of January, A.D. 1866;

and they further pretend that said British letters patent anticipate the invention of said Conant. But your orators aver the fact to be that the application of said Conant for letters patent for his invention was made and filed in the Patent Office prior to the date of the sealing of said British letters patent to said Weild, and that the invention of said Conant, for which letters patent were granted to him as aforesaid, was made before the publication or date of sealing of said British letters patent of said Weild."

The allegation that Conant's application for his patent was made and filed in the Patent Office prior to the date of the sealing of Weild's British patent is not correct. It is not proved, and the contrary appears to be the truth. Conant's application was first filed on the 5th or 6th of January, 1859, and was afterwards withdrawn and renewed on the last of April or first of May in the same year. The specification annexed to the patent is dated the 11th of April, 1859; and the drawings are marked as received in the office and filed January 6, 1858, [an evident mistake for 1859,] and received and filed in new application May 2, 1859. There is a certified copy of the file wrapper and contents in the record which shows that the original application was filed in the office January 5, 1859, and was withdrawn and a new application filed April 30, 1859, the papers being received in the examiner's office a day or two later in each case. But as this copy of the file wrapper and contents was only introduced on an unsuccessful motion for a rehearing, and not in the principal case, it may not be proper to rely upon it in a matter affecting the merits. There is other evidence, however, sufficient to verify the same facts.

The allegation that the *invention* of Conant, for which his said letters patent were granted, was made before the publication or sealing of Weild's patent requires more careful consideration.

The defendants, in their answer, denied that they had infringed Conant's patent, and denied that he was the first inventor of what is claimed to be patented thereby, and averred "that on the contrary, the same, under the broad

construction thereof claimed for it by complainants, was, prior to any invention thereof by said Conant, described in and patented by letters patent granted by the government of Great Britain to Archibald Thomson, which were dated the 10th day of November, 1801, and numbered 25,053; also described in and patented by letters patent granted by the government of Great Britain to Wm. Young, which were dated the 2d day of December, 1848, and numbered 12,353; also described in and patented by letters patent granted by the government of Great Britain to Thomas Willis, which were dated the 1st day of June, 1852, and numbered 14,151; also described in and patented by letters patent granted by the government of Great Britain to John Wibberly, which were dated the 4th day of December, 1853, and numbered 2901."

As to the Weild patent, referred to in the bill of complaint, the defendants answered as follows:

"And these defendants, further answering, say that letters patent of the United States for an invention in machines for winding thread upon spools were granted to William Weild, dated the 2d day of January, 1866, and that the only machine which these defendants have used for winding thread on spools, and those which they now have in use for that purpose, were purchased by them from said Weild under said patent, and were made in conformity therewith, and that they paid said Weild royalty for the use of the same.

"And these defendants, further answering on information and belief, say that said letters patent for said last-named invention were granted by the government of Great Britain to said Weild, dated January 22, 1858, and sealed April 30, 1858.

"And these defendants, further answering, say that they do not know and are not informed, save by said bill of complaint, when said Conant made his application for the letters patent upon which this suit is brought, or whether or not the same or the invention of said Conant was made prior to the sealing of the English patent to Weild, and leave the complainants to make such proof thereof as they may be advised is material.

"And these defendants, further answering on information

and belief, deny that said Conant made his alleged invention before the date of said foreign letters patent to said Weild.

"And these defendants say that they are informed and believe that said Weild made the invention for which said patents were issued to him and put the same into public use prior to the time of said Conant's alleged invention."

We have thus adverted to the pleadings for the purpose of showing that the issue as to the priority of Weild's patent over the invention of Conant was raised by the complainants themselves in their bill of complaint, and was accepted by the defendants in their answer. This should settle all doubt as to the relevancy of that question in disposing of the case on its merits.

Objection was made that the Weild patent was not duly proved in the case, but without foundation. It appears by the record that, at an examination of witnesses on the part of the defendants before W. C. Witter, examiner, by consent, continued from time to time from June 17, 1875, to April 8, 1876, one Boyd Eliot, being under examination, was asked, amongst other things:

"3 Q. Have you read and examined the copy — Weild patent, defendant's Exhibit William Weild?

"A. I have.

"4 Q. Do you find therein described the defendants' machines of which Exhibit 5 is a model in part?

"A. I do; substantially the same."

At the end of the depositions of the witnesses are the exhibits referred to therein, among which is the copy of the Weild patent in question, marked "Defendants' Exhibit William Weild, W. C. W. Ex'r;" and at the end of the entire record is the certificate of the clerk of the Circuit Court verifying the same, under the seal of the court, as a true transcript of all the proceedings in the cause on file and of record in his office at Trenton. The patent was referred to and used in the examination, was marked as an exhibit in the cause by the examiner and is actually found in the record and returned and certified as a part thereof. Though the depositions contain no express minute that the patent was offered in evidence,

we think that it must be received as so offered. Nearly the same question arose in *Hoskin* v. *Fisher*, 125 U. S. 217, in relation to a patent marked as an exhibit, and we held that it was sufficiently authenticated as a part of the evidence in the case. If the Weild patent was improperly inserted in the record, the complainant should have moved the court below to have it excluded before the transcript was sent to this court.

As this patent, in our view, has an important bearing on the questions involved in the case, it is proper that we should examine with some care the allegation in the bill of complaint that Conant made his invention before the patent was recorded and published, which is conceded to have been on the 22d day of July, 1858, six months after it was granted and after its date. The question is important because the law is that any person sued for infringement of an American patent may show in defence that the invention claimed was patented or described in some printed publication [not before the American patent was granted — nor before the application for it was filed, but] before the patentee's supposed invention or discovery thereof. Rev. Stat. § 4920. It is also important, because the defendants proved that the machines used by them, and charged to be infringements of Conant's invention, were built in Manchester, England, and obtained from Weild himself, and constructed in accordance with his patent. It would seem to be very clear, therefore, that unless the invention of Conant was made and perfected before the 22d day of July, 1858, the time of publication of Weild's patent, the defendants had a perfect defence to the suit, either on the ground that the Weild patent anticipated Conant's invention, or that Conant's patent, in view of the state of the art, must be so construed and restricted as not to embrace any portion of the Weild patent — in which case the defendants could not be justly charged with infringement.

The only evidence on the question as to the time of Conant's invention is his own testimony, a species of evidence which, in cases of this kind, ought to be received with great caution. The following question was put to him by his counsel:

"Q. 4. Please state when you made the invention which is

described in the aforesaid letters patent granted to you; give the date of its conception and the successive stages of its development."

His answer was as follows:

"My attention was drawn to this point of the matter of winding thread automatically by machinery some time during the year 1857. I worked at intervals at making drawings and trying to develop different motions and devices, and, to the best of my recollection, I fixed upon a definite style of machine, which I proposed to build some time during that year, and prosecuted the thing so far as to have some of the patterns made, but was interrupted during the winter, and, on further reflection, in the spring of 1858, I decided upon another style of machine, which I thought would be more certain in its action, and which I completed during the summer of — and, to the best of my recollection, in July — 1858. The part of my machine called the traverse changer was the same in the first set of drawings as it is in present use. The various devices for accomplishing the change required to wind different lengths were carefully studied over, and I fixed on this present style of traverse changer, with different lengths of teeth or projections arranged upon the periphery of the wheel, as the most practical and best form in which it could be arranged, from the fact that the wheel is always in a position to wind the first course of thread upon the spool immediately after the last course on the previous spool is completed. The first machine, according to the best of my recollection, was deficient in that it had no way of adjustment by which I could wind spools of different lengths, but having the same number of courses, and which I considered defective, because in such case I would be obliged to have a different traverse changer for every different length of spool. So I made my traverse changer long enough for winding the coarsest number of thread in ordinary business, and then fixed the adjustment of the lips, so that, by spreading them apart, I could wind as short courses as was desirable, when by setting the lips close together, I could wind courses the full length of the traverse changer. It was also a point in my

study to make the machine as simple as possible, so it could be readily operated by persons of ordinary ability. The first machine, as I mentioned, was completed and put in operation in the summer of 1858. After getting the machine completed and testing it to my satisfaction I went to work and made a model myself. After that I made a set of patent drawings and drew up my own specification and made the first application for a patent myself. In January, 1859, I exhibited my machine at a meeting of the stockholders of the Willimantic Linen Company, in Willimantic, Connecticut, at which time they were so well pleased with the machine that they proposed to purchase one-half of the right; but they ascertained that I made the application for a patent myself, and, thinking, perhaps, that it was not as perfectly done as it should be, employed Mr. Henry B. Renwick to redraft the specification. In the meantime a Mr. C. N. Spencer invented a self-acting winding machine, for which he made application for a patent, which the Patent Office declared interfered with my application. I was obliged to take testimony, which delayed the granting of the patent, after which a patent was issued to me."

On a subsequent examination, being questioned with regard to the disposition of the machine constructed by him, he said:

"I made an exhibition of it in the month of January, 1859, at a meeting of the stockholders of the Willimantic Linen Company, and I run it the best part of a half day in their presence. Afterwards I exhibited it to Mr. Harry B. Renwick, who, I suppose, was employed at that time as an expert for the Willimantic Linen Company, but after that it was laid away and I don't know that it was ever again used."

No person accustomed to weigh the credibility of human testimony can fail to perceive the stress under which this evidence was given. With the most favorable construction, the most that can be deduced from it is that the invention was not completed until July, 1858. The witness does not say in what part of July, although his interest strongly suggested that part of the month which preceded the 22d. The generality of the expression — "July, 1858" — excites attention,

and in this case it is not applying too strict a rule to say that the evidence should be construed most strongly against the complainants; and this would necessarily lead to the inference that the invention was completed in the last part of July, subsequent to the publication of the English patent. We feel bound to put this strict construction upon the patentee's evidence because such testimony, given for the purpose that this was, is necessarily subject to the gravest suspicion, however honest and well-intentioned the witness may be.

We say that Conant's testimony cannot be construed as showing that his invention was completed before the month of July, 1858. According to his statement it was not until then that he put it in visible form in the shape of a machine. He had conceived of a machine in 1857, and made some patterns, but in the spring of 1858 he decided upon another style of machine, which he completed during the summer — to the best of his recollection in July, 1858. The part of his machine called the traverse changer was the same in the first set of drawings as it is in present use. This is the substance of the testimony. It is evident that the invention was not completed until the construction of the machine. A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments or projects, abandoned by the inventor, are equally destitute of that character. These propositions have been so often reiterated as to be elementary.

If the result to which we have come as to the date of Conant's invention is correct, it really determines the controversy, without any inquiry as to the similarity of Conant's invention to that shown in Weild's patent; for it is proved beyond all controversy that the defendants only used Weild's machine, and if they only used that which antedated Conant's invention they could not be guilty of violating his rights.

The only part of Conant's testimony on which any plausible argument can be raised to show that his invention was prior to the 22d day of July, 1858, is that in which he states that the part of his machine called the traverse changer was the same in the first set of drawings as it is in present use; but

this is so vague and uncertain that no satisfactory inference can be drawn from it. The traverse changer by itself was not claimed in the patent as the invention of Conant, but it was claimed in combination with other things, which may or may not have been exhibited in his drawings; and traverse changers had been in use long before Conant had thought of the subject at all. To make the matter more manifest, it may be proper to give a brief description of the machine and the invention which related to it.

In winding thread upon a spool it is necessary to wind it in layers, one above, or around, the other, until the spool is filled flush with the two ends. To do this with a continuous and unbroken thread, the first layer is commenced at one end of the spool and carried to the other as fast as the thickness of the thread wound in a continuous coil will admit; from thence the next layer is wound in a reverse direction back to the end at which the first layer commenced; and so on alternately until the spool is filled. The thread is fed on to the spool by means of a slender finger called a thread-guide, through and over which the thread is brought close to the spool; and in order to wind the alternate layers as above described, this thread-guide has to be moved alternately backward and forward just as fast as the thread is wound, and just as far as the length of the spool. It receives this alternate movement by being attached to a slide-bar, or traverse-rod, which is carried backward and forward by means of a parallel shaft furnished on one-half its length with a right-hand screw and on the other half of its length with a left-hand screw. Two half nuts, attached by arms to the slide-bar, are so arranged that by the action of the machine one of them may be engaged with the right-hand screw for a limited time, and then the other with the left-hand screw for an equal length of time. The result is that the slide-bar will be forced first in one direction and then in the other, according as the right or left-hand screw is engaged with its corresponding nut. The change of motion is effected by a change of engagement of the nuts, so that when one nut is withdrawn from the screw the other may be set up against it. For a constant and uniform extent or length, of alternate

movement, this may be very easily effected by ordinary cam or stop devices. But a spool has not an invariable length from its centre, or barrel, to its circumference. The inner surface of the two ends flare out a little, so that the outside layers of thread are longer than those beneath them. This renders it necessary that the length of the alternate movement of the thread-guide and slide-bar should be slightly and continuously increased, from the first or inside layer to the last or outside layer. The device for effecting this change of extent of lateral movement is the thing which requires most inventive skill in the construction of the machine. Conant evidently supposed that he was the first to contrive a device of this kind, which, in his patent, he calls a pattern cam, or traverse changer. But in this he was mistaken; spool-winders had long been in use in England, with the right and left hand screw device for giving the thread-guide an alternate backward and forward movement, both in hand machines and in automatic machines driven by power; and in two of the latter, Wibberly's, patented in 1853, and Young's, patented in 1848, traverse changers were used for the same purpose as in Conant's machine.

Besides the regulation of the alternate movement of the thread-guide to correspond with the variable length of the layers of thread on the spool, it was also necessary, or at least desirable, that there should be some device for stopping the machine, or the winding of the thread, when the spool was full. This was effected in a certain way by Conant in his machine, and had been effected in different ways by Wibberly and Young in their machines. It is unnecessary here to go into a description of the various devices used. Enough has been said for a general understanding of the claims made in Conant's patent.

The court below held that the defendants had infringed the first and third claims of the patent, and it cannot be seriously contended that any other claims were infringed. The first and third claims of the patent were as follows:

"First. The combination, substantially in the manner hereinbefore set forth, of a traverse changer, with right and left-hand screws and with nuts which are alternately in gear with

such screws, the combination operating as a whole substantially in the manner and for the purpose herein described."

"Third. I claim a stop motion, substantially such as described herein, for causing the machine to come to rest when a spool is filled, in combination with automatic apparatus, substantially such as set forth, for regulating the length of motion and change of direction of a motion of a guide through which thread is delivered on to a bobbin or spool."

These claims are for combinations. The first claim is for a combination of a traverse changer, right and left-hand screws and nuts alternately in gear with such screws — the combination operating substantially in the manner and for the purpose described. This combination has three elements, and a specific mode of operation. The third claim is for the stop motion in combination with the apparatus described and combined in the first claim.

From this review it is apparent how uncertain and unsatisfactory is the statement made by Conant in his testimony that "the part of my machine called the traverse changer was the same in the first set of drawings as it is in present use." It fails entirely to show that, prior to the 22d of July, 1858, he ever had or ever exhibited any drawings of the invention described in the first or third claim of the patent. We conclude, therefore, that there is no proof on which reliance can be placed that Conant made his alleged invention before the publication of Weild's patent in England. After Weild's patent was introduced into the case, showing with certainty the date of its publication, and such date anterior to the issue of Conant's patent, it was incumbent on the plaintiffs, in rebuttal, to show, if not with equal certainty, yet to the satisfaction of the court, that Conant's invention preceded that date. *St. Paul Plow Works* v. *Starling*, *ante*, 184, decided at this term.

It is also clear that Conant was not a pioneer in this department of invention, and that he must be held strictly to the terms of his patent and was entitled only to the specific form of device described and claimed therein; and the evidence is very clear to the effect that the defendants never used such

device. It is unnecessary for us to enter into an examination of the evidence on this subject. We are satisfied that the complainants had no case on which to ground a decree, and that the bill of complaint ought to have been dismissed.

The decree is reversed, and the cause remanded with directions to enter a decree dismissing the bill of complaint, and taking such further proceedings as may be in conformity with this opinion.

ALBRIGHT *v.* OYSTER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 133. Argued and submitted January 6, 1891. — Decided May 25, 1891.

This suit is brought to determine the legal effect of a will, and of a modifying contract in regard to it made by those interested. As "the whole question in the case is one of fact," the court has "given the evidence a very careful examination," and, without determining the legal effect of the will or the contract, and proceeding on the real intention of the parties, which were fair to all interested, and have been acted upon and acquiesced in by every one concerned for a long period, and deeming it for the interest of all concerned and of the community that litigation over this estate should cease, it makes a decree to effect those objects.

IN EQUITY. The case is stated in the opinion.

Mr. James H. Anderson for appellants.

Mr. D. P. Dyer for appellees submitted on his brief.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was a suit in equity brought by Mollie N. Albright and William E. Oyster, by their next friend, David K. Oyster, and David K. Oyster in his own right, citizens of Missouri, against George Oyster, Margaret Oyster, Margaretta Oyster, executrix of the last will and testament of Simon Oyster, de-

ceased; Simon K. Oyster and Iola E. Oyster, his wife, and John Albright, husband of Mollie N. Albright, citizens of Pennsylvania. Its object was to establish the title of the plaintiffs to a large amount of land situated in Lewis County, Missouri, the legal title to which was in the defendant George Oyster.

The controversy grows out of a will made by Abraham Oyster, and a subsequent agreement in writing among the parties to this suit, who were beneficiaries under the will. The plaintiffs Mollie N. Albright and William E. Oyster and the defendant Iola E. Oyster are the children of the plaintiff David K. Oyster.

Abraham Oyster died in Lewis County, Missouri, on the 10th day of August, 1862, leaving four children, viz., the plaintiff David K. Oyster, the defendants Margaret and George Oyster, and Simon Oyster, since deceased. He left a will dated two days before his death, and duly probated in the county court of Lewis County, Missouri, on the 21st of October, 1862, which was as follows:

"It is my will that all my real estate, part of which is situate in Cumberland County, State of Pennsylvania, a part in Pike County, State of Illinois, and a part in Lewis and Marion counties, in the State of Missouri — Island No. 14, in the Mississippi, opposite the city of La Grange, is not included in this clause — be taken possession of as soon as may be by the executors of this will, and that all such parts thereof as can shall be leased or rented until such time as, in the judgment of said executors, it will sell for fair prices, when they will proceed to sell said real estate to the best advantage, all of which they are hereby authorized to bargain, sell and alien in fee simple, and out of the proceeds of such sale and rents —

"1. I hereby give and bequeath to my daughter, Martha Oyster, ten thousand dollars ($10,000).

"2. I give and bequeath to my son, George Oyster, ten thousand dollars ($10,000).

"3. Of the remainder of the proceeds of the sales and rents aforesaid I give and bequeath to my sons, Simon Oyster, George Oyster and David K. Oyster, and my daughter, Martha Oyster, each an equal portion; but it is my will that

the portion that falls to my son David K. Oyster my executors shall so dispose of as that only the interest annually shall be paid to him; also that the saw-mill in the city of La Grange shall, until such time as my executors shall deem it proper to sell it, as the other real estate, be rented to my son David K. at a fair sum, or to some other person.

"Also that my executors collect all the debts owing to me, and out of such collections pay all the expenses of the executorship, including all fees, etc.

"I do hereby appoint as executors of this will my son George Oyster and my son-in-law Charles Oyster, both of the county of Cumberland, and State of Pennsylvania."

Martha Oyster mentioned in the will is known as *Margaret* Oyster throughout these proceedings.

The bill of complaint in this case was filed on the 6th of September, 1883; and, after setting out the foregoing facts in somewhat the same order as we have stated them, contained substantially the following material averments: In consequence of the executors named in the will not residing in Missouri, they were disqualified to act, under the laws of that State, and on the day the will was probated the court appointed David K. Oyster administrator of the estate of Abraham Oyster, deceased, with the will annexed, and he duly qualified as such administrator. Simon Oyster and David K. Oyster were not satisfied with the provisions of the will, and, on the 18th of April, 1866, the former instituted a suit in the Circuit Court of Lewis County, Missouri, to have it set aside and declared null and void. While that suit was pending Simon Oyster died, leaving a will in which he appointed his wife Margaretta his sole executrix, with full power to settle up his estate. That will was duly probated in the orphans' court of Dauphin County, Pennsylvania, and the executrix took upon herself the execution of it.

On the 3d of March, 1868, the legatees under the will, then living, and Margaretta Oyster, executrix, etc., as a sort of compromise of the suit instituted by Simon Oyster, as aforesaid, entered into an agreement in writing, drawn by George Oyster, by the terms of which it was provided that, for the purpose of

effecting a speedy settlement of said estate, Margaretta Oyster, executrix, etc., and David K. Oyster should pay to Margaret and George Oyster the sum of $5000, in equal parts of $2500 to each, and that, in consideration of certain advances made to Simon, George and Margaret Oyster, by their father, Abraham, during his lifetime, and in order to nearly equalize the shares of the several legatees, the plaintiff David K. Oyster, should receive from the estate (1) 640 acres of unimproved lands in Lewis County, Missouri; (2) 320 acres of land in Pike County, Illinois; (3) certain particularly described property in La Grange, Missouri, on which steam saw-mills were built, in consideration of $1125; and (4) $5000. The agreement further provided that, in consideration of the foregoing parts of it being fully complied with, the remainder of the estate of their ancestor should be divided equally among George, Margaret, David K. and the heirs of Simon Oyster; and that, except as to the bequests made to Margaret and George Oyster of $10,000 each, and as to so much as related to the saw-mill property at La Grange, the will of Abraham Oyster should be fully executed. And it was further agreed that, in consideration of the above premises, the suit to contest the will, brought by Simon Oyster, should be forever abandoned.

In pursuance of that agreement, on the 13th of April, 1868, the suit instituted by Simon Oyster to have the will set aside was dismissed. Afterwards, in November, 1869, the lands belonging to the estate in Missouri were sold at public auction. A few days before the sale, George, Margaret, Margaretta, executrix, etc., and David K. Oyster held a consultation, at the residence of David K., as to the best method of carrying out the provisions of the will and the subsequent agreement, at which time it was fully agreed by all of them that at the forthcoming sale David K. should bid in for the benefit of his children what was then known as the "home farm" of Abraham Oyster, for $12,000, and also 640 acres of land in what was known as "Oyster prairie," in Lewis County, in order that they (his children) might be made to share equally, in the distribution of the estate, with the other legatees who had received advancements from Abraham Oyster during his life-

time. It was found, however, that David K., being administrator with the will annexed, was precluded, under the laws of Missouri, from bidding at the sale; and, accordingly, arrangements satisfactory to all concerned were finally made by which David K. relinquished all right, title, claim and interest in and to the property under the will and the subsequent modifying agreement, for the benefit of his children, and Simon K. Oyster, the son of Margaret, and the son-in-law of David K., bid in those two last-mentioned pieces of property — the former for $12,000 and the latter for $3200 — for the benefit of the children of David K.

After a few other tracts of prairie land had been sold at what seemed to those interested to be unsatisfactory prices, an understanding was reached among the legatees under the will that the remainder of the prairie lands should be sold and bought in by any one of them without regard to price or location; and, in order that such property might be equally divided among them, it was further agreed that three appraisers should be appointed to go with the county surveyor upon those prairie lands and divide them into four equal parts. The sale then proceeded to completion, and the purchasers at the sale received their deeds from David K., as administrator. Afterwards, in pursuance of the agreement last above referred to, three appraisers were appointed, who made division of the prairie lands bought in by the legatees under the will in four equal parts, as nearly as was possible according to their value. Thereupon, by virtue of a mutual agreement between the beneficiaries under the will, they selected their respective portions of the lands divided as aforesaid in the following order: (1) George Oyster, (2) Margaret Oyster, (3) Margaretta Oyster, executrix, etc., and (4) Simon K. Oyster, for the benefit of the children of David K. Oyster. Accordingly deeds were made to each one of them by David K., as administrator, including absolute deeds to Simon K. of the two first-mentioned properties and the last division of the prairie land. In making conveyances the prairie land property was treated as if it had been bid in at the administrator's sale. The grantees in those conveyances thereupon took possession of the property

conveyed to them, respectively, and continued to hold it ever afterwards.

Subsequently, on the 11th of September, 1871, the Circuit Court of Lewis County, Missouri, appointed one Robinson trustee for the children of David K., to take the property purchased at the sale and that set aside by the appraisers for the benefit of those children, and authorized him to receive said property at the prices at which it had been bid in by Simon K., as aforesaid. The trustee made demand therefor of Simon K., but the latter, acting under the influence of the defendant George Oyster, declined to make such transfer; and soon thereafter the trustee died without having begun any proceedings to compel such conveyance.

The deeds to Simon K., although absolute in form and purporting to have been executed in consideration of $21,000, were taken by Simon K. with the distinct understanding that he should hold the property as the trustee for the benefit of the children of David K., and no consideration whatever was paid by him, all of which facts were well known to all the beneficiaries of the estate. But, nevertheless, on the 10th day of February, 1881, Simon K., with full knowledge of all the facts in the premises, and in violation of the trust reposed in him, in consideration of the sum of five dollars, (which was never paid,) conveyed the property deeded to him as aforesaid to the defendant George Oyster, who also had full knowledge of all those facts and circumstances relative to said trust, and who, in fact, was mainly instrumental in procuring such conveyance to himself, by representing to Simon K., who was then very sick, that if he should die it would involve his estate in much litigation, and that he (George) would indemnify him (Simon K.) against any loss which he might suffer by reason of such conveyance.

At the time of the partition and sale aforesaid the children of David K. were all minors and unmarried. But subsequently the daughter, Iola E., intermarried with said Simon K., and moved to Pennsylvania. The other daughter married the defendant John Albright, but both she and her brother, William E., have always lived with their father, who had been in posses-

sion and enjoyment of the lands so conveyed to Simon K. ever since that conveyance, with the consent of his children, holding the same for their benefit.

Soon after the defendant George Oyster got the legal title to the lands in question, he instituted a suit in ejectment against David K., which, under a stipulation between the parties to that suit, resulted in a judgment of ouster against David K. on the 30th of April, 1883. At the same time the plaintiff in that suit agreed not to cause execution to issue on his judgment before the 1st of May, 1884, in order that the plaintiffs in this suit might have time to file this bill, to test their equitable rights to the property in dispute.

The bill further stated that the reason the plaintiff Mollie N. Albright appeared by her next friend, and her husband, John Albright, was made a defendant, was because they did not live together, and he refused to join as a coplaintiff with her; and that the reason Iola E. Oyster was not made a coplaintiff was because she was under the influence and control of her husband, Simon K., who refused to join as a coplaintiff in this suit.

The prayer of the bill was for an injunction to restrain the defendant George Oyster from causing execution to issue on the aforesaid judgment in the ejectment proceedings, and for a decree directing him to convey the property in dispute to the plaintiffs and the defendant Iola E. Oyster, on the ground that the conveyance of the property to Simon K. Oyster was made in trust for their use and benefit, that it had been fully paid for out of David K. Oyster's distributive share of the estate of his father, and that the defendant George Oyster acquired the property, with knowledge of the trust, and parted with no value therefor; and for other and further relief, etc.

George Oyster filed an answer to the bill, and the main issues in the case arise out of the bill and that answer. It was in substance as follows: It admitted all the averments contained in the bill up to and including the making of the agreement of March 3, 1868, modifying the terms of the will; and averred in relation to that matter that the respondent

had never refused to be bound by that agreement, but that plaintiff David K. had persistently ignored the obligations which that instrument imposed upon him, although he had been quite willing to accept the benefits which it conferred. It further admitted the main facts in relation to the sale of the property by the administrator to be substantially as stated in the bill; but averred that the real agreement entered into by the legatees under the will, with respect to the purchase of certain of the lands by the legatees and their subsequent partition, was this: That the share of each legatee, as ascertained by the partition proceedings mentioned in the bill, should be paid for by each one, respectively, and the prices therefor should be treated as assets of the estate, to be disposed of by the administrator in the proper execution of the will and the modifying contract.

The answer then averred that, at the sale, property to the value of $4920 was sold to strangers, and the remainder of it was bid in by the four legatees or by some one in their interest under the agreement; that the sale having been concluded, the four legatees under the will met and mutually agreed upon the division that should be made of the property bid in by them, whereby $3500 worth of lands fell to each respondent, Margaret and Margaretta, executrix, etc., and $6000 worth to them jointly, (none of which are in dispute,) and all the remainder of the property, that in dispute, was apportioned to David K. for $21,800; that all of that property was to be accounted for by them respectively, according to its amount and value; that, as the property apportioned to David K. was more than his share under the will and the modifying agreement, it was agreed that the title to that property should remain in the estate until paid for by him, and be chargeable with the purchase money; that the deeds were made in pursuance of that agreement or understanding; that respondent, Margaret and Margaretta, executrix, etc., each paid to the administrator the price of the lands allotted to them respectively, but that the purchase price of the land conveyed by Simon K. was not paid by him, by David K., or by any one else; that David K., as administrator, was chargeable with

the purchase price of the land conveyed to Simon K., and with $4920 purchase money of land sold to strangers, and with other property which came into his hands, the precise amount of which was unknown to respondent; and that David K., in making the conveyances to Simon K. without payment of the purchase price, acted in violation of his official duty, and the conveyance thus operated to invest Simon K. with the title to the property thus conveyed, subject to the incumbrance for purchase money, and to constitute him a trustee of said property for the legatees under the will for their respective shares in the estate of the testator remaining unsatisfied, viz., to respondent, $4975, to Margaret, $2887, and to Margaretta, executrix, etc., $5230.

It was denied that the "house farm" and the 640 acres of prairie lands, or either of them, was bid in for the benefit of the children of David K., or that Simon K. ever held said lands upon any trust whatever for said children. It was then averred that the alleged trust in Simon K. was void under the Missouri statute of frauds, because it was not in writing. Further answering, respondent admitted that Simon K. never paid any consideration for the property in dispute; and averred that neither did the plaintiffs, who claim to be his *cestuis que trust*, ever pay any consideration therefor, and that plaintiffs should be estopped from averring the consideration in the deed to Simon K. to have been other than that stated in the deed.

The conveyance of Simon K. to respondent was admitted, but it was denied that any unfair means were adopted by respondent as an inducement to that conveyance. And it was further averred that the conveyance was taken by respondent, not for his sole use and benefit, as alleged in the bill, but in trust for the benefit of the legatees under the will, as the only means of securing the amounts due from David K. to the other legatees, David K. and his sureties on his official bond being wholly insolvent; that all acts done by respondent since he secured the title to the property were likewise in the execution of said trust; and that respondent is still claiming to hold the property in trust as aforesaid.

Without going more into detail, it is sufficient to say that

any and all other material averments in the bill charging the respondent with any illegal practices or any wrong were specifically denied by him, as was also the averment that respondent was holding the property in trust for the children of David K.; and it was prayed that the bill be dismissed.

Margaret Oyster and Margaretta Oyster, executrix, etc., filed separate demurrers to the bill on the ground that it did not allege that those defendants had any interest in the lands mentioned in the bill adverse to plaintiffs, or that those defendants did in any way controvert or deny, or had in any way controverted or denied, the rights of plaintiffs to the relief demanded, or that those defendants were in any way interested or concerned in the granting or refusal of the relief demanded; and because no case was stated which entitled plaintiffs to any discovery or relief against those defendants.

Iola E. Oyster filed a disclaimer; and Simon K. filed a plea that the trust alleged to have been in him was not in writing, and was, therefore, void under the laws of Missouri.

The plaintiffs filed exceptions to that part of the answer of George Oyster which set up the statute of Missouri to defeat the trust, and also to the plea of Simon K. Oyster setting up the same defence, on the grounds (1) that the facts alleged in the bill took the case out of the operation of the statute, (2) that there had been a part performance which took the case out of the operation of the statute, and (3) because the alleged trust was a resulting trust.

On the 31st of January, 1884, the court entered an order overruling the demurrers of Margaret and Margaretta Oyster, sustaining the exceptions to the plea of Simon K. and the first exception to the answer of George Oyster, overruling the other exceptions to the answer, and giving the defendant Simon K. leave to answer in twenty days. The opinion of the court on these points, delivered by Judge Treat, is found in 19 Fed. Rep. 849.

On the 4th of February, 1884, the plaintiffs filed a reply to the answer of George Oyster; and on the 18th of the same month Simon K. Oyster filed an answer to the bill, in which he admitted many of the facts alleged in the bill, among

others that he never paid any of the consideration named in the deed to him; and averred that it was never expected of him that he should pay it, but, on the contrary, it was understood that David K. should pay it. He further admitted that he conveyed the property in dispute to the defendant George Oyster, but denied that he violated any trust in so doing, and further denied any confederacy or any intention on his part to commit any wrongful acts, in the transaction, or to violate any trust reposed in him.

Replication was also filed to this answer; and the case being thus at issue a considerable amount of testimony was taken. The case was heard upon the pleadings and proofs, and arguments of counsel, and on the first of December, 1884, the Circuit Court entered a decree dismissing the bill of complaint, without prejudice to any rights that the parties might have in the final administration of the trusts which were found to have devolved on the defendant George Oyster, by the deed from Simon K. and the aforesaid contract of March 3, 1868, modifying the will of Abraham Oyster, deceased. The opinion of the court, delivered by Judge Treat, is found in 22 Fed. Rep. 628. An appeal from that decree brings the case here.

The theory upon which this suit is prosecuted is, that the complainants are the owners in equity of the real estate described in the bill, the consideration for it having been paid by the distributive share of the complainant David K. Oyster, in his father's estate; that part of the property described was bid off at the sale in 1869 by Simon K. Oyster, for the benefit of the children of David K., and the remainder, which was the one-fourth part of the lands in Oyster prairie set apart as the share of David K., was bid off at the sale by the heirs; that all that property was deeded to Simon K., as trustee for David K. and his children, the conveyance not proceeding directly to the beneficiaries, because, under the law of Missouri, David K., being administrator of the estate, could not convey to himself individually, and his children at that time were minors; and that the conveyance of the property by Simon K. to the defendant George Oyster was charged with those trusts. The real defence of George Oyster is, that David K. Oyster was in

arrears to the estate in a large sum, and for that reason his share in the estate of their father was conveyed to Simon K., as trustee, charged with that sum; and that he himself now holds the property, by conveyance from Simon K., charged with the lien of himself, Margaret and Margaretta, executrix of Simon, deceased, for the unpaid portion of the purchase price from David K. The court below found that the evidence did not sustain complainant's theory of the case, and accordingly dismissed the bill without prejudice to the rights of the parties in the final administration of the trust devolved upon George Oyster by the deed to him from Simon K., and under the contract of March 3, 1868, amendatory of the will of Abraham Oyster.

As the whole question in the case is one of fact, we have given the evidence a very careful examination. Certain facts are undisputed, or are clearly proven. Abraham Oyster died testate in Missouri in 1862, leaving a large amount of property in that State, in Illinois and in Pennsylvania. He left four children surviving him, Margaret, Simon, George and David K. A few years before his death he had made certain advancements to Margaret, George and Simon, but had advanced nothing to David K. By his will he made further preferences in favor of George and Margaret, bequeathing to them $10,000 apiece, and then dividing the remainder of the estate equally among the four children. The clause in the will relating to the share of David K. was worded somewhat peculiarly, as follows: "It is my will that the portion that falls to my son, David K. Oyster, my executors shall so dispose of as that only the interest annually shall be paid to him." We need not stop here to consider the legal effect of that clause. But the evidence clearly shows that, until a very recent period, the understanding of all the legatees was, that it conveyed to David K. only a life estate in the share coming to him, with a remainder over to his children. The foregoing facts are thus stated in the forefront of the opinion, because upon them hinges much that is to follow.

As is usual when there has been an unequal division of an estate among the children of the testator, those receiving the

smaller shares were dissatisfied with the will. Accordingly, we find Simon Oyster bringing a suit to set the will aside and have it declared null and void. Before that suit was terminated Simon Oyster died, leaving a will by which he appointed his widow (who was also named Margaret and who is the "Margaretta" throughout these proceedings—so called because she was small of stature, and to distinguish her from the other Margaret) executrix of his estate. Throughout the subsequent transactions relating to the estate of Abraham Oyster, Margaretta represented the share that fell to Simon. To all intents and purposes she was treated by the other legatees as the legal representative of Simon, and has been so treated by them up to this time.

The unequal distribution of the estate of Abraham Oyster by his will and the suit of Simon to set it aside brought about the agreement in writing of March 3, 1868, amendatory of the will. The object of that agreement was to place the children of Abraham Oyster on a comparatively equal footing respecting the estate, and to compromise the suit of Simon; for the understanding of the parties was, that that suit did not abate by his death. That agreement is as averred in complainant's bill; but to make its terms fully understood it may be necessary to advert to certain facts brought out by the evidence. As already stated, Abraham Oyster, in his lifetime, had made advancements to Margaret, Simon and George, but had never advanced anything to David K. Those advancements appear to have been made in the years 1858 or 1859. Accordingly, the first consideration moving in the agreement was to place David K. on a comparatively equal footing with his brothers and sister. The agreement, therefore, provided that Margaret, Margaretta, executrix, and George, should quitclaim their interests to David K. in the following property belonging to the estate: (1) Six hundred and forty acres of unimproved land in Lewis County, Missouri (known as a portion of the "Oyster prairie" lands, in the subsequent proceedings); and (2) three hundred and twenty acres of land in Pike County, Illinois. Certain particularly described property in La Grange, Missouri, known as the "saw-mill" property, was to be sold

to David K. for $1125; and he was to receive further the sum of $5000 out of the estate. In consideration of this equalization of the shares in the estate, Margaret and George still retained a slight advantage over the other two heirs. True, they relinquished the bequests of $10,000 made to each of them by the will of their father; but it was part of the agreement that they were each to receive from David K. and Margaretta, executrix, etc., $2500, or $1250 apiece from each of them. By the terms of the agreement the will, as thus modified, was to be carried out. That is, the other property of the estate was to be sold and the proceeds divided equally among the four legatees.

Regarding subsequent events in the distribution of the estate, there is some dispute. But we think the evidence, fairly and reasonably considered, warrants us in finding the following: As before stated, George Oyster was one of the executors of his father's will. In the management and settling up of his father's estate in Illinois and Pennsylvania he had full and absolute control. He was the leading spirit of the family, and, in the matter of the estate, whatever was said or done by him was acquiesced in by his sister Margaret and his sister-in-law Margaretta. He conceived the idea, either originally or after taking the advice of counsel, that the agreement of March 3, 1868, was not valid and binding upon the parties to it, for the reason that Margaretta, as executrix, had no power to make any agreement or conveyance that would be binding upon minor heirs. Accordingly, while the subsequent proceedings in the settlement of the estate were carried out on the basis of the equality of interests represented by the contract of March 3, 1868, the proceedings authorized by that contract were not adhered to. No quit-claim deeds were made to David K. for the 320 acres of land in Illinois, or the 640 acres in Lewis County, Missouri; nor did David K. receive the $5000 from the estate, according to the terms of the contract. But an oral agreement was reached at some time after the date of the contract and prior to the 15th of November, 1869, (the precise date not being readily ascertainable, nor is it material,) by which the interest of David K. in

the estate in Illinois and Pennsylvania was to be concentrated in what was known as the "home farm" of Abraham Oyster, (at that time and since the residence of David K.); and at the forthcoming sale on said 15th of November, 1869, David K. was to bid it in for $12,000. The other property mentioned in the agreement of March 3, 1868, that was to go to David K., was also to be bid in by him at that sale. This arrangement was made because it was believed by the beneficiaries under the will that David K.'s share of the estate could not be paid to him in money under the clause of the will above quoted, but might be put into real estate for his benefit during his lifetime with a remainder over to his children; and for the further reason that it was doubted if any conveyance could be made to David K. by the other legatees that would bind the minor heirs of David K. and of Simon, especially by Margaretta, as executrix. This theory harmonizes best with all the testimony in the case, and is borne out by a letter of George Oyster to David K., dated at his Pennsylvania home, June 11, 1868, wherein, after referring to the condition of affairs in relation to the estate, and particularly to the manner in which he understood the distribution should be made by David K. in the settlement of it, he says:

"Simon having brought an action to test the validity of Father's will, His Executrix is a Legal party to the articles of Agreement we have Entered into, having made his objection in said suit a part of the consideration upon which our agreement was based whereby his Executrix represents all the interest that Simon has or may have had to any and all Interest arising to Simon of Father's Estate, in the property contained or embraced in said agreement.

"The minor or other children of Simon are all represented By Simons Executrix and when you, as administrator of Fathers Estate, proceed under an order of sale from the court in pursuance of Father will, you are the proper party to sell and make all the titles for all the property Belonging to said Estate and after having done so and received the proceeds arising from such sale and you make or are ready to make Distribution of the same that Simon Executrix on receiving

his share or Interest arising therefrom that her release to you will be all that will be necessary to forever exclude any and all heirs of Simon from any further claim. Such is certainly the law here She having her Letters Testamentary Issued here. Now the only question that presents itself to my mind is whether the Laws of your state will recognize acts legally done by her here as of the same force and effect there, if not, then her signature and acknowledgment to the agreement can be of no value and the whole agreement become void, as it was not the intention of any of the parties to it at the time of making it that it should be confined in its effect to the property in this state; and in regard to the farm on which you live You will best make Title to some other person who will return the title to you, or have title through an order of the court. I am of the Opinion that Simon's Executrix would not be vested with power to join us in making title to you for property there that would exclude the minor children from claiming thereafter. I hold that the power to become a competent party to the agreement by which real Estate is disposed of arose from Simon's own act in filing Exceptions to the manner in which Father disposed of his property in which he was interested in the final Distribution and that in the Balance of the property she is not legally qualified to do anything more than receive the share due Simon and release the Executors and Administrators therefrom.

"In making or having title made to the farm you should have it made so that the trust vested in the executors by father can be discharged and all your interest in the moneys arising from the sales of real estate can be invested in that property in pursuance of the will, otherwise the interest arising out of this property here would have to continue in the possession of the executor as trustee which is not desirable. I wish it so arranged that your shares shall be vested in that farm and the trust closed in it."

The sale of the property was made by David K. as administrator, as advertised, on the 15th of November, 1869. For the purpose of making plain the facts connected with that sale we will divide the lands sold into eight parcels, following

in this respect the division made by counsel for appellees, viz.: (1) Lands sold to strangers; (2) certain property in La Grange; (3) the saw-mill property in La Grange; (4) the 640-acre tract in Lewis County, Missouri, which, under the contract of March 3, 1868, was to be quit-claimed to David K.; (5) the "home farm;" (6) about 40 acres five or six miles southeast of La Grange, known as the "Durgin Creek property;" (7) about 45 acres of land near La Grange, or as it is frequently designated, "the tract back of town;" and (8) prairie lands and timber lands, unimproved, aggregating about 2200 acres. It may be well to state here, also, that the property in dispute comprises parcels 3, 4, 5, 6 and 7, and the one-fourth part of parcel 8.

It was found, however, that, under the laws of Missouri, David K. could not bid in any property at the sale, because he was the administrator of the property to be sold. Without going into the details of the transactions on the day of the sale, or referring particularly to all of the evidence upon which our judgment is based, it is sufficient to say that, in our opinion, the evidence, fairly and reasonably considered, shows that Simon K. Oyster was selected, and mutually agreed upon by all parties in interest, to represent the share of David K. in the bidding in of the property which had been selected for that share. Under that arrangement Simon K. bid in parcels 3, 4, 5, 6 and 7, as above designated. Parcel 4 was bid in at $5 per acre, $3200; but, in reality, it matters nothing what the price of it was, for it was purely a *pro forma* proceeding for the purpose of ultimately passing the title to it to David K.'s share, in pursuance of the agreement for the equalization of the shares that was, at that time, being carried out in apparent good faith. That parcel, as was also parcel 3, was bid in by Simon K., as trustee for the share of David K., to effectuate the same purpose as was originally intended to be accomplished by quit-claim deeds which were contemplated by the agreement of March 3, 1868; and this proceeding was adopted in preference to quit-claim deeds from the other legatees, as being safer and in accordance with the law, as the parties then understood it, as already stated. We say, therefore,

that, according to our view of the evidence, parcel 4 was to be conveyed to David K. to assist in making his share of the estate equal to those of the other legatees; and that, in that view of the case, the price bid for the land was immaterial, inasmuch as that tract of land was regarded as being fully paid for by David K.'s share.

Parcel 3 was to be paid for at the price stated in the agreement of March 3, 1868, to wit, $1125; and in the final settlement of the estate that sum was to be charged against the share of David K.

Parcel 2 was bid in for the benefit of George, Margaret and Margaretta, executrix, etc., and was to be accounted for by them at $6000. To equalize David K.'s share with that transaction, it was to receive parcels 6 and 7. Parcel 6, known as the "Durgin Creek property," was valued at $10 per acre, or $400; and parcel 7 at $35 per acre, or $1575 — $1975 for both tracts, or practically equal to one-third of the value of parcel 2.

Parcel 1, as we have stated, represents land sold to various persons other than the legatees. The amount realized from the sale of those parcels was $4920. It was found, however, during the progress of the sale, that the land was not bringing what the heirs thought it ought to bring. Accordingly, it was arranged that any tract which should not sell for about its full value should be bid in by one or the other of the heirs, it mattered not which, for the benefit of all; and that at the conclusion of the sale the lands thus bought in should be divided into four parcels, as nearly equal in value as could be ascertained.

That arrangement was carried out; the remainder of the lands, aggregating about 2200 acres (parcel 8), were bought in promiscuously by the heirs; and they were afterwards divided into four equal parts, according to their value, by three appraisers and a surveyor appointed by the heirs. One of those parts was selected by Margaret; another by Margaretta, executrix; a third by George; and the fourth was left for the share of David K. Deeds were made by David K., as administrator, to Margaret, Margaretta and George for their

respective parts of those lands. The other part, allotted to the share of David K., was included in the deed from David K., as administrator, to Simon K., trustee for David K.'s share. Thus, the sale and division of the lands belonging to the estate were completed. We have said that we would not refer particularly to all of the evidence in the case bearing upon this sale and division of the property. One part of it we desire to speak of, viz., a letter from George Oyster, dated at La Grange, Missouri, November 20, 1869, (five days after the sale,) addressed to his daughter, Annette, at their home in Pennsylvania. In this letter he speaks particularly of the transactions relating to the sale and division of the property, saying, among other things, the following: "On Monday last was the sale. We went to Monticello and commenced selling about 11 o'clock. The farm at the river was sold first, or rather knocked down, at $12,000. There was no stranger bid on it. We sold near $5000 worth of Lands all below what they are worth, 3 pieces of 80 Acres Each Brought $14.75 & 15$ per acre, I have since Been told were worth 18 to 20$ per acre. I think the Balance was knocked down at prices running from 4$ to 13.50. There was 2300 Acres sold besides what David had selected which sold at $5 per acre (640 acres) and 400 acres we sold strangers, we have this morning agreed on the Balance of the Property unsold, we have agreed to Divide the prairie and timber Lands Equally by having 3 men to divide it for us, and the property at the river. David gets the Farm at $12,000 and 45 Acres of Land at 35$ per acre and 40 Acres timber land 8 miles from From LaGrange at $10 per acre; and Margaret, Simon's Wife and me take the town property at $6000 and we pay David $200 for his share of some shops on the lots. The arrangement is satisfactory to all of us and I think will change this Estate from a sinking fund to supporting itself."

This letter, written about the time the transactions to which it refers occurred, is of vastly more value, as evidence, than the statements of witnesses as to the same occurrences made many years afterwards, when differences had arisen and their minds were more or less prejudiced in favor of their own interests.

Moreover, it is in entire accord with the evidence introduced by David K., many of whose witnesses had been familiar with the transactions concerning which they testified, and were apparently representative men in the community where those transactions occurred. Some of them had purchased land at the sale in November, 1869, and most of them had been at that sale and saw what was taking place. Nor is their evidence contradicted materially by Margaret Oyster, one of the defendants herein, who, though not remembering very many things connected with the transaction very definitely, testified that she "always thought David should have the 'home farm;'" and that on the way home from the sale she heard David say he wanted that farm for his children. Indeed, the general effect of the testimony in support of the conclusion at which we have arrived, on this point, is not shaken by any evidence in the record, either oral or documentary, and George Oyster himself, unconsciously, perhaps, corroborates it in his testimony.

Upon this branch of the case, therefore, we say, that our conclusion is in accordance with complainant's theory of the case. We think there can be no reasonable doubt but that parcels 3, 4, 5, 6 and 7, as above designated, were bought in at the sale by Simon K. Oyster, as trustee for the share of David K.; that parcel 4 went to David K.'s share of the estate towards equalizing that share with the shares of the other heirs who had received advancements for more than that amount a few years before the death of Abraham Oyster, and was, therefore, fully paid for; that parcels 5 and 6 went to David K.'s share, while parcel 2 went to Margaret, Margaretta, executrix, and George, thus practically equalizing the shares in those transactions; that parcels 3 and 5 were bought in for the benefit of David K.'s share — the former at $1125 and the latter at $12,000; and that parcel 8 was equally divided among the heirs, according to its value. With respect, then, to parcels 4, 6, 7 and the one-fourth part of parcel 8, we think the evidence shows that they have been fully paid for by David K.'s interest in the estate of his father, in accordance with the will and the subsequent modifying agreements; that

Simon K. took a deed for them as trustee for the interest of David K.; and that the transfer of those tracts from Simon K. to George was charged with the same trust.

With respect to parcels 3 and 5, that is, the "saw-mill property" and the "home farm," we are equally clear that they were bid off by Simon K. Oyster for the benefit of the share of David K., were deeded to him as such, and were conveyed by him to the defendant George Oyster charged with that trust. The only difficulty on this point is as to whether the consideration for those two pieces of property was fully paid by the interest of David K. in his father's estate.

As already stated, those two pieces of property were to be paid for at $1125 and $12,000 or $13,125. Under the agreement modifying the will, however, David K. was to receive $5000 cash from the estate and also 320 acres of land in Illinois. He never received either of those items; but their value was intended to be concentrated in the "home farm." It is shown by the evidence that the title to 160 acres of the 320 in Illinois failed, through some delinquent tax proceedings, and that George Oyster, as executor, sold the other 160 acres, receiving therefor, it seems, the sum of $1800. Thus at least $6800 was paid on parcels 3 and 5, by the equalization proceedings, leaving but $6325 due to the estate for those two pieces of property. This sum represents an asset of the estate of Abraham Oyster, deceased. In the administration of his executorship in Illinois and Pennsylvania, George Oyster received a considerable amount of money — the exact amount not being ascertainable from the present record, because he does not appear to have made a final settlement of his executorship. That sum also represents an asset of the estate. Likewise the amount received by David K. from the sale of the personalty of the estate represents an asset.

At the sale on Nov. 15, 1869, certain lands (parcel 1) were sold to strangers for $4920. According to the evidence herein, that sum was paid to George Oyster and is, therefore, chargeable against him as an asset of the estate. These assets are the portion of the estate which, under the will and the modifying agreements, was to be equally divided among the four

legatees. Again, running through the long period of years since the death of Abraham Oyster, considerable money has been paid out for taxes, etc., both by George Oyster and David K., on property belonging to the estate. We are not able from the present record to ascertain the exact amounts paid by each.

There should, therefore, be an accounting between George Oyster and David K. before there can be any exact settlement of the estate as to them.

As respects Margaret Oyster and Margaretta, executrix, etc., we are of the opinion that, as against David K.'s share in the estate, they have no claim whatever. Although made defendants in this suit, they did not defend, except to file a demurrer, which was overruled; and they never answered. They have had their day in court, as regards David K. Oyster and his share of the estate; and any claim which either or both could have asserted against him cannot now be prosecuted.

It will be observed that we have not seen fit to determine the legal effect of the will of Abraham Oyster, or the modifying contract of March 3, 1868. We have proceeded, rather, on the real intention of the parties, as manifested by that agreement and the subsequent oral agreements shown by the evidence to have existed. Those agreements when made were fair to all interested, and having been acted upon and acquiesced in by every one concerned for a long period, ought to be taken as the basis of the final settlement.

It is certainly for the interest of all concerned that litigation over this estate should cease. Nearly thirty years have elapsed since the death of Abraham Oyster, and nearly the whole of that period has been spent in litigation by his children over the property disposed of by his will. Animosities have been engendered by these proceedings, and a total estrangement now exists between the brothers George and David K. Moreover, the title to a large amount of valuable property has been in dispute all that time. The interests of the community, no less than the interests of the parties, require that there should be an end of litigation respecting it.

Opinion of the Court.

The decree of the court below is reversed, with directions to enter a decree enjoining the defendant George Oyster from further prosecution of his suit in ejectment, and decreeing that he convey to David K., for the term of his natural life, with remainder over to his children, parcels 4, 6, 7 and the one-fourth part of parcel 8, freed from all claim, lien or encumbrance whatsoever; and that he also convey in like manner the "saw-mill" property in La Grange and the "home farm," subject to any claim which may be found due him from David K.'s share in the estate, upon a final accounting to be had of the matters between them. There should be a reference to a master to ascertain the exact amount due the estate from the administratorship of David K. and the executorship of George Oyster; also the amounts of taxes, etc., paid by both of them; and the $1250, due from David K. to George, under the modifying agreements, should also be taken into consideration, to the end that a full and final settlement between them may be effected, and it is so ordered.

No. 134. OYSTER *v.* OYSTER. This case is supplementary to No. 133. The case is this: After the decree of December 1, 1884, in No. 133 was entered in the Circuit Court, to wit, April 15, 1885, the complainants filed a new bill containing substantially the same allegations with respect to the resulting trust in George Oyster as did the bill in No. 133, with certain others relating to an accounting; and, seeking to enforce that same trust, the bill prayed for an accounting with respect to the matters in difference between them, and for a decree for the conveyance of the lands in dispute to the complainants, subject to whatever lien might be found to exist, if any, for any balance which might be found due the estate from David K. Oyster, on such accounting.

To so much of the bill as sought an enforcement of the resulting trust, George Oyster filed a plea in bar, setting up the former adjudication in No. 133. At the argument on this plea, the case was treated as if a demurrer had been filed to it, and it was held, Mr. Justice Brewer (then Circuit Judge) delivering the opinion, that

the plea was good; and the bill was dismissed. 28 Fed. Rep. 909. From that decree of dismissal this appeal was prosecuted.

We are entirely convinced that the decree of the court below, in this case, was correct. The merits of the questions relating to the resulting trust in George Oyster were adjudicated by the Circuit Court in No. 133, against the complainants; and so long as that decree remained unreversed they were concluded by it. Those questions were *res judicata* in that court. As the question of accounting was subsidiary to, and dependent upon, the establishment of that resulting trust, it was proper to dismiss the bill as to that feature of the case also.

It may be proper to add, in this connection, that the disposition made by us of No. 133, above set forth, practically gives the complainants all they seek in this supplementary case; and as it is clear that the real issues involved in this case are the same as in No. 133, the decree herein is

Affirmed.

Mr. James H. Anderson submitted for appellants.

Mr. D. P. Dyer submitted for appellees.

MARCHAND *v.* GRIFFON.

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

No. 124. Argued and submitted December 19, 1890. — Decided May 25, 1891.

In Louisiana a married woman, sued upon a promissory note signed by her, and defending upon the ground that the debt contracted in her name did not enure to her benefit or the benefit of her separate estate, has the burden of proof to establish that defence.

A married woman having been authorized by her husband and a District Court in Louisiana to borrow money and to give her note secured by mortgage on her separate property for its repayment, is not estopped thereby from setting up, in an action on the note and mortgage, that the debt did not enure to her benefit or the benefit of her separate estate, and from averring and showing facts which constitute a fraud upon her in law, although the word fraud is not used in her plea: and if it appear

that the holder of the note and mortgage had advanced the money to the husband, knowing it to be for his sole benefit, neither the wife nor her property would be bound for its payment.

A court is not bound to repeat, in the words of a request for instructions, instructions which have already been given in substance in another form.

THE case is stated in the opinion.

Mr. Charles W. Hornor and *Mr. George A. King* for plaintiff in error.

Mr. Edgar H. Farrar, *Mr. Ernest B. Kruttschnitt* and *Mr. B. F. Jonas* for defendant in error, submitted on their brief.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an action at law brought in the Circuit Court of the United States for the District of Louisiana, by Alfred Marchand, a citizen of the Republic of France, against Josephine Adèle Livaudais, wife of Charles Lafitte, to recover the sum of $5000, with interest, costs and damages, which alleged indebtedness was represented by two promissory notes executed by the defendant, and held by the plaintiff.

The petition, filed on the 23d of November, 1886, alleged that, at New Orleans, on the 15th of January, 1868, the defendant, duly authorized by her husband, made her note for the sum of $5000, at one year, to her own order, and by her endorsed, with eight per cent interest from maturity until paid; that to secure the payment of the same, with interest and attorney's fees, she, on that day, under authority of the judge of the Second District Court for the parish of Orleans, executed a mortgage, before one Cuvillier, notary, in favor of any holder of the note, upon certain of her real estate in that parish; that thereafter, on October 30, 1879, for the purpose of securing an extension of time for the payment of the note above described, and in order to furnish a note negotiable in form, without in any manner novating it, the defendant executed another note for $5000, payable January 15, 1881, with eight per cent interest from maturity, and to secure the same executed another mortgage before one Fahey, notary,

upon the same property, covered by the prior mortgage; that upon the payment of either of those notes the other was to be considered null and void; that neither of those notes ever was paid; and that there was then due thereon the sum of $5000, with eight per cent interest from August 25, 1885, until paid, together with five per cent attorney's fees on both principal and interest.

The prayer of the petition was for a judgment in favor of the plaintiff and against the defendant for the above-mentioned sum, with a reservation to the plaintiff of all rights and actions in equity in and to the before-mentioned special mortgages, and for general and equitable relief.

The defendant answered, admitting that she signed the notes sued on, but denying any liability on them. She then averred that she never received any consideration for the notes; that the first note passed from her husband, Charles Lafitte, to the Merchants' Mutual Insurance Company, a corporation domiciled in New Orleans; that the renewal endorsed thereon in 1874, and the second note described in the petition and the mortgage securing it, were signed by her under the pressing solicitations of the officers of that company, and under the controlling influence of her husband; that when her signatures to those instruments were given the officers of the company well knew that she was not liable on the notes, and had never received any consideration for them, she having notified them at those dates that, although yielding to their demand to endorse the notes, she would never pay, because there was nothing due from her; that the company was still the holder of the notes, or if not, the plaintiff herein had taken them after maturity, and therefore had no greater rights in the matter than the company; that no demand had ever been made upon her for the payment of the notes since the 19th of October, 1879, no acknowledgment of the notes or debt had been made by her since that date, and no payments had been made by her on either the principal or interest of the notes; and that the notes were extinguished by the prescription of five years, which prescription was pleaded in bar of the action.

Further answering, she averred that the notes were issued

by her husband for his own use and benefit, and not for her separate use and benefit, and that no part of the consideration received by him had ever enured to her benefit; and that the notes, although issued in her name, really constituted an obligation of her husband and not of herself, and that they had been paid by him.

The defendant then assumed the character of a plaintiff in reconvention, and averred affirmatively that she had never received any consideration from either of the notes sued on, and that if any consideration was ever given for them it was not given to her and did not enure to her benefit; and that the notes were prescribed on their face, and the mortgages referred to in the petition were extinguished, null and of no effect, and should be cancelled.

Wherefore she prayed that the suit of the plaintiff be dismissed at his costs; that there be a judgment in her favor against the plaintiff decreeing that she was not liable on the notes, that they were not her legal obligations, and that they and the mortgages be cancelled and erased; and for general relief.

There was a trial before the court and a jury, resulting in a verdict and judgment in favor of the defendant; and the plaintiff thereupon prosecuted a writ of error. Since the argument of the case here, at the present term, the defendant has died, and her heirs have been made parties in her stead.

There were three bills of exceptions taken at the trial. It appears from the first one that, on the trial of the case, the plaintiff, to maintain the issue on his part, introduced evidence tending to show the following facts: On the 15th of January, 1868, the defendant, being duly authorized by her husband and a judge of the Second District Court of New Orleans, as provided by the Civil Code of Louisiana, executed three notes of $5000 each, and, to secure the payment thereof, granted a mortgage in favor of any holder of them on certain described real estate. These notes were similar in all essential features. Two of them were negotiated by the defendant and are not in issue here.

In June, 1873, nearly five years after the note in suit became

due, Charles Lafitte, the husband of the defendant, obtained a loan of $5000 on his own individual note, from the Merchants' Mutual Insurance Company, a Louisiana corporation, of which he was then a director, and, as collateral security therefor, pledged this note of his wife, at the same time representing to the company that the interest thereon had been paid to the 4th of January, 1874, although the note itself bore no endorsements of interest paid.

Afterwards, on the 3d of January, 1874, this note was presented to the defendant by the insurance company, for the purpose of having her renew it, and she then made the following endorsement upon the back of it:

"By consent, the payment of this note is extended for one year from date without novation.

"New Orleans, 3d January, 1874.

"(Signed) J. A. Lafitte."

There was conflicting evidence as to what was assented to by the defendant, at the time of this renewal of the note, as to the payment of interest.

On or about the 22d of October, 1879, various amounts of interest having been paid by Charles Lafitte upon his own note, and also upon the note of his wife up to that date, the insurance company applied to Lafitte for the payment of this note, and threatened, in case of its non-payment, to bring suit upon it, which threat was conveyed by Lafitte to the defendant. On the 30th of the same month the defendant executed another note to Paul Fourchy, president of the insurance company, and to secure its payment gave a mortgage upon the same property as was embraced in the preceding mortgage. There was no evidence adduced showing any authorization from a judge for the execution of this latter note by the defendant.

The act of mortgage recites that Fourchy is the holder of the original note, and that the new note was not a novation of it, but was merely an accommodation to Fourchy to furnish him a note negotiable in form, and was executed in consideration of the extension of her original note.

Opinion of the Court.

The interest on this last note was paid by Charles Lafitte, in various payments, up to August 25, 1885, since which date no payment either of principal or interest has been made.

In September, 1886, the defendant, being desirous of selling the property covered by the mortgage, offered to pay, as a matter of compromise, a certain sum of money to have the notes and mortgages cancelled, at the same time expressly denying her liability on them.

On the 9th of October, 1886, the insurance company sold the notes in suit to the plaintiff, who knew all the facts above stated with reference to the history of them.

The defendant, to maintain the issue on her part, testified in her own behalf that she never issued the note in question to any other person than her husband; that she never received any benefit from the same, either to herself or to her estate; that she administered her paraphernal property separate and apart from her husband; that of the three notes given to secure the common mortgage sued upon here she had issued two and had received the amount of the same, to wit, ten thousand dollars, which she had used for the benefit of her separate paraphernal property; that she made the mortgage for fifteen thousand dollars, with the expectation of making repairs and improvements upon her separate paraphernal property, but that she never used the third note and never issued it except to her husband.

To this testimony the plaintiff objected on the ground that the law did not permit her, under the allegations of her answer, to contradict her affidavit, under which she was authorized to effect the loan on her separate property set forth in the act of mortgage; that the allegations of her answer — as she had not pleaded fraud — did not permit her, in connection with the acquisition of the said note by the said insurance company, to introduce evidence as against her written act, and her notarial acts, concerning the ownership of said notes; and that the allegations of her answer, in the absence of any allegation of fraud, did not enable her to introduce any evidence to prove any want of original consideration for the note.

The court overruled the objection, and the plaintiff excepted.

The second bill of exceptions states that at the close of the testimony "the court instructed the jury that, since the assignor of the plaintiff had acquired the note sued on, after maturity, from the husband of the defendant, as collateral security for a loan made to him personally, and distinct from any property of his wife, and that the note, on its face, was the note of a married woman, the jury were at liberty to consider the question whether the defendant had ever received any consideration for the said note, and whether the defendant had ever issued the same; that under the laws of Louisiana, though there was an authorization by a judge, if, as a matter of fact, the person taking the note of a married woman made the advance directly to the husband, and knew that the advance was made to him, the wife would not be bound for the note, nor would her property; that the statements of the husband, made to the assignor of the plaintiff, unless authorized by the plaintiff, did not bind her, and that the defendant was not estopped from proving the facts to which she herself testified, as set forth in the offer to prove, referred to in bill of exceptions No. 1; and if they found from the evidence, as a fact, that the note in suit had never been issued by the defendant until she delivered it to her husband; that it was passed to the assignor of the plaintiff after maturity, and upon its face was the note of a married woman, and the plaintiff knew that the loan was made to the defendant's husband, for his benefit and not for hers, and delivered the money to him; and that the defendant received no part of it, then their verdict must be for the defendant."

To this instruction, and to each proposition contained in it, counsel for the plaintiff objected and reserved exceptions.

The third bill of exceptions states that the counsel of the plaintiff asked the court to give to the jury the following instructions:

"First. That parol evidence was not admissible to show that the money borrowed on the note made by a married woman, under proper judicial authority, was received and

used by the husband for his own personal use, there being no allegation of fraud or bad faith.

"Second. That where the wife represents to the judge in her application for leave to borrow money that she requires a certain sum, and in order to enable her to realize the same she gave a mortgage on her separate property, and he grants such authority, she is bound by the act of mortgage placed thereon and by the notes secured by such mortgage, after the same leave her possession or control, whether through her husband or otherwise, in the absence of any or all allegations that said notes were obtained by fraud or ill practices on the part of the husband or subsequent holder through him.

"Third. That whereas in this case the wife has not specially pleaded fraud in the obtaining of said notes by the insurance company or its assignee, the plaintiff, and has been the sole and only witness on her own behalf under allegations in her own behalf, such evidence, having been objected to, ought to be excluded from the consideration of the jury; and if it be considered by them at all should be held to be insufficient in and of itself to authorize her to be released from her obligation on said note; that it having been shown that the husband conducted the affairs of his wife relative to her separate property, and it being shown that the wife in good faith gave to her husband the note herein sued upon for the purpose of realizing funds in the event that the same should be needed, and having been benefited thereby, she is precluded under the law from attacking the rights of the holders of said notes, who in good faith have parted with their money upon representations made by her under oath to the proper judge to make the note and mortgage to secure the same, after she has shown that the note was voluntarily given by her to her said husband for the uses and purposes which she testified and expressed as necessary for the benefit of his business thereafter.

"Fourth. That the defendant is estopped by her admissions in the act of acknowledgment of the 30th October, 1879, from attacking the ownership of the insurance company and its president, Paul Fourchy, in and to said note; that the acts of her husband in paying the interest thereon to that date, her own

acts in extending the payment of that note to a future date, or the subsequent acts of her said husband, done in like manner and form, in paying interest on said note thereafter to the 25th August, 1885, or of setting up no defence of want of consideration thereafter, without any defence being pleaded of coercion on the part of the husband, and his acts in the premises are her acts, she having recognized by said acknowledgment of the 30th October, 1879, his authority as her agent.

"Fifth. That the act of the wife in endeavoring to obtain money for herself, her husband or her family, by a mortgage of her paraphernal property, by and under due and proper authority of the laws of the State of Louisiana, with the consent of her husband, is binding upon her. She cannot be permitted, where by reason of her own acts she or her husband have received the full consideration of the note declared upon herein, which went either to her own separate use and benefit or that of the community, or be permitted, without an allegation of fraud, knowledge on the part of the insurance company or its assignee, to injure such insurance company or its assignee, after having received full consideration of the insurance company and assignee and profited thereby, and to injure them or either of them in her own interest."

But the court stated to the jury that the issues upon the evidence in the cause were such as had been stated to the jury in its general instructions, set forth in the second bill of exceptions; and instructed the jury that if they found the issuing of the note by the defendant to have been merely to her husband; that the party taking the same, the assignor of the plaintiff, knew that it was the note of a married woman, and that the consideration which the husband was receiving therefor was a consideration for himself, and not in any respect for her estate; and that neither the defendant nor her estate was benefited by the loan made her husband, and she received no part of the money arising therefrom, then their verdict must be for the defendant.

To which instructions, and to the refusal on the part of the court to give the instructions requested, the defendant excepted.

The assignments of error are based on these three bills of exceptions. Concisely stated, the first assignment is, that it was error, under the pleadings, to admit the parol evidence of Mrs. Lafitte to show that she had never received any consideration for the notes, because her answer does not specifically aver that any fraud was practised upon her in the execution of them. The argument is, that Mrs. Lafitte having been authorized by her husband and the judge of the District Court to borrow money and give a mortgage as security for its payment, upon her separate property, cannot be allowed to prove that the money received on her note was not used for the benefit of her separate property. In other words, that contention is, that by her own acts in relation to the notes and mortgages she should, not having specifically pleaded fraud, be estopped from saying that she did not receive the money and apply it to her own separate estate.

We do not think this contention is sound. It is immaterial if the specific word "fraud" was not used in the answer, if the facts set forth therein constitute what is denominated fraud in law. Under the law of Louisiana, a married woman cannot bind herself for her husband for his debts. Article 2398 of the Civil Code is specific on this point. It provides as follows: "The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during marriage."

This section appeared in the Civil Code of 1825, as section 2412. The construction put upon it by the Supreme Court of Louisiana was that a debt contracted by a married woman could not be enforced against her unless the creditor established affirmatively that the contract enured to her benefit. *Fortier* v. *New Orleans Bank*, 112 U. S. 439, 446, and cases there cited.

The only modification ever made of this section was by an act of the Louisiana legislature passed in 1855, which is now embodied in sections 126, 127 and 128 of the Civil Code of 1870. They are as follows:

"Article 126. A married woman over the age of twenty-

one years, may, by and with the authorization of her husband, and with the sanction of the judge, borrow money or contract debts for her separate benefit and advantage, and to secure the same, grant mortgages or other securities affecting her separate estate, paraphernal or dotal.

"Article 127. In carrying out the power to borrow money or contract debts, the wife, in order to bind herself or her paraphernal or dotal property, must, according to the amount involved, be examined, at chambers, by the judge of the district or parish in which she resides, separate and apart from her husband, touching the objects for which the money is to be borrowed or debt contracted, and if he shall ascertain either the one or the other are for her husband's debts or for his separate benefit or advantage, or for the benefit of his separate estate, or of the community, the said judge shall not give his sanction authorizing the wife to perform the acts or incur the liabilities set forth in article 126.

"Article 128. If the wife shall satisfy the judge that the money about to be borrowed or debt contracted is solely for her separate advantage, or for the benefit of her paraphernal or dotal property, then the judge shall furnish her with a certificate setting forth his having made such examination of the wife as is required by article 127, which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage, or other act which may be required for the security of the debt contracted, and shall be annexed to the act, which act, when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all courts of this State, and have the same effect as if made by a *femme sole*."

It is well settled that the only effect of these articles is to shift the burden of proof from the creditor to the married woman. So that now the law is that the burden is upon the wife to show affirmatively that the debt contracted in her name did not enure to her benefit or to the benefit of her separate estate. 112 U. S. 447.

In *Fortier* v. *New Orleans Bank*, *supra*, all of these sections were very carefully considered, in the light of the Louisiana

decisions bearing upon them, and it was held, Mr. Justice Woods delivering the opinion, that the certificate of the judge was not conclusive evidence of the fact that money lent to a married woman was for her sole use and benefit; but that she might be allowed to contradict it, the burden of proof being upon her to show that it did not enure to her benefit.

In *Chaffe* v. *Oliver*, 33 La. Ann. 1008, 1010, it was held that in transactions of this nature parol evidence was admissible to prove that the debt for which the note and mortgage were given was in reality the debt of the husband, and was not contracted by the wife for her own use and benefit. The same doctrine was announced in *Barth* v. *Kasa*, 30 La. Ann. 940, and also in *Harang* v. *Blanc*, 34 La. Ann. 632, 635; and it is not open to question.

Such being the law of the case, it was not error on the part of the court to give the instruction set forth in the second bill of exceptions. The established facts were, that the insurance company received the first note long after it was due, and merely as collateral security for a loan made to Charles Lafitte, the husband of the defendant; that the second note was not a novation of that note, but was merely an accommodation note, representing the original indebtedness, and was given by the defendant under the controlling influence of her husband and upon the pressing solicitations of the insurance company; and that the plaintiff herein was cognizant of those facts when he purchased them. The law being that the wife could not be bound for the debts of her husband contracted during coverture; that she might be allowed to prove by parol evidence that no part of the consideration of the notes enured to the benefit of her separate estate; and the note on its face showing that it was the note of a married woman; it was certainly not error to instruct the jury that they might consider the question whether the defendant had received any consideration for the note. The second proposition contained in this charge of the court was, that, though there had been an authorization by the judge, if, as a matter of fact, the company taking the note had advanced the money to the husband, knowing it to be for his benefit, the wife would not be bound for

the payment of the note, nor would her property be bound. That such is the law of Louisiana we think there can be no doubt. *Claverie* v. *Gerodias*, 30 La. Ann. 291, 293; *Fortier* v. *New Orleans Bank*, *supra*, and cases there cited.

It is equally clear that any statements made by the husband with reference to interest having been paid upon the first note up to January 4, 1874, cannot bind the wife, especially as there were no endorsements of interest on the note itself.

With respect to the execution of the second note and the mortgage, on October 30, 1879, the case is no better. No new consideration passed, and they represented the same indebtedness as the first note and mortgage — an indebtedness which we have shown was not binding on the wife or on her separate estate.

With respect to the five instructions asked for by the plaintiff, which the court refused to give, very little need be said. The bill of exceptions states that the court refused to give those instructions for the reason that the issues upon the evidence which had been introduced were such as had been stated by the court in its general charge as embodied in the second bill of exceptions. So far as these instructions were correct and were applicable to the facts of the case, the substance of them had already been given to the jury in the general charge, as set forth in the second bill of exceptions, and the refusal of the court to repeat them in other language was not error.

There are no other features of the case that call for special mention. We are satisfied that the judgment of the court below was correct, and it is

Affirmed.

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

The Chief Justice was not present at the argument, and took no part in the decision.

WILLIAMS *v.* HEARD.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 375. Argued May 1, 1891. — Decided May 25, 1891.

When the judgment of a state court is against an assignee in bankruptcy in an action between him and the bankrupt, where the question at issue is whether the matter in controversy passed by the assignment, this court has jurisdiction in error to review the judgment.

The sum awarded by the Tribunal of Arbitration at Geneva, when paid, constituted a national fund, in which no individual claimant had any rights legal or equitable, and which Congress could distribute as it pleased.

The decisions and awards of the Court of Commissioners of Alabama Claims, under the statutes of the United States, were conclusive as to the amount to be paid upon each claim adjudged to be valid, but not as to the party entitled to receive it.

A claim decided by that court to be a valid claim against the United States is property which passes to the assignee of a bankrupt under an assignment made prior to the decision.

Comegys v. *Vasse*, 1 Pet. 193, again affirmed and applied, and *United States* v. *Weld*, 127 U. S. 51, distinguished.

This was an action for money had and received, brought in the Supreme Judicial Court of the Commonwealth of Massachusetts, for the county of Suffolk, by John Heard, Augustine Heard and Albert F. Heard, against their assignees in bankruptcy, to recover the amount of an award made by the Court of Commissioners of Alabama Claims, under the act of Congress approved June 5, 1882, 22 Stat. 98, c. 195, on account of war premiums of insurance paid by the plaintiffs during the war of the rebellion, which award had been paid to the assignees by the United States.

The case was entered in the full court, where it was tried upon the following agreed statement of facts:

"The plaintiffs, citizens of the United States, were engaged between April 13, 1861, and April 9, 1865, as partners under the firm-name of Augustine Heard and Company, in the busi-

ness of buying and shipping steamers for China, receiving merchandise from China and selling the same and insuring merchandise and vessels. During that period the plaintiffs bore true allegiance to the government of the United States, and, after the sailing of the first Confederate cruiser, they made, in the course of their business, certain enhanced payments of insurance, otherwise called payments of premiums for war risks or war premiums, on merchandise and vessels to an amount exceeding the sum awarded on their account by the Court of Commissioners of Alabama Claims, as hereinafter set forth.

"On May 31, 1865, the said firm of Augustine Heard and Company was dissolved by the agreement of the members thereof. On August 5, 1875, the plaintiffs were severally adjudicated bankrupts in the U. S. District Court for the District of Massachusetts. On September 11, 1875, assignments in bankruptcy in the usual form were made to the defendants, and on July 20, 1877, the plaintiffs received their discharge in bankruptcy. The said firm and each of the plaintiffs individually were solvent when said firm was dissolved, and all the debts owed by the plaintiffs at the time of their said adjudication in bankruptcy were incurred after said dissolution. The estate of said bankrupts received by the defendants hitherto has been insufficient to pay in full the debts of the bankrupts.

"In December, 1886, an award was made by the Court of Commissioners of Alabama Claims, established under the act of Congress approved June 5, 1882, to the defendants as assignees in bankruptcy of the plaintiffs in proceedings in said court, to which the plaintiffs in this action were parties, on account of the said payments of war premiums by the plaintiffs, and was in part paid to the defendants by the United States. Of the sum so awarded and paid there remains in the hands of the defendants, after paying the reasonable expenses of prosecuting the claim before said court of commissioners and collecting the award, the sum of thirteen thousand six hundred and twelve and $\frac{85}{100}$ ($13,612.85) dollars. The amount of the Geneva award remaining unappropriated was insufficient to pay the war-premium awards in full.

Argument for Defendants in Error.

"The treaty of Washington, between the United States and Great Britain, promulgated July 4, 1871; the decisions rendered by the tribunal of arbitration at Geneva, and the final decision and award made by said tribunal on September 18, 1872; the acts of Congress of June 23, 1874, and June 5, 1882, respectively, creating and reëstablishing the Court of Commissioners of Alabama Claims, the several acts of Congress relating to the said courts and the payment of their awards, are to be treated as facts in this case and may be referred to at the argument.

"No controversy or question exists between the parties as to the proportions in which the several plaintiffs are entitled, if at all, to the sum recovered, or as to the distribution of the same; and it is agreed that if upon the foregoing facts the plaintiffs are entitled to recover, judgment is to be entered for them and the case is to stand for the assessment of damages; otherwise judgment for the defendants. It is further agreed that in either event the expenses of this action and reasonable counsel fees to each party may be paid out of the fund in the defendants' hands."

There was a judgment for the plaintiffs, two of the judges dissenting (146 Mass. 545), the rescript being entered April 25, 1888. By agreement damages were assessed at $10,000; and, in accordance therewith, judgment for that amount was entered on the 5th of June, 1888. To review that judgment this writ of error was prosecuted.

One of the defendants having died and the other having resigned his trust, the present plaintiff in error was appointed assignee, and he thereafter regularly entered his appearance in the case.

Mr. Moses Williams and *Mr. C. A. Williams* for plaintiff in error.

Mr. Henry W. Putnam for defendants in error.

I. This is not a Federal question within the meaning of United States Rev. Stat. sec. 709, but one of general law and

of the policy of the law as to what interests or expectancies will, and what will not, pass as — in the eye of the law — property under a general assignment by operation of law for the benefit of creditors under insolvency and bankruptcy laws. Such questions of general law decided by a state court do not give this court jurisdiction. *Bethel* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Ins. Co.*, 14 Wall. 661; *Steines* v. *Franklin County*, 14 Wall. 15; *Tarver* v. *Keach*, 15 Wall. 67; *Ins. Co.* v. *Hendren*, 92 U. S. 286; *Rockhold* v. *Rockhold*, 92 U. S. 129; *United States* v. *Thompson*, 93 U. S. 586; *Wolf* v. *Stix*, 96 U. S. 541; *Old Dominion Bank* v. *McVeigh*, 98 U. S. 332; *Lange* v. *Benedict*, 99 U. S. 68; *Allen* v. *McVeigh*, 107 U. S. 433; *Grame* v. *Mut. Ass. Co.*, 112 U. S. 273, 275; *Railroad Co.* v. *Rock*, 4 Wall. 177, 181; *Chouteau* v. *Gibson*, 111 U. S. 200; *Boatmen's Savings Bank* v. *State Savings Ass'n*, 114 U. S. 265, 268–269; *San Francisco* v. *Itsell*, 133 U. S. 65, 67; *Manning* v. *French*, 133 U. S. 186. And it is so, though plaintiff in error's general title in the subject matter is under an act of Congress. *Kennedy* v. *Hunt*, 7 How. 586, 594.

The assignee's right or title to this money is evidently not claimed under the Constitution; it does not arise under a treaty; nor does it arise under a statute.

There is no pretence that the act of 1882 grants this money to creditors or assignees in bankruptcy. The original sufferers are alone mentioned in the act or contemplated by it. The assignee can be said to claim under the act, if at all, only derivatively through us, at second hand, and in a remote and indirect sense which this court has expressly rejected in construing similar statutes conferring jurisdiction. *United States* v. *Weld*, 127 U. S. 51, 57.

Even the rights of the direct claimants themselves have been held not to have grown out of the act of 1874 within the meaning of jurisdictional statutes. *Great Western Ins. Co.* v. *United States*, 112 U. S. 199. The war-premium claims are, indeed, in the sense of the legal rights, created solely and originally by the act of 1882; but they are created not in the assignee, but in us.

The award of the Court of Alabama Commissioners to the

assignee is not "a commission held or authority exercised under the United States," within the meaning of either the first or third clause of sect. 709. To come within the statute, such an authority must be a governmental power competent to create the right or title in question. *Millingar* v. *Hartupee*, 6 Wall. 258, 261–2.

In our case the award of the commissioners gave the assignee only a bare *prima facie* right to receive the money, no valid legal right to it. The commissioners were not a judicial tribunal. *Comegys* v. *Vasse*, 1 Pet. 193, 212; *Frevall* v. *Bache*, 14 Pet. 95; *Great Western Ins. Co.* v. *United States*, 112 U. S. 193; *Leonard* v. *Nye*, 125 Mass. 455, 458; *Ahrens* v. *Brooks*, 68 Maryland, 212; *Taft* v. *Marsily*, 120 N. Y. 474; *Kingsbury* v. *Mattocks*, 81 Maine, 310.

II. If the court finds that it has jurisdiction of the case, the single question raised by all of the remaining ten assignments of error, though presented in various aspects and stated in different ways, is simply this: Did the defendants in error have, in regard to this so-called "claim" for war premiums at the date of their adjudication in bankruptcy (August 5, 1875), any estate or property assignable in bankruptcy under the bankrupt act of 1867, Rev. Stat. § 5044, then in force?

So far as any question that has not already been expressly adjudicated by this court can be regarded as settled as a matter of precedent and authority, this question is already settled in our favor. Four state courts of last resort of the highest authority have determined the precise point at issue in favor of the bankrupts and against the assignees, all upon the same general ground; namely, that, prior to the passage of the act of 1882, the war-premium "claims" had not the elements of a *legal right* in them so as to pass under a general assignment by operation of law. Only what exists in law can pass by mere operation of law. *Heard* v. *Sturgis*, 146 Mass. 545; *Taft* v. *Marsily*, 120 N. Y. 474; *Brooks* v. *Ahrens*, 68 Maryland, 212; *Kingsbury* v. *Mattocks*, 81 Maine, 310.

The defendants in error who had paid enhanced premiums of insurance in 1861–65, went into bankruptcy in 1875, seven years before the passage of the act of June 5, 1882, 22 Stat.

98, which authorized the payment of the war-premium claims from the unexpended balance of the Geneva award. The act of 1874, 18 Stat. 245, had provided for the distribution of the money received from Great Britain in accordance with the judgments of the Geneva tribunal and the terms of the award, and, therefore, to all the persons who had, in any legal or judicial sense, any "right" to the money. It merely gave a remedy for the existing rights.

The latter point has been expressly held both negatively and affirmatively by this court, in holding, in accordance with the judgment of the Geneva tribunal, that the direct "claims" were not created as rights by the act of 1874, that they existed against Great Britain before the passage of that act and even before the treaty, *Bachman* v. *Lawson*, 109 U. S. 659, and *Great Western Insurance Co.* v. *United States*, 112 U. S. 193; and that the war-premium "claims" did not arise under the treaty, and had no existence as "rights," until the act of 1882 created them such against the United States. *United States* v. *Weld*, 127 U. S. 51.

The cases on the assignability in bankruptcy of pensions go upon the same distinction; namely, that an antecedent legal right possessing the *vinculum juris*, although without a remedy, — being against the government, — will pass to the assignee; but that a mere equitable claim, which not only lacks the remedy but would not be a legal right if a private individual stood in the government's place, will not pass. *In re Webber*, 18 Q. B. D. 111; *In re Wicks*, 17 Ch. D. 70; *Gibson* v. *East India Co.*, 5 Bing. (N. C.) 262, 274; *Ex parte Hawker* (L. R.) 7 Ch. 214; *Innes* v. *East India Co.*, 17 C. B. 351. These grants of money do not pass in bankruptcy, because they are only "imperfect obligations, — obligations which want the *vinculum juris*, although binding in moral equity and conscience . . . of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a court of law." Tindal, C. J., in *Gibson* v. *East India Co.*, *ubi supra*. See also *Milner* v. *Metz*, 16 Pet. 227; *Erwin* v. *United States*, 97 U. S. 392; *In re Haggins*, 21 Ch. D. 85; *Phelps* v. *McDonald*, 99 U. S. 298; *Burnand* v. *Rhodocanachi*, 7 App. Cas. 333.

Opinion of the Court.

The true rule to be deduced from the decisions of this court may be summed up as follows: A legal right existing at the date of the assignment is, in the eye of the law, property, and passes to the assignee, though there be no remedy for enforcing it by judicial process. Where, however, there is neither remedy nor the constituent elements of a legal right, the claim or expectancy does not pass, and the subsequently created right dates from the time of its creation and goes to the claimant or to his legal representatives or to his assignees by contract, and becomes assignable by operation of law (as in bankruptcy) only *after* the creating act. Any other rule would defeat the whole purpose of a bankrupt law, — the relief of honest traders, — and prevent the bankrupt from ever acquiring property after his assignment; for any acquisition he might make would necessarily be connected more or less remotely by some slender chain of cause and effect with transactions or events antedating his bankruptcy, and, therefore, under such a rule, would go to the assignee. The line must be drawn at the point we have indicated or not at all. It is submitted that the authorities on the general subject sustain this ground.

The only judicial authority opposed to our view is the opinion of the Court of Alabama Commissioners, by French, J., on the bankruptcy question, dated March 3, 1884, and the dissenting opinion of Mr. Justice Field in this case (146 Mass. 552–58).

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

The single question on the merits of the case is, whether, at the date of their adjudication in bankruptcy, the claim of the defendants in error for war premiums passed to their assignees in bankruptcy, as a part of their estate.

As preliminary to the discussion of the merits of the case, it is urged by the defendants in error that this is not a Federal question, and that, therefore, the writ of error should be dismissed. We do not think, however, that this contention can be sustained. Both parties claim the proceeds of the

award, the defendants in error asserting that it did not pass to their assignees in bankruptcy under section 5044 of the Revised Statutes, and the plaintiff in error insisting that the claim was a part of their estate at the date of their adjudication in bankruptcy, and did pass to the assignees under that section of the Revised Statutes. The assignee's claim to the award is based on that section of the statutes; and as the state court decided against him, this court has jurisdiction under section 709, Revised Statutes, to review that judgment; for the decision of the state court was against a "right" or "title" claimed under a statute of the United States, within the meaning of that section.

The case upon the merits is more difficult. There is high authority in the state courts in support of the judgment of the court below. The same general question has arisen in New York, in Maryland and in Maine; and in each instance the decision has been, like the one we are reviewing, against the assignee. See *Taft* v. *Marsily*, 120 N. Y. 474; *Brooks* v. *Ahrens*, 68 Maryland, 212; and *Kingsbury* v. *Mattocks*, 81 Maine, 310. But as the question is one arising under the bankruptcy statute of the United States, we cannot rest our judgment upon those adjudications alone, however persuasive they may be.

By the treaty of Washington, concluded May 8, 1871, between the United States and Great Britain, and proclaimed July 4, 1871, 17 Stat. 863, it was provided that, in order to settle the differences which had arisen between the United States and Great Britain respecting claims growing out of depredations committed by the Alabama and other designated vessels which had sailed from British ports, upon the commerce and navy of the United States, which were generically known as the Alabama claims, those claims should be submitted to a tribunal of arbitration called to meet at Geneva, in Switzerland. The claims presented to that tribunal on the part of the representative of the United States included those arising out of damages committed by those cruisers, and also indirect claims of several descriptions, and among them claims for enhanced premiums of insurance, or war risks, as they

were sometimes called. As respects the claims for enhanced premiums for war risks, and certain other indirect claims, objection was made by Great Britian to their consideration by the tribunal, as not having been included in the purview of the treaty; and as no agreement could be reached, upon this point, between the representatives of the respective governments, the arbitrators, without expressing any opinion upon the point of difference as to the interpretation of the treaty, stated that "after the most careful perusal of all that has been urged on the part of the government of the United States in respect of these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon." Messages and Documents, Department of State, Pt. 2, vol. 4, 1872–3, p. 20.

This declaration of the tribunal was accepted by the President of the United States as determinative of their judgment upon the question of public law involved; and, accordingly, those indirect claims were not insisted upon before the tribunal, and were not in fact taken into consideration in making their award. Id. 21.

The tribunal finally awarded to the United States $15,500,000 as indemnity for losses sustained by citizens of this country by reason of the acts of the aforesaid cruisers, and that sum was paid over by Great Britain.

It was held in *United States* v. *Weld*, 127 U. S. 51, that this award was made to the United States as a nation. The fund was, at all events, a national fund to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the

most natural disposition of the fund that could be made by Congress was in the payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund.

We premise this much to show that, as respects the various claims, both of the first and second classes, for which payment was afterwards provided by Congress, they stood on a basis of equality, in the matter of legal right on the part of the claimants to demand their payment, or legal obligation on the part of the government of the United States to pay them. There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress — an expectancy of interest in the fund, that is, a possibility coupled with an interest.

The first provision made for the distribution of this fund was by the act of June 23, 1874, 18 Stat. 245, c. 459. By that act there was established a court known as the Court of Commissioners of Alabama Claims, to be composed of five judges, whose duties, among other things, were to receive and examine all claims, admissible under the act, that might be presented to them, directly resulting from damage caused by the aforementioned Confederate cruisers. By section 8 the court was to exist for one year from the date of its first convening and organizing, and the President might, by proclamation, extend its existence for six months more. By subsequent acts of Congress the existence of the court was continued until January 1, 1877, to enable it to complete the business for which it was created.

The claims allowed by this court did not amount to the sum of the award; and as many claims had not been presented to the court, Congress by the act of June 5, 1882, 22 Stat. 98, c. 195, reëstablished the court "for the distribution of the unap-

propriated moneys of the Geneva award." It was made the duty of the court, as reorganized, to receive and examine the claims which might be presented, putting them into two classes, and to render judgment for the amounts allowed. Claims of the first class were those "directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore;" and claims of the second class were those "for the payment of premiums for war risks, whether paid to corporations, agents or individuals, after the sailing of any Confederate cruiser."

As already stated, the defendants in error were adjudicated bankrupts August 5, 1875, and were discharged July 20, 1877. No steps were taken in the matter of their claim until after the passage of the act of 1882. The award was made by the Court of Commissioners in December, 1886, that court finding that the assignees of the defendants in error were entitled to such award.

It is urged on behalf of the plaintiff in error that this finding, that the assignees were entitled to the amount of the award on this claim, was final and not subject to review in any other court or tribunal. In other words, it is insisted that the decision of that court, both as respects the amount to be paid on the claims and also as to who was entitled to receive that amount, was final and irrevocable.

We are not impressed with this view. In our opinion it is unsound. The object for which the Court of Commissioners of Alabama Claims was established was to pass upon the claims which were presented to it for adjudication, and determine the amount to be paid by the United States on each claim. Questions respecting the ownership of the respective claims did not concern the court. Its function was performed when it rendered its judgment on the merit of the claims. Its judgments were final upon all parties, as respects the validity of the claim, and the amount to be paid in satisfaction of it; but there is nothing in the acts of Congress relating to this matter, or in the reason of things, to indicate that the

judgment of the court, as to who were the owners of the respective claims submitted, should be considered final and irrevocable.

Passing now to the most important question in the case, we are to consider whether the claim passed to the assignees of the defendants in error by virtue of the deed of assignment in their bankruptcy proceedings; or, whether, on the other hand, it never constituted a part of the estate until the passage of the act of 1882. From the agreed statement of facts it is ascertained that the assignments in bankruptcy were in the usual form.

By section 5044, Rev. Stat., it is provided that "all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto," shall be conveyed to the assignee immediately after he is appointed and qualified. Section 5046 puts the assignee in the same position as regards all manner and description of the bankrupt's property, (except that specifically exempt,) as the bankrupt himself would have occupied had no assignment been made. And subsequent sections establish in the assignee the right to sue for and recover all the bankrupt's "estate, debts and effects" in his own name, and otherwise represent the bankrupt in every particular as respects the latter's property of whatever species or description.

It must be conceded that the language of the Revised Statutes relating to bankruptcy to which we have referred is broad and comprehensive enough to embrace the whole property of the bankrupt. Was the claim in this case property, in any sense of the term? We think it was. Who can doubt but that the right to prosecute this claim before the Court of Commissioners of Alabama Claims would have survived to their legal representatives had the original claimants been dead at the passage of the act of 1882? If so, the money recovered would have been distributable as assets of the estate. While, as already stated, there were no means of compelling Congress to distribute the fund received in virtue of the Geneva award, and while the claimant was remediless with respect to any proceedings by which he might be able to retrench his losses,

nevertheless there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property. As we have shown from the history of the proceedings leading up to the organization of the tribunal at Geneva, these war premiums of insurance were recognized by the government of the United States as valid claims for which satisfaction should be guaranteed. There was thus at all times a possibility that the government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the act of Congress for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of Congress did was to provide a remedy for the enforcement of the right.

The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened. They are descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives and be distributable as assets; or might have been devised by will: while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personalty.

Neither do we think that the money appropriated by Congress by the act of 1882 to pay these claims should be considered merely as a gratuity. On this point we can do no better than to quote the language of the learned judge of the court below who delivered the dissenting opinion. He says: "If Congress intended by these statutes to appropriate the money to certain persons as a gratuity, the only matters for the Court of Commissioners to deal with would have been the persons intended by the statutes, and the amounts given to each, and it is difficult to see how a judicial court could reëxamine the distribution made by the Court of Commissioners unless the persons to whom that court awarded the money claimed and received it in some representative capacity. The judicial

courts determine the ownership of the money awarded only on the ground that it follows the ownership of the property as compensation for which the awards were made. Congress did not, however, in these statutes, specify the persons entitled to receive the money otherwise than by describing the claims to be admitted, except that it provided for the exclusion of claims for the loss of property insured to the extent of the indemnity received from the insurance, and that no claim should be allowed 'in favor of any person not entitled at the time of the loss to the protection of the United States in the premises,' nor 'in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States.'" 146 Mass. 554, 555.

We have authority in this court for the position we maintain. In *Comegys* v. *Vasse*, 1 Pet. 193, the controversy was between a bankrupt and his assignees over a claim against the government of Spain for insurance on various vessels and cargoes which had been condemned by the Spanish prize courts. The case was this: Vasse had been an underwriter on ships and cargoes owned by citizens of the United States which were captured and carried into the ports of Spain, and, abandonments having been made thereof to him, he paid the losses thus arising prior to the year 1802. In that same year he became embarrassed and made an assignment under the bankrupt law of April 4, 1800. His certificate of discharge was dated May 28, 1802. In his return of his property and effects to the commissioners, which he was required to make by the act, he did not include this claim against Spain, because it was not believed to have any value, depending, as it did, merely on the discretion and pleasure of the Spanish government. By the treaty of 1819 with Spain that government stipulated to pay five millions of dollars in full discharge of the unlawful seizures which she had made; and the money was afterwards paid over. Under the distribution of that fund the assignees in 1824 received a sum amounting to over $8000, as a part of the bankrupt's estate. Vasse brought suit to recover it from the assignees and recovered judgment in the Circuit Court; but on error this court reversed that judgment and held that the claim for which sat-

isfaction had been made was a part of the estate of the bankrupt in 1802, and therefore passed to the assignees under the deed of assignment. The bankrupt act of 1800, under which the case arose, was quite similar to the statute involved in this case, providing that "all the estate, real and personal, of every nature and description, to which the bankrupt might be entitled, either in law or in equity," should go to his assignee; and the court held that those words were broad and comprehensive enough to cover every description of vested right and interest attached to and growing out of property. The opinion of the court was delivered by Mr. Justice Story. In the course of his remarks he said: "It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain nor the government of the United States is suable in the ordinary courts of justice for debts due by either; yet who will doubt that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right both to the justice of his own and the foreign sovereign." 1 Pet. 216.

Again, referring to the language of the bankrupt act of 1800, he said: "'All the estate, real and personal, of every nature and description, in law or equity,' are broad enough to cover every description of vested right and interest attached to and growing out of property. Under such words the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question that the rights devolved upon Vasse by the abandonment could, in case of his death, have passed to his personal representative; and when the money was received be distributable as assets. Why, then, should it not be assets in the hands of the assignees? Considering it in the light in which Lord Hardwicke viewed it, as an equitable trust in the money, it is

still an interest, or, at all events, a possibility coupled with an interest." 1 Pet. 218, 219.

The principles of that case were applied in *Milnor* v. *Metz*, 16 Pet. 221, to the case of a claim for extra pay for services rendered by a bankrupt as gauger at the port of Philadelphia, which, although presented to Congress prior to his adjudication in bankruptcy, was not recognized by that body or satisfied until afterwards, the court holding that the claim passed to the assignee as part of the bankrupt's estate, and that the doctrine of donation did not apply.

In *Phelps* v. *McDonald*, 99 U. S. 298, McDonald, who was a British subject residing in the United States, was declared a bankrupt in 1868, and the conveyance of his estate was made in the usual form by the register to an assignee. At that time he had a claim against the United States, of which the commission organized under the treaty of Washington took cognizance, and made an award for its payment. It was held that such claim passed to the assignee. In the opinion of the court, delivered by Mr. Justice Swayne, after referring to *Comegys* v. *Vasse*, and other cases of that nature, it was said: "There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. . . . It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. . . . If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re* — possibilities coupled with an interest and claims growing out of property — pass to the assignee." 99 U. S. 303, 304. To the same effect are *Erwin* v. *United States*, 97 U. S. 392; *Bachman* v. *Lawson*, 109 U. S. 659.

Syllabus.

There is nothing in *United States* v. *Weld*, 127 U. S. 51, that militates against the view herein presented. In that case it was held that, as respects the jurisdiction of the Court of Claims to entertain the suit against the United States under section 1066, Rev. Stat., the claim must be regarded as growing out of the act of 1882, because that act furnished the remedy by which the rights of the claimant might be enforced. But that is an entirely different proposition from the one contended for here by the defendants in error, that the claim was created by that act.

In our opinion this case falls within the principles of *Comegys* v. *Vasse* and *Phelps* v. *McDonald;* and the judgment of the court below is

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

Mr. Justice Bradley was not present at the argument, and took no part in the decision.

In re RAHRER, Petitioner.

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

No. 1529. Argued March 17, 1891. — Decided May 25, 1891.

The act of August 8, 1890, 26 Stat. 313, c. 728, enacting "that all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise" is a valid and constitutional exercise of the legislative power conferred upon Congress; and, after that act took effect, such liquors or liquids, introduced into a State or Territory from another State, whether in original packages or otherwise, became subject to the operation of such of its then existing

Statement of the Case.

laws as had been properly enacted in the exercise of its police powers — among which was the statute in question as applied to the petitioner's offence.

THIS was an application for a writ of *habeas corpus* made to the Circuit Court of the United States for the District of Kansas by Charles A. Rahrer, who alleged in his petition that he was illegally and wrongfully restrained of his liberty by John M. Wilkerson, sheriff of Shawnee County, Kansas, in violation of the Constitution of the United States.

The writ was issued, and return having been made thereto, the cause was heard on the following agreed statement of facts:

"It is understood and agreed by and between the attorneys for the petitioner herein and the respondent that the above-entitled application to be discharged upon writ of *habeas corpus* shall be heard and decided upon the following facts, namely:

"That H. C. Maynard and Lisle Hopkins are citizens and residents of the State of Missouri, and are partners doing business at Kansas City, in the State of Missouri, under the firm name of Maynard, Hopkins & Co.; that said Maynard, Hopkins & Co. are and were at all the times herein mentioned doing a general wholesale business in Kansas City, in the State of Missouri, in the sale of intoxicating liquors; that said Maynard, Hopkins & Co. do a general business of packing and shipping intoxicating liquors from their place of business in Kansas City, in the State of Missouri, to various points in the State of Kansas and other States; that in June, 1890, the said Maynard, Hopkins & Co. constituted and appointed the petitioner herein, Charles Rahrer, a citizen of the United States, their lawful agent in the city of Topeka, in the State of Kansas, to sell and dispose of for them in original packages liquors shipped by the said Maynard, Hopkins & Co. from the State of Missouri to Topeka, in the State of Kansas; that in July, 1890, the said Maynard, Hopkins & Co. shipped to the city of Topeka, in the State of Kansas, from Kansas City, in the State of Missouri, a car-load of intoxicating liquors packed by them and shipped from Kansas City, in the State of Missouri, in

Statement of the Case.

original packages, which car-load of intoxicating liquors so shipped was taken charge of by the petitioner herein, Charles Rahrer, at Topeka, in the State of Kansas, as the agent of Maynard, Hopkins & Co.; that on the 9th day of August, 1890, the said Charles Rahrer, as agent of the said Maynard, Hopkins & Co., offered for sale and sold in the original package a portion of said liquor, so shipped by the said Maynard, Hopkins & Co., to wit, one pony keg of beer, being a four-gallon keg, which keg was in the same condition in which it was shipped from Kansas City, in the State of Missouri, to Topeka, in the State of Kansas; that said keg of beer was separate and distinct from all other kegs of beer so shipped, and was shipped as a separate and distinct package by Maynard, Hopkins & Co. from Kansas City, in the State of Missouri.

"That the petitioner, Charles A. Rahrer, on the 9th day of August, 1890, offered for sale and sold one pint of whiskey, which was a portion of the liquor shipped by Maynard, Hopkins & Co., as above stated; that said pint of whiskey was sold in the same condition in which it was shipped from the State of Missouri and received in the State of Kansas; that it was separate and distinct from every other package of liquor so shipped, and was sold in the same package in which it was received, being securely enclosed in a wooden box of sufficient size to hold said pint bottle of whiskey.

"It is further agreed that Charles A. Rahrer, the petitioner herein, was not the owner of said liquor, but was simply acting as the agent of Maynard, Hopkins & Co., who were the owners of said liquor.

"That on the 21st day of August, 1890, there was filed in the office of the clerk of the District Court of Shawnee County, Kansas, an information by R. B. Welch, county attorney of said county, together with affidavit of Otis M. Capron and John C. Butcher, appended and attached thereto and in support thereof, taken under sec. 2543, General Statutes of 1889, charging the said Charles A. Rahrer with violating the prohibitory liquor law of the State of Kansas by making the two sales hereinbefore mentioned. A copy of

said information and affidavits so filed is attached to the return of the respondent herein and is hereby referred to and made a part hereof; that the petitioner herein, Charles A. Rahrer, was arrested upon a warrant issued upon the information and affidavit heretofore referred to and is held in custody by the respondent, John M. Wilkerson, sheriff of Shawnee County, by reason of said information so filed and said warrant so issued, and not otherwise.

"Said Charles A. Rahrer was not a druggist and did not have, nor did his principals, Maynard, Hopkins & Co., have, any druggist's permit at the time of making the said sales of intoxicating liquor hereinbefore mentioned, nor had he or they ever made any application for a druggist's permit to the probate judge of Shawnee County, Kansas, before making such sales of intoxicating liquor as aforesaid. The said sales of intoxicating liquors were not made by said Charles A. Rahrer upon a printed or written affidavit of the applicant for such intoxicating liquors, as required under the prohibitory laws of the State of Kansas.

"A copy of the warrant under and by virtue of which the respondent, John M. Wilkerson, sheriff of Shawnee County, holds the said Charles A. Rahrer is attached to the return of the respondent and is hereby referred to and made a part hereof.

"The recent act of Congress relating to intoxicating liquors and known as the 'Wilson bill' was signed by the President on August 8, A.D. 1890."

The Circuit Court discharged the petitioner, and the case was brought to this court by appeal. The opinion will be found in 43 Fed. Rep. 556.

The constitution of Kansas provides: "The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific and mechanical purposes." 1 Gen. Stat. Kansas, 1889, p. 107. The sections of the Kansas statutes claimed to have been violated by the petitioner are as follows:

"Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicat-

Counsel for Appellant.

ing liquors, shall be guilty of a misdemeanor, and punished as hereinafter provided: *Provided, however*, That such liquors may be sold for medical, scientific and mechanical purposes, as provided in this act.

"It shall be unlawful for any person or persons to sell or barter for medical, scientific or mechanical purposes, any malt, vinous, spirituous, fermented or other intoxicating liquors, without first having procured a druggist permit therefor from the probate judge of the county wherein such druggist may be doing business at the time," etc.

"Any person without taking out and having a permit to sell intoxicating liquors, as provided in this act, or any person not lawfully and in good faith engaged in the business of a druggist, who shall directly or indirectly sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars and be imprisoned in the county jail not less than thirty days nor more than ninety days." 1 Gen. Stat. Kansas, c. 31, §§ 380, 381, 386.

On August 8, 1890, an act of Congress was approved, entitled "An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases," which reads as follows: "That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313, c. 728.

Mr. A. L. Williams, *Mr. J. N. Ives* and *Mr. R. B. Welch* for appellant, opposing the petitioner. *Mr. L. B. Kellogg*, Attorney General of Kansas, was with *Mr. Welch* on his brief.

Argument for Petitioner, Appellee.

Mr. Louis J. Blum and *Mr. David Overmyer* for appellee. *Mr. Edgar C. Blum* was with *Mr. Louis J. Blum* on his brief.

The commerce clause of the Constitution has been frequently before the court for construction, and the questions as to the extent of the power granted by it to Congress and its limitations upon state power have been firmly established. In *Gibbons* v. *Ogden*, 9 Wheat. 1, the court laid down the doctrine that the power granted to Congress under this clause was exclusive, and an inhibition upon the States. In *Sturges* v. *Crowninshield*, 4 Wheat. 122, it was held that whenever the terms in which a power is granted to Congress, or the nature of the power, require that it shall be exercised exclusively by Congress, the subject is completely taken away from the state legislatures. See also *Cooley* v. *Board of Wardens*, 12 How. 299; *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114; *Minnesota* v. *Barber*, 136 U. S. 313.

Whether liquor, as an article of interstate commerce, belongs to the class subject to the exclusive control of Congress, or to that which may be regulated by the States, is not an open question. The State of Iowa enacted a statute forbidding common carriers to bring liquors into the State, unless consigned to a party holding a permit from the local authorities. The court held that the article in question belonged to commerce within the exclusive power of Congress, and that, as the statute in question was a regulation of such commerce, it was void. *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465. Subsequently it was decided that the right to import liquor into the State — a right which the State had in vain sought to destroy — included the right to sell it in the condition in which it was imported. *Leisy* v. *Hardin*, *supra*.

The statutes of Iowa referred to, and the statutes of Kansas in question, are similar in terms, and, by these decisions all must have been alike affected.

Admitting for the purpose of the argument, that the act of

Congress is a valid enactment, has it any effect upon the existing statute?

The statute in question virtually embraced two provisions; one regulating the internal commerce in liquor, the other applying to imported liquor. The latter was void when passed; but it is claimed that, by virtue of the terms of the act of Congress, there is now in force a state law prohibiting the sale of imported liquor, and the statute in question is relied upon in support of this contention. Up to the time of the passage of that act there was no such state law as the one claimed. When the court held the statute to be unconstitutional, so far as it applied to imported liquor, it decided in effect that the statute should never have been enacted, and that in law it never had been enacted. "An unconstitutional act is not a law. . . . It is in legal contemplation as though it had never been passed." *Norton* v. *Shelby County*, 118 U. S. 425. No other statute relating to imported liquor having thereafter been passed, there is no state law on the subject; and if, as is claimed, such a law has been created by the act of Congress, we have here a state law, enacted by the national legislature.

It may be said that the state statute in question in effect contains two provisions, and that the act of Congress is not designed to revive the provision relating to imported liquors, but seeks merely to extend the operation of the provision prohibiting the sale of domestic liquors, so as to embrace interstate commerce. If this is its intent, aside from the question as to the constitutional power of Congress to do this, the statute is more clearly subject to the objection that Congress cannot legislate directly for the States. If the State enacts a law covering one subject, and Congress then provides that the state law shall cover another and an entirely different subject, what is the statute, as changed? Unless it is intended to adopt the state law, and thus make it a law of Congress, the statute is clearly a new state law, enacted by Congress, under the police power of the State. Congress may, undoubtedly, afford a freer scope to the operation of state laws than they could otherwise obtain; but the state laws so acted upon by Congress must be valid laws, and relate to a subject within the control of Congress.

Before Congress acted there was no law of Kansas prohibiting the sale of imported liquor in its original package; there was no power in the State to enact it. Such a law, if there is any, owes its existence entirely to Congress; and, as Congress cannot legislate for the States, but can only make a state law a Federal measure by adoption, it necessarily follows that Congress has adopted the state statute in question.

If this statute has, by adoption, become a law of the United States, then an offence against it is punishable only in the Federal courts, and the state courts have no jurisdiction. Yet the Federal courts have no authority to punish the offence.

But Congress has no power to adopt this statute because it is not a fit subject for adoption. It is not now a law, nor has it ever to any legal purpose or intent had any existence. It would be just as reasonable, and as constitutional, for Congress to adopt, or legalize, the act of an individual claiming sovereign power, as to adopt a statute enacted by a legislature without authority. If it has been done in this instance, it is certainly an original and extraordinary mode of legislation, without precedent in congressional records. If, for example, some enterprising State should by statute create a national bank, and Congress should assent to the statute, would the bank have a legal existence? The case supposed would be analogous to the one at bar, it being in either case an attempt by the State to exercise the power of Congress to regulate interstate commerce, and an attempt by Congress to give existence to such legislation. The principles that can sustain the one will certainly justify the other. If we separate the valid from the void part of the statute, we find remaining only a statute confined to a subject within the exclusive control of the State, and Congress cannot adopt a state law having no relation to its own powers.

Before the passage of this bill the States had exhausted all their resources to bring the interstate commerce in liquor within their jurisdiction, and in vain. Towards the attainment of this end, the aid of Congress was then invoked, resulting in the enactment of this measure. But the commerce clause of the Constitution vests in Congress an exclusive power

to regulate interstate commerce of a national character, and the commerce in question here is of that character.

Here, then, is a law of Congress, conferring upon the States an authority to exercise the very power denied them by the Constitution. While Congress was doubtless actuated by worthy motives, and certainly cannot be chargeable with the design to defy the Constitution from which it derives its own existence and authority, we respectfully submit that such is the effect of its action. This conclusion is certainly irresistible, unless we find in the Constitution itself some provision enabling Congress to extend the state power in this regard, or to delegate to the States its own power to regulate this branch of interstate commerce. But, the United States and the States being distinct governments, sovereign and supreme within their respective spheres, and both alike being controlled by the Federal Constitution, it follows that the power of neither can be extended by the other.

Counsel for appellant says that the grant of power to Congress to regulate commerce with foreign nations and among the States is without limitation other than the discretion of Congress, and from that fact infers that its grant of power to the States by the act of 1890 is authorized because not expressly forbidden by the Constitution. It is true the grant of power to Congress is without limitations other than those prescribed by the Constitution, but the delegation of authority to the State is one of the limitations prescribed by the Constitution. The commercial power of Congress is not exceptional in this respect; every Federal power is subject to no limitation other than the requirements of the Constitution.

It would appear to be settled beyond all doubt, that the Constitution provides or allows no means by which a State can be enabled to legislate with respect to foreign or interstate commerce. That it does not possess the power as an attribute of its sovereignty, is certain. That Congress cannot confer or delegate to it this power, is no less clear. If, therefore, the act of 1890 subjects an article of interstate commerce to the state jurisdiction, what claim has it to validity? That it does subject an article of interstate commerce to the

state jurisdiction, admits of no doubt; for if the State statutes are to have any effect upon imported liquors, they are, to that extent, commercial regulations; and this was the express point decided in the case of *Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U. S. 465.

The power to regulate commerce includes the right to determine what is commerce, subject to regulation. The latter power is incidental to the former; is, in fact, a component and essential part of it. If Congress can delegate a part of its commercial power to the States, it can certainly delegate any other part, and therefore the whole. This power is not withheld by the Constitution from the States in fractions, but as an entirety. If, therefore, Congress can allow the States to determine whether or not imported liquor shall be an article of commerce, subject to the power of Congress, it may delegate its entire commercial power to the States. In fact, it would be better to transfer its power, as a whole, than to leave it in this uncertain condition, subject to the varying policy of each particular State.

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

The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.

And this court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government.

The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life,

liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of state legislation.

As observed by Mr. Justice Bradley, delivering the opinion of the court in the *Civil Rights Cases*, 109 U. S. 3, 13, the legislation under that amendment cannot "properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection."

In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment. *Barbier* v. *Connolly*, 113 U. S. 27, 31.

The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. And if a law passed by a State in the exercise of

its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210. That which is not supreme must yield to that which is supreme. *Brown* v. *Maryland*, 12 Wheat. 419, 448.

"Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Unquestionably, fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between State and State, 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. Nevertheless, it has been often held that state legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of a 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. *Mugler* v. *Kansas*, 123 U. S. 623, and cases cited. "These cases," in the language of the opinion in *Mugler* v. *Kansas* (p. 659,) "rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in *Gibbons* v. *Odgen*, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government." But it was not thought in that case that the record presented any question of the invalidity of state laws, because repugnant to the power to regulate commerce among

the States. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the commercial power and the police power, which "though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them." 12 Wheat. 441.

And here the sagacious observations of Mr. Justice Catron, in the *License Cases*, 5 How. 599, may profitably be quoted, as they have often been before: "The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*; *Brown* v. *The State of Maryland*; and *New York* v. *Miln*. What, then, is

the assumption of the state court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds 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 in this connection it may be proper to say, that the three States whose laws are now before us had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of State, under the belief that such a policy will best subserve the interests of society; and that to this end, more than to any other, has the sovereign power of these States been exerted; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result, — at least, in some of the States, — and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police." And the learned judge reached the conclusion that the law of New Hampshire, which particularly raised the question, might be sustained as a regulation of commerce, lawful, because not repugnant to any actual exercise of the commercial power by Congress. In respect of this the opposite view has since prevailed, but the argument retains its force in its bearing upon the purview of the police power as not concurrent with and necessarily not superior to the commercial power.

The laws of Iowa under consideration in *Bowman* v. *Railway Company*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that 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 did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such

commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?

By the first clause of section 10 of Article I of the Constitution, certain powers are enumerated which the States are forbidden to exercise in any event; and by clauses two and three, certain others, which may be exercised with the consent of Congress. As to those in the first class, Congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports, by state enactments, subject to the revision and control of Congress; and a tonnage duty, to the exaction of which only the consent of Congress is required. Beyond this, Congress is not empowered to enable the State to go in this direction. Nor can Congress transfer legislative powers to a State nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. *Cooley* v. *Port Wardens of Philadelphia*, 12 How. 299; *Gunn* v. *Barry*, 15 Wall. 610, 623; *United States* v. *Dewitt*, 9 Wall. 41.

It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of Congress to so regulate

it as to bring any of its subjects within the grasp of the police power of the State. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things, and that not only may intoxicating liquors be imported from one State into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result.

Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.

The principle upon which local option laws, so called, have

been sustained is, that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend; but we do not rest the validity of the act of Congress on this analogy. The power over interstate commerce is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.

No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

The differences of opinion which have existed in this tribunal in many leading cases upon this subject, have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the States.

We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.

The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. The manner of that disposition brought into determination upon this record involves no ground for adjudging the act of Congress inoperative and void.

We inquire then whether fermented, distilled, or other intoxicating liquors or liquids transported into the State of Kansas, and there offered for sale and sold, after the passage of the act, became subject to the operation and effect of the existing laws of that State in reference to such articles. It is said that this cannot be so, because, by the decision in *Leisy* v.

Hardin, similar state laws were held unconstitutional, in so far as they prohibited the sale of liquors by the importer in the condition in which they had been imported. In that case, certain beer imported into Iowa had been seized in the original packages or kegs, unbroken and unopened, in the hands of the importer, and the Supreme Court of Iowa held this seizure to have been lawful under the statutes of the State. We reversed the judgment upon the ground that the legislation to the extent indicated, that is to say, as construed to apply to importations into the State from without and to permit the seizure of the articles before they had by sale or other transmutation become a part of the common mass of property of the State, was repugnant to the third clause of section eight of article one of the Constitution of the United States, in that it could not be given that operation without bringing it into collision with the implied exercise of a power exclusively confided to the general government. This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the State.

In *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418, it was held that the act of the legislature of the State of Minnesota of March 7, 1887, establishing a railroad and warehouse commission, as construed by the Supreme Court of that State, by which construction we were bound in considering the case, was in conflict with the Constitution of the United States in the particulars complained of by the railroad company, but nevertheless the case was remanded, with an instruction for further proceedings. And Mr. Justice Blatchford, speaking for this court, said: "In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission."

In *Tiernan* v. *Rinker*, 102 U. S. 123, an act of the legislature of the State of Texas levying a tax upon the occupation

of selling liquors, malt and otherwise, but not of selling domestic wines or beer, was held inoperative so far as it discriminated against imported wines or beer, but as Tiernan was a seller of other liquors as well as domestic, the tax against him was upheld.

In the case at bar, petitioner was arrested by the state authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the State. The act of Congress had gone into effect on the 8th of August, 1890, providing that imported liquors should be subject to the operation and effect of the state laws to the same extent and in the same manner as though the liquors had been produced in the State; and the law of Kansas forbade the sale. Petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the state constitution and the terms of the law, (within whose mischief all intoxicating liquors came,) that the State did not intend imported liquors to be included. We do not mean that the intention is to be imputed of violating any constitutional rule, but that the state law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause.

Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

It appears from the agreed statement of facts that this liquor arrived in Kansas prior to the passage of the act of Congress, but no question is presented here as to the right of

the importer in reference to the withdrawal of the property from the State, nor can we perceive that the Congressional enactment is given a retrospective operation by holding it applicable to a transaction of sale occurring after it took effect. This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reënactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property.

Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice Brewer concurred in the judgment of reversal, but not in all the reasoning of the opinion of the court.

INSURANCE COMPANY OF NORTH AMERICA *v.* HIBERNIA INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 14. Argued December 3, 1889. — Decided May 25, 1891.

A contract of reinsurance to the whole extent of the original insurer's liability is valid, in the absence of usage or stipulation to the contrary.

An open policy of insurance, executed in one State and sent to another, and taking effect by acceptance of risks under it by the insurer's agent there, is not affected by local usage of the place where it was executed.

A policy of reinsurance, limited to the excess of the original insurer's risk above a certain sum, does not prevent him from reinsuring himself elsewhere within that sum.

In equity. Decree for complainant. Defendant appealed. The case is stated in the opinion.

Mr. Lawrence Lewis, Jr., and *Mr. J. M. Wilson* for appellant. *Mr. J. Bayard Henry* and *Mr. Samuel Shellabarger* were with them on the brief.

Mr. Thomas J. Semmes for appellee.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity by the Hibernia Insurance Company, a corporation of Louisiana, against the Insurance Company of North America, a corporation of Pennsylvania, to recover back sums paid under policies of reinsurance by which the plaintiff reinsured the defendant. The bill prayed for a discovery, an account and general relief. The case was referred to a master, upon whose report a decree was entered for the plaintiff for $27,986.79, with interest from the date of the master's report, and costs. The defendant appealed to this court.

Upon full examination of the voluminous and somewhat conflicting evidence, the material facts, as clearly established, appear to be as follows:

In September, 1880, Marshall J. Smith, a member of the firm of Marshall J. Smith & Co., agents of the Hibernia Insurance Company at New Orleans, was in Philadelphia, and called upon Charles Platt, Jr., an insurance broker, son of the president of the Insurance Company of North America, but in no way connected in business with that company, and asked him if he could get business for the Hibernia Insurance Company and a commission for himself, by making an arrangement by which the Insurance Company of North America should reinsure with the Hibernia Insurance Company under an open policy issued in Platt's name; and Smith said he would go back to New Orleans, and write Platt on the subject, and accordingly, after returning to New Orleans, sent him the following letter:

"New Orleans, October 6, 1880.

"Charles Platt, Jr., Esq., Philadelphia.

"Dear Sir: Our Mr. Smith has returned home, and begs to refer to his conversation with you in regard to reinsuring here the excess lines of the North America. We have consulted with the officers of the Hibernia Ins. Co., a branch of which company is under our management, and we propose to take a proportion of the general reinsurance of the North America, excepting coastwise risks from New York here, of which business, at the present rates, we believe the North America does little. The Hibernia will carry a line of $10,000 on all foreign business of the company at all ports, excepting New Orleans. From New Orleans the line must be limited to $5000, as the Hibernia often have a line from their customers, and they may unknowingly double on a vessel. The Hibernia will allow twenty-five per cent rebate, and to you a brokerage of five per cent. Should you be able to arrange this, please notify us at once. The Hibernia Ins. Co. has a capital of $400,000 paid up, is conservative, and we look upon it here as in every way first class for the amount of risk they will assume.

"Yours truly, MARSHALL J. SMITH & Co."

To this letter Platt, after calling on the officers of the Insurance Company of North America, who agreed to give a share of their reinsurance business to the Hibernia Insurance Company, sent the following reply:

"Charles Platt, Jr., Insurance, 331 Walnut Street, Philadelphia.

"Philadelphia, October 11, 1880.

"Marshall J. Smith, Esq., New Orleans.

"Dear Sir: Your valued favor of the 6th inst. is received and I note contents with care. The Ins. Co. of North America, through me, will be glad to enter into the reinsurance arrangement with the Hibernia on the terms named. I inclose herewith a policy I had with the Home Ins. Co. of Newark, N. J., which you can take a copy of on a Hibernia policy, making the sum insured $10,000. Please send me the policy

and I can begin at once. Of course all risks accepted by me will be such that the Ins. Co. of North America carries their line on, and all risks that are bound by me will be held by the Co., as it will not do to have any cancellations. Shall I report all risks to you or the Hibernia Co. direct? I see no reason why the arrangement should not prove a success, and I will do all I can to make it so. The most part of it will be grain and general cargo from Atlantic ports to Europe. Please return the Home policy. With many thanks and regards from Mr. Prictet and myself, I am,

"Yours very truly, CHARLES PLATT, JR."

On October 13, 1880, the Hibernia Insurance Company issued to Platt an open policy, No. 268, in which "The Hibernia Insurance Company of New Orleans by this policy of insurance do make insurance and cause to be insured Charles Platt, Jr., for account of whom it may concern, lost or not lost, at and from ports in the United States and foreign ports, upon all kinds of lawful goods, merchandise, etc.," with the names of the vessel and master, voyage, value of goods insured, rate of premium and amount of risk left blank, and otherwise in the usual form of a policy of marine insurance, not reinsurance, and having this indorsement: "This policy is limited to the sum of ten thousand ($10,000) dollars upon any one vessel from all ports except from New Orleans, where the limit is hereby agreed to and understood to be five thousand ($5000) dollars. This policy is not to cover any risk from port or ports to New Orleans. Notice of each shipment to be given to Marshall J. Smith & Co., managers, as soon as known, and amounts declared as soon as ascertained. This policy to be continuous until cancelled by either party giving twenty days' notice, but without any prejudice to risks pending at the date of cancellation."

Platt showed this policy to the officers of the Insurance Company of North America, but retained it in his own possession.

The Hibernia Insurance Company in 1881 and 1882 issued and sent to the Insurance Company of North America, on

application of its president, four other open policies, Nos. 277, 296, 297, 306, in a different form from No. 268, and differing from each other only in date, voyage and amount of excess.

In No. 297, for instance, dated November 9, 1881, "The Hibernia Insurance Company of New Orleans by this policy of insurance do make insurance and cause to be reinsured the Insurance Company of North America, for account of whom it may concern, lost or not lost, at and from port or ports in the West India Islands to port or ports in the United States, direct or *via* port or ports, liberty of transshipment to include risk of lighterage when such is assumed by the Insurance Company of North America, upon all kinds of lawful goods, merchandise, etc." That policy had this endorsement: "To apply to the excess which the said company may have in all their various policies over fifty thousand ($50,000) dollars, and to apply *pro rata* with all reinsurance policies on same excess, but not to exceed ten thousand ($10,000) dollars. This policy may be cancelled by either party giving notice to that effect, but without prejudice to risks pending at the date of cancellation. This policy is subject to such risks, valuations, conditions and mode of settlement as are or may be taken by the said Insurance Company of North America, notwithstanding anything to the contrary in the within policy, and payment of loss to be made at the same time. Returns to be sent to Marshall J. Smith & Co., in New Orleans."

No. 277, dated April 14, 1881, was on an excess of $60,000 on goods from La Guayra, Porto Cabello and Curaçoa to ports in the United States; No. 296, dated November 14, 1881, was on an excess of $50,000 on goods from the East Indies to ports in the United States; and No. 306, dated September 1, 1882, was on an excess of $70,000 on goods from ports in the United States to ports in Europe.

Many hundred of reinsurances were made under the five policies, mostly under No. 268, in the following manner: Whenever the Insurance Company of North America desired reinsurance, it handed to Platt as representing the Hibernia Insurance Company an application in the form copied in the

margin,[1] except in sometimes omitting all statements as to excess; and Platt, after accepting the application and entering it in his books, forthwith sent to Marshall J. Smith & Co. at New Orleans a certificate in the form copied in the margin,[2] and afterwards, as soon as he was advised by the Insurance Company of North America of the exact amount of risk attaching, sent to Marshall J. Smith & Co. a statement of particulars in the form copied in the margin.[3] All Platt's commissions were paid by the Hibernia Insurance Company, out of the premiums received by it from the Insurance Company of North America.

---

[1] Philadelphia, —— —— 18—.

Reinsurance is wanted by the Insurance Company of North America for $—— on —— on board of the ——, at and from —— — ——; to apply to the excess which the said company may have on all their various policies on vessel, freight, cargo or profits, including specie or treasure, over $——, and to apply *pro rata* with all reinsurance policies on same excess, but not to exceed $——. This policy is to be subject to such risks, valuations, conditions and mode of settlement as are or may be taken by the said Insurance Company of North America, notwithstanding anything to the contrary in the within policy, and payment of loss to be made at the same time. To remain open until particulars are given in.

Premium, —— per cent, less —— per cent, $——.

When and where built, ——; number of decks, ——; tonnage, ——; rate, ——.

—— ——, Secretary.

To the —— ——.

[2] Office of Charles Platt, Jr., Philadelphia.

Certificate No. —. No. —.

Insurance has been made in the Hibernia Insurance Company of N. O., under open policy No. ——, for Insurance Company of North America, payable, in case of loss, to them, for $—— upon —— on board ——, at and from —— to ——.

When built, ——; where built, ——; metalled, ——; tonnage, ——.

Remarks, ——; rate, ——.

Premium, —— per cent, $——. Charles Platt, Jr.

Philadelphia, —— —, 188–.

[3] To the Hibernia Insurance Company of New Orleans:

The amount attaching on open entry of ————, 188–, under open policy No. ——, on ——, per ship ——, is ——, at —— per cent; premium, $——; net, $——

Charles Platt, Jr.

Philadelphia, —— —.

On July 1, 1883, an endorsement was made on each of the five policies, in the following form, differing only in the description of the number of each policy: "New Orleans, La., July 1, 1883. From and after this date this policy, No. 268, of the Hibernia Insurance Co. of New Orleans shall apply to five thousand dollars ($5000) instead of ten thousand dollars ($10,000) as heretofore, on same excess as expressed therein and subject to the same terms and conditions."

On November 23, 1883, all the policies were cancelled, in accordance with their terms, by the Hibernia Insurance Company.

The bill and the master's report proceed upon the theory that Platt, acting for the Insurance Company of North America, applied to the Hibernia Insurance Company to reinsure the Insurance Company of North America on the excess of its usual line, (that is to say, beyond the sum usually carried by it on any good risk, which was alleged to be $50,000,) and represented to the Hibernia Insurance Company that it was to reinsure only those risks that the Insurance Company of North America carried its usual line on; that the Hibernia Insurance Company, upon the faith of that representation, issued nominally to Platt, but really to the Insurance Company of North America, policy No. 268; that the Hibernia Insurance Company afterwards issued the other four policies directly to the Insurance Company of North America for stated excesses; that by ancient and general usage reinsurance is always made upon the faith that the reinsured procures it on the excess only of the usual line carried by him, and is never, unless for special reasons disclosed, effected to the full sum originally insured; that various reinsurance risks were placed by the Insurance Company of North America with the Hibernia Insurance Company under all the policies, and particularly under No. 268, in cases where the Insurance Company of North America was not itself carrying the full sum of $50,000, and in many such cases the Hibernia Insurance Company paid losses without knowledge of that fact; and that many reports of risks made by the Insurance Company of North America were false, and were outside of the terms of the policies. We are unable to concur in this view of the case.

Platt was an insurance broker, carrying on an independent business, and was employed, not by the Insurance Company of North America, but by the Hibernia Insurance Company, to obtain for it a proportion of the reinsurance business of the Insurance Company of North America. The letter of October 6, 1880, from the Hibernia Insurance Company's agents at New Orleans to Platt, after referring generally, and by way of introducing the subject, to their previous conversation "in regard to reinsuring here the excess lines of the North America," proposed, on behalf of the Hibernia Insurance Company, "to take a proportion of the general reinsurance business of the North America," excepting certain voyages, and limiting the amount which the Hibernia Insurance Company would take on each risk. In Platt's letter in reply of October 11, 1880, the statement that "the Insurance Company of North America, through me, will be glad to enter into the reinsurance arrangement with the Hibernia on the terms named," apparently refers to the terms as to voyages and amounts to be taken by the Hibernia Insurance Company. There is no evidence whatever that the Insurance Company of North America authorized him to contract or to represent in its behalf that the reinsurance should be only in excess of its usual line. Nor is there anything in his letter which shows an assumption of such authority by him. Reliance is placed on this sentence: "Of course all risks accepted by me will be such that the Insurance Company of North America carries their line on, and all the risks that are bound by me will be held by the company, as it will not do to have any cancellations." But the clear meaning and purpose of this are, first, to assure the Hibernia Insurance Company, his employer, that he will only accept in its behalf risks that the Insurance Company of North America carries its line on, and, second, to warn it that whatever risks he does accept will be held by that company.

Policy No. 268, dated October 13, 1880, was made by the Hibernia Insurance Company to Platt "for account of whom it may concern," and sent to him at Philadelphia, to enable him to accept in its behalf reinsurance there, and never took effect as a contract of reinsurance of the Insurance Company

of North America on any risk, until the risk had been stated by that company to Platt, and by him accepted in behalf of the Hibernia Insurance Company. The contract between the two insurance companies was made in Philadelphia. The evidence introduced by the Hibernia Insurance Company to prove a usage not to reinsure to the whole amount of the original insurance, giving it the utmost possible weight, proved no more than a local usage in New Orleans. See *Louisiana Ins. Co.* v. *New Orleans Ins. Co.*, 13 La. Ann. 246. It could not therefore affect a contract made elsewhere, and it is unnecessary to consider whether evidence of a similar usage, if universal, would be admissible to control a written contract expressed in the terms of this policy. *Macy* v. *Whaling Ins. Co.*, 9 Met. 354, 365, 366; *Parkhurst* v. *Gloucester Ins. Co.*, 100 Mass. 301; *Cobb* v. *Lime Rock Ins. Co.*, 58 Maine, 326.

In the absence of any such usage, and of any specific stipulation in the policy, there can be no doubt that the original insurer may protect himself to the whole extent of his liability. In the words of Roccus, quoted and approved by Emerigon, by Mr. Justice Park and by Mr. Justice Livingston, *secundus assecurator tenetur ad solvendum omne totum quod primus assecurator solverit.* Roccus, n. 30; Emerigon, c. 8, § 14; Park Ins. (8th ed.) 595; *Hastie* v. *De Peyster*, 3 Caines, 190, 196. So Chancellor Kent says: "After an insurance has been made, the insurer may have the entire sum he hath insured, reassured to him by some other insurer. The object of this is indemnity against his own act." 3 Kent Com. 278. See also *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 323; *Bradford* v. *Symondson*, 7 Q. B. D. 456.

Policy No. 268, as originally issued, mentions no limit of excess. It contains nothing to prevent its taking effect for the sums thereby insured, although covering the whole original insurance. It does not even show that it is a reinsurance, but it is not the less effectual for that reason. *Mackenzie* v. *Whitworth*, L. R. 10 Ex. 142, and 1 Ex. D. 36. In the agreement of July 1, 1883, endorsed on each of the five policies, by which the sum insured on any one vessel is reduced from $10,000 to $5000 "on same excess as expressed therein," the words just

quoted can have no effect as applied to this policy, in which no excess is expressed. All the reinsurances under policy No. 268, therefore, were in accordance with the terms of the contract; and the allegations of fraud are wholly unsupported by the evidence.

All the claims of the Hibernia Insurance Company, sustained by the decree below, relate to reinsurances under this policy, and are disposed of by what has been said, except two under policy No. 296, as to which there is admitted to have been error, and one under policy No. 297.

That policy, by the terms of the original endorsement thereon, was "to apply to the excess which the said company may have in their various policies over $50,000, and to apply *pro rata* with all reinsurance policies on same excess." This clause, while it limits the reinsurance by the Hibernia Insurance Company to excess over the sum named, contains nothing to prevent the original insurer from protecting himself by obtaining reinsurance from other companies within that sum. There was error, therefore, in holding that the fact that the Insurance Company of North America had obtained such reinsurance elsewhere avoided the reinsurance of the Hibernia Insurance Company upon the same property.

The result is, that the decree must be

Reversed, and the cause remanded to the Circuit Court with directions to enter a decree dismissing the bill, with costs.

Mr. Justice Brewer and Mr. Justice Brown, not having been members of the court when this case was argued, took no part in the decision.

In re WILSON, Petitioner.

ORIGINAL.

No. 11. Original. Submitted April 27, 1891. — Decided May 25, 1891.

Prior to 1885 the District Courts of a Territory had jurisdiction over the crime of murder, committed by any person other than an Indian, upon an Indian reservation within its territorial limits; and such jurisdiction was not taken away by the act of March 3, 1885, c. 341, § 9, 23 Stat. 385.

A deficiency in the number of grand jurors prescribed by law, there being present and acting a greater number than that requisite for the finding of an indictment, is not such a defect as vitiates the entire proceedings, and compels his discharge on *habeas corpus*, though unnoticed by the prisoner until after trial and sentence.

If it be doubtful whether the defendant can, after trial and verdict, take advantage of such a defect by direct challenge, it is clear that the defect does not go to the jurisdiction, and cannot be taken advantage of by a collateral attack in *habeas corpus*.

It is unnecessary to decide whether the "sixty days'" limitation of the sessions of the legislative assemblies of the Territories means a term of sixty calendar days.

THE case is stated in the opinion.

Mr. J. Altheus Johnson for the petitioner.

Mr. Solicitor General opposing.

MR. JUSTICE BREWER delivered the opinion of the court.

On June 12, 1890, the petitioner was, by the District Court of the Second Judicial District of the Territory of Arizona, sentenced to be hung. He has sued out this *habeas corpus* to test the validity of such sentence. He does not come here by writ of error to review the proceedings, so that errors therein may be corrected; but attacks them in this way, collaterally, as void. His attack is rested on two propositions. The proceedings had were in a territorial court, sitting as a court of the United States. The first claim is, that the court did not have jurisdiction of the offence charged. The indictment

charges the crime of murder committed upon one William Fleming, within the White Mountain Indian Reservation, in the Second Judicial District of the Territory of Arizona. The petition alleges that the petitioner is a citizen of the United States, of African descent; that William Fleming, the person killed, was also a negro; that the Second Judicial District of Arizona is composed of four counties, one of them being the county of Gila; and that the White Mountain Indian Reservation is within said county of Gila. The reservation, therefore, is within the territorial limits of the Second Judicial District, but the contention is that the District Court of that district, sitting as a United States court, did not have jurisdiction, but that it was vested alone in the District Court sitting as a territorial court; and that the indictment should have run in the name of the people of the Territory, instead of in the name of the United States of America. The second contention is, that the grand jury which indicted him was not a legally constituted tribunal, in that it was composed of only fifteen persons. In this respect it is admitted that by the laws of the Territory of Arizona, in force until March 22, 1889, grand juries were to be composed of not less than thirteen nor more than fifteen members, (Revised Statutes Arizona, p. 384, sec. 2164,) but it is claimed that on that day a law came into force by which the number of members of a grand jury was increased, and required to be not less than seventeen nor more than twenty-three. Upon these two propositions the petitioner denies the validity of the sentence against him, and asks that he be discharged from custody.

With respect to the first question, it may be observed that the White Mountain Indian Reservation was a legally constituted Indian reservation. True, when the Territory of Arizona was organized, on February 24, 1863, 12 Stat. 664, c. 56, there was no such reservation; and it was created in the first instance by order of the President in 1871. Whatever doubts there might have been, if any, as to the validity of such executive order, are put at rest by the act of Congress of February 8, 1887, 24 Stat. 388, c. 119, § 1, the first clause of which is "That in all cases where any tribe or band of Indians has been

or shall hereafter be, located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities, as follows."

The necessary effect of this legislative recognition was to confirm the executive order, and establish beyond challenge the Indian title to this reservation. Indeed, the fact that this is an Indian reservation is not contested by the petitioner; but rather assumed by him in his argument. His proposition is, that "Congress by act approved March 3, 1885, 23 Stat. 385, c. 341, § 9, conferred upon the Territory and her courts full jurisdiction of the offence of murder when committed on an Indian reservation by an Indian. *Ex parte Gon-sha-yee*, 130 U. S. 343. This offence had heretofore, when committed in such place by others than an Indian, been cognizable by the courts of the United States under Rev. Stat. § 2145. The petitioner believes that the United States, by yielding up a part of her jurisdiction over the offence of murder when committed on an Indian reservation, lost all; that is, that her jurisdiction of the offence in the particular place must be 'sole and exclusive,' or will not exist at all; that it cannot be that there shall be one law and one mode of trial for a murder in a particular place if committed by an Indian and another law and mode of trial for the identical offence in the same place committed by a white man or a negro." We are unable to yield our assent to this argument. The question is one of statutory construction. The jurisdiction of the United States over these reservations and the power of Congress to provide for the punishment of all offences committed therein, by whomsoever committed, are not open questions. *United States* v. *Kagama*, 118 U. S. 375. And this power being a general one, Congress may provide for the punishment of one

class of offences in one court, and another class in a different court. There is no necessity for, and no constitutional provision compelling, full and exclusive jurisdiction in one tribunal; and the policy of Congress for a long time has been to give only a limited jurisdiction to the United States courts. Section 2145 extends to the Indian country the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except as to crimes the punishment of which is otherwise expressly provided for. This Indian reservation is a part of the Indian country within the meaning of that section. *Bates* v. *Clark*, 95 U. S. 204; *Ex parte Crow Dog*, 109 U. S. 556. But this extension of the criminal laws of the United States over the Indian country is limited by the section immediately succeeding, 2146, as follows: "The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively." So that before the act of 1885 the jurisdiction of the United States courts was not sole and exclusive over all offences committed within the limits of an Indian reservation. The words "sole and exclusive," in section 2145, do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. The effect of the act of 1885 was not to transfer to territorial courts a part of the sole and exclusive jurisdiction of United States courts, but only a part of the limited jurisdiction then exercised by such courts, together with jurisdiction over offences not theretofore vested therein. The argument of the petitioner therefore fails. There has been no transfer of part of a sole and exclusive jurisdiction, carrying by implication, even in the absence of express language, a transfer of all jurisdiction, but only a transfer of part of an already limited jurisdiction, and neither by language nor implication transferring that theretofore vested and not in terms trans-

ferred. We may here, in passing, notice that the distinction between District Courts when sitting as courts of the Territory, and when sitting as courts of the United States, was fully developed and explained in the case of *Ex parte Gonsha-yee*, *supra;* that by section 629 of the Revised Statutes the Circuit Courts of the United States are given jurisdiction of crimes and offences cognizable under the authority of the United States; and that by the act organizing the Territory of New Mexico, of September 9, 1850, 9 Stat. 446, c. 49, and the subsequent act of February 24, 1863, 12 Stat. 664, c. 56, organizing the Territory of Arizona, the District Courts of the latter Territory were given the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States. It follows that as the Circuit Courts of the United States have jurisdiction over the crime of murder committed within any fort, arsenal or other place within the exclusive jurisdiction of the United States, so, prior to 1885, the District Courts of a Territory had jurisdiction over the crime of murder committed by any person other than an Indian, upon an Indian reservation within its territorial limits, and that such jurisdiction has not been taken away by the legislation of that year. The first contention of petitioner, therefore, cannot be sustained.

The second is equally untenable. His proposition is, that the grand jury, which indicted him, was not a legally constituted tribunal — in that it was composed of only fifteen members — whereas, by an act of the legislature of the Territory of Arizona, passed on March 12, 1889, a day before that upon which the offence is charged to have been committed, it was required that grand juries should be composed of not less than seventeen nor more than twenty-three members. The response thereto is, that no such act was passed; and that, even if it were, the defect in the number of grand jurors did not vitiate the entire proceedings; so that they could be challenged collaterally on *habeas corpus*, but it was only a matter of error, to be corrected by proceedings in error. It appears from the record that a challenge to the grand jury was made by the

petitioner and overruled; but the ground here presented was not taken in such challenge.

With regard to this supposed act of the legislature, the official volume of the acts and resolutions of the legislative assembly of Arizona, of the year 1889, certified by the secretary of the Territory, contains no such act. It is claimed, however, that a bill passed both houses of the assembly — passing the house on March 8, 1889, and the council, March 9, 1889 — as appears from the assembly journals, and, on March 12, was properly certified and placed in the hands of the governor for his action; that he did not within ten days either approve by signing it or return it without his signature to the house in which it originated; and that the assembly continued in session until the 10th day of April, which was more than ten days after the bill was placed in the hands of the governor, whereby the bill passed into a law. The contention on behalf of the government is, that by virtue of the act of Congress of December 23, 1880, 21 Stat. 312, which reads as follows — "The session of the legislative assemblies of the various Territories of the United States shall be limited to sixty days' duration" — the session for the year 1889 was by law terminated on the 21st day of March, sixty days from the day, January 21, on which by law and in fact it commenced. It is urged that the sixty days mentioned in the statute means sixty calendar days; and that at the expiration of such sixty days the session terminates as a matter of law, and the legislative assembly has no power to do any valid act thereafter, or even to remain in session. The petitioner insists that the sixty days means sixty legislative days — days in which the legislature is actually in session; that the legislature acted upon this construction by continuing in session until the 10th day of April, and was thus a *de facto* legislature at least.

This presents an interesting question of statutory construction, one into which, however, we deem it unnecessary to enter. As it is a question, if it had been duly presented to the District Court, a court having jurisdiction over the offence and the prisoner, and by it erroneously decided, can it be that such erroneous decision would have vitiated the proceedings

and rendered void the sentence thereafter rendered? We think not. Does the fact that the question was not presented put the case in any worse position than if presented and erroneously decided? Assuming that this act of 1889 was legally passed, and was a law of the Territory, let us see what changes were accomplished by it. Prior thereto, as we have noticed, grand juries were to be composed of not less than thirteen nor more than fifteen members. The amendment made by this act provided that they should be composed of not less than seventeen nor more than twenty-three members. The record discloses that there were but fifteen members. Prior to 1889, the Territorial law authorized the finding of an indictment on the concurrence of twelve grand jurors. Rev. Statutes, Arizona, 778, sec. 1430. A similar provision is found in the Federal statutes. Rev. Stat. sec. 1021. The act of 1889 made no change in this respect; so, whether the grand jury was composed of thirteen — the lowest number sufficient under the prior law — or twenty-three, the highest number named in the act of 1889, the concurrence of twelve would have required the finding of an indictment. By petitioner's argument, if there had been two more grand jurors it would have been a legal body. If the two had been present, and had voted against the indictment, still such opposing votes would not have prevented its finding by the concurrence of the twelve who did in fact vote in its favor. It would seem, therefore, as though the error was not prejudicial to the substantial rights of the petitioner.

Again, by section 1392 of the Arizona Penal Code, (Arizona Rev. Statutes, 775,) "A person held to answer to a charge for a public offence can take advantage of any objection to the panel or to an individual grand juror in no other mode than by challenge." A challenge, as heretofore stated, was in fact made, but not on the ground now presented. When by statute a particular way is prescribed for raising an objection, and a party neglects to pursue the statutory way, and the objection is one which could have been cured at the time if attention had been called to it, must he not be adjudged to have waived that objection? *Montgomery* v. *The State*, 3 Kansas,

263. In that case, which was one in which an irregularity in impanelling a jury was the error complained of, the court observed: "Under the Criminal Code a party charged with crime may have the benefit of all just matters of defence as well as of all defects and imperfections in the proceedings against him on the part of the State which tend to prejudice his rights. But he must assert his privilege in the proper way and at the proper time, or he may be deemed to have waived it."

If it be said that the section of the Arizona Penal Code does not apply to proceedings in the District Courts sitting as United States courts, we pass to the general question, whether a deficiency in the number of grand jurors prescribed by law, there being present and acting a greater number than that requisite for the finding of an indictment, is such a defect as, though unnoticed by the prisoner until after trial and sentence, vitiates the entire proceedings and compels his discharge on *habeas corpus?* That question must be answered in the negative. The case of *Ex parte Watkins*, 3 Pet. 193, is an early and leading case on the question of the power of this court to examine on *habeas corpus* into the proceedings of a court of general criminal jurisdiction. In that case Watkins had been convicted in the Circuit Court of the United States for the District of Columbia, a court of general criminal jurisdiction. He filed his petition for a writ of *habeas corpus*, setting forth a copy of the indictment and sentence, and sought a discharge from custody on the ground that the indictment charged no offence punishable in the Circuit Court, or of which it could take cognizance; and that therefore the proceedings were *coram non judice* and totally void. The court unanimously, Chief Justice Marshall delivering the opinion, denied the application. We quote as follows: "This writ is, as has been said, in the nature of a writ of error which brings up the body of the prisoner, with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon

this writ, look beyond the judgment and reëxamine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive to all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it." pp. 202, 203. And again: "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offence cognizable in any court is cognizable in that court. If the offence be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other, and must remain in full force unless reversed regularly by a superior court capable of reversing it." p. 203.

It may be true that subsequent decisions of this court have softened a little the rigor of the rule thus declared. *Ex parte Bain*, 121 U. S. 1, is cited in support of this claim. In that case it appeared that after the indictment had been returned to and filed with the court, a change was made in its language by the prosecuting attorney, on permission and order of the court. It was held on *habeas corpus* that such a change was beyond the power of the court, and that its jurisdiction was ended thereby as fully as if the indictment had been dismissed or a *nolle prosequi* entered; and therefore that a judgment rendered thereafter against the petitioner was one rendered without jurisdiction and void, and that the prisoner was entitled to his discharge. And yet in the opinion the distinc-

tion between matter of error and matter of jurisdiction was noticed, for it was said: "Upon principles which may be considered to be well settled in this court, it can have no right to issue this writ as a means of reviewing the judgment of the Circuit Court, simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge." p. 3. See also *In re Coy*, 127 U. S. 731, 757; *In re Wood*, 140 U. S. 278, 370; *In re Shibuya Jugiro*, 140 U. S. 291.

As the question whether the grand jury should be constituted of fifteen or seventeen members was a matter which must necessarily be considered and determined by the trial court, its ruling thereon, however erroneous, would seem within the above authorities to present simply a matter of error, and not be sufficient to oust the jurisdiction. Indeed, it may be considered doubtful, at least, whether such a defect is not waived if not taken advantage of before trial and judgment. In the case of *United States* v. *Gale*, 109 U. S. 65, a question as to the competency of the grand jury was presented for the first time on a motion in arrest of judgment, and from the decision of the trial court came to this court on a certificate of division. The objection was that in the organization of the grand jury the court, under the authority of section 820, Revised Statutes, excluded from the panel persons otherwise qualified, who voluntarily took part in the rebellion. The unconstitutionality of this section was asserted; but this court declined to pass upon that question, holding that the defendants, by pleading to the indictment and going to trial without making any objection to the grand jury, waived any right of subsequent complaint on account thereof. Mr. Justice Bradley, delivering the opinion of the court, reviews the authorities at length, and shows that they clearly sustain the conclusion announced. The opinion is carefully guarded, and does not reach to the precise question here presented; but its implication, and the drift of the authorities referred to, is that a defect in the constitution or organization of a grand jury

which does not prevent the presence of twelve competent jurors, by whose votes the indictment is found, and which could have been cured if the attention of the court had been called to it at the time, or promptly remedied by the empanelling of a competent grand jury, is waived if the defendant treats the indictment as sufficient, pleads not guilty, and goes to trial on the merits of the charge. There is good sense in this conclusion. The indictment is the charge of the State against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation and demand the judgment of his peers on the merits of the charge. If he omits the former and chooses the latter, he ought not, when defeated on the latter, when found guilty of the crime charged, to be permitted to go back to the former and inquire as to the manner and means by which the charge was presented. See upon this question Wharton's Criminal Pleading and Practice, sec. 353; 1 Chitty's Criminal Law, page 309; *People* v. *Robinson*, 2 Parker Cr. Rep. 233–308, *et seq.*; 1 Bishop on Criminal Procedure, sec. 884; *Shropshire* v. *The State*, 12 Arkansas, 190.

If it be, therefore, a doubtful question, whether the defendant can, after trial and verdict, take advantage of such a defect by direct challenge, it would clearly seem that it is one not going to the matter of jurisdiction, and one which cannot be taken advantage of by a collateral attack in *habeas corpus*.

The application must therefore be

Denied, and the petitioner remanded to the custody of the marshal.

In re DELGADO, Petitioner.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 1648. Argued April 22, 1891. — Decided May 25, 1891.

A statute providing that "for the purpose of hearing application for and issuing writs of *mandamus*," the court "shall be regarded as open at all times" authorizes a hearing on the return of the alternative writ, and the issue of a peremptory writ in vacation.

A statute limiting the fine to be imposed for violation of a peremptory writ of *mandamus*, and providing that, when paid, it shall be a bar to an action for any penalty incurred by reason of refusal or neglect to perform the duty, does not deprive the court of power to punish for disobedience of the writ, or to compel obedience by imprisonment.

In case of a disputed election to a municipal office, *mandamus* may issue to compel the recognition of the *de facto* officer until the rights of the parties can be determined on *quo warranto*.

THE case is stated in the opinion.

Mr. William M. Springer and *Mr. Thomas Smith* for petitioner. *Mr. C. H. Gildersleeve* was also on the brief.

Mr. John H. Knaebal opposing. *Mr. E. L. Bartlett*, Solicitor General of New Mexico, was also on the brief.

MR. JUSTICE BREWER delivered the opinion of the court.

On the 13th of January, 1891, Abraham Staab, William H. Nesbitt and Juan Garcia filed in the District Court of the First Judicial District of the Territory of New Mexico, and presented to the judge thereof, their petition, in which they set forth certain facts, showing, as they claimed, that they had been elected, at the general election in November preceding, members of the board of county commissioners of Santa Fé County, in the Territory of New Mexico; and further alleged that on the 2d day of January, 1891, they had duly qualified as such commissioners; that at the same election Pedro Del-

gado had been duly elected probate clerk of said county, and had qualified as such officer; that by virtue thereof he became and was the acting clerk of the board of county commissioners, and had possession of the records, books, files and papers of that office; that after their qualification as such board they demanded of him to produce the books, and to record their proceedings as such board; and that he refused so to do or to in any manner recognize them as the board of county commissioners. They prayed that a writ of mandamus might issue, commanding him to recognize them as the board of county commissioners; that he act with them as such board; and that he enter of record their proceedings as a board. Upon this petition an alternative writ was issued; and on the 15th day of January, in obedience to such writ, appellant appeared and filed his answer, alleging facts, which, as he claimed, showed that three other persons were at the November election elected county commissioners, and that the petitioners were not; and further averring that two of those other persons, on the 1st of January, 1891, duly qualified as members of the board of county commissioners, entered into possession and assumed the duties of such office, met on that day in the court-house of the county as the board of county commissioners, and proceeded to transact the business of the county; and that they were still in possession of their offices of county commissioners. He admitted that he refused to recognize the petitioners as a board of county commissioners, and alleged as his reason therefor that they were not the legally elected commissioners, and had never been in possession of such offices. On the same day, January 15, the matter came on to be heard on these pleadings, and a peremptory mandamus was ordered, commanding the appellant that he record on the records of the county the proceedings of the petitioners as the board of county commissioners of the county; and that in all things he recognize them as the only lawful county commissioners of the county. Disobeying the peremptory writ, he was brought up on an attachment for contempt, and committed to jail until he should purge himself thereof by obeying the writ. Instead of taking steps to review this judgment directly, by proceedings in error

in the Supreme Court of the Territory, appellant, on the 23d of January, filed in that court a petition for a writ of *habeas corpus*. On January 31 a hearing was had thereon, and it was denied; from which judgment this appeal has been taken to this court.

The attack upon the contempt proceedings is in a collateral way by *habeas corpus*, and the inquiry is one of jurisdiction. *Ex parte Watkins*, 3 Pet. 193, 203; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *Cuddy, Petitioner*, 131 U. S. 280, 285, 286; *In re Wilson*, *ante*, 575. In *Ex parte Yarbrough* one question was as to the conformity of the indictment to the provisions of the statute; and it was held that it "cannot be looked into on a writ of *habeas corpus* limited to an inquiry into the existence of jurisdiction on the part of that court."

This narrows the range of inquiry. It is objected that the peremptory writ was void, because ordered in vacation by the judge, and not after trial before a jury, in the court, in term time. Section 2005, Comp. Laws of the Territory, provides: "For the purpose of hearing application for and issuing writs of mandamus the District Court shall be regarded as open at all times wherever the judge of such court may be within the Territory." This section gives full authority for these proceedings. The original application was entitled "in the court," though addressed to the judge, as was proper. The hearing and judgment were by the court, and the peremptory mandamus was issued by direction of the court; and the power of the legislature to provide that the court shall always be open for certain purposes, cannot be doubted. A somewhat similar provision has been made for the Circuit Courts of the United States in respect to the supervision of elections. Rev. Stat. section 2013. While no jury was had, apparently, none was demanded; and the determination of the facts by a jury in a mandamus case is not a necessary preliminary to a valid judgment.

Again, it is objected that the punishment is different from that permissible in cases of mandamus, and section 2002 of the Compiled Laws is cited. That reads as follows: "Whenever

a peremptory mandamus is directed to a public officer, body or board, commanding the performance of any public duty specially enjoined by law, if it appears to the court that such officer or any member of such body or board, without just excuse, refuses or neglects to perform the duty so enjoined, the court may impose a fine not exceeding $250, upon every such officer or member of such body or board; such fine, when collected, shall be paid into the Territorial treasury, and the payment of such fine is a bar to an action for any penalty incurred by such officer, or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined." But that section provides for the wrong done by the party, in failing to discharge the duty imposed; and does not exclude the power of the court to punish for disobedience of the writ, or to compel obedience to the writ by imprisonment until compliance. The section quoted was taken from the legislation of the State of New York, 2 N. Y. Rev. Stat. 587, section 60; and the scope of that section was considered by the New York Court of Appeals in *People ex rel.* v. *Railroad Company*, 76 N. Y. 294. In that case the court thus interpreted the section: "We do not think that this provision was intended to prescribe the punishment for disobeying the writ, but that its object was to authorize the court to whom application should be made for a writ of mandamus against a public officer, body or board, to compel the performance of a public duty specially enjoined by law, to impose a fine upon the officer, etc., for past neglect of the duty, in addition to awarding a peremptory mandamus compelling its performance, providing no just excuse is shown for such past neglect. This power of the court granting the mandamus, to fine for past neglect, was intended to obviate the necessity of a criminal prosecution under the statute which constitutes such neglect a misdemeanor, and to enable the court awarding the mandamus to dispose of the whole matter in one proceeding. The offence for which the fine is authorized to be imposed, is not disobedience of the writ, but the unexcused neglect of duty of which the officer was guilty before the writ issued and which rendered the application necessary, and the fine may be imposed

at the time of issuing the peremptory writ. This is the clear import of the language of the section, and in the revisers' notes it is stated to be a new provision, intended for the purpose above indicated."

This brings us to the principal question in the case; and that is, that the real import of this proceeding was to try the title to office; that *quo warranto* is a plain, speedy and adequate, as well as the recognized remedy for trying the title to office; and that the familiar law in respect to mandamus, reinforced by statutory provisions in New Mexico, is that mandamus shall not issue in any case where there is a plain, speedy and adequate remedy at law. On this, the invalidity of the proceedings is asserted. But the obvious reply is, that this was not a proceeding to try the title to office. The direct purpose and object was to compel the defendant to discharge his duties as clerk, and to forbid him to assume to determine any contest between rival commissioners. It was enough in this case for the court to determine, and it must be assumed that the evidence placed before it was sufficient to authorize an adjudication, that the petitioners were commissioners *de facto*. As such, the clerk was bound to obey their commands and record their proceedings. It is true, the pleadings disclose the existence of a contest between these petitioners and other parties, and it is true that the answer would tend to show that the others were the commissioners *de facto;* but that was a question of fact to be determined by the court hearing this application, and it, as must be assumed from the decision, found that these petitioners rather than their contestants were the commissioners *de facto*. It was proper for it then to issue a mandamus to compel the defendant to recognize them as the commissioners of the county, and this, irrespective of the question whether or no the petitioners were also commissioners *de jure*. No one would for a moment contend that this adjudication could be pleaded as an estoppel in *quo warranto* proceedings between the several contestants. If that has not already been determined in a suit to which all the contestants are parties, it is still a matter open for judicial inquiry and determination. Who would doubt, if these petitioners were

the unquestioned commissioners of the county that mandamus would lie to compel the clerk to recognize them, and record on the county books their proceedings as such? Does the fact that certain parties are contesting their rights as commissioners oust the court of jurisdiction, or forbid it to compel other county officers to recognize them? Must the office of county commissioners remain practically vacant, and the affairs of the county unadministered, pending a trial of a right of office between contestants? Surely not; public interests forbid. They require that the office should be filled; and that when filled by parties under color of right, all other officers should recognize them as commissioners until their right to hold the office has been judicially determined adversely by proper *quo warranto* proceedings. It would be strange indeed if, when their title and possession of the office were unquestioned, the court had undoubted jurisdiction by mandamus to compel the clerk of the board to record their proceedings, and recognize them as officers, its jurisdiction to act was lost by a mere pleading on the part of the delinquent clerk asserting that some other parties were the rightful commissioners. This is not a suit by one party claiming to be clerk of the board, to compel by mandamus another party also claiming to be clerk of the board to transfer to him the records and papers of the office; nor by certain parties claiming to be commissioners, to compel other parties also claiming to be commissioners to surrender the office, and desist from interference with its duties; but it is a suit by certain parties showing themselves to be *de facto* commissioners, to compel the clerk of that board to respect their possession of the office, discharge his duties as clerk to the acting board, and not assume to himself judicial functions, and adjudicate against the validity of their title. The case of *Putnam* v. *Langley*, 133 Mass. 204, is in point. Plaintiff there claimed to have been elected one of the board of water commissioners of the town of Danvers. One Josiah Ross also claimed to have been elected, and there was a matter of disputed title between plaintiff and Ross. Langley and Richards were the other commissioners, whose title was apparently undisputed. It was held that mandamus was a proper

remedy to compel Langley and Richards to recognize, receive and act with the plaintiff as a member of the board. As sustaining the views we have expressed, though not exactly in point, see also *Rex* v. *Harris*, 3 Burrow, 1420; *Page* v. *Hardin*, 8 B. Mon. 648; *State* v. *Mayor*, 23 Vroom, (54 N. J. Law,) 332; *Williams* v. *Clayton*, Supreme Court of Utah, 21 Pac. Rep. 398.

Our conclusion, therefore, is that the District Court had jurisdiction, and that the merits of the controversy cannot be inquired into collaterally in this way. The judgment of the Supreme Court of the Territory of New Mexico is

Affirmed.

Mr. Justice Bradley was not present at the argument and took no part in the decision of this case.

KNEELAND *v.* BASS FOUNDRY AND MACHINE WORKS.

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

No. 334. Submitted April 22, 1891. — Decided May 25, 1891.

Necessary supplies purchased on credit by the receiver of a railroad, appointed in foreclosure proceedings, if not paid out of net earnings before the sale, are a charge upon the fund realized from the foreclosure sale; and where the railroad managed by the receiver consists of two or more divisions, which are sold separately and at different times to different purchasers, it will be presumed, in the absence of evidence to the contrary, that the court below has correctly distributed such charges among the different divisions to which they properly belong.

The case is stated in the opinion.

Mr. John M. Butler for appellant.

Mr. Robert C. Bell for appellee.

Opinion of the Court.

MR. JUSTICE LAMAR delivered the opinion of the court.

This case, like that of *Kneeland* v. *Lawrence*, *ante*, 209, grows out of litigation respecting the foreclosure of the mortgage of the Central Trust Company of New York upon the Toledo, Cincinnati and St. Louis Railroad.

The appellee herein, the Bass Foundry and Machine Works, is an Indiana corporation, having its place of business at Fort Wayne, in that State. It was an intervenor in the foreclosure suit brought by the trust company against the railroad company, and, as such, filed several petitions setting up claims to the fund arising from the sale of the road, by reason of having furnished various supplies, (particularly set out in itemized statements accompany its petitions,) to the receivers who operated the road pending the foreclosure litigation, and also to the road prior to the appointment of a receiver. The claim here in dispute is for supplies furnished the receivers, as aforesaid. There is no dispute but that the supplies were received and that they were necessary for the continued operation of the road.

The petition and claim were referred to William P. Fishback, a master of the court, who, on the 12th of March, 1886, reported that there was due the appellee, for supplies furnished the receivers, the sum of $8009.22. The appellant filed exceptions to this report, but they were overruled by the court, and on the 20th of November, 1886, a decree was entered confirming the report. This decree, among other things, provided as follows:

"It is therefore considered that there be allowed said Bass Foundry and Machine Works the said $8009.22, so found due for supplies furnished said receivers, and that Noble C. Butler, clerk of this court, be, and he is hereby, authorized and directed to pay the same to said Bass Foundry and Machine Works out of any funds in the registry of the court in said cause."

It is from this decree that the present appeal is prosecuted.

The entire time covered by the receiverships extended from October 1, 1883, to April 18, 1885. In making up his statement of the account of the appellee with the receivers the

master divided that time into three periods. Those periods, together with the amounts of the supplies furnished in each, and the respective credits, are as follows:

"Amount furnished from Oct. 1, 1883, to Dec. 1, 1883 (1st period)		$1,695 01
"Amount furnished from Dec. 1, 1883, to Aug. 1, 1884 (2d period)		10,085 76
"Amount furnished from Aug. 1, 1884, to April 18, 1885 (3d period)		1,085 14
		$12,865 91
"Credits during 1st period . .	None.	
" " 2d " . .	$2,291 63	
" " 3d " . .	2,565 06	
		4,856 69
"Balance due		$8,009 22"

As explained by counsel for both parties, the first period represents the time when one Dwight was receiver for the entire system of roads in Ohio, Indiana and Illinois, he having been appointed by the Circuit Court of the United States for the District of Indiana, at the suit of a judgment creditor; the second period represents the time when one Craig was the receiver of the entire systems of roads, he having been appointed by the Circuit Court of the United States for the Southern District of Ohio, at the suit of the trustees of the bondholders; and the third period represents the time when Craig was receiver of the main line of the road extending from Toledo, Ohio, to East St. Louis, Illinois, after the other Ohio divisions of the road had been sold on foreclosure decrees and delivered to the purchasers.

The main line of the road, extending from Toledo, Ohio, to East St. Louis, Illinois, was sold to the appellant herein, Sylvester H. Kneeland, on the 30th of December, 1885, and the sale was afterwards confirmed. The Ohio divisions of the road were sold to other persons.

The objection urged to the item of $1695.01, which was for supplies furnished to the receiver Dwight, is, that Dwight

was not the receiver for the bondholders and Kneeland, but was appointed receiver at the suit of a judgment creditor; that, so far as Kneeland and the bondholders are concerned, the situation was precisely the same as if the company had remained in possession of the road up to the expiration of Dwight's receivership, December 1, 1883; and that, therefore, that item should not be entitled to a preferred lien over the claims of the bondholders. *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, and *S. C.* 138 U. S. 509, are relied upon as authority to sustain that contention. We do not think, however, that that case will bear any such construction. The claim in that case was for rental of rolling stock used by the road during the period of the receivership, under a contract of purchase made by the company with the owner thereof prior to the receivership. The rental was not paid, and the lessor took possession of his rolling stock. As respects the claim for rental during the period of the receivership at the suit of a judgment creditor, it was held, that it was not entitled to priority of lien over the mortgage creditors, on the foreclosure and sale of the road. In other words, it was held that the bondholders, represented by the appellant, the beneficial owners of the property, could not be held liable for rental value during the time the receivership was at the instance of a judgment creditor. The theory of that ruling was, that, as the earnings of the road did not pay the operating expenses, and as the lessor of the rolling stock had a lien on only that personal property of the road, and was not chargeable with a *pro rata* share of such deficiency, he should be content with the return of his property. For, as was said by Mr. Justice Brewer, "when the court, in the administration of the receivership, thereafter returns the personalty to the holder of the liens upon it, such lien holder must be content to be relieved from any burden for a *pro rata* share of the deficiency, and has no equity to claim that he shall be not only thus relieved, but that he may also charge upon the realty, to the detriment of the lien holder thereon, both the entire burden of the deficiency and compensation to him for the use of his property." 136 U. S. 100.

The general rule with respect to supplies furnished which went into the *corpus* of the property covered by the mortgage, and thus served to increase the fund arising from the mortgage sale, was thus stated in the opinion in that case: "A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself." 136 U. S. 98.

As respects the supplies furnished the road in this case during the period of Dwight's reciversship, the court below, in the exercise of its undoubted authority, ordered them paid out of the fund arising from the sale of the road, because, so far as the record shows, that was the only fund available; and they had been necessary to the continued operation of the road, and had gone into the general property covered by the mortgage which was sold at the foreclosure sale. They contributed to the preservation of the property during the receivership, and went towards swelling the fund arising from the sale on foreclosure. Under such circumstances the court appointing the receiver was justified, under the rule laid down in *Kneeland* v. *American Loan & Trust Company*, *supra*, in preferring such claim to the claims of bondholders whose property they assisted in preserving.

It was held in *Fosdick* v. *Schall*, 99 U. S. 235, 253, 254, that where a receiver has been appointed pending foreclosure proceedings by mortgage bondholders, the court in its discretion may apply the net income to the payment of the claims of employés and supply men, who, before the receiver was ap-

pointed, furnished labor and materials required in the operation of the road, "not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights." And it was further remarked that "while, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way."

In *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, it was held that a court has the power to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage; and that it may provide for the payment of arrears due for operating expenses incurred before the receiver was appointed, and make such expenditures a lien prior to the lien of the mortgage.

In *Union Trust Co.* v. *Souther*, 107 U. S. 591, the same rule was upheld, and a claim for supplies furnished before the receiver was appointed was ordered paid out of the fund arising from the sale of the road, before the mortgage bondholders were paid, that fund not being sufficient to satisfy all demands. See also *Wallace* v. *Loomis*, 97 U. S. 146, 163; and *Burnham* v. *Bowen*, 111 U. S. 776.

These authorities justify us in allowing the item in dispute.

Another objection to the claim herein is, that, even admitting that it should be paid out of the fund arising from the sale of the road, it should not be entitled to payment out of the fund arising from the sale of the main line of the road alone, but should be distributed ratably among the several divisions of the entire system of roads, according to a basis

adopted by Special Master J. D. Cox, in 1884, with respect to the general liabilities of the entire system of roads under the control of the several receivers.

It is quite true that the several receivers had control of and operated the entire system of roads, and that these supplies were furnished them while they were thus in control of the roads; but there is nothing in the record going to show specifically by what division of the road these supplies were used. Indeed, if any presumptions are to be indulged, it may justly be presumed that they were all used on the main line of the road from Toledo to East St. Louis. For the court below, being familiar with the basis of distribution of liabilities before referred to, and it not appearing anywhere in the record that they were not used on that division of the road, it must, of necessity, be presumed that the order made by the court, that they be paid for out of this fund, was in accordance with the law and the facts of the case. The evidence upon which the master made his report and the court made its order is not before us, and, in the absence of anything showing that the allowance was improperly made a lien upon the fund, we must conclude that the court below committed no error in the matter.

These remarks also dispose of the third point of the appellant, viz., that, as the main line of the road — that purchased by Kneeland — was the only part of the system in the hands of the receiver after August 1, 1884, it should be entitled to credit for all payments made to the appellee by the receiver after that date. In other words, the contention is, that as, according to the master's report, the supplies furnished after August 1, 1884, amounted to only $1085.14, and the credits for that period amounted to $2565.06, the difference between those amounts, to wit, $1479.92, ought to be applied as a credit upon that portion of the appellee's claim which accrued between December 1, 1883, and August 1, 1884, (the period of the Craig receivership,) upon the aforesaid basis of distribution of liabilities.

This contention, like the preceding one, assumes that the supplies, which were furnished by the appellee, were used

indiscriminately upon all of the divisions of the roads. But, as already stated, there is nothing in the record showing such to have been the case, or that the Kneeland divisions of the road did not receive all of them. Such being the case, the presumption is, that the master, having all of the facts before him, made a proper award in the premises, and that the court below committed no error in confirming that award. The court, in the exercise of its legitimate authority in the matter of the appointment and control of the receivers, had ample power to make such order or decree respecting the supplies furnished those receivers as the law and the facts of the case warranted, and in the absence of any circumstance showing that there was any error committed in charging the fund arising from the sale of the main line of the road with the lien for the supplies in suit, we must assume that the proceedings below were correct.

Decree affirmed.

UNITED STATES *v.* DALLES MILITARY ROAD CO.
UNITED STATES *v.* OREGON CENTRAL MILITARY ROAD CO.
UNITED STATES *v.* WILLAMETTE VALLEY AND CASCADE MOUNTAIN WAGON ROAD CO.
UNITED STATES *v.* KELLY.
UNITED STATES *v.* COOPER.
UNITED STATES *v.* ROGERS.
UNITED STATES *v.* GRANT.
UNITED STATES *v.* FLOYD.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Nos. 1218, 1219, 1248, 1444 to 1448. Argued March 6, 9, 1891. — Decided May 25, 1891.

In suits in equity brought by the United States under the act of Congress passed March 2, 1889, (25 Stat. 850,) against corporations and persons claiming to own lands granted to the State of Oregon by the acts of

Counsel for Parties.

Congress of July 2, 1864, (13 Stat. 355,) July 5, 1866, (14 Stat. 89,) and February 25, 1867, (14 Stat. 409,) to declare the lands to be forfeited to the United States, and to set aside, for fraud, patents granted therefor, the defendants pleaded the issuing of certificates by the governor without fraud committed upon or by him; that they were *bona fide* purchasers, for a valuable consideration, without notice; and that they had expended moneys in respect of the lands in good faith. The pleas having been set down for hearing, the Circuit Court sustained them and dismissed the bills, without permitting the plaintiffs to reply to the pleas: *Held*, that they ought to have been allowed to take issue on the pleas.

The act of 1889 intended a full legal investigation of the facts, and did not intend that the interests involved should be determined on the untested allegations of the defendants.

The claims of the United States cannot be treated as stale claims, nor can the defences of stale claim and laches be set up against them.

Other bills were dismissed on general demurrers, after the bills were dismissed on the hearing on the pleas, and, as it appeared that the disposition of the pleas was regarded as determining all the suits, the decrees in all of them were reversed.

The facts which make the case in each of these cases are stated in the opinion, in connection with that particular case, so completely that it is not necessary, nor would it be proper to repeat them. Different counsel represented different parties at the argument and their arguments necessarily travelled over somewhat the same ground. In the case in which argument is reported, the facts will be found in the opinion upon The Willamette Valley Case, *post*, 622.

Mr. Assistant Attorney General Parker for the United States in all the cases.

Mr. James K. Kelly for the Dalles Military Road Company, the Eastern Oregon Land Company, Kelly, Thornbury and others.

Mr. Rufus Mallory for the California and Oregon Land Company.

Mr. John E. Parsons and *Mr. C. E. S. Wood* for the Willamette Valley and Cascade Mountain Wagon Road Company.

Argument for Willamette &c. Road Co.

I. When the government of the United States becomes a suitor, it submits itself to such principles of justice and rules of equity as apply between ordinary suitors.

The act of 1889, under which the bill was filed, provides in so many words that the suit "shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are tried."

It does not require such an express enactment to deprive the government of special immunities when it sees fit to accept the jurisdiction of its own courts. That it may not be sued without its permission involves grave considerations of public policy. When, however, it sees fit to waive its privilege, and as a suitor to come before its courts, more particularly before a court of equity, its rights and liabilities are to be determined by the same standard which applies in any case. *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Ringgold*, 8 Pet. 150; *United States* v. *Macdaniel*, 7 Pet. 1; *United States* v. *Barker*, 12 Wheat. 559; *United States* v. *Bostwick*, 94 U. S. 53; *United States* v. *Smith*, 94 U. S. 214; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Mitchel* v. *United States*, 9 Pet. 711; *Manufacturing Co.* v. *United States*, 17 Wall. 592; *The St. Jago de Cuba*, 9 Wheat. 409; *The Siren*, 7 Wall. 152.

II. The act of July 5, 1866, constituted a grant *in præsenti*.

The provision that if the wagon road contemplated "is not completed within five years no further sales shall be made, and the lands remaining unsold shall revert to the United States," is in the nature of a condition subsequent. To create a forfeiture required affirmative action by Congress and suit instituted.

The language of the act is, "that there be and hereby is granted to the State of Oregon." Upon this subject the law is correctly stated by Judge Deady. As soon as the line of road was designated, the grant attached to the odd numbered sections, within the prescribed limits, on either side of said line, and took effect from the date thereof. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Missouri, Kansas &c. Railway* v. *Kansas Pacific Railway*, 97 U. S. 491; *Van Wyck* v. *Knevals*, 106 U. S. 360. No one except the grantor could enforce the

forfeiture. Assuming the right to forfeit to exist — if it were not exercised, or if an attempt to exercise it was unduly delayed, the title remains unimpaired in the grantee. *Schulenberg* v. *Harriman*, 21 Wall. 44.

III. By the allegations of the bill it appeared both that the demand was what is known in equity as stale, and that the government was chargeable with laches. For that reason the bill was properly dismissed.

The law about the staleness of claims is well settled. Somewhat running in the same lines is the application to this case of the doctrine of *laches*. Our claim is that any right of forfeiture is barred, both because the claim is stale and because of laches.

It is something more than mere negative action in which the laches consists. It is in the omission by the government to do what in the interest of protecting subsequent purchasers good conscience required that it should do, and in its affirmative action in recognizing that no equitable claim to a forfeiture existed.

We understand stale demands to be distinguished from laches in these particulars amongst others, viz.: Laches is mere delay. Stale demand is without necessary analogy to the Statute of Limitations. It may be by analogy the statutory limitation; it may be a less period. See *United States* v. *Beebe*, 127 U. S. 338; *United States* v. *Throckmorton*, 98 U. S. 61; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273.

IV. Furthermore, the facts alleged in the bill and the action of the government as shown by the reports of its houses of Congress and the action of its executive officers, create an estoppel which of itself was an answer to the bill.

Estoppel we understand to be radically distinct on principle from either stale demand or laches. Of course, there may be estoppel by mere silence or lapse of time, but we understand the underlying principle to be, when the plaintiff has done some positive act or acquiesced in some positive act so as to assert or seem to assert one thing, and the defendant has depended upon this assertion and altered his position relying upon it, it is inequitable to allow the plaintiff then to assert the contrary

and place the defendant in a worse position; that is, laches and stale demand are negative and consist essentially in letting time slip by, while estoppel is affirmative and generally consists in doing some positive act.

As this defence has been clearly and distinctly allowed as against sovereign States it ought, on principle to be allowed against the national sovereignty. Although there is no case in the Supreme Court which we have found that distinctly asserts the principle, there are many which assume as apparently beyond doubt that the doctrine of estoppel is applicable to the government.

V. The action of the government constituted a waiver of the right of reëntry, and freed the estate from liability to forfeiture.

It is an incident of an estate liable to be defeated upon a condition subsequent, that only the grantor is entitled to take advantage of a failure to perform the condition. He may waive his right of reëntry. The waiver may be either expressed or implied from tacit acquiescence or from some other recognition of the estate freed from the condition. Touchstone, 153; Cruise, Title 13, c. 2, sec. 63, *et seq.; Ludlow* v. *N. Y. & Hudson River Railroad*, 12 Barb. 440; *Douglas* v. *Union Mut. Ins. Co.*, 127 Illinois, 101. That the condition may be waived expressly or *in pais*, see *Davis* v. *Gray*, 16 Wall. 203; *Holden* v. *Joy*, 17 Wall. 211; *Ludlow* v. *N. Y. & Hudson River R'y*, 12 Barb. 440; *Chicago, Rock Island &c. Railway* v. *Grinnell*, 51 Iowa, 476; *Hooper* v. *Cummings*, 45 Maine, 359. And waiver by silence is deemed acquiescence. *In re N. Y. Elevated Railroad*, 70 N. Y. 327.

There is another rule which follows from the principle that only the grantor has the right to reënter if the condition is broken, and that this right may be waived by him; and that is that the exercise of this right is necessarily an option. If the right resolve itself into an option on the part of the grantor, then all the principles of law applicable to options must be applied here; that is, he must take advantage of it promptly, and, as many of the courts have held, upon the very instant of the breach. See *Hall & Rawson* v. *Delaplaine*, 5

Wisconsin, 206; *S. C.* 68 Am. Dec. 57, and *Grigg* v. *Landie*, 6 C. E. Green, 506.

We do not care to contend that the rule in all its strictness should be applied to a sovereign, but we do maintain that, within a reasonable time after acquiring knowledge of the breach, the sovereign is bound to take notice of it, or his silence will be taken as a waiver of this option and acquiescence in the breach. *People* v. *Society &c.*, 2 Paine, 545.

VI. The uncontradicted allegations of the pleas and answers coupled with the statements of the bill show that the respondents are *bona fide* purchasers. For that reason the bill was properly dismissed as to them.

The act of March 2, 1889, under which the bill was filed provides that there shall be saved and reserved "the rights of all *bona fide* purchasers of either of said grants or of any portion of the said grants for a valuable consideration, if any such there be."

The pleas and answers show that the respondents paid originally $182,128.89 for the lands. They are *bona fide* purchasers within the purview of the act.

More for the sake of preserving the authorities than from any real necessity for reference to them, we cite the following cases which sustain the proposition that a grant in present words of grant passes the whole legal title, and that, upon selection and certification of any particular body of land, the title to this land takes effect by relation as of the date of the grant. *Rutherford* v. *Greene*, 2 Wheat. 196; *Wright* v. *Roseberry*, 121 U. S. 488; *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Percheman*, 7 Pet. 51; *Mitchel* v. *United States*, 9 Pet. 711; *Ladiga* v. *Rowland*, 2 How. 581; *United States* v. *Brook*, 10 How. 442; *Lessieur* v. *Price*, 12 How. 59; *Fremont* v. *United States*, 17 How. 542; *United States* v. *Reading*, 18 How. 1; *Railroad Co.* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Railroad Land Co.* v. *Courtright*, 21 Wall. 310; *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Wood* v. *Railroad Co.*, 104 U. S. 329; *Van Wyck* v. *Knevals*, 106 U. S. 360. These authorities settle the question as to whether

our grantor had the legal title with right to convey. And pertinent to this question also is the act of 1874. The plea recites, and for the purposes of this argument its recitals are truth, that the defendants Weill and Cahn paid at the time of the purchase nearly $150,000.

We have in our case a union of all the elements above mentioned, and which make up the status of a *bona fide* purchaser.

VII. The act of Congress of June 18th, 1874, is a conclusive and binding adoption by the United States of the governor's certificates as conclusive evidence of the completion of such portions of the road as the certificates cover. The act is a legislative recognition and affirmation of the correctness of the certificates and establishes the defendants' right to patents for all lands covered by the certificates.

The language of the act is that, in all cases where the road in aid of the construction of which said lands were granted "is by the certificate of the governor of the State of Oregon shown as in said acts provided to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon . . . unless the State of Oregon shall by public act have transferred its interest in said lands to any corporation or corporations," etc.

By this language Congress, with presumed knowledge of all that had happened up to the date of the passage of the act, adopted and ratified the certificates of the governor as conclusive upon the right of the defendants to receive the patents.

VIII. The allegations made by the bill and the questions examined by this court must be limited by the provisions of the act of 1889.

We are reluctant to make any purely technical defences, but as attorneys for the defendants we feel obliged to insist that the Attorney General in bringing the bill can only examine the certain questions permitted by the act. We are well convinced that the Attorney General would have had the right to have filed a full and complete bill without any direction from Congress. That no Attorney General has seen fit to do so is to a certain extent argument that no good cause of suit on behalf of the government existed. When, therefore, Congress under-

takes to direct a suit, we hold that the Attorney General and this court are limited by the provisions of that directing act, both as to the grievances to be stated in the bill and the relief to be sought. *United States* v. *Union Pacific Railway Co.*, 98 U. S. 569, 608; *United States* v. *Arredondo*, 6 Pet. 691, 726.

IX. The decree properly dismissed the bill, no request having been made for leave to take proofs or to go to a hearing upon the facts. The only disposition of the case which could be made by the Circuit Court was to dismiss the bill.

Unless plaintiff undertakes to reply to the plea after it is allowed, if the plea goes to the whole bill, the order allowing it directs dismissal of the bill. 1 Daniell Ch. Pr. 5th ed. p. 698.

Mr. Justice Blatchford delivered the opinion of the court.

No. 1218 was a bill in equity, filed by the Attorney General of the United States, on their behalf, against the Dalles Military Road Company, James K. Kelly, C. N. Thornbury, the Eastern Oregon Land Company and twelve other individual defendants.

The bill sets forth that on the 25th of February, 1867, the Congress of the United States passed, and the President duly approved, an act (14 Stat. 409, c. 77) granting to the State of Oregon, to aid in the construction of a military wagon road from Dalles City on the Columbia River, by way of Camp Watson, Cañon City and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boisé in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road; that said act provided that the lands granted should be exclusively applied to the construction of said road and to no other purpose, and should be disposed of only as the work progressed, and that any and all lands theretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, should be and the same were thereby reserved from the operation of said act, except so far as it might be necessary to locate the route of said road through the same, in which case the right of way to the width

of one hundred feet was granted; that it was further provided that the grant should not embrace any mineral lands of the United States, that the lands thereby granted to said State should be disposed of by the legislature thereof for the purpose aforesaid, and for no other, that the said road should be and remain a public highway for the use of the government of the United States, free from tolls or other charges upon the transportation of any property, troops or mails of the United States, and that the said road should be constructed with such width, gradation and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon might prescribe; that the said act also authorized the State to locate and use, in the construction of said road, an additional amount of public lands, not previously reserved to the United States or otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of the act, to be selected in alternate odd sections, as provided therein; that the lands thereby granted to said State should be disposed of only in the following manner, that is to say, when the governor of the State should certify to the Secretary of the Interior that ten continuous miles of said road were completed, then a quantity of the land granted by the act, not exceeding thirty sections, might be sold, and so on from time to time until said road should be completed, and, if it was not completed within five years, no further sales should be made, and the lands remaining unsold should revert to the United States; and that the United States surveyor general for the district of Oregon should cause the lands so granted to be surveyed at the earliest practicable period after the State should have enacted the necessary legislation to carry said act of Congress into effect.

The bill further set forth, that on the 20th of October, 1868, the legislative assembly of the State of Oregon passed, and the governor approved, an act (Laws of Oregon, of 1868, p. 3) entitled "An act donating certain lands to Dalles Military Road Company," which act, after setting forth the passage of the act of Congress of February 25, 1867, granted to Dalles Military Road Company, incorporated March 30, 1868,

all lands, right of way, rights, privileges and immunities theretofore granted or pledged to the State by said act of Congress, for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress, upon the conditions and limitations therein prescribed; that said act of the State also granted and pledged to said company all moneys, lands, rights, privileges and immunities which might be thereafter granted to the State to aid in the construction of such road, for the purposes and upon the conditions mentioned in said act of Congress, or which might be mentioned in any further grants of money or lands to aid in constructing said road; and that said act of the State authorized the company to locate, subject to the approval of the governor of the State, the lands mentioned in said act of Congress within the ten miles limit prescribed by the latter act, in lieu of lands reserved.

The bill further set forth, that the State of Oregon never passed any law for the special purpose of carrying into effect the act of Congress of February 25, 1867, but had passed, on the 14th of October, 1862, an act (General Laws of Oregon, of 1862, reported by Code Commission, p. 3) entitled "An act providing for private incorporations and the appropriation of private property therefor," which provided, among other things, that any road, other than a railroad, constructed by a corporation formed under the said act, should be cleared of standing timber for thirty feet in width, and should have a track in the centre not less than sixteen feet wide, finished and kept in good travelling condition, except when the cutting on said road was six feet or more deep on either side, in which case such track need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of such narrow track; that all streams or other waters upon the line of such roads should be safely and securely bridged, except where the county court of the county wherein the line of such road might cross such streams or other water, or, if such stream or other water formed the boundary between two counties, then the county court of either of said counties might authorize the corporation to place a ferry boat upon such stream or other water, to be kept and run for such toll as

the county court might prescribe, and in the manner required of ferries established under the general statutes in relation to ferries, or except where such county court might authorize such corporation to connect their road with a ferry then or thereafter established over such stream or other water under the general statute in relation to ferries; and that those provisions of said act of October 14, 1862, had been at all times thereafter and still remained in force.

The bill further set forth that the Dalles Military Road Company was a private corporation, purporting to have been incorporated on the 30th of March, 1868, under the general laws of the State of Oregon; that the business in which it proposed to engage was the location and construction of a clay road from Dalles City in the county of Wasco, Oregon, by way of Camp Watson and Cañon City, to a point on Snake River opposite Fort Boisé in Idaho Territory, about two miles below the mouth of Owyhee River; that James K. Kelly and two other persons were the incorporators thereof; that on the 11th of January, 1871, the company, by its then directors, five in number, in pursuance of the unanimous vote of the stockholders, made and filed supplementary articles of incorporation, which provided that the additional business in which the corporation proposed to engage was to accept and receive any and all grants of land and other things of value from the United States to the State of Oregon, and to purchase and hold land and other property which its directors might deem necessary and convenient for its interests, and to engage in any business incident to and connected with receiving any such grant, and in selling, conveying, purchasing and holding any land or property that might come into the possession of the company, and also to establish and keep a toll road on any part of the road belonging to it; and that the corporation was still in being, and the officers thereof were James K. Kelly, president, and C. N. Thornbury, secretary.

The bill further set forth, that on the 1st of January, 1869, and on divers other days between that day and the 23d of June, 1869, the officers, stockholders and agents of the company, and other persons acting in their and its interests, falsely

and fraudulently represented to George L. Woods, then the governor of Oregon, that said road had been constructed as by law required, they then knowing that said representations were false, and that said road had not been constructed; that they made such representations for the sole purpose of fraudulently procuring from the said governor a certificate declaring that the road had been constructed in accordance with the act of Congress of February 25, 1867, and of the act of the State of October 20, 1868; that the said governor, in consequence of such representations, made and issued a certificate, dated June 23, 1869, under his hand and the great seal of the State, and attested by the secretary of state, which set forth as follows: "I, George L. Woods, governor of the State of Oregon, do hereby certify that this plat or map of the Dalles Military Road has been duly filed in my office by the Dalles Military Road Company, and shows, in connection with the public surveys, as far as said public surveys are completed, the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an act of Congress approved February 25, 1867, entitled 'An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boisé, on Snake River,' and with the act of the legislative assembly of the State of Oregon approved October 20, 1868, entitled 'An act donating certain lands to Dalles Military Road Company.' I further certify that I have made a careful examination of said road since its completion, and that the same is built in all respects as required by the said above-recited acts, and that said road is accepted."

The bill further alleged, that the company had not constructed at any time a road upon any line of route located or surveyed anywhere within the limits of the grant of land provided for in said act of Congress, or at all; that the said governor knew this, and had not made any examination of any road constructed or owned by the company; that said certificate was procured by the company, through such false representations, in order to enable it fraudulently to obtain possession of the lands lying within the limits of the grant

provided for in said act of Congress; that the acceptance of said pretended road by said governor was a fraud upon the United States; that the road never was built, graded, bridged, cleared or constructed, either in whole or in part, so as to be a public highway, or so as to permit the transportation of any property, troops or mails of the United States over the same, and was not and never had been maintained as a public highway by any of the defendants or any person or persons claiming any interest in the lands embraced within the limits provided for by said act of Congress; that neither the said lands nor the proceeds thereof had ever been exclusively or at all applied to the construction of the road or any part thereof, or of any bridges thereon, or to the establishment of ferries on any streams along the line of the road; and that the lands granted by said act of Congress had not been disposed of by the State of Oregon for the purposes expressed in said act.

The bill further alleged that on the 18th of June, 1874, Congress passed an act (18 Stat. 80, c. 305) entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," which, after reciting that certain lands had theretofore by acts of Congress been granted to said State to aid in the construction of certain military wagon roads in that State, and that there existed no law providing for the issuing of formal patents for said lands, provided as follows: "That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations, upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind except to provide for issuing patents for lands to

which the State is already entitled;" and that on the 19th of June, 1876, the President of the United States, imposed upon by said fraudulent certificate, issued to the company a patent for 126,910.23 acres of land, included in the grants made, or intended to be made, by said acts of Congress.

The bill then set forth, that, by certain conveyances the title of the company became vested in the defendant, the Eastern Oregon Land Company, a private corporation; that the deeds conveyed the lands in bulk, and purported to grant to the respective grantees all the lands lying and being in Oregon, granted or intended to be granted to that State by the act of Congress of February 25, 1867, and granted or intended to be granted by the State to the road company by the act of October 20, 1868, the substantive parts of both of said acts being recited in all of the deeds and expressly made parts of each of them; and that the Eastern Oregon Land Company was a private corporation created under the laws of California, on September 26, 1884, its business being, among other things, to buy and sell lands in Oregon, and it being an existing corporation.

The bill further averred, that the maps or plats referred to in the certificate of the governor showed the line of the pretended road to be 357 miles, which would make the grant of lands covered by the act of Congress of February 25, 1867, embrace in the aggregate 685,440 acres, of which 558,529.77 acres were not yet patented to the Dalles Military Road Company, and it claimed the right to have a patent therefor.

The bill further alleged that each of the defendants, and the intermediate grantors and grantees, had full knowledge, at the time of the execution and delivery of the deeds, that the road provided for by said act of Congress had not been constructed and maintained as required thereby and by the laws of Oregon, so as to be a public highway, or so that it could be used by the United States or by any of the citizens or residents thereof as a public highway, or so that the United States could transport its property, troops or mails over the same, and also had full knowledge that no grades had been established or constructed upon any part of said road, no

ferries established or maintained, no clearing done, no cuts made and no turnouts constructed, anywhere on said line of road, no bridges built or maintained over any streams on said line, and had full knowledge that said road was not begun or completed within five years from the date of the passage of said act of Congress, that the statements made in said certificate were false, that the governor did not at any time examine the road, that said certificate had been procured by such false and fraudulent representations, and that said patent was procured to be issued upon said false and fraudulently procured certificate.

The prayer of the bill was that all the lands granted to the State of Oregon by the act of Congress of February 25, 1867, be decreed to be forfeited to the United States, and restored to the public domain; that the said certificate, patent and deeds be declared fraudulent and void; and for further relief. Copies of the patent and of the deeds are annexed to the bill.

The Dalles Military Road Company, Kelly and Thornbury excepted to the bill for impertinence. These exceptions were sustained. 40 Fed. Rep. 114.

By leave of the court, the defendants D. V. B. Henarie, Eleanor Martin, P. J. Martin and the Eastern Oregon Land Company, on the 17th of October, 1889, filed two pleas to so much of the bill as prayed that the land granted to the State of Oregon by the act of Congress of February 25, 1867, and owned by those defendants, be decreed to be forfeited to the United States. The first plea set up that Woods, the then governor, without any false representations having been made to him, and without any fraud on his part, certified, on June 23, 1869, that the plat or map of the road had been filed in his office by the company, and showed the location of the line of route as actually surveyed, and upon which its road had been constructed in accordance with the requirements of said act of Congress and the act of the State of October 20, 1868, and that he had made a careful examination of said road since its completion, and that the same was built in all respects as required by said acts, and the said road was then accepted; that, on the 31st of May, 1876, the com-

pany, for a valuable consideration, to wit, $125,000, paid to it by Edward Martin, sold and conveyed all the said lands belonging to it to the said Martin, his heirs and assigns, and that, by sundry mesne conveyances from Martin to the Eastern Oregon Land Company, the title to said lands became and then was vested in that company.

The second plea, after setting forth the contents of the governor's certificate of June 23, 1869, averred that on December 18, 1869, the Commissioner of the General Land Office withdrew from sale the odd numbered sections within three miles from each side of said road in favor of the Dalles Military Road Company; that Congress passed the act of June 18, 1874; that Edward Martin, placing confidence in the truth of said governor's certificate of June 23, 1869, and in the order of withdrawal of the Commissioner of the General Land Office of December 18, 1869 and believing that the act of Congress of June 18, 1874, would be carried into effect, purchased from said company, on the 31st of May, 1876, in good faith, for the consideration of $125,000 then paid by him to the company, all the lands embraced in the grant to it, except such portions as had been previously sold by it; that, prior to the time he paid said purchase money and received his deed, he had no notice of any failure on the part of the company to construct and complete the road, and had no reason to believe that it was not constructed in accordance with the act of Congress, but was informed and believed that it had been constructed with such width, gradation and bridges as to permit of its regular use as a wagon road; and that he thus became a *bona fide* purchaser, for a valuable consideration, of all the lands then owned by the company, which it then conveyed to him. The plea then averred the execution by him on January 31, 1877, of a deed of trust acknowledging that said Martin held an undivided one-fourth of said lands in trust for said D. V. B. Henarie; and that when Martin purchased the lands Henarie had paid one-fourth of the $125,000, in good faith, relying upon the certificate of the governor and on the act of Congress of June 18, 1874, and had no notice that the road had not been constructed and completed by the company as re-

quired by the act of Congress. The plea then set forth proceedings and deeds by which the title of Martin, (who had died,) and the title of all other persons, became vested in the Eastern Oregon Land Company, and averred that the latter company then held the legal title to all the lands granted to the Dalles Military Road Company, except such as had theretofore been sold and conveyed by the latter company and its grantees and the Eastern Oregon Land Company. On the same date the defendants who filed those two pleas filed an answer in support of them.

On the 25th of October, 1889, the Dalles Military Road Company, and Kelly and Thornbury, who were, respectively, president and secretary of the company, filed an answer to the bill. No replication appears to have been filed to this answer.

The case was heard upon the pleas above mentioned, and the court, on the 18th of February, 1890, entered a decree sustaining the pleas and dismissing the bill. The opinion of the court, delivered by Judge Sawyer, the Circuit Judge, is reported in 41 Fed. Rep. 493. In the opinion, it was held that both of the pleas were good. As to the first plea, the view taken was, that the authority to determine whether the road was completed was vested solely in the governor of Oregon, who was the agent of the United States in the premises; that his decision was, in the absence of fraud, final and conclusive; and that the government was estopped from denying its finality. As to the second plea, it was held to be good because it alleged that the defendants were *bona fide* purchasers from the Dalles Military Road Company, without notice of any fraud or defect in the title, and that the defendants were entitled to rely upon the acts of Congress of 1867 and 1874, the act of the State of Oregon, the certificate of the governor of that State, the withdrawal of the lands from sale, and the issue of the patent. After deciding that the two pleas were valid and sufficient, the opinion proceeded: "The remaining question to be considered, and the only one presented upon which there is any room for doubt, is whether complainants should be permitted to reply to the pleas, or whether the bill should be dismissed. Upon the whole, after careful consideration, I think

the bill should be dismissed. I think it in the highest degree probable that such would be the final result, whichever course is pursued. If so, the expense and annoyance of a long litigation would be fruitless." The opinion then held that the bill must be dismissed, on the ground that subsequent purchasers were entitled to rely upon the certificate of the governor; that the act of Congress of June 18, 1874, affirmed the truth of the certificate and authorized the issuing of the patent; and that the claim of the United States was stale.

We are of opinion that the Circuit Court erred in not permitting the plaintiffs to reply to the pleas, and in dismissing the bill absolutely. It is provided by rule 33 of the Rules of Practice in Equity, that the plaintiff may set down a plea to be argued, or may take issue upon it. This does not mean that the plaintiff is to make thereby such a conclusive election that, if he sets down the plea to be argued and it is sustained on the argument, he cannot afterwards take issue on it. By rule 34, on the overruling of a plea on hearing, the defendant has a right to answer the bill. The object of having a plea set down for hearing is to induce the presentation to the court, as a question of law, of the matters set up in the plea, so that, assuming those matters to be true in point of fact, the whole controversy may, perhaps, be determined as a question of law. But this practice would be discouraged, if the plaintiff were not to be allowed, in case the plea be sustained in matter of law, to take issue upon it as matter of fact. Rule 35 provides that, in case upon a hearing a plea is allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill. But there is no restriction put upon the right of the plaintiff to take issue upon a plea after it is allowed on a hearing; and such is the view which has been adopted by this court.

In *State of Rhode Island* v. *State of Massachusetts*, 14 Pet. 210, 257, it is laid down by the court, speaking by Chief Justice Taney, that if a plea, upon argument, is ruled to be sufficient in law to bar the recovery of the plaintiff, the court would, according to its uniform practice, allow him to put in issue, by a proper replication, the truth of the facts stated in the plea.

In 1 Daniell's Chancery Pleading & Practice, 4th ed. c. 15,

sec. 5, p. 696, it is said, that if a plea is allowed upon argument, the plaintiff may take issue upon it, and proceed to disprove the facts upon which it is endeavored to be supported, and that he does this by filing a replication in the same manner as if the defendant had answered the bill in the usual way. To the same effect, see Cooper's Eq. Pl. 232; Beames on Pleas in Equity, 316 to 318; Rule of Lord Chancellor King, 12 Geo. I., Gilbert's Reports in Equity, 184, 2d ed. folio, 1742; Story's Eq. Pl. § 697; and Mitf. Ch. Pl., by Jeremy, 301.

Various matters of fact are alleged in the pleas, which the plaintiffs have a right to controvert, such as that there were no fraudulent representations made to the governor, that he made the certificate without any fraud on his part, that Martin was a *bona fide* purchaser for a valuable consideration, without notice, that Henarie was likewise, and that the subsequent grantees were such *bona fide* purchasers.

The decree must be reversed in so far as it dismisses the bill, and the case be remanded to the Circuit Court, with a direction to allow the plaintiffs to reply to, and join issue on, the pleas.

Case No. 1219 is a similar bill in equity, filed by the Attorney General of the United States, on their behalf, against the Oregon Central Military Road Company, the California and Oregon Land Company and nineteen individual defendants. It alleges, that, on the 2d of July, 1864, Congress passed an act (13 Stat. 355) entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the Eastern boundary of said State," which granted to the State of Oregon, to aid in the construction of such wagon road, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of said road, to be exclusively applied in the construction of the road and to no other purpose, and to be disposed of only as the work should progress. The provisions of the act of Congress of July 2, 1864, were substantially the same as those of the act of Congress of February 25, 1867, considered in No. 1218.

The bill sets forth an act of the State of Oregon, of October 24, 1864, (Laws of Oregon of 1864, p. 36,) entitled "An act

donating certain lands to the Oregon Central Military Road Company," granting to that company all the lands and rights granted to the State by the act of Congress of July 2, 1864, for the purpose of aiding the company in constructing the road mentioned in the act of Congress, and all lands and rights which might be thereafter granted to the State to aid in the construction of such road; and also that, on the 26th of December, 1866, Congress passed an act (14 Stat. 374) granting to the State for such purpose such odd sections or parts of odd sections not reserved or otherwise legally appropriated, within six miles of each side of the road, to be selected by the surveyor general of the State, as should be sufficient to supply any deficiency in the quantity of the grant, occasioned by any lands sold or reserved, or to which the rights of preëmption or homestead had attached, or which, for any reason, were not subject to such grant, within the designated limits.

The bill also contains like allegations with the bill in No. 1218, in regard to the passage of the act of the State of Oregon of October 14, 1862, and avers that the Oregon Central Military Road Company is a private corporation purporting to have been incorporated on the 15th of April, 1864, under the general laws of the State of Oregon, to construct a wagon road from Eugene City in a southeasterly direction to the southeastern corner of the State, by way of the middle fork of the Willamette River; that on the 27th of July, 1866, the officers, stockholders and agents of the company and other persons, acting in their and in its interest, fraudulently represented to Addison C. Gibbs, then the governor of Oregon, that the road had been constructed for 50 miles from Eugene City eastward, they well knowing that such representations were false and that the road had not been constructed at all; that such representations were made for the purpose of fraudulently procuring from said governor a certificate that the road had been constructed in accordance with the act of Congress of July 2, 1864, and of the act of the State of Oregon of October 24, 1864; that in that certificate the governor certified that, in accordance with said two acts, he had passed over and carefully examined the first 50 miles of the road of the company,

beginning at Eugene City and extending eastward towards the southern or eastern boundary of the State, and that the first continuous 50 miles of said road beginning at Eugene City were completed in accordance with the requirements of said act of Congress and the laws of Oregon; that it was not true that the 50 miles of road referred to had been constructed; that, in order to procure the certificate and to use the same to secure the control of the land within the limits of the grant provided for in the act of Congress, the company, by its officers, agents and representatives, fraudulently pointed out to the governor a county road to which the company never had any legal right, and led the governor to believe that the road had been constructed by the company under the said acts; that, on the 26th of November, 1867, like fraudulent representations were made to George L. Woods, then governor of Oregon, in regard to 42½ additional miles of the road; that on that date the said governor made a certificate that such 42½ miles, more or less, had been carefully inspected and found to be well and faithfully built in accordance with the requirements of the law, and, therefore, the same was approved and received; that the 42½ miles had not been constructed and the governor well knew that, and no inspection of any road constructed or owned by the company had been made by the authority of the governor; that, on the 12th of January, 1870, like fraudulent representations were made to the same governor by the officers, stockholders and agents of the company and other persons acting in their and its interest, that the road had been constructed as by law required, and they presented a map falsely showing the same and its route; that the certificate made by the governor on that day stated that the plat or map of the road had been duly filed in his office by the company, and showed that portion of the road commencing at Eugene City and ending at the eastern boundary of the State, which had been completed as required by the act of Congress and the act of the State; that it was not true that the company had constructed a road upon any line of route located or surveyed anywhere within the limits of the grant of land provided for in the act of Congress or at all; that said

governor then and there well knew this; and that it was not true that he made or caused to be made any examination of any road constructed or owned by the company.

The bill contains like allegations with the bill in No. 1218, in regard to non-compliance with the act of Congress granting the lands, and in regard to the act of Congress of June 18, 1874; and avers that in 1867, 1871 and 1873 the Secretary of the Interior and the Commissioner of the General Land Office, deceived by such fraudulent certificates, executed and delivered to the State of Oregon, for the benefit of the road, seven certified lists of lands, covering 361,327.43 acres, as intended to be granted by the acts of Congress, which lists were claimed to have the force and effect of patents; that thereafter, the President of the United States, deceived by said fraudulent certificates, issued to the company two patents for 40,913.24 acres of land included in the grants; that afterwards, by various deeds, the lands were conveyed in bulk to the California and Oregon Land Company, as lands covered by the act of Congress of July 2, 1864, and by the act of the State of Oregon of October 24, 1864; that the California and Oregon Land Company is a private corporation, incorporated January 9, 1877, under the general laws of the State of California; that the maps or plats referred to in said certificates showed the line of the pretended road to be 420 miles, which would make the grant of lands covered by the act of Congress of July 2, 1864, embrace in the aggregate about 720,000 acres, of which 402,240.67 acres had been in effect patented to the road company, and for the remaining 317,759.33 acres that company inequitably claimed the right to have a patent issued.

The bill also avers, that the two companies and the nineteen individual defendants, at the time of the accruing of their interests in the lands, had full knowledge that the road had not been constructed and maintained as required by the act of Congress and the laws of Oregon, so as to be in any sense a public highway, or so that it could be used by the United States, or by any of its citizens or residents, as a public highway, or so that the United States could transport its property, troops or mails over the same, and also had full knowledge

that no grades had been established or constructed upon any part of the road, or any clearing done, or any bridges built over any streams on its line, or any cuts made, or any turnouts constructed, or any ferries established or maintained over any streams, and that the road was not begun or completed within five years from the date of the passage of the act of Congress of July 2, 1864, and that the statements made in the said certificates of the governors were false, and that they did not at any time examine the road, and that the certificates had been procured by such false and fraudulent representations, and that said patents were procured to be issued upon such false certificates.

The prayer of the bill is that the lands granted to the State by the act of Congress of July 2, 1864, be decreed to be forfeited to the United States and restored to the public domain; that the certificates, lists, patents and deeds described in the bill be decreed fraudulent and void; and for general relief.

Exceptions were filed to the bill for impertinence by the California and Oregon Land Company and nine of the individual defendants; which exceptions were sustained. 40 Fed. Rep. 120.

On the 24th of October, 1889, the California and Oregon Land Company, by leave of the court, filed two pleas to the bill. It also filed an answer sustaining the pleas. The case was heard upon the bill and the pleas, and a decree was entered on the 18th of February, 1890, sustaining the pleas and dismissing the bill. The opinion of Judge Sawyer, the Circuit Judge, (41 Fed. Rep. 501,) states that the pleas were held sufficient and the bill dismissed for the reasons stated in the opinion in No. 1218.

The first plea relies on the three certificates of the governors as having been made in good faith and without any fraudulent intent or false representation. The second plea relies on the three certificates and the delivery of the certified lists embracing the 361,327.43 acres of land; and avers that fifteen of the individual defendants, on the faith of said certificates and certified lists, purchased from two of the individual defendants, in good faith and for a valuable consideration, all the lands granted by the act of Congress which the Oregon

Central Military Road Company had conveyed, without notice of the fraudulent representations set forth in the bill, and without any reason to believe that there had been any fraudulent misrepresentations in examining or certifying the completion of any part of the road, or that it had not been completed in accordance with the requirements of the statutes; that those individual purchasers conveyed to the California and Oregon Land Company their interests in the grant; that at that time neither said land company nor any of its officers, agents or stockholders had any notice or reason to believe that there had been any fraud or misrepresentation or failure of duty in such examination or certifying; that there had been paid *bona fide* by the land company and its promoters, as expense attending the lands and in taxes, large sums of money, and sales and transfers of the stock of the land company had been made to others than its original stockholders, who had purchased such stock relying on the truth of said certificates, and on said listing of the lands, and on the act of Congress of June 18, 1874, and without any notice of, or reason to suspect, any of the fraudulent representations charged in the bill, the capital stock of the company being held by twenty-five stockholders, of whom only eight were original stockholders or are defendants in this suit.

For the reasons set forth in regard to case No. 1218, the decree of the Circuit Court, so far as it dismisses the bill, must be reversed, and the case be remanded to that court with a direction to allow the plaintiffs to reply to and join issue on the pleas.

In No. 1248, the bill is filed by the Attorney General of the United States, on their behalf, against the Willamette Valley and Cascade Mountain Wagon Road Company, the Willamette Valley and Coast Railroad Company, the Oregon Pacific Railroad Company, the Farmers' Loan and Trust Company, two individual defendants named David Cahn and Alexander Weill and five other individual defendants.

The bill alleges that, on the 5th of July, 1866, Congress passed an act (14 Stat. 89) entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Albany, Oregon, to the eastern boundary of said

State," granting to the State alternate sections of public lands, designated by odd numbers, three sections per mile, to be selected within six miles of said road, and to be exclusively applied in the construction of the road, and to no other purpose, and to be disposed of only as the work should progress, and containing substantially similar provisions with the grants made in the acts of Congress in cases Nos. 1218 and 1219.

The bill sets forth, that the State of Oregon, by an act passed October 24, 1866, (Laws of Oregon of 1866, p. 58,) granted to the Willamette Valley and Cascade Mountain Wagon Road Company all lands and rights granted to the State by said act of Congress, for the purpose of aiding the company in constructing the road mentioned in the act, and also all lands and rights which might thereafter be granted to the State to aid in constructing the road; and that by an act of Congress passed July 15, 1870, (16 Stat. 363,) a change was made in the route of the road.

The bill then makes the same allegations as in Nos. 1218 and 1219, as to the act of Oregon of October 14, 1862. It alleges that the road company was incorporated on the 12th of March, 1864, under the general laws of the State, to construct a wagon road by a specified route; that, on the 8th of September, 1866, it filed supplemental articles of incorporation changing the line of its road so as to begin at Albany and run over the Cascade Mountains to the eastern boundary of the State; that, on the 19th of August, 1871, by supplemental articles of incorporation, it changed the route of its road so as to conform to the act of Congress of July 15, 1870; that, on the 11th of May, 1868, the officers, stockholders and agents of the company and other persons acting in their and its interest fraudulently represented to the acting governor of Oregon that the road had been constructed as required by law for a distance of 180 miles eastward from Albany, they knowing that such representations were false and that the road had not been constructed at all; that such representations were made for the purpose of fraudulently procuring from the acting governor a certificate that the road for that distance had been constructed in accordance with the act of Congress of July 5,

1866, and the act of the State of October 24, 1866; that the acting governor on that day certified that the plat or map of the road had been duly filed in his office by the company, and showed that the portion of the road commencing and ending as designated on the map had been completed as required by those acts; that the acting governor did not examine or cause to be examined any part of the 180 miles; that the certificate was procured by the company to enable it fraudulently to obtain control of lands lying within the limits of the grant for the distance of 180 miles east of Albany; that, on the 8th of September, 1870, the officers, stockholders and agents of the company and other persons acting in their and its interest, fraudulently represented to the then governor of the State that the road had been constructed as required by law from the 153d mile post east from Albany to Camp Harney, they well knowing that such representations were false, and that the road had not been constructed at all; that such representations were made for the sole purpose of fraudulently procuring from the governor a certificate declaring that the road for that distance had been constructed in accordance with the said acts; that on the same day the governor made a certificate that the plat or map of the road had been filed in his office by the company, and showed, in connection with the public surveys, the location of route of the extension of the road as actually surveyed from the 153d mile post east from Albany, extending fourteen sections, to Camp Harney, in the line of the road, as definitely fixed in compliance with the act of Congress and the act of the State, and that said extension of the road had, by his direction, been examined and accepted from the 153d mile stake to Camp Harney, and embracing the 29th section, inclusive; that it was not true that the company had constructed the road in question; that the governor well knew this; that it was not true that he had directed any part of the road to be examined; that such certificate was procured by the company in order to enable it fraudulently to obtain control of the lands in question; that, on the 9th of January, 1871, the officers, stockholders and agents of the company, and other persons acting in their and its interest, fraudulently represented

to the then governor that the road had been constructed from the 29th section to the 36.8th section thereof, they well knowing that such representations were false, and that the road had not been constructed at all, and having made such representations for the sole purpose of fraudulently procuring from the governor a certificate declaring that the road for such distance had been constructed in accordance with said acts; that on the same day the governor made a certificate that the plat or map of the road had been filed in his office by the company and showed, in connection with the public surveys, the location of the route of the road as actually surveyed from Albany, extending from the 29th section to the 36.8th section in the line of the road as definitely fixed in compliance with the said acts, and that the road had been, by his direction, examined and accepted from the 29th section to the 36.8th section, inclusive, and had been completed in accordance with the act of Congress; that it was not true that such road had been constructed; that on the 24th of June, 1871, the then officers, stockholders and agents of the company, and other persons acting in their and its interest, fraudulently represented to the same governor that the road had been constructed as required by law from the 36.8th section thereof to the 44.87th section, inclusive, terminating at the eastern boundary of the State, they well knowing that such representations were false and that the road had not been constructed at all; that such fraudulent representations were made for the sole purpose of fraudulently procuring from the governor a certificate declaring that said road for that distance had been constructed in accordance with said acts; that on the same date the governor, in consequence of such false representations, made a certificate certifying that the plat or map of the road had been filed in his office by the company, and showed the location of route as actually surveyed (there being no public surveys in connection with the route to his knowledge) of the road from Albany to the eastern boundary of the State, the part therein being from the 36.8th section to the 44.87th section, inclusive, in the line of the road, terminating at the eastern boundary of the State, as definitely fixed in compliance with said acts, that

said road had been, by his direction, examined and accepted from the 36.8th section to the 44.87th section, inclusive, terminating at the eastern boundary of the State, and that the same had been completed according to the act of Congress.

The bill further alleges, that the road never was constructed either in whole or in part, so as to be a public highway or so as to permit of the transportation of any property, troops or mails of the United States over it, and had never been maintained as a public highway, and never was examined as stated in said certificate; that neither the lands nor their proceeds had ever been applied to the construction of any part of the road or of any bridges thereof, or the establishment of any ferries on any streams along the line of any part of the road.

The bill then sets forth the act of Congress of June 18, 1874, as in Nos. 1218 and 1219, and avers, that on the 19th of June, 1876, the President of the United States, deceived by such fraudulent certificates, issued to the State of Oregon, for the use and benefit of the company, a patent for certain described lands, aggregating 107,893.01 acres, and on the 30th of October, 1882, a patent to the company for 440,856.52 acres. The bill then sets forth conveyances of certain of the lands to the defendant Cahn in trust for the defendants Hogg and Weill and one Clark, the vesting of title to some of the lands in Weill individually, and to him in trust for Cahn and the defendants Arnstein and Meyer, the deeds covering all the lands granted, or intended to be granted, to the State by the act of Congress, or by the State to the company by its act; that Hogg still claimed an interest in the lands; that the Willamette Valley and Coast Railroad Company, an Oregon corporation, and the Oregon Pacific Railroad Company, another Oregon corporation, each of them claimed a legal interest in all the lands; that the Farmers' Loan and Trust Company, a New York corporation, claimed a legal and an equitable interest in the lands; that the Willamette Valley and Cascade Mountain Road Company and the Willamette Valley and Cascade Mountain Military Wagon Road Company were one and the same; that the maps or plats referred to in the certificates showed the line of the road to be 456½ miles, which would

make the grant of land covered by the act of Congress 876,480 acres, of which 327,730.47 acres were not yet patented to the road company, and that the company claimed the right to have a patent issued therefor; that the four corporation defendants and five of the individual defendants, at the time their interests accrued, had full knowledge that the road had not been constructed and maintained as required by the acts of Congress and the laws of the State, so as to be in any sense whatsoever a public highway, or so that it could be used by the United States, or by any citizens or residents thereof, as a public highway, or so that the United States could transport its property, troops or mails over the same, and that no grades had been constructed upon any part of the road, nor any clearing done, nor any bridges built over any streams, nor any cuts made, nor turnouts constructed, nor any ferries maintained over any streams; and that the road was not begun or completed within five years from the date of the passage of the act of Congress, and that each of said defendants knew that the statements made in the certificates of the governors and acting governor were false, and that they did not at any time examine the road, and that the certificates were procured by said fraudulent representations, and that the said patents were procured to be issued upon said fraudulently procured certificates.

The prayer of the bill is that all the lands granted to the State by the act of Congress of July 5, 1866, be decreed to be forfeited to the United States and restored to the public domain; that the said certificates, patent and deeds be declared fraudulent and void; and for general relief.

The defendants, Weill and Cahn, by leave of the court, filed pleas to the bill, and an answer in support of the pleas. The defendants Hogg, the Willamette Valley and Coast Railroad Company, the Willamette Valley and Cascade Mountain Wagon Road Company and the Oregon Pacific Railroad Company filed exceptions to the bill for impertinence, which exceptions were sustained. The Farmers' Loan and Trust Company filed pleas to the bill, with an accompanying answer. The defendants Hogg, the Willamette Valley and Coast Railroad Company and the Oregon Pacific Railroad Company filed pleas to the bill, with an answer supporting the pleas.

The cause was heard upon the pleas of the defendants Weill and Cahn, by Judge Deady, and a decree entered sustaining them and dismissing the bill as to those defendants. The opinion of the court is reported in 42 Fed. Rep. 351. Subsequently, the cause was heard upon the pleas and answers of the defendants, Hogg, the Willamette Valley and Coast Railroad Company, the Oregon Pacific Railroad Company and the Farmers' Loan and Trust Company, and a decree was entered on the 12th of May, 1890, sustaining the pleas and dismissing the bill as to those defendants.

Weill and Cahn filed two pleas. The first plea sets up that the Secretary of the Interior, after duly investigating a complaint that the road had not been constructed as required by the act of Congress, directed the Commissioner of the General Land Office to certify the lands for patent under the act of Congress of July 18, 1874; that the patent for the 440,856.52 acres was thereafter duly issued to the road company; that the defendants Weill and Cahn, relying upon those facts, so altered their position in reference to the lands as would render it inequitable for the United States to assert any right to forfeit or reclaim the lands; that those defendants had laid out, in securing the patents, in selecting other lands which had not yet been patented and in taxes, expenses and protecting their title, large sums of money, and had sold portions of the land with warranty, and had expended a large sum in rebuilding and improving the road through its entire length, and in constructing bridges.

The second plea of Weill and Cahn avers that, in 1871, the attention of Weill was called to the existence of the road company and its ownership of the land grant; that it was represented that the road had been fully constructed and the grant earned, that the company held title to the lands, and that they were for sale; that Weill joined with Hogg and one Clarke to purchase the lands, which was done, and they were deeded by the road company to Clarke in August, 1871; that, in September, 1871, Clarke conveyed the lands to Cahn, to hold them in trust for Weill, Hogg and Clarke, according to their respective interests; that the greater part of the lands was then un-

surveyed, a few sections had been selected, and none had been patented by the United States to the road company or to the State of Oregon, and for additional protection Weill and Clarke purchased the stock of the road company; that, at the time of the first conveyance by the road company, Weill had paid, in the purchase of the lands, over $140,000, and Clarke over $20,000; that at that time the certificates of the governors of Oregon had been made and duly filed in the office of the secretary of state of the State and in the Department at Washington; that said defendants relied upon those certificates; and that in 1879 Weill purchased the interests of Clarke and Hogg in the lands for $21,400, all of them believing that the road had been completed as required by the act of Congress and as certified. The plea denies all fraud or notice of any fraud or of any claim on the part of the United States at the time the defendants acquired title to any part of the lands, and avers that they are purchasers in good faith, without notice, for a valuable consideration.

The answer which accompanies these pleas contains averments in support of them, and alleges that but for the existence of the certificates Weill would not have purchased the lands. To the pleas and answer are annexed the reports of the special agent of the United States and of committees of Congress, and a letter of the Secretary of the Interior.

The pleas and answer of the Farmers' Loan and Trust Company set forth the principal matters appearing in the pleas and answer of Weill and Cahn; and the answer alleges that the trust company is the trustee for certain holders of bonds secured by a mortgage made to it, as trustee.

The pleas and supporting answer of Hogg, the Willamette Valley and Coast Railroad Company and the Oregon Pacific Railroad Company set forth substantially the same matters contained in the pleas and answer of Weill and Cahn and in those of the Farmers' Loan and Trust Company.

The first plea of Weill and Cahn was treated by the Circuit Court as a plea of estoppel. On the facts stated in that plea, the court held that the claim made in the bill was a stale claim; and that the delay or lapse of time constituted a bar

to the relief sought, and ought to have the same effect as in a suit between private parties. The court also held that the second plea of Weill and Cahn was good, because it set up all the elements of a *bona fide* purchase for a valuable consideration; that the certificates of the governors were conclusive as to the fact of the completion of the road; and that the lands could not be forfeited to the United States, even if the certificates of the governors should be proved to have been false and fraudulent. The opinion of the court further says, that the facts stated in the pleas are manifestly true; that it is extremely improbable, under the circumstances, that the defendants Weill and Cahn had notice of the falsity of the certificates; and that, admitting that their falsity might be shown, in conjunction with notice to the defendants of that fact, it would be extremely difficult, in view of the lapse of time and of the absence of any resident population along the line of the road at the time, to make any satisfactory proof on the subject. The opinion then refers, as an authority applicable to the cases generally, to the opinion of Judge Sawyer in No. 1218, *United States* v. *Dalles Military Road Co.*, 41 Fed. Rep. 493.

For the reasons hereinbefore set forth in regard to case No. 1218, we are of opinion that the United States were entitled, on the sustaining of the pleas in the present case, to take issue as to the matters of fact alleged in them; and that the decrees in No. 1248 must be reversed, in so far as they dismiss the bill as to the defendants who put in pleas, and the case be remanded with a direction to allow the plaintiffs to reply to and join issue on the pleas.

All of the eight suits here involved were commenced by the Attorney General in the name of the United States, under the authority and direction of an act of Congress passed March 2, 1889, 25 Stat. 850, which directed him to bring suits in the name of the United States in the Circuit Court of the United States for the District of Oregon, against all persons, firms and corporations claiming to own or to have an interest in the lands granted to the State of Oregon by the acts of Congress of July 2, 1864, July 5, 1866, and February 25, 1867, giving their titles, "to determine the questions of the seasonable

and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the State of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried, with right to writ of error or appeal by either or any party as in other cases."

By this act, suits are directed to be brought to determine (1) "the question of the seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part;" (2) "the legal effect of the several certificates of the governors of the State of Oregon of the completion of said roads;" (3) "the right of resumption of such granted lands by the United States;" (4) to obtain judgments, which the court is thereby authorized to render, "declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with requirements of the granting acts;" and (5) to set aside patents which have been issued for any such lands, "saving and preserving the rights of all *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration, if any such there be."

It is manifest that, although the act says that the suits are to be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity, Congress intended a full legal investigation of the facts, and

did not intend that the important interests involved should be determined upon the untested allegations of the defendants. They set up, to avoid an actual investigation, staleness of claim, estoppel, laches, the certificates of the governors, and allegations of *bona fide* purchase. It must be held that, in passing the statute of 1889, Congress gave full effect to its three granting acts and to its act of June 18, 1874, to the reports made by its committees and to the acts and proceedings of the Secretary of the Interior, the Commissioner of the General Land Office and other executive officers. An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suit to be brought upon a stale claim. If laches be a good defence, it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. Besides, the defences of stale claim and laches cannot be set up against the government. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Van Zandt*, 11 Wheat. 184; *United States* v. *Nicholl*, 12 Wheat. 505; *Dox* v. *Postmaster General*, 1 Pet. 318; *Lindsey* v. *Miller*, 6 Pet. 666; *Gibson* v. *Chouteau*, 13 Wall. 92; *Gaussen* v. *United States*, 97 U. S. 584; *Steele* v. *United States*, 113 U. S. 128; *United States* v. *Insley*, 130 U. S. 263.

The government has had no opportunity to prove the charges of fraud made in the bill, and there is no proof but the allegations of the pleas as to the *bona fides* of the defendants, and as to the amounts expended by them in good faith in connection with the roads or the lands. It cannot be properly held that, under the act of 1889, final adjudication can be made, on such pleadings alone, as to the extensive interests involved in this litigation. The claims of the United States cannot be treated as stale claims, in view of the act of 1889, especially as to those portions of the lands which remain unpatented, and as to those certificates of the governors which were false and fraudulent to the knowledge of those who made them and to the knowledge of the several defendants, or in view of the alleged defects of the certificates in cases Nos. 1219 and 1248.

Cases Nos. 1444, 1445, 1446, 1447 and 1448 arose out of transactions under the acts involved in No. 1218, namely, the

act of February 25, 1867, (14 Stat. 409,) and the act of the State of Oregon of October 20, 1868, granting the lands covered by said act of Congress to the Dalles Military Road Company. In No. 1444, the defendant Kelly is a grantee of the road company, and in the four other cases the defendants Cooper, Rogers's administratrix, Grant and Floyd, are grantees respectively of the Eastern Oregon Land Company, which derives its title from the road company. In each of the bills of complaint in Nos. 1444, 1445, 1446, 1447 and 1448 the allegations are in substance the same as those of the bill in No. 1218, with the further allegation, that the defendants respectively entered into possession of some of the lands under deeds, and claim severally to own and hold them adversely to the United States, and had the full knowledge charged against the defendants in the bill in No. 1218.

In each of the four cases, Nos. 1444, 1445, 1447 and 1448, (those against Kelly, Cooper, Grant and Floyd,) a stipulation was entered into between the parties, on November 5, 1889, that the defendant need not further plead until the determination of the pleas in the suit of the United States against the Eastern Oregon Land Company, (that is, No. 1218,) or until the further order of the court. The decree in No. 1218, dismissing the bill, was made February 18, 1890. On May 5, 1890, a general demurrer to the bill for want of equity was interposed in each of the four cases, Nos. 1444, 1445, 1447 and 1448; and in No. 1446, on the 30th of April, 1890, a demurrer to the bill was filed for want of equity and on the ground that the heirs of Alexander Rogers, deceased, were necessary parties to the bill. On May 2, 1890, a decree sustaining the demurrer and dismissing the bill was entered in No. 1446, and on May 7, 1890, a decree sustaining the demurrer and dismissing the bill was entered in each of the other four cases.

The prayers of these five bills are that the certificates, patents and deeds be declared fraudulent and void and the lands be restored to the public domain, and for general relief.

It is apparent that the decision on the pleas in No. 1218 was regarded as determining these five suits, and that, as the decree in No. 1218 is reversed, the decrees in these five

suits must also be reversed, and such further proceedings be had in them as shall not be inconsistent with the opinion of this court in No. 1218, so that these five suits may proceed *pari passu* with No. 1218, and the United States be entitled to have the full benefit of the act of 1889 in all the suits.

As to the ground of demurrer stated in No. 1446, that the heirs of Alexander Rogers, deceased, are shown by the bill to be proper and necessary parties, the deed from the Eastern Oregon Land Company is to the defendant Matilda C. Rogers, "administratrix, in trust for the estate of Alex. Rogers, deceased," and the conveyance is "to her, her heirs and assigns forever." The bill does not state that Alexander Rogers left any heirs. It only misstates the contents of the deed, a copy of which is annexed to the bill, by stating that the conveyance was to "Matilda C. Rogers, administratrix of the estate of Alexander Rogers, in trust for said estate and the heirs of said deceased," which is an incorrect statement of the deed.

To prevent any misapprehension, we state that

We do not intend to determine any question as to the controversy between the United States and the claimants of the lands, but reverse the cases that their merits may be investigated. Decrees of this court will be entered in accordance with the foregoing directions.

Reversed.

MARTIN *v.* BARBOUR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 369. Submitted May 1, 1891. — Decided May 25, 1891.

In a proceeding instituted under the statute of Arkansas to confirm a tax title to a lot of land, the person who owned the lot when it was sold for taxes may set up in defence defects and irregularities in the proceedings for the sale.

A lot was sold to the State in 1885, for the taxes of 1884, and, after the two years allowed for redemption had expired, it was certified to the commissioner of state lands, and purchased from him by a person who brought the proceeding to confirm the title. The widowed mother of certain

minors had bought the lot in 1883, in trust for the minors, and had put money into the hands of an agent to pay the taxes of 1884, but he failed to pay them. The lot was listed for the taxes of 1885 and 1886, and they were paid, as if the lot had not been sold. No suit to show irregularities in the sale was brought within two years from its date: *Held*,

(1) The irregularities were not cut off, because the prior owners of the lot were deprived of a substantial right;

(2) The oath prescribed by statute was not taken by the assessor, or endorsed on the assessment books;

(3) There was no record proof of the publication of the notice of the sale for taxes;

(4) The right to redeem was prevented from being exercised within the two years by dereliction of duty on the part of officers of the State;

(5) The purchaser from the State took his deed subject to the equities and defences which existed against the State;

(6) The minors had a right to a decree dismissing the petition to confirm the tax sale, subject to a lien on the lot for the amount of the purchase money on the purchase from the State.

THE case is stated in the opinion.

Mr. U. M. Rose and *Mr. G. B. Rose* for appellant.

Mr. Luther H. Pike for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a proceeding involving the question of the validity of a sale for taxes of lot 5 in block 140, situated in the United States reservation of the Hot Springs, in Garland County, Arkansas. It was commenced by a petition filed July 22, 1887, in the Circuit Court of that county, by R. W. Martin, to confirm his tax title to the lot in question. The petition was brought under certain sections forming part of chapter 23, headed "Confirmation of Titles," of Mansfield's Digest of the Statutes of Arkansas, of 1884, the sections being numbered from 576 to 583, both inclusive, and being set forth in the margin.[1]

[1] Section 576. The purchasers, or the heirs and legal representatives of purchasers, of lands at sheriff's sales, those made by the county clerks or by the State land commissioner of this State, in pursuance of any of the laws thereof, or those made by the order, decree or authority of any court of record, may protect themselves from eviction of the lands so purchased, or from any responsibilities as possessors of the same, by pursuing the rules hereinafter prescribed.

Section 577. The purchasers or the heirs and legal representatives of

The petition states that the lot in question, being a town lot in the city of Hot Springs, in the county of Garland, was

---

purchasers, at all sales which have been, or may hereafter be, made may, when such lands are not made redeemable by any of the laws of this State applicable to such sales, or, if redeemable, may, at any time after the expiration of the time allowed for such redemption, publish six weeks in succession, in some newspaper published in this State, a notice calling on all persons who can set up any right to the lands so purchased, in consequence of any informality or any irregularity or illegality connected with such sale, to show cause, at the first circuit court which may be held for the county in which such lands are situated six months after the publication of said notice, why the sale so made should not be confirmed, which notice shall state the authority under which the sale took place, and also contain the same description of the lands purchased as that given in the conveyance to the buyer, and shall further declare the price at which the land was bought and the nature of the title by which it is held.

Section 578. The affidavit of one or more of the publishers or proprietors of said newspaper, setting forth a copy of such notice, with the date of the first publication thereof and number of insertions, sworn to and subscribed before some justice of the peace of the county or city in which said newspaper is published, with a certificate of magistracy from the clerk of the court of said county, under the seal of his office, on being produced to said court, shall be taken and considered as sufficient evidence of the fact of publication, the date and number of insertions, and form of such notice.

Section 579. On producing the proof of said notice, as required in the preceding section, the party publishing the same may apply to the judge of the court aforesaid to confirm said sale; and it shall be the duty of the judge, in case no cause is shown against the prayer of said purchaser, to confirm the sale in question: *Provided, always*, That before he does so confirm it he shall be fully satisfied that said notice is in due form, that it has been regularly published, that the land has been correctly described and the price at which it was purchased truly stated in conformity to the provisions of this act; but in case opposition be made, and it shall appear that the sale has been made contrary to law, it shall be the duty of the judge to annul it.

Section 580. A sheriff's or auditor's deed, given in the usual form, without witnesses, shall be taken and considered by said court as sufficient evidence of the authority under which said sale was made, the description of the land and the price at which it was purchased.

Section 581. The judgment or decree of the court confirming said sale shall operate as a complete bar against any and all persons who may hereafter claim said lands in consequence of informality or illegality in the proceedings; and the title to said land shall be considered as confirmed and complete in the purchaser thereof, his heirs and assigns forever; saving, however, to infants, persons of unsound mind, imprisoned beyond seas or

delinquent for the non-payment of the taxes of the year 1884; that the lot was duly offered for sale by the collector of the county, and was struck off to the State of Arkansas; that the time for the redemption of the lot having expired, it was duly certified to the commissioner of State lands by the county clerk of Garland County, as required by law; that the petitioner applied to the said commissioner to purchase the lot, and, upon the payment to the commissioner of $110.95, received from him, on the 16th of June, 1887, a deed, No. 8867, covering the lot; and that the petitioner paid for the deed the sum of $1, and was the owner of the lot by virtue of such conveyance, and had given the notice required by law, and was entitled to a decree confirming his title. He therefore prayed that his title to the lot be confirmed.

On the 31st of August, 1887, Frances M. Barbour and her three infant children, all under the age of fourteen years, by their next friend, Ormand Barbour, served a notice upon the commissioner of state lands for the State of Arkansas, that the lot in question was the property of the three minors, held in trust for them, at the time of the supposed forfeiture, by their mother, said Frances M. Barbour, who was now the wife of said Ormand Barbour. The notice stated that the minors and the mother applied to be permitted to redeem the lot, by paying the taxes, penalty and costs, and interest, charges and fees, for which they tendered the money. To this notice the commissioner replied, on the 3d of September, 1887, that the land had been sold by the State, and they could not redeem from the State, but must redeem from Martin, and through the courts, if necessary.

On the 10th of September, 1887, the three minors and their

---

out of the jurisdiction of the United States, the right to appear and contest the title to said land within one year after their disabilities may be removed.

Section 582. When no opposition is made to the confirmation of such sale, the costs attending the proceedings shall be paid by the party praying such confirmation; and where opposition is made the costs shall be borne by the party against whom judgment is rendered.

Section 583. In case any such purchaser shall not deem it necessary to use the remedy conferred by this act to confirm the title thereto, then the said sale shall have the effect given to it by law.

mother filed their answer and cross-bill to the petition of Martin, setting up that the minors were the children and the only heirs of Franklin J. Munger, deceased, who died in December, 1881; that the deed of June 16, 1887, and all the proceedings on which it was granted, were void as to them, by reason of the coverture of the mother and the infancy of the three children; and that they were entitled to redeem the lot under the tender they had made. The answer and cross-bill then set forth that the lot in question was patented by the United States in 1882 to certain parties; that the title became vested in one Laley, who, in September, 1883, conveyed it, by a deed of general warranty, to the mother of the minors, who entered with them into possession under such deed, for a consideration of $11,500, of which $5000 were paid in lawful money and the balance secured by bond and mortgage, a first-class boarding-house having been erected on the lot; that at the date of such deed the mother of the minors was the widow of said Munger; that the proceeds of a policy of insurance on the life of said Munger, being $5000, were paid to the mother of the minors in trust for them, and were paid by her to said Laley for said lot and boarding-house and the furniture thereof; that she kept the boarding-house for a while, and then rented it out, applying the rents to support herself and the minors, who had resided with her continuously since she purchased the premises, and were dependent entirely upon her for their maintenance and education, with the voluntary assistance of her husband; that, on renting the house and removing from Hot Springs, they employed one Wiggs, a real estate agent, who subsequently absconded from the State, to collect the rents of the house and pay the taxes, but he failed to apply the rents to pay the taxes on the land for the year 1884, although he paid the taxes for that year on the personalty; that Wiggs, who was then county judge of the county, caused the clerk of the county court of the county to have the lot listed for taxes for the years 1885 and 1886, and they were collected, as if the lot had not been sold to the State for the year 1884; that the plaintiffs in the cross-bill were thereby kept in ignorance of the non-payment of the taxes for the year 1884; that at that

time the mother of the minors was the wife of Barbour, having been such prior to the attempted return of the lot as delinquent, and prior to the attempted advertisement and sale of the same for taxes for the year 1884, and at the date of the execution of the deed to Martin by the commissioner of state lands on June 16, 1887, and was still under such coverture; and that she purchased and held the lot as the trustee of the minors.

The cross-bill then avers, that the deed of the lot to Martin conveyed no title to him, in consequence of certain specified defects and irregularities in the proceedings under which the conveyance was attempted to be made, nine of them being specified. The cross-bill further avers that the plaintiffs in it, in June, 1887, immediately after the deed to Martin was made known to him, tendered to him, through their agent at Hot Springs, $111.95, the amount of the taxes, penalty, costs and interest, but the tender was refused by Martin, and they bring into court $125, and tender the same in redemption of the lot, to be paid as the court may direct, and pray that they be decreed to have the right to redeem the lot on payment of such sum as may be lawfully due. On the ground of their disabilities, before stated, and the frauds alleged in the cross-bill, they pray that, upon payment by them of all dues and expenses incurred in respect to the sale and deed to Martin, said deed be declared void and be delivered up to be cancelled, and that their title in the lot be quieted.

Subsequently, and in October, 1887, the plaintiffs in the cross-bill, as citizens of Illinois, Martin being a citizen of Arkansas, removed the suit into the Circuit Court of the United States for the Eastern District of Arkansas. A replication was filed to the answer. An amendment was then filed to the answer and cross-bill; and an amendment also to the petition of Martin, waiving an answer under oath. Martin then put in an answer to the cross-bill, and subsequently the plaintiffs in the cross-bill filed an amendment waiving an answer to it under oath. Proofs were taken, and the case was heard by the court, held by Judge Caldwell, then District Judge, whose opinion is reported in 34 Fed. Rep. 701. On

the 9th of April, 1888, the court entered a decree dismissing the petition of Martin for want of equity, and decreeing that he have a lien upon the lot in question for $110.95, with interest at six per cent per annum from June 16, 1887; and that, unless that sum should be paid within twenty days, the lot should be sold to raise the money to pay that sum. Martin was charged with the costs of the suit, and took an appeal to this court. On the 11th of April, 1888, the appellees paid into court $117.57, the amount of the redemption money with poundage, and the amount, less the poundage, was ordered to remain in the registry and to be paid on demand to Martin.

The lot in question was sold to the State on the 25th of May, 1885, for the taxes of 1884, and at the expiration of two years, the period allowed by law for redemption, by section 5772, it was certified to the commissioner of state lands, and immediately thereafter was purchased by Martin from that officer. The substantial facts set up in the cross-bill are proved by the evidence.

The appellant relies upon section 5782 of Mansfield's Digest, of 1884, which is section 146 of the act of March 31, 1883, (Laws of 1883, p. 273,) and reads as follows: "Section 5782. In all controversies and suits involving title to real property, claimed and held under and by virtue of a deed executed substantially as aforesaid by the clerk of the county court, the party claiming title adverse to that conveyed by such deed shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year (or years) named in the deed, or that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this act, and that such redemption was had or made for the use and benefit of persons having the right of redemption, under the laws of this State; or that there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property. But no person shall be permitted to question the title acquired by a deed of the clerk of the county court, without first showing that he, or the person under whom he claims title to the

property, had title thereto at the time of the sale, or that title was obtained from the United States or this State after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid: *Provided*, That in any case where a person had paid his taxes, and, through mistake (or otherwise) by the collector, the land upon which the taxes were paid was afterward sold, the deed of the clerk of the county court shall not convey the title: *Provided, further*, That in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling said lands or in the purchaser, to defeat the same, and, if fraud is so established, such sale and title shall be void." But that section relates exclusively to deeds made "by the clerk of the county court," and does not embrace deeds made by the commissioner of state lands.

The appellant also relies upon section 4246 of Mansfield's Digest, of 1884, which reads as follows: "All deeds issued by said commissioner (of state lands) . . . shall be under his hand and official seal, and shall convey to the purchaser, his heirs and assigns, all the right, title and interest of the State to said lands and town lots, and such deeds shall be received as evidence in any court in the State." But, in *Scott* v. *Mills*, 49 Arkansas, 266, it was held that the effect of that section was to make the deed *prima facie* evidence of title in the purchaser, and to relieve the grantee and those holding under him from making proof, until evidence was introduced showing or tending to show that the deed conveyed no title. The deed does not prevent the plaintiffs in the present cross-bill from showing that they have been deprived of substantial rights by reason of the failure of the officers of the State to observe requirements of the law in respect to listing or assessing the property for taxation, or selling it as delinquent, or in respect to the redemption of it after its sale. In the present case, the plaintiffs in the cross-bill proved such failure to the satisfaction of the Circuit Court.

By section 577 of Mansfield's Digest, of 1884, before referred to, the purchaser is required to publish a notice "calling on

all persons who can set up any right to the lands so purchased, in consequence of any informality or any irregularity or illegality connected with such sale," to show cause why the sale should not be confirmed.

By section 579, it is provided, that, "in case opposition be made, and it shall appear that the sale has been made contrary to law, it shall be the duty of the judge to annul it."

By section 581, it is provided, that the judgment of the court confirming the sale shall operate as a complete bar against any and all persons who may "claim said land in consequence of informality or illegality in the proceedings; and the title to said land shall be considered as confirmed and complete in the purchaser thereof, his heirs and assigns forever; saving, however, to infants, persons of unsound mind, imprisoned beyond seas or out of the jurisdiction of the United States, the right to appear and contest the title to said land within one year after their disabilities may be removed."

Section 5791 of Mansfield's Digest, of 1884, reads as follows: "All actions to test the validity of any proceeding in the appraisement, assessment or levying of taxes upon any land or lot, or part thereof, and all proceedings whereby is sought to be shown any irregularity of any officer, or defect or neglect thereof, having any duty to perform, under the provisions of this act, in the assessment, appraisement, levying of taxes or in the sale of lands or lots delinquent for taxes, or proceedings whereby it is sought to avoid any sale under the provisions of this act, or [for] irregularity or neglect of any kind by any officer having any duty or thing to perform under the provisions of this act, shall be commenced within two years from the date of sale, and not afterward." The provisions of this section, as section 138 of the act of April 8, 1869, were considered by the Supreme Court of Arkansas in *Radcliffe* v. *Scruggs*, 46 Arkansas, 96, 107, where it was said that the statute did not operate to deprive the former owner of any "meritorious defence," meaning thereby "any act or omission of the revenue officers in violation of law and prejudicial to his rights and interests, as well as those jurisdic-

tional and fundamental defects which affect the power to levy the tax, or to sell for its non-payment." The court further said: "We have no doubt of the power of the legislature to cure any irregularity or illegality in a tax sale, which consists in a mere failure to observe some requirement imposed, not by the constitution, but by the legislature itself, and the non-observance of which does not deprive the former owner of any substantial right. . . . All technical objections to the sale, not actually prejudicial to the former owner, must be brought forward within two years, under penalty of not being afterwards regarded when the tax title is assailed."

In the present case, it is contended by the appellant that the irregularities alleged by the appellees were cut off under section 5791, because they commenced no suit within two years from the date of the sale. But those irregularities deprived the appellees of a substantial right, and were not technical objections to the sale, and were actually prejudicial to the appellees.

It was proved that the sale was made contrary to law, because no valid assessment for the year 1884 was made, in that the assessor did not take and subscribe the oath or affirmation prescribed by section 5661 of Mansfield's Digest, of 1884, which provides as follows: "Every assessor shall, on or before the first day of January succeeding his election, and before entering upon or discharging any of the duties of his office, take and subscribe to the oath prescribed in section twenty, article nineteen, of the constitution of Arkansas, and, in addition thereto, the following oath or affirmation, which oath shall be endorsed upon the assessment books prior to their delivery to the assessor: 'I, ———, assessor for ——— county, do solemnly swear that the value of all real and personal property, moneys, credits, investments in bonds, stocks, joint stock companies, of which statements may be made to me by persons required by law, will be appraised at its actual cash value; that in no case will I, knowingly, omit to demand of any person or corporation, of whom by law I may be required to make such demand, a statement of the description and value of personal property, or the amount of moneys and

credits, investments in bonds, stock, joint stock companies or otherwise, which he may be required to list, or in any way connive at any violation or evasion of any of the requirements of the law or laws in relation to the listing or valuation of property, credits, investments in bonds, stocks, joint stock companies or otherwise, of any kind, for taxation.'"

It was also shown that such oath was not endorsed upon the assessment books for the year 1884, prior to their delivery to the assessor, as provided by section 5661.

It is also provided by section 5662 as follows: "If any person so elected fails or refuses to take the oath required in the preceding section, and file the same with the clerk of the county court of his county, within the time prescribed, the office shall be declared vacant, and the clerk of the county court shall immediately notify the governor, and such vacancy shall be filled in accordance with the constitution and laws of the State." See *Parker* v. *Overman*, 18 How. 137; *Moore* v. *Turner*, 43 Arkansas, 243.

Where the statute provides for the publication of a notice of sale for taxes, and prescribes the terms of such publication, it must be strictly pursued. Cooley on Taxation, 2d ed. p. 484. In the present case, there was a failure to prove the publication required by the statute. An attempt was made to do so by means of *ex parte* affidavits, presented more than two years after the sale was made. But the statute required record proof, and nothing could be substituted for that, nor could a failure to give it be excused.

By section 5763 of Mansfield's Digest, the form is prescribed of the notice which is to be attached to the list of delinquent lands, which, by section 5762, is required to be published in a newspaper; and section 5763 goes on to provide as follows: "The clerk of the county court shall record said (delinquent) list and notice (of publication attached to it) in a book, to be by him kept for the purpose, and shall certify at the foot of said record, stating in what newspaper said list was published, and the date of publication, and for what length of time the same was published before the second Monday in April then next ensuing, and such record, so certified, shall be evidence

of the facts in said list and certificate contained." In the present case, no such record was made. The provision is a peremptory one, and it cannot be dispensed with, without invalidating the proceeding.

By section 5705, the clerk of the county court was required, on or before the first Monday in November in each year, to make out and deliver the tax books of the county to the collector, with his warrant thereunto attached, under his hand and the seal of his office, authorizing the collector to collect the taxes.

By section 5731, the collector was required to give notice, by the posting of printed notices, of his attendance at certain places to receive the taxes, and to attend by himself or his deputy for that purpose at the time and place named in the notice, and thereafter to attend at his office at the county seat, until the 10th of February of each year, to receive taxes from persons wishing to pay them.

By section 5760, the collector was required, by the first Monday of March in each year, to file with the clerk of the county court a list or lists of all such taxes levied on real estate as he had been unable to collect, therein describing the land or town or city lots on which the delinquent taxes were charged, as the same were described on the tax-book, and to attach thereto his affidavit to the correctness of the list; and he was required also to scrutinize the list and compare it with the tax-book and record of tax receipts, and strike from the list any land or lot upon which the taxes had been paid, or which did not appear to have been entered on the tax-book, or which should appear from the tax-book to be exempt from taxation.

By section 5762, he was required to cause the list of the delinquent lands in his county, as corrected by him, to be published weekly for two weeks between the first Monday in March and the second Monday in April in each year, in a newspaper.

Then followed the provision before stated of section 5763. The sale in the present case was made May 25, 1885.

By section 5769, the clerk of the county court was required

to attend the sale and to make a record of it in a substantial book, and to record in a separate book, to be kept for that purpose, each tract of land or lot sold to the State, together with the taxes, penalty and cost due thereon; and by section 5771, he was required immediately after the sale to transfer upon the tax-books all lands sold for taxes to the name of the purchaser.

It is quite clear that the clerk did not comply with these requirements, especially with those of sections 5763 and 5769. Because he so failed in his duty in respect to the tax-sale of 1884, the assessor returned the lot in question on the assessment for 1885 as subject to taxation, instead of returning it as exempt from taxation by reason of its having been struck off to the State at the tax-sale for the delinquent tax of 1884, which would have prevented the county clerk from placing the lot on the tax-books for 1885, which he was required by section 5705 to make out and deliver to the collector on or before the first Monday of November, 1885. If the requirements of the law had been followed, the plaintiffs in the cross-bill, when attending by their agent to pay the taxes for 1885, would have been informed that there were no taxes for them to pay, because the lot stood in the name of the State. In such case, it being shown that they intended to pay the tax for 1884 and made full provision for that purpose, it is manifest they could and would have redeemed the lot.

To permit the sale to the appellant to be confirmed would be to assist the State to take advantage of its own wrong. The right to redeem is a substantial right, and was prevented from being exercised within the statutory period of two years by the dereliction of duty on the part of the officers of the State. The sale was made contrary to law, and it was the duty of the Circuit Court, under the statute, to annul it, in order to allow the redemption to take place. No more manifest case for the interposition of a court of equity can be imagined. The State is bound by the acts of her officers in placing the lot on the tax-books for the years 1885 and 1886, and receiving from the appellees the taxes for those years. Equity will treat the transaction as a waiver of the prior sup-

Counsel for Plaintiff in Error.

posed forfeiture, and will regard the tax paid for 1885 and 1886 as so much paid toward redemption, and will permit the payment of the rest. The appellant took his deed for the land in the same condition in which the State held it, and subject to the same equities and defences. The State having created its bureau of taxes, is bound to see to it that its officers impart correct information to parties dealing with it and do not mislead them.

The mother of the minors had the right to acknowledge, as she did, her trusteeship for them. The minors are the real parties in interest in the case, and they have appeared and contested the title to the lot, within the right reserved to them by section 581. They are entitled to the relief given to them by the Circuit Court, although section 5772 does not give the right to redeem to married women; for it gives that right to minors within two years after the expiration of their disability.

The case is so thoroughly discussed, and the rights of the appellees to relief so fully vindicated, in the opinion of the Circuit Court, that we do not deem it necessary to add anything further.

Decree affirmed.

CHICAGO DISTILLING COMPANY *v.* STONE.

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

No. 130. Argued and submitted January 6, 1891. — Decided May 25, 1891.

The provision in Rev. Stat. § 3309, that if the Commissioner of Internal Revenue, on making a monthly examination of a distiller's return, "finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller," etc., refers to the real average spirit-producing capacity of the distillery, and not to a fictitious capacity for any particular day or days.

THE case is stated in the opinion.

Mr. Joseph Kirkland for plaintiff in error, submitted on his brief.

Mr. Solicitor General for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought by the Chicago Distilling Company, the plaintiffs in error, against Rensselaer Stone, a collector of internal revenue, to recover a certain sum alleged to have been unlawfully exacted by him from the plaintiffs, by assessing them for a pretended excess of grain distilled by them beyond the rated capacity of their distillery, in the month of September, 1885. A jury was waived and the cause was tried by the court upon an agreed statement of facts, and judgment rendered for the defendant. The case is now here on writ of error. In order to a better understanding of it a few explanatory observations will be proper.

The law requires that every distillery, before operations are commenced, shall be surveyed for the purpose of estimating and determining its true spirit-producing capacity for a day of twenty-four hours. Rev. Stat. § 3264. This is done by ascertaining the number of fermenting tubs, the capacity of each, and the fermenting period required for the particular process to be followed. The distiller may use all of his tubs or only a part of them. Those not used are sealed up by the collector or his deputy, and the distiller is only charged for those which are open; but he is obliged to pay the excise due for the full spirit-producing capacity of the latter whether he manufactures the amount or not. If he uses any grain in excess of the capacity of his distillery as estimated according to law, an assessment is made against him at the rate of ninety cents for every proof gallon of such excess. It is an assessment of this kind of which the plaintiffs complain. Whenever a distiller desires to open or close any of his tubs for the purpose of increasing or reducing the capacity of his distillery, he must give notice to that effect to the collector, who makes the change by sealing or opening the tubs designated. Rev. Stat. § 3311. It is not pretended that the plaintiffs failed in any respect to comply with this requirement of the law, or that they used, or ceased to use, any fermenting tubs without the knowledge and sanction of the collector of internal revenue.

Another provision of the law requires that on the first of each month a return shall be made to the collector by the distiller, or his principal manager, under oath, of the amount of materials used for the production of spirits each day during the previous month, and the number of gallons and proof-gallons of spirits produced and placed in the warehouse. Rev. Stat. §§ 3307, 3309.

In the present case there is no dispute as to the *bona fides* of the plaintiffs, or as to their business being conducted regularly and lawfully in every way, unless the matter hereafter referred to should be regarded as open to exception. The controversy is explained by the agreed statement of facts, the material parts of which are as follows:

"1. The Chicago Distilling Co., plaintiff herein, a corporation duly organized and existing under the laws of Illinois, paid to the defendant (then collector of internal revenue for the first district of Illinois), under protest, the sum of fifty-seven dollars and eighty-three cents, on the 26th day of August, 1886.

"2. The said company, in September, 1885, operated a duly bonded and registered distillery, known as distillery No. 5, first district of Illinois.

"3. By government survey the said distillery contained fifteen fermenting tubs, numbered No. 1 to No. 15, inclusive, each having a total working capacity of 438.46 bushels of grain. It was using, under the said survey, a three-day fermenting period, and under the regulations of the Treasury Department the daily capacity of each fermenting tub was one-third of the total working capacity — that is to say, 146.15 bushels of grain.

"4. The following table is a true statement of the openings and closings of fermenting tubs and the mashings of grain and distillations of spirits during September, 1885, and also of the grain in mash brought forward from the preceding month, and of the grain in mash carried forward to the succeeding month, and the notices for such openings and closings of fermenting tubs were duly filed in apt time and proper form, and the designated fermenting tubs were regularly, by the

authorized agents of the government, opened at the times specified, and the respective quantities of grain named in the said table as mashed and distilled were the quantities which were actually made and distilled ; all as therein set forth under appropriate headings."

[Omitting the first part of the month as not material, the headings and details of the latter part, from the 18th to the 30th, are as follows :]

Day of month.	Mashing.		Day of month.	Distillation.	
	Fermenting tubs opened by collector and filled by distiller.	Grain mashed.		Fermenting tubs empt'd by distiller and closed by collector.	Grain used, *i.e.* distilled.
	Serial Nos.	*Bushels.*		*Serial Nos.*	*Bushels.*
18	No. 10, No. 11, No. 12..	1,315.50	21	No. 7, No. 8, No. 9....	1,315.50
19	No. 13, No. 14, No. 15..	1,315.50	22	No. 10, No. 11, No. 12..	1,315.50
21	No. 1, No. 2.....	877.00	23	No. 13, No. 14, No. 15..	1,315.50
22	No. 3, No. 4.....	877.00	24	No. 1, No. 2.....	877.00
23	No. 5, No. 6, No. 7.....	1,315.50	25	No. 3, No. 4.....	877.00
24	No. 8, No. 9, No. 10....	1,315.50	26	No. 5, No. 6, No. 7....	1,315.50
25	No. 11, No. 12, No. 13..	1,315.50	28	No. 8, No. 9, No. 10...	1,315.50
26	No. 14, No. 15, No. 1...	1,315.50	29	No. 11, No. 12, No. 13..	1,315.50
28	No. 2, No. 3.....	877.00	30	No. 14, No. 15, No. 1...	1,315.50
29	No. 4, No. 5.....	877.00			
30	No. 6, No. 7, No. 8.....	1,315.50			
		33,326.00			
	Deduct mashing of 28th, 29th and 30th Sept., carr. for'd to Oct....	3,069.50			
		30,256.50			30,256.50

"5. A certain assessment of tax in the sum of fifty-seven dollars and eighty-three cents was made in regular form and apt time against the Chicago Distilling Company by the Commissioner of Internal Revenue, acting on behalf of the U. S., and was duly certified to the defendant herein for collection from the plaintiff herein. The ground for said assessment was that during the month of September, 1885, as decided by said Commissioner, there was used at said distillery for the production of spirits by the distiller, this plaintiff, a certain quantity of grain, to wit, $294\frac{81}{100}$ bushels, in excess of the capacity of said distillery for said month as

estimated according to law; said Commissioner deciding that said capacity for each and every working day during said month was as set forth in that part of the following tabular statement which is marked A, but this plaintiff claiming it to be as set forth in that part of said statement which is marked B.

A.			B.		
Sept.	1..... 876.93	bushels.	Sept.	1..... 877.00	bushels.
"	2..... 876.93	"	"	2..... 877.00	"
"	3..... 876.93	"	"	3..... 877.00	"
"	4.....1,023.08	"	"	4..... 877.00	"
"	5.....1,023.08	"	"	5..... 877.00	"
"	7.....1,023.08	"	"	7.....1,315.50	"
"	8.....1,023.08	"	"	8..... 877.00	"
"	9.....1,023.08	"	"	9..... 877.00	"
"	10.....1,023.08	"	"	10.....1,315.50	"
"	11.....1,315.39	"	"	11.....1,315.50	"
"	12.....1,315.39	"	"	12.....1,315.50	"
"	14.....1,315.39	"	"	14.....1,315.50	"
"	15.....1,315.39	"	"	15.....1,315.50	"
"	16.....1,315.39	"	"	16.....1,315.50	"
"	17.....1,315.39	"	"	17.....1,315.50	"
"	18.....1,315.39	"	"	18.....1,315.50	"
"	19.....1,315.39	"	"	19.....1,315.50	"
"	21.....1,315.39	"	"	21.....1,315.50	"
"	22.....1,169.24	"	"	22.....1,315.50	"
"	23.....1,169.24	"	"	23.....1,315.50	"
"	24.....1,169.24	"	"	24..... 877.00	"
"	25.....1,169.24	"	"	25..... 877.00	"
"	26.....1,169.24	"	"	26.....1,315.50	"
"	28.....1,169.24	"	"	28.....1,315.50	"
"	29.....1,169.24	"	"	29.....1,315.50	"
"	30.....1,169.24	"	"	30.....1,315.50	"

"6. The demand for and collection of the said sum of money from the plaintiff by the defendant was made by the defendant under and by virtue of the said assessment by the Commissioner of Internal Revenue.

"7. The plaintiff, before the said tax was assessed, petitioned the Commissioner of Internal Revenue that the same be not

assessed; after the assessment was made he petitioned that the assessment might be abated, and after payment as above set forth he petitioned that the sum paid might be refunded; all which petitions were denied by the said Commissioner."

The agreed statement then sets forth a document known as Circular 238, being a regulation of the Treasury Department issued in due form, and known to the plaintiffs. As we understand the counsel for the government, it is claimed by the defendant that this Circular fixes and defines the daily producing capacity of a distillery by taking the average capacity of the fermenting period of three days, four days, or whatever it may be. Thus if the fermenting period is three days, and the producing capacity is 500 bushels of grain the first day, 500 the second day, and 200 the third day, the average for the three days is 400 bushels; and the Circular makes this average the daily capacity. So long as the fermenting period comes wholly within the calendar month no difficulty occurs; for then the actual results of the three days' work agree with the result for the same days produced by the fictitious daily capacity imposed by the Circular. But when, as in the present case, it happens that two of the days come in one month (September) and the third comes in the next month (October), a discrepancy arises in the former month between the fiction and the fact. The three days in group came on the 29th and 30th of September and the 1st of October. The actual production, as well as capacity, on the first two days was 1315.50 bushels of distilled mash each day, being the product of three tubs filled on the 25th of September and three others on the 26th of that month, whilst on the 1st of October the production was only 877 bushels, being the product of two tubs filled on the 28th of September (Sunday, the 27th, not being counted). The production of the whole three days, therefore, was 3508 bushels (or, precisely, 3507.71 bushels), one-third of which, namely, 1169.24, being the average production per day, was prescribed by the department Circular as the daily producing capacity of the distillery at that time. This fictitious estimate made the producing capacity of the last two days of September equal to only 2338.48 bushels, whilst the actual pro-

duction for those two days was 2631 bushels, an excess of 292.52 bushels, which, together with some minute fractional differences during the rest of the month, amounted in all to 294.81 bushels, for which the assessment complained of by the plaintiffs was made. Now, although this very excess of production over the estimated capacity in September will be balanced by a corresponding deficiency in October, yet the distiller gets no benefit from that. He never gets any credit for deficiency; but is always charged extra for any excess.

It seems to us perfectly apparent from this statement that the distiller is subjected to an unjust mulct, or assessment, by a mere fiction. The counsel for the government argues that the Commissioner of Internal Revenue could not do otherwise than as he did in prescribing the requirements of Circular 238, because the statute requires that the original survey of the distillery shall determine its true spirit-producing capacity for a day of twenty-four hours, and the same expression, producing capacity "for every twenty-four hours," is prescribed in the form of notice to be given by the distiller in declaring his intention to carry on the business, and in applying for a reduction or change of capacity in his establishment. Rev. Stat. §§ 3259, 3311. But those expressions evidently mean no more than average producing capacity in a given time. "A day of twenty-four hours" is named for the purpose of expressing with greater certainty and precision the exact period of duration for which the average capacity of production was to be ascertained or fixed. That nothing but "average" was intended is manifest from the fact that no distillery under ordinary conditions has any spirit-producing capacity in twenty-four hours. It requires three days, four days and sometimes six days, to produce the article desired. And the statute which imposes an extra assessment for over-production does not make the average daily capacity the standard, but merely the capacity of the distillery. The words are: "If the commissioner finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate of ninety cents for every proof-gallon of spirits that

should have been produced from the grain or molasses so used in excess." Rev. Stat. § 3309. The expression, "the capacity of his distillery as estimated according to law," clearly refers to the real capacity as thus ascertained, and not to a fictitious capacity for any particular day or days.

As the judgment of the court below was based upon the view taken by the counsel of the government, we think it was erroneous, and must be reversed. The judgment is accordingly

Reversed, and the cause remanded with directions to enter judgment for the plaintiff, and take such further proceedings as may be in accordance with this opinion.

NEW ORLEANS *v.* LOUISIANA CONSTRUCTION COMPANY.

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

No. 435. Submitted November 11, 1889. — Decided May 25, 1891.

The destination or character of spaces of ground, part of the public quay or levee in the city of New Orleans, dedicated to public use, and *locus publicus* by the law of Louisiana, is not changed so as to make them private property, subject to be taken on execution for the debts of the city, by a lease made pursuant to an ordinance of the city, by which the city grants to an individual the exclusive right for twenty-five years to use such spaces, designated by the city surveyor, and not nearer than one hundred and fifty feet to the present wharves, for the purpose of erecting thereon, for the shelter of sugar and molasses landed at the quay, fire-proof sheds, "with such accommodations and conveniences for the transaction of business as may be necessary;" and also grants to him the exclusive privilege of sheltering sugar and molasses landed at the port; and authorizes him to charge prescribed rates on the sugar and molasses sheltered under the sheds, and, in case those sheds "shall not be of sufficient capacity to meet the demands of increased production, or the requirements of commerce," to erect additional sheds on spaces to be designated by the city; he agrees to keep the sheds in repair, and to pay the city one-tenth of such charges; the sheds are to revert to the city on certain terms at the end of the lease; and right is reserved to the wharfinger to enforce existing regulations against encumbering the quay, and to the city to open or extend streets.

Statement of the Case.

THE city of New Orleans, against which the Louisiana Construction Company, a corporation of Pennsylvania, had recovered a judgment for $50,000, filed a petition of intervention and of third opposition, according to the Louisiana practice, to have the seizure and sale, upon an execution issued on that judgment, of the interest of the city in four spaces of ground, part of the public quay or levee, and in certain sugar sheds thereon, prohibited and set aside, because the ground was "*locus publicus*, and the ground and sheds were, when seized and long prior thereto, and now are, exclusively devoted to public use, that is, to the purposes of commerce."

At the trial before the jury, it was proved that the spaces of ground on which the sugar sheds stood were between the front row of houses and the Mississippi River, and were part of the ground dedicated as *locus publicus* in the plans of the city made before the cession of Louisiana to the United States; that the spaces covered by the sheds had, in 1869 and for years before, been in actual and exclusive public use as the levee or landing place for the sugar and molasses brought to the city in steamboats and other vessels, there being no covering for the sugar and molasses when landed; that on August 14, 1869, the city made a lease for twenty-five years of these spaces of ground to Francis B. Fleitas, pursuant to, and following the words of, an ordinance of the city council, which is copied in the margin;[1] that the lessee accepted the lease, erected the

[1] Mayoralty of New Orleans, City Hall, August 14, 1869.

No. 1528, N. S.

An ordinance to provide for the shelter and protection of sugar and molasses received at the port of New Orleans.

SEC. 1. Be it ordained by the common council of the city of New Orleans, that Francis B. Fleitas shall have and enjoy for the period of twenty-five years the exclusive right and privilege of using the public spaces on the levee, in the second district of this city, between Custom-house and St. Louis streets, commonly known as the Sugar landing — said spaces being designated on a plan of the city surveyor, to be by him submitted to the committee on streets and landings on or before the 15th day of September in the year 1869 — for the purpose of erecting and constructing thereon fire-proof sheds for the reception and shelter of sugar and molasses, according to the plans and specifications of the city surveyor on the day aforesaid,

sheds and had been in possession thereof ever since; that, save and except these sheds, the ground between the front

---

which sheds, with such arrangements for the transaction of business as may be convenient, are to be constructed on or before the 1st day of November, 1871, unless the construction be interfered with or prevented by extraordinary accident or calamity, from which time said privilege and right is to commence to run; Provided, that said Fleitas, immediately after the passage of this ordinance, shall have the right to enter upon and use the said spaces for the purposes of construction as aforesaid.

SEC. 2. Be it further ordained, that the terms and conditions on which said right and privilege are granted are the following:

1st. Said sheds are to be erected, with such accommodations and conveniences for the transaction of business as may be necessary, by said Fleitas, at his own cost, and free of expense to the city of New Orleans, and during the existence of said privilege he is to keep said sheds in good order and repair at his own expense.

2d. Said Fleitas is allowed to charge, during the term said privilege is to last under the provisions of this ordinance, a sum not exceeding twenty-five cents on every hogshead of sugar, and fifteen cents on every barrel of molasses, sheltered under said shed, and no other charge for shelter is to be made, unless the packages aforesaid, after being under cover, shall change hands; then he is allowed to charge, each and every time such package changes hands while under cover, fifteen cents for each hogshead of sugar, and five cents for each barrel of molasses, at the time of transfer; Provided, that this last-mentioned charge is to be paid by each transferee or purchaser, and shall not be made when the sugar or molasses transferred or sold shall be removed by such transferee or purchaser on the same day he acquired title; Provided further, that sugar and molasses in other packages than hogsheads and barrels shall be subject to *pro rata* charges.

3d. That said Fleitas shall pay to the city of New Orleans, as a consideration for said privilege during the term aforesaid, ten per centum of the gross amount of charges realized for shelter on each hogshead of sugar and each barrel of molasses placed under said sheds, the said per cent to be paid quarterly, on statements rendered under oath to the treasurer of the city of New Orleans; Provided, that said sheds and the revenues or income derived therefrom or from said privilege shall not be subject to any municipal taxation whatever during the existence of said privilege.

4th. In addition to the above consideration, the said sheds, at the expiration of said term of twenty-five years, are to be appraised at their then cash value in the manner following: One appraiser to be appointed by the said Fleitas or his representatives, successors or assigns, and the other by the city of New Orleans. In case of disagreement, the two thus selected shall call in a third disinterested person as umpire; and the appraisement thus made shall be conclusive and binding on all parties; and the city of New Orleans shall have the option to take said sheds at one-half of said

row of houses and the river remained open and unobstructed as before; and that the spaces and sheds had been always and

---

appraised value, or of extending the privileges herein granted, on the same terms as those herein specified, for the further period of fifteen years, except that at the expiration of said fifteen years said sheds are to revert to the city in full ownership, free of all cost. In case the city of New Orleans, within three months after the expiration of said twenty-five years, shall fail or refuse to appoint an appraiser, it shall be considered as having exercised the option to extend the privilege aforesaid for fifteen years longer; and in case the said Fleitas, his representatives, successors or assigns, shall, within one month after the city shall have appointed its appraiser, fail or refuse to appoint an appraiser on his behalf, the city shall have the right of appointing two additional appraisers, whose appraisement shall be final, and said Fleitas shall receive one-half of the appraised value of said sheds from the city. On the presentation of the decision of the appraisers provided for in this clause, and on the payment of the said one-half of the said appraised value, the sheds and spaces on which they are erected as aforesaid shall be surrendered and transferred to the city of New Orleans.

SEC. 3. Be it further ordained, that the city of New Orleans hereby guarantees to said Fleitas, his representatives, successors or assigns, during the term of his privilege and its extension, the following:

1st. The undisturbed possession of said public spaces and the sheds thereon erected.

2d. That the present landing for sugar and molasses shall remain where it now is and as designated on the plans aforesaid.

3d. That no other landing for sugar and molasses shall be established or allowed for the city or port of New Orleans.

4th. That no other privilege for the reception and shelter for sugar or molasses shall be allowed by the city.

SEC. 4. Be it further ordained, that, in case the sheds erected under the provisions of this ordinance shall not be of sufficient capacity to meet the demands of increased production, or the requirements of commerce, the said Fleitas shall have the right to increase the number of sheds, said additional sheds to be erected on such spaces as the city may designate and on such terms as may be agreed on; Provided, that if said additional sheds are erected within ten years from the 1st November, 1871, the cost thereof is to be paid by the said Fleitas, his representatives, successors or assigns; and said additional sheds are to revert to the city at the expiration of twenty-five years from the date of construction, on the same terms in regard to appraisement and the option to extend the privilege of using the same as if the said additional sheds were originally constructed under this ordinance, and all the terms and stipulations of this ordinance shall be considered applicable to them in the same manner and to the same extent as they are herein applied to the original sheds.

exclusively used to receive sugar and molasses landed from steamboats and other vessels, as provided in the ordinance and lease.

The city offered evidence tending to show that said spaces were essential to the public use for the commerce of the port to receive said sugar and molasses. The Louisiana Construction Company offered evidence tending to show that these spaces were not necessary for public uses, and were not used for the landing of the sugar and molasses, and that the city exercised no control over the sheds; and also, to show the location of the sheds, offered in evidence a modern map by which it appeared that the space between them and the river was about one hundred and fifty feet, and was open to the public and traversed by railroad tracks. It was admitted that the spaces occupied by the sugar sheds, as well as the space between them and the wharves, were alluvion.

The city requested the court to instruct the jury that "the character of *locus publicus*, impressed upon ground within the city of New Orleans devoted to public use, cannot be changed, except by an act of the legislature of the State authorizing said change; and hence that the city of New Orleans, without such legislative authority, had no power to change the character of a *locus publicus*, and thereby make said *locus publicus* subject to seizure and sale on execution for the debts of the city."

The city also requested the court to instruct the jury that if they found that the ground seized and sold on the execution issued on the judgment in favor of the Louisiana Construction

---

SEC. 5. Be it further ordained, that said Fleitas shall give security in the sum of fifty thousand dollars for the faithful performance of the stipulations herein contained.

SEC. 6. Be it further ordained, that the wharfinger shall have the right, at any time when the levee is encumbered, to enforce the now existing regulations.

SEC. 7. Be it further ordained, that the sheds shall not be located nearer than one hundred and fifty feet to the present wooden work or wharves.

SEC. 8. Be it further ordained, that, if at any time the city should desire to open or extend any street, the privilege hereby granted shall not in any manner prevent said street from being opened or extended.

Statement of the Case.

Company "was *locus publicus*, as a portion of the public levee of this city, dedicated to the common use of the inhabitants of the city, to serve the public purposes of a levee and landing place for the sugar and molasses brought to this port by steamboats and other vessels navigating the Mississippi River; and if the jury find that in 1869 the city of New Orleans leased said spaces for the term of twenty-five years under ordinances of the city council and the contract with the lessee that he should erect over said spaces sugar sheds for the accommodation and protection of the aforesaid sugar and molasses landed from said steamboats and other vessels, the lessee to have the right to collect dues upon the sugar and molasses deposited under said sheds, for and in consideration of the accommodation and protection afforded by said sheds to said sugar and molasses, the city to be paid a percentage of said dues annually, and the sheds to revert and belong to said city at the end of said lease, as appears by said ordinances and contract in evidence; and if the jury find that said sheds were so constructed, and at and before the date of said adjudication, ever since 1869, the said spaces of ground and sheds were used for said purposes and for no other purposes; then the erection of said sheds upon and the use of said spaces, as provided by said contract and ordinances, did not change the character of said spaces as part of the public levee or *locus publicus*, and make said spaces and sheds over them liable to seizure and sale on execution for the debts of the city, and any such seizure and adjudication was illegal and passed no title to the purchaser."

The court declined to give either of the instructions requested, and instead thereof instructed the jury as follows:

"The space upon which the sugar sheds, the reversion of the title to which has been seized under a writ of *fieri facias* in this case, was, prior to August 14, 1869, upon the undisputed facts, established a *locus publicus*.

"By the undisputed evidence it is established that said space was a portion of what is called the 'batture,' which is the alluvial land between that portion of the city of New Orleans and the Mississippi River, and was a *locus publicus*

at the time when Louisiana was acquired by the United States.

"There is no doubt of the correctness of the general proposition that a public place is inalienable except by the sovereign; but a public place which is a portion of the batture, according to the well settled jurisprudence of this State, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the city. This qualification is seen to be a public necessity when we consider that, by the action of the vast stream which half encircles the city, the levees may be so widened as that, unless a portion of them were used for buildings and the inhabited city extended over them, the city itself would possibly be left at an inconvenient distance from the river. Accordingly we find, both in the decisions of the highest tribunal of the State and in the act of the legislature, a clear recognition of the authority of the city to withdraw from the public use any portion of the batture which it deems no longer necessary to be held for that purpose.

"Therefore the court instructs you that it was lawful for the city of New Orleans to withdraw the said space from the public and to make it private property while it was a *locus publicus*. The fee was in the city and the use was in the public; and the question of fact for you to decide is whether the city did not by the contract or lease of the date of August 14, 1869, withdraw said space from the public use as being no longer necessary for the public.

"It is to be observed that the said contract gives to the grantee or lessee 'the exclusive right of using the public spaces,' and gives to him 'undisturbed possession of said public spaces and the sheds thereon erected.' Said sheds are to be for the purpose of storing sugar and molasses. There is no condition or requirement, in said grant or lease, which requires the grantee or lessee to receive up to the capacity of the sheds the sugar and molasses of any person offering, or which prevents him from any degree of discrimination; that is, he may store the products of one man and refuse those of another, although his store is not full. The contract reserves a royalty

as a rent. The possession thus granted is to continue for the period of twenty-five years. The contract protected the public by the provision that 'the sheds shall not be located nearer than one hundred and fifty feet to the present wooden work or wharves.'

"If you find this contract was executed by the city of New Orleans and was accepted by the grantee or lessee, and that he went into possession at the time of its execution, and ever since remained under it in possession, (and there is no dispute about these facts,) then the court instructs you there has been such a change in the destination of the property in question, such a withdrawal of it from the public, as makes it property held by the city for its own use and not that of the public, and makes its reversion liable to seizure on the part of a creditor of the city of New Orleans, and your verdict would be for the plaintiff in the writ and against the intervener and third opponent."

The jury returned a verdict against the city, on which judgment was rendered; and the city duly excepted to the refusals to instruct as requested, and to the instructions given, and sued out this writ of error. A motion to dismiss the writ of error, on the ground that the case should have been brought up by appeal, was overruled at a former term. 129 U. S. 45.

Mr. Carleton Hunt and *Mr. Henry C. Miller* for plaintiff in error.

Mr. E. Howard McCaleb for defendant in error.

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

Upon the admitted facts of this case, it is undisputed, and indisputable, that the spaces of land in question were originally part of the public quay or levee in New Orleans, dedicated to public use, and, in the phrase of the law of Louisiana, *locus publicus*, and that they never ceased to be such, so as to become private property subject to be taken on execution for debt, unless by force of the ordinance and lease of the city.

Civil Code, arts. 454 (445), 458 (449); *Mayor* v. *Magnon*, 4 Martin, 2; *Mayor* v. *Hopkins*, 13 Louisiana, 326; *New Orleans & Carrollton Railroad* v. *First Municipality*, 7 La. Ann. 148.

Two questions have been argued: First, whether the city of New Orleans had power to dispose of the land, so as to change its destination or character as *locus publicus*, and make the land its own private property? Second, whether the city has done so?

Upon consideration of the opinions heretofore delivered by this court and by the Supreme Court of Louisiana, the solution of the first question appears to be not wholly free from doubt. *New Orleans* v. *United States*, 10 Pet. 662; *Board of Liquidation* v. *Louisville & Nashville Railroad*, 109 U. S. 221; *Packwood* v. *Walden*, 7 Martin (N. S.) 81; *Delabigarre* v. *Second Municipality*, 3 La. Ann. 230; *Parish* v. *Second Municipality*, 8 La. Ann. 145. See also *New Orleans* v. *Morris*, 3 Woods, 103; *Hart* v. *New Orleans*, 12 Fed. Rep. 292. We abstain from expressing any opinion upon that question, because it is unnecessary to the decision of this case, inasmuch as we are of opinion that, if the city had the power contended for, it has not exercised it.

The object of the ordinance, as declared in its title, and recited in the lease, is "to provide for the shelter and protection of sugar and molasses received at the port of New Orleans." By the terms of the ordinance, repeated in the lease, the city grants the exclusive right for twenty-five years to use four public spaces, designated by the city surveyor, and not nearer than one hundred and fifty feet to the present wharves, on the levee commonly known as the Sugar Landing, for the purpose of erecting and constructing thereon fire-proof sheds, according to the plans of the city surveyor, for the reception and shelter of sugar and molasses; and the further right, in case these sheds "shall not be of sufficient capacity to meet the demands of increased production, or the requirements of commerce," to erect additional sheds on spaces to be designated by the city. The city guarantees to the lessee that he shall have undisturbed possession of the spaces and of the sheds erected thereon; that the sheds and the revenues derived

therefrom shall not be subject to municipal taxation during the existence of the privilege; that the present landing for sugar and molasses shall remain where it now is, as designated on the plan aforesaid; and that no other landing for sugar or molasses, or privilege for its reception and shelter, shall be established or allowed by the city. The lessee agrees to erect the sheds, "with such accommodations and conveniences for the transaction of business as may be necessary," and to keep them in repair, at his own expense; is authorized to charge certain prescribed rates on each hogshead or barrel, or other package, of sugar or molasses sheltered under the sheds; and agrees to pay to the city one-tenth of the gross amount of such charges, and to give security in the sum of $50,000 for the faithful performance of the contract. It is further provided that the wharfinger shall have the right, at any time when the levee is encumbered, to enforce the now existing regulations; and that the privilege granted by the lease shall not in any manner prevent the city from opening or extending streets at its pleasure. At the end of the twenty-five years, the city is to have the option of terminating the lease and taking the sheds at half their appraised value, or of extending the lease for fifteen years, at the end of which the sheds shall revert to the city free of all cost.

Among the public uses for which the quay or levee was established, and to which it was devoted, was the landing of sugar and molasses brought by the Mississippi River to the port of New Orleans in the regular course of commerce and navigation. The real and the declared purpose of the ordinance and of the lease was to secure the necessary shelter for the sugar and molasses so brought and landed. The various stipulations of the contract, including the grant to the lessee of the exclusive use of the sheds and of the spaces under them, and the exclusive privilege of receiving and sheltering sugar and molasses at the port, were intended and adapted to accomplish this purpose, with the greatest benefit to the public, and with the least expense to the city. The shelter of the sugar and molasses from the weather was not a new and distinct use, nor in any sense a private one, but was incidental to the

principal public use of landing these articles of commerce. The sheds for sheltering the goods were as subservient to the public use of the quay, as the wharves for landing them.

The provisions requiring the lessee to erect the sheds "with such accommodations and conveniences for the transaction of business as may be necessary," and authorizing him to erect additional sheds, in case those first erected "shall not be of sufficient capacity to meet the demands of increased production, or the requirements of commerce," as well as the provision defining and limiting the rates which he may charge for sheltering the goods, clearly show that he was to exercise a *quasi* public employment, and was charged with a duty of accommodating the public, like a wharfinger, a warehouseman or a common carrier, and had no right to refuse to shelter, to the reasonable capacity of the sheds, the sugar or molasses of any one applying to him, and paying him the prescribed rates.

The city has not undertaken to alienate or sell the ground under the sheds, but has only leased it for a term of years, reverting at the end of that term, with the sheds built thereon, to the city for the benefit of the public. The ground has no more ceased to be devoted to the public use by the making of the lease and the erection of the sheds, than if the city had itself built and managed the sheds for the promotion of commerce and the benefit of the city and its inhabitants.

Moreover, the use of the levee for the equally important public use of a highway is carefully guarded by the provisions that the sheds shall not be nearer than one hundred and fifty feet to the existing wharves, that the existing regulations against encumbering the levee may be enforced by the wharfinger and that the city may extend existing streets, or open new ones, notwithstanding any privileges granted by this contract.

Taking all the provisions of the lease together, we are of opinion that it in no way affected the character of the spaces in question as *locus publicus*, and that the city had no such private interest in those spaces, or in the sheds built upon

Decree.

them, as could be seized and sold on execution for the debts of the city.

Decree reversed, and case remanded with directions to enter judgment for the city of New Orleans.

MR. JUSTICE BREWER and MR. JUSTICE BROWN took no part in the decision of this case.

THE LATE CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS *v.* UNITED STATES.

ROMNEY *v.* UNITED STATES.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Nos. 695, 715. Decided May 19, 1890. — Reported 136 U. S. 1. — Decree entered May 25, 1891.

The court now orders a decree entered in this case, for which purpose it was reserved at the last term. See *Mormon Church* v. *United States*, 136 U. S. 1, 66.

DECREE.

THE decree entered in this case on the 19th day of May, 1890, having been set aside by an order of the court made on the 23d day of May, 1890, it is now upon further consideration ordered, adjudged and decreed, that the decree of the Supreme Court of the Territory of Utah be affirmed with the following modification, that is to say: that the seventh clause of said decree be changed and modified so as to read as follows:

[7th. And the court does further adjudge and decree that the late corporation of the Church of Jesus Christ of Latter-Day Saints having become by law dissolved as aforesaid, there did not exist at its dissolution, and do not now exist, any trusts or purposes within the objects and purposes for which said personal property was originally acquired, as hereinbefore set out, whether said acquisition was by purchase or donation, to or for which said personalty or any part thereof could be

used, or to which it could be dedicated, that were and are not, in whole or in part, opposed to public policy, good morals and contrary to the laws of the United States; and furthermore, that there do not exist any natural persons or any body, association or corporation who are legally entitled to any portion of said personalty as successors in interest to said Church of Jesus Christ of Latter-Day Saints, and the said personal property has devolved to the United States; and not being lawfully applicable to the purposes for which it was originally dedicated or acquired, and to which, at the commencement of this suit, it was being devoted by the said corporation and its controlling authorities, the same ought to be limited and appointed to such charitable uses, lawful in their character, as may most nearly correspond to those to which it was originally destined, to be ascertained and defined (unless in the meantime Congress should otherwise order) by reference to a master for due examination, inquiry and report thereon, subject to the approval of the court; and to be established, administered and carried out in such manner and according to such scheme as may be suggested and reported by said master and approved by the court. It is further ordered and decreed that until the ascertainment and determination of such uses and the adoption of such scheme, and until direction be taken for the ultimate funding or investment of the said personal property for the purposes aforesaid, the receiver appointed in this cause do continue in the custody and charge thereof, with all accumulations, subject to the further order of the court, and (conjointly with the rents and income of the real estate) to the payment of the costs and expenses of this proceeding and of the receivership aforesaid. The reference herein provided for to be made by a separate order.]

Whereupon it is considered, adjudged and decreed that the cause be remanded to the Supreme Court of the Territory of Utah, with directions to modify its decree as herein directed, and to take such further proceedings as to law and justice may appertain in conformity with the opinion of this court delivered on this appeal at the last term of the court.

Per Mr. Justice Bradley.

May 25, 1891.

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES AT OCTOBER TERM, 1890, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 437. ACKLEY *v.* HUNTINGTON. Appeal from the Circuit Court of the United States for the District of Kentucky. July 3, 1890: Dismissed, pursuant to the 28th rule. *Mr. C. B. Simrall* for appellant. *Mr. Wm. M. Ramsey* and *Mr. Lawrence Maxwell, Jr.*, for appellee.

No. 345. ACME HAY HARVESTER COMPANY *v.* MARTIN. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 24, 1891: Dismissed, with costs, on motion of *Mr. J. H. Peirce* for appellant. *Mr. George P. Fisher, Jr.*, *Mr. J. H. Peirce* and *Mr. George Harding* for appellant. *Mr. L. L. Bond* for appellees.

No. 83. ADAMS *v.* HEISEL. Appeal from the Circuit Court of the United States for the Northern District of Ohio. November 13, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. Arthur v. Briesen* for appellants. *Mr. E. Sowers* for appellee.

No. 237. ADLER *v.* TOWER. Appeal from the Circuit Court of the United States for the District of Maryland. November 26, 1890: Dismissed, per stipulation. *Mr. Sebastian Brown* for appellants. *Mr. Frederick P. Fish* for appellee.

No. 647. ALLEN *v.* HALLIDAY. Appeal from the Circuit Court of the United States for the Eastern District of Arkan-

sas. April 6, 1891: Dismissed, with costs, per stipulation, on motion of *Mr. A. H. Garland* for appellee. *Mr. John M. Moore* for appellants. *Mr. A. H. Garland* and *Mr. H. J. May* for appellee.

No. 236. ARCHER *v.* ARND. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. March 19, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. M. H. Burgett* for appellant. No appearance for appellees.

No. 1572. ARD *v.* BRANDON. Error to the Supreme Court of the State of Kansas. December 8, 1890: Docketed and dismissed, with costs, on motion of *Mr. A. B. Browne* for defendant in error.

No. 240. ARNHEIM *v.* CORN. Appeal from the Circuit Court of the United States for the Southern District of New York. March 20, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. F. H. Betts* for appellant. *Mr. G. M. Plympton* for appellees.

No. 241. ARNHEIM *v.* ROSENBAUM. Appeal from the Circuit Court of the United States for the Southern District of New York. March 20, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. F. H. Betts* for appellant. *Mr. G. M. Plympton* for appellee.

No. 1742. ARNHEIM *v.* FINSTER. Appeal from the Circuit Court of the United States for the Southern District of New York. April 30, 1891: Docketed and dismissed, with costs, on motion of *Mr. G. M. Plympton* for appellees.

No. 166. ARTHUR'S EXECUTORS *v.* WILKINSON. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Judgment affirmed, with costs and interest, per stipulation of counsel. *Mr. Attorney General*

for plaintiffs in error. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for defendants in error.

No. 181. ASPINWALL MANUFACTURING COMPANY *v.* GILL. Appeal from the Circuit Court of the United States for the District of New Jersey. January 29, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Francis Forbes* for appellant. No appearance for appellees.

No. 837. ATLANTIC AND PACIFIC RAILROAD COMPANY *v.* LESUEUR. Appeal from the Supreme Court of the Territory of Arizona. October 21, 1890: Dismissed, with costs, on motion of *Mr. A. B. Browne* for appellant. *Mr. A. T. Britton*, *Mr. A. B. Browne* and *Mr. W. C. Hazeldine* for appellant. *Mr. David Turpie* for appellee.

No. 120. BABBITT *v.* CLARK. Error to the Supreme Court of the State of Ohio. October 27, 1890: Dismissed, with costs, pursuant to the 15th rule, on motion of *Mr. James Lowndes* for defendant in error. *Mr. John C. Lee* for plaintiff in error. *Mr. James Lowndes* for defendant in error.

No. 732. BABSON *v.* ROBERTSON. Error to the Circuit Court of the United States for the Southern District of New York. November 3, 1890: Judgment reversed, with costs, and cause remanded with directions to grant a new trial on motion of *Mr. Assistant Attorney General Maury* for defendant in error. *Mr. Edward Hartley* and *Mr. Walter H. Coleman* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 218. BAKER *v.* TALBOTT. Error to the Supreme Court of the Territory of Montana. January 30, 1891: Dismissed,

with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Montana. *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendants in error.

No. 1524. BALLIN *v.* MAGONE. Error to the Circuit Court of the United States for the Southern District of New York. April 27, 1891: Judgment reversed, with costs, by consent of counsel for defendant in error, who confessed error, and cause remanded to be proceeded in according to law and justice, on motion of *Mr. Assistant Attorney General Maury* for defendant in error. *Mr. Stephen G. Clarke* and *Mr. Edwin B. Smith* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 1009. BARNEY *v.* BENDA. Error to the Circuit Court of the United States for the Southern District of New York. April 17, 1891: Judgment reversed, with costs, by consent of counsel for defendants in error, and cause remanded to be proceeded in according to law and justice, on motion of *Mr. S. F. Phillips* for defendants in error. *Mr. Attorney General* for plaintiff in error. *Mr. A. W. Griswold* and *Mr. S. F. Phillips* for defendants in error.

No. 426. BARNEY *v.* HURLBUT. No. 427. BARNEY *v.* CURTIS. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Judgments affirmed, with costs and interest, per stipulation of counsel. *Mr. Attorney General* for plaintiffs in error. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for defendant in error.

No. 986. BARNEY *v.* KAUPE. Error to the Circuit Court of the United States for the Southern District of New York. January 12, 1891: Dismissed, with costs, on motion of *Mr.*

Attorney General for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. A. W. Griswold Mr. S. F. Phillips*, and *Mr. Frederic D. McKenney* for defendants in error.

No. 1000. BARNEY *v.* TOMES. Error to the Circuit Court of the United States for the Southern District of New York. January 12, 1891: Dismissed, with costs, on motion of *Mr. Attorney General* for the plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. S. F. Phillips*, *Mr. A. W. Griswold* and *Mr. Frederic D. McKenney* for defendants in error.

No. 270. BARTELS *v.* REDFIELD. Error to the Circuit Court of the United States for the Southern District of New York. March 30, 1891: Dismissed, with costs, on motion of *Mr. S. F. Phillips* for plaintiffs in error. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for plaintiffs in error. *Mr. Attorney General* for defendants in error.

No. 259. BARTLETT *v.* PARKER. Appeal from the Circuit Court of the United States for the Northern District of Illinois. August 7, 1890: Dismissed pursuant to the 28th rule. *Mr. Edwin W. Keightly* for appellants. *Mr. E. A. West* for appellees.

No. 194. BEAL *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 506. BEAN *v.* CLARK. Appeal from the Circuit Court of the United States for the Northern District of New York.

August 15, 1890: Dismissed pursuant to the 28th rule. *Mr. E. E. Wood*, *Mr. Edward Boyd* and *Mr. Thomas J. Pringle* for appellant. *Mr. R. H. Parkinson* for appellees.

No. 1729. BEEBE *v.* UNITED STATES. Error to the Circuit Court of the United States for the Middle District of Alabama. April 27, 1891: Docketed and dismissed, on motion of *Mr. Solicitor General* for the defendant in error.

No. 1010. BENDA *v.* BARNEY. Error to the Circuit Court of the United States for the Southern District of New York. April 17, 1891: Dismissed, with costs, on motion of *Mr. S. F. Phillips* for plaintiffs in error. *Mr. A. W. Griswold* and *Mr. S. F. Phillips* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 204. BERNARD *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 904. BERNHEIMER *v.* ROBERTSON. Error to the Circuit Court of the United States for the Southern District of New York. May 11, 1891: Judgment reversed, with costs, and cause remanded to be proceeded in according to law and justice, on motion of *Mr. Assistant Attorney General Maury* for the defendant in error, who confessed error. *Mr. Charles Curie* and *Mr. Stephen G. Clarke* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 921. BIRDSEYE *v.* NICKERSON. No. 922. BIRDSEYE *v.* ROGERS. Error to the Circuit Court of the United States for

the Western District of Texas. April 27, 1891: Dismissed for the want of jurisdiction, per stipulation, in the record in No. 920, to abide the decision in Birdseye *v.* Schaeffer *et al.* (No. 920). *Mr. Bethel Coopwood* and *Mr. John Hancock* for plaintiffs in error.

No. 784. Bliss *v.* Hughes. Appeal from the Circuit Court of the United States for the District of Kentucky. July 3, 1890: Dismissed pursuant to the 28th rule. *Mr. Lawrence Maxwell, Jr.*, and *Mr. Wm. M. Ramsey* for appellants. *Mr. C. B. Simrall* for appellee.

No. 782. Bliss *v.* McMichael. Appeal from the Circuit Court of the United States for the District of Kentucky. July 3, 1890: Dismissed pursuant to the 28th rule. *Mr. Lawrence Maxwell, Jr.*, and *Mr. Wm. M. Ramsey* for appellants. *Mr. C. B. Simrall* for appellee.

No. 495. Bodart *v.* Schell's Executors. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Dismissed, with costs, per stipulation of counsel. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for plaintiff in error. *Mr. Attorney General* for defendants in error.

No. 132. Bonn *v.* Thrasher. Error to the Supreme Court of the State of Iowa. December 8, 1890: Dismissed, with costs, per stipulation, on motion of *Mr. P. Henry Smyth* for plaintiff in error. *Mr. P. Henry Smyth* for plaintiff in error. *Mr. W. E. Blake* and *Mr. S. W. Packard* for defendants in error.

No. 212. Bowes *v.* Murray. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State

of Montana, on motion of *Mr. George F. Edmunds* for plaintiff in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 5. BRADFORD *v.* MILLER. Error to the Supreme Court of the District of Columbia. October 21, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. D. Mussey* for plaintiff in error. No appearance for defendant in error.

No. 70. BROWN *v.* HAZARD. Appeal from the Supreme Court of the Territory of Washington. November 10, 1890: Dismissed, with costs, pursuant to the 10th rule, and cause remanded to the Supreme Court of the State of Washington. *Mr. Leander Holmes* for appellants. *Mr. A. H. Garland* and *Mr. W. W. Upton* for appellee.

No. 292. BUCKSTAFF *v.* MILES. Error to the Circuit Court of the United States for the District of Nebraska. December 16, 1890: Dismissed, with costs, per stipulation. *Mr. C. S. Montgomery* for plaintiff in error. *Mr. J. M. Woolworth* for defendant in error.

No. 187. BUAL *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 387. CABLE TRAMWAY COMPANY OF OMAHA *v.* OMAHA HORSE RAILWAY COMPANY OF THE CITY OF OMAHA. Appeal from the Circuit Court of the United States for the District of Nebraska. March 24, 1891: Dismissed, with costs, per stipu-

lation. *Mr. J. C. Cowin* for appellant. *Mr. G. E. Pritchett* for appellee.

No. 162. CARSLEY *v.* TRAVIS. Appeal from the Circuit Court of the United States for the Southern District of New York. January 21, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Samuel T. Smith* for appellant. *Mr. C. A. Collins* for appellees.

No. 337. CENTRAL IOWA RAILWAY COMPANY *v.* PIERCE. Error to the Superior Court of the State of Iowa. April 22, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Anthony C. Daly* for plaintiff in error. No appearance for defendants in error.

No. 764. CENTRAL PACIFIC RAILROAD COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. November 21, 1890: Dismissed, on motion of *Mr. Joseph E. McDonald* for appellant. *Mr. Joseph E. McDonald* and *Mr. Joseph K. McCammon* for appellant. *Mr. Attorney General* and *Mr. Solicitor General* for appellee.

No. 1706. CHASE *v.* MASSACHUSETTS HOME MISSIONARY SOCIETY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 8, 1891: Docketed and dismissed, with costs, on motion of *Mr. C. K. Offield* for appellee.

No. 741. CHENEY *v.* HUGHES. Error to the Circuit Court of the United States for the District of Nebraska. January 5, 1891: Dismissed, with costs, on motion of *Mr. William A. McKenney* for plaintiff in error. *Mr. C. E. Magoon* and *Mr. William A. McKenney* for plaintiff in error. No appearance for defendants in error.

No. 1273. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* DALY. Error to the Circuit Court of the United

States for the District of Minnesota. October 3, 1890: Dismissed, pursuant to the 28th rule. *Mr. Charles E. Flandrau* for plaintiff in error. *Mr. A. B. Jackson* for defendant in error.

CHINESE CASES. [The titles[1] of these cases are printed in the margin.] Appeals from the Circuit Court of the United States for the Northern District of California. March 16, 1891: Dismissed, pursuant to the 10th rule. *Mr. S. G. Hilborn*, *Mr. J. J. Scrivner* and *Mr. Thomas D. Riordan* for appellants. *Mr. Attorney General* for appellees.

CHINESE CASES. [The titles[2] of these cases are printed in the margin.] Appeals from the Circuit Court of the United

---

[1] No. 552. *Won Ken Hong* v. *United States.* No. 553. *Leong We* v. *United States.* No. 602. *Lue Wing* v. *United States.* No. 603. *Gun Sin Han* v. *United States.* No. 604. *Mar Hai Yung* v. *United States.* No. 605. *Hom Dai Quong* v. *United States.* No. 606. *Quock Ah Ship* v. *United States.* No. 607. *Leong Choy* v. *United States.* No. 608. *Wong Tsue Jo* v. *United States.* No. 609. *Hom Yee Ling* v. *United States.* No. 610. *Wong Ah Yick* v. *United States.* No. 611. *Day Kim Dung* v. *United States.* No. 612. *Mock Gee* v. *United States.* No. 613. *Fong Jong* v. *United States.* No. 614. *Bing Cheong* v. *United States.* No. 615. *Wong Gun* v. *United States.* No. 616. *Liew Guas Newy* v. *United States.* No. 617. *Kong Gim* v. *United States.* No. 618. *Tow Ngee* v. *United States.* No. 636. *Mar We Jing* v. *United States.* No. 637. *Mar Lick Yew* v. *United States.* No. 650. *Yee Quong Lin* v. *United States.* No. 651. *Yee Quong Nuey* v. *United States.* No. 652. *Wong Li Lip* v. *United States.* No. 653. *Jung Dok Jim* v. *United States.* No. 654. *Wong Tu Choy* v. *United States.* No. 655. *Wong You Choy* v. *United States.* No. 656. *Chin Qui Far* v. *United States.* No. 657. *Wong Qui Fong* v. *United States.* No. 658. *Poon Chuck Bee* v. *United States.* No. 659. *Lee Sing Suey* v. *United States.* No. 660. *Loui Dew Chong* v. *United States.* No. 661. *Loui Lin Gak* v. *United States.* No. 662. *Lem Dor Ang* v. *United States.* No. 663. *Gee Kum Sue* v. *United States.* No. 664. *Lee Ah Doo* v. *United States.* No. 665. *Ching Tai Quong* v. *United States.* No. 666. *Mack Sew Heong* v. *United States.* No. 667. *Gun Hong Sue* v. *United States.* No. 668. *Chung Ping Wo* v. *United States.* No. 678. *Tom Ah Fong* v. *United States.* No. 679. *Choy Yow Yee* v. *United States.* No. 680. *Wo Quan Goon* v. *United States.* No. 681. *Jeong Kee* v. *United States.* No. 1509. *Yee Hoy Jung* v. *United States.*

[2] No. 632. *Hor Quong Pok* v. *United States.* No. 633. *Pun Choy* v. *United States.* No. 634. *Chan Bing Chan* v. *United States.* No. 635. *Lee Sick* v.

States for the Northern District of California. May 11, 1891: Decrees affirmed. *Mr. J. J. Scrivner* for appellants. *Mr. Attorney General* for appellees.

No. 820. CITY OF CHANUTE *v.* TRADER. Error to the Circuit Court of the United States for the District of Kansas. November 25, 1890: Dismissed, with costs, on motion of *Mr. J. W. Cary* in behalf of counsel for plaintiff in error. *Mr. George R. Peck* for plaintiff in error. No appearance for defendant in error.

No. 209. COHEN v. MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 215. COHEN *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 1436. COLE *v.* UNITED STATES. Appeal from the Supreme Court of the District of Columbia. April 13, 1891: Remanded to said Supreme Court for such further proceedings as to that court shall seem meet, upon the application of either party. *Mr. M. F. Morris* and *Mr. George C. Hazelton* for

---

United States. No. 639. *Tang Do* v. *United States.* No. 640. *Lee Kwan* v. *United States.* No. 641. *Lie Cheong* v. *United States.* No. 642. *Lui Hok Chue* v. *United States.* No. 1413. *Leong Kum Ping* v. *United States.* No. 1415. *Tang Wing* v. *United States.*

appellant. *Mr. Attorney General* and *Mr. Solicitor General* for appellee.

No. 250. COTZHAUSEN *v.* KERTING. Error to the Circuit Court of the United States for the Eastern District of Wisconsin. March 30, 1891: Judgment affirmed, with costs and interest. *Mr. Enoch Totten* and *Mr. F. W. Cotzhausen* for plaintiff in error. No appearance for defendant in error.

No. 242. CROCKER *v.* CUTTER TOWER COMPANY. Appeal from the Circuit Court of the United States for the District of Massachusetts. March 20, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Thomas H. Talbot* and *Mr. C. H. Drew* for appellant. *Mr. F. C. Somes* for appellee.

No. 256. CURTISS *v.* HURD. Appeal from the Circuit Court of the United States for the Southern District of New York. March 25, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. John E. Burrill* for appellant. No appearance for appellee.

No. 257. CURTISS *v.* HURD. Appeal from the Circuit Court of the United States for the Southern District of New York. March 25, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. John E. Burrill* for appellant. No appearance for appellee.

No. 206. DAVIS *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiff in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 211. DELLENGER *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dis-

missed with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 100. Detroit Lubricator Company *v.* Lunkenheimer. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. July 11, 1890: Dismissed pursuant to the 28th rule. *Mr. A. P. Hodges* for appellant. *Mr. C. M. Peck* and *Mr. E. W. Rector* for appellee.

No. 210. Dovenspeck *v.* Murray. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 17. Eisner, Administrator *v.* Tarrant. Appeal from the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Dismissed per stipulation of counsel. *Mr. Nathaniel Myers* for appellant. *Mr. C. A. Peabody* for appellees.

No. 332. Ewart Manufacturing Company *v.* Moline Malleable Iron Company. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 17, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Charles K. Offield* for appellant. No appearance for appellees.

No. 691. Fauché *v.* Schell's Executors. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Dismissed, with costs, per stipulation of counsel. *Mr. A. W. Griswold*, *Mr. S. F. Phillips*

and *Mr. Frederic D. McKenney* for plaintiffs in error. *Mr. Attorney General* for defendants in error.

No. 1215. FELLOWS *v.* WALKER. Appeal from the Circuit Court of the United States for the Northern District of Ohio. May 25, 1891: Dismissed, with costs, per stipulation of counsel. *Mr. John H. Doyle* and *Mr. Stevenson Burke* for appellants. *Mr. W. H. A. Read* and *Mr. Clarence Brown* for appellees.

No. 28. FERGUSON *v.* DENT. Appeal from the Circuit Court of the United States for the Western District of Tennessee. October 21, 1890: Dismissed, with costs, pursuant to the 19th rule. *Mr. T. B. Edgington* for appellants. *Mr. D. H. Poston* and *Mr. L. W. Finlay* for appellees.

No. 208. FIRST NATIONAL BANK OF BUTTE *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 1690. FITTON *v.* TAYLOR. Appeal from the Circuit Court of the United States for the District of Vermont. April 22, 1891: Dismissed, with costs, pursuant to the 16th rule, on motion of *Mr. William W. Stickney* for appellee. *Mr. Joel C. Baker* for appellant. *Mr. William W. Stickney* for appellee.

No. 131. FLORANG *v.* CRAIG. Error to the Supreme Court of the State of Iowa. December 8, 1890: Dismissed, with costs, per stipulation, on motion of *Mr. P. Henry Smyth* for plaintiffs in error. *Mr. P. Henry Smyth* for plaintiffs in error. *Mr. W. E. Blake* and *Mr. S. W. Packard* for defendant in error.

Cases not Otherwise Reported.

No. 216. FOSTER *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 30, 1891: Dismissed, with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Montana. *Mr. G. W. Stapleton* and *Mr. J. C. Robinson* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 1635. GARY *v.* MUHLHAUSER. Error to the Circuit Court of the United States for the Northern District of Ohio. April 2, 1891: Dismissed, with costs, on motion of *Mr. Solicitor General* for the plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendants in error.

No. 1584. GIBBONS *v.* BISHOP. Appeal from the Circuit Court of the United States for the Northern District of Florida. January 7, 1891: Docketed and dismissed, with costs, on motion of *Mr. A. G. Riddle* for appellee.

No. 1452. GLENN *v.* SUMNER. Error to the Circuit Court of the United States for the Western District of North Carolina. March 2, 1891: Dismissed, with costs, by the plaintiff in error. *Mr. Charles Marshall* for plaintiff in error. *Mr. S. F. Phillips* for defendant in error.

No. 350. GOOD *v.* BAILEY. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. April 24, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edwin H. Brown* for appellant. *Mr. W. H. Doolittle* for appellees.

No. 245. GREEN *v.* PEOPLE OF COLORADO *ex rel.* MARSH. Error to the Supreme Court of the State of Colorado. March 23, 1891: Dismissed, with costs, on the motion of the plaintiff in error. *Mr. Thomas A. Green* for plaintiff in error. *Mr. L. S. Dixon* for defendants in error.

Cases not Otherwise Reported.

No. 249. GUNTHER *v.* OTTAWA BOTTLE AND FLINT GLASS COMPANY. Error to the Circuit Court of the United States for the Eastern District of Wisconsin. November 26, 1890: Dismissed, per stipulation. *Mr. F. W. Cotzhausen* for plaintiffs in error. *Mr. Hiram T. Gilbert* for defendant in error.

No. 988. HADDOCK *v.* WRIGHT. Error to the Supreme Court of the State of Florida. October 21, 1890: Dismissed, with costs, on motion of *Mr. James Lowndes* for plaintiff in error. *Mr. James Lowndes* for plaintiff in error. *Mr. J. C. Cooper* for defendants in error.

No. 200. HAMILTON *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 202. HAMILTON *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiff in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 207. HAMILTON *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds*, for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

Cases not Otherwise Reported.

No. 243. HANCOCK INSPIRATOR COMPANY *v.* LALLY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. March 20, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Chauncey Smith* for appellant. *Mr. Hector T. Fenton* and *Mr. R. Mason* for appellee.

No. 197. HANSWIRTH *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 198. HANSWIRTH *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 203. HAUSER *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 283. HENDERSON *v.* CENTRAL PASSENGER RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of Kentucky. January 15, 1891: Dismissed, per stipulation, on motion of *Mr. Alexander P. Humphrey* for appellant. *Mr. Alexander P. Humphrey* for appellant. *Mr. George M. Davie* for appellee.

Cases not Otherwise Reported.

No. 1730. HENDERSON *v.* LASATER. Error to the United States Court for the Indian Territory. April 27, 1891: Docketed and dismissed with costs, on motion of *Mr. John Johns* for defendant in error.

No. 123. HERR *v.* BRADLEY. Error to the Supreme Court of the District of Columbia. July 15, 1890: Dismissed, pursuant to the 28th rule. *Mr. Enoch Totten* for plaintiff in error. *Mr. Reginald Fendall* for defendants in error.

No. 365. HILTON *v.* OTOE COUNTY NATIONAL BANK. Appeal from the Circuit Court of the United States for the District of Nebraska. April 30, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. H. Ames* for appellant. No appearance for appellees.

No. 108. HOUSATONIC RAILROAD COMPANY *v.* GRISSELL. Error to the Supreme Court of the State of Connecticut. December 2, 1890: Dismissed, with costs, pursuant to the 10th rule. *Mr. M. W. Seymour* for plaintiff in error. No appearance for defendant in error.

No. 374. HOYT *v.* WALLS. Error to the Circuit Court of the United States for the Western District of Michigan. August 27, 1890: Dismissed, pursuant to the 28th rule. *Mr. D. H. Ball* for plaintiffs in error. *Mr. Joseph H. Chandler* for defendants in error.

No. 295. HUMPHREYS *v.* MCKISSOCK, RECEIVER, ETC. Appeal from the Circuit Court of the United States for the Southern District of Iowa. December 10, 1890: Dismissed, with costs, on motion of *Mr. Wells H. Blodgett* for appellants. *Mr. Thomas H. Hubbard* and *Mr. Wells H. Blodgett* for appellants. No appearance for appellee.

Cases not Otherwise Reported.

No. 432. ISELIN *v.* SCHELL'S EXECUTORS. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Dismissed, with costs, per stipulation of counsel. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for plaintiff in error. *Mr. Attorney General* for defendants in error.

No. 195. JACOBS *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 183. J. L. MOTT IRON WORKS *v.* CASSIDY. Appeal from the Circuit Court of the United States for the Southern District of New York. January 29, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Francis Forbes* for appellant. *Mr. Arthur v. Briesen* for appellees.

No. 182. J. L. MOTT IRON WORKS *v.* S. KIRM. Appeal from the Circuit Court of the United States for the District of New Jersey. January 29, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Francis Forbes* for appellant. *Mr. Causten Browne* for appellees.

No. 947. JOHNSTON *v.* ROBERTSON. Error to the Circuit Court of the United States for the Southern District of New York. May 11, 1891: Judgment reversed, with costs, and cause remanded to be proceeded in according to law and justice, on motion of *Mr. Assistant Attorney General Maury* for the defendant in error, who confessed error. *Mr. Stephen G. Clarke*, *Mr. E. B. Smith* and *Mr. Charles Curie* for plaintiff in error. *Mr. Attorney General* for defendant in error.

Cases not Otherwise Reported.

No. 1508. JUGIRO *v.* BRUSH, AGENT, ETC. Appeal from the Circuit Court of the United States for the Southern District of New York. November 24, 1890: Decree affirmed, with costs, on the authority of *Ex parte Kemmler*, 136 U. S. 436. *Mr. Roger M. Sherman* for appellant. *Mr. Charles F. Tabor* for appellee.

No. 381. KENSLER *v.* COHN. Error to the Circuit Court of the United States for the Western District of Missouri. December 3, 1890: Dismissed with costs, per stipulation. *Mr. Alexander Graves* for plaintiff in error. *Mr. J. H. McGowan* for defendant in error.

No. 1563. KINGSTON COAL COMPANY *v.* MYERS *et al.* Error to the Supreme Court of the State of Pennsylvania. November 24, 1890: Docketed and dismissed, with costs, on motion of *Mr. William A. McKenney* for defendants in error.

No. 361. KLEINSCHMIDT *v.* SECOND NATIONAL BANK OF HELENA. Error to the Supreme Court of the Territory of Montana. April 29, 1891: Dismissed, with costs, pursuant to the 10th rule, and cause remanded to the Supreme Court of the State of Montana. *Mr. E. W. Toole* and *Mr. William Wallace, Jr.*, for plaintiffs in error. No appearance for defendant in error.

No. 156. LAING *v.* FERTIG. Appeal from the Circuit Court of the United States for the Southern District of Ohio. January 19, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edward L. Taylor* for appellants. No appearance for appellees.

No. 328. LANDESMAN *v.* JONASSEN. Appeal from the Circuit Court of the United States for the Southern District of New York. April 16, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. M. B. Philipp* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 217. LAVELL *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 30, 1891: Dismissed, with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Montana. *Mr. G. W. Stapleton* and *Mr. J. C. Robinson* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 260. LELAND *v.* CENTRAL NATIONAL BANK OF THE CITY OF NEW YORK. Error to the Circuit Court of the United States for the District of New Jersey. March 26, 1891: Judgment affirmed, with costs and interest. *Mr. Spencer L. Hillier* for plaintiff in error. *Mr. John Linn* for defendant in error.

No. 261. LELAND *v.* CENTRAL NATIONAL BANK OF THE CITY OF NEW YORK. Appeal from the Circuit Court of the United States for the District of New Jersey. March 26, 1891: Decree affirmed, with costs and interest. *Mr. Spencer L. Hillier* for appellant. *Mr. John Linn* for appellee.

No. 1173. LEWIS *v.* BOARD OF COUNTY COMMISSIONERS OF COMANCHE COUNTY, KANSAS. Error to the Circuit Court of the United States for the District of Kansas. September 30, 1890: Dismissed pursuant to the 28th rule. *Mr. W. H. Rossington* and *Mr. A. L. Williams* for plaintiff in error. *Mr. G. Clemens* for defendant in error.

No. 190. LEWIS *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendants in error.

Cases not Otherwise Reported.

No. 1527. LONG *v.* THAYER. Appeal from the Supreme Court of the United States for the Western District of Missouri. October 27, 1890: Docketed and dismissed, with costs, on motion of *Mr. William A. McKenney* for the appellee.

No. 291. LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* KENTUCKY CENTRAL RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of Kentucky. March 10, 1891: Dismissed, with costs, per stipulation of counsel, on motion of *Mr. James Lowndes* in behalf of counsel. *Mr. Walter Evans* for appellant. *Mr. William M. Ramsey* and *Mr. T. W. Bullitt* for appellees.

No. 1525. MAGONE *v.* BALLIN. Error to the Circuit Court of the United States for the Southern District of New York. April 27, 1891: Dismissed, with costs, on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Stephen G. Clarke* and *Mr. Edwin B. Smith* for defendants in error.

No. 367. MALLAY *v.* ROOT. Appeal from the Circuit Court of the United States for the Western District of Missouri. April 30, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. S. Botsford* for appellant. No appearance for appellee.

No. 73. MARTIN *v.* POND. Appeal from the Circuit Court of the United States for the District of Minnesota. September 8, 1890: Dismissed, pursuant to the 28th rule. *Mr. E. M. Wilson* and *Mr. A. B. Jackson* for appellant. *Mr. George B. Young* for appellee.

No. 326. MAY *v.* MCKEE. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. August 22, 1890: Dismissed, pursuant to the 28th rule. *Mr. J. C. Fraley* for appellants. *Mr. C. C. Cole* for appellees.

Cases not Otherwise Reported.

No. 178 and No. 179. MAYOR ETC. OF THE CITY OF HOUSTON *v.* FAZENDE. Error to the Circuit Court of the United States for the Eastern District of Texas. August 30, 1890: Dismissed, pursuant to the 28th rule. *Mr. H. F. Ring* for plaintiffs in error. *Mr. E. H. Farrar* and *Mr. E. B. Kruttschnitt* for defendants in error.

No. 1392. MCCORMICK HARVESTER MACHINE COMPANY *v.* MINNEAPOLIS HARVESTER WORKS. Appeal from the Circuit Court of the United States for the District of Minnesota. March 2, 1891: Dismissed, per stipulation of counsel. *Mr. R. H. Parkinson* for appellant. *Mr. John R. Bennett* for appellee.

No. 189. MCNAMARA *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 282. MERRITT *v.* MOLLER. Error to the Circuit Court of the United States for the Southern District of New York. March 23, 1891: Dismissed, with costs, on motion of *Mr. Attorney General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendants in error.

No. 953. MEXICAN NATIONAL RAILROAD COMPANY *v.* CARPENTER. Error to the Circuit Court of the United States for the Western District of Texas. April 13, 1891: Dismissed, with costs, per stipulation, on motion of *Mr. W. Hallett Phillips* for the defendant in error. *Mr. Charles C. Beaman* and *Mr. Thomas W. Dodd* for plaintiff in error. *Mr. W. Hallett Phillips* for defendant in error.

Cases not Otherwise Reported.

No. 316. MILLER *v.* EDGERTON. Error to the Supreme Court of the District of Columbia. April 16, 1891: Dismissed, with costs, pursuant to the 16th rule, on motion of *Mr. Assistant Attorney General Maury* for defendants in error. *Mr. Morris S. Miller* for plaintiff in error. *Mr. Attorney General* for defendants in error.

No. 45. MILLER *v.* THOMPSON. Appeal from the Circuit Court of the United States for the Northern District of Georgia. October 31, 1890: Dismissed, with costs, pursuant to the 19th rule. *Mr. J. Carroll Payne* for appellant. *Mr. W. T. Turnbull* for appellee.

No. 697. MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY *v.* STATE OF MINNESOTA *ex rel.* CITY OF MINNEAPOLIS. Error to the Fourth Judicial District Court of Hennepin County, Minnesota. November 26, 1890: Dismissed, with costs, per stipulation. *Mr. J. D. Springer* for plaintiff in error. *Mr. R. D. Russell* for defendant in error.

No. 205. MORRIS *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 89. NEW AMERICAN FILE COMPANY *v.* NICHOLSON FILE COMPANY. Appeal from the Circuit Court of the United States for the District of Rhode Island. November 19, 1890: Dismissed, per stipulation. *Mr. Chauncey Smith* for appellant. *Mr. W. H. Thurston* for appellee.

No. 30. NEW ENGLAND MORTGAGE SECURITY COMPANY *v.* GROOVES. Appeal from the Circuit Court of the United States

for the District of Oregon. October 22, 1860: Dismissed, with costs, pursuant to the 19th rule. *Mr. J. D. Campbell* for appellant. No appearance for appellees.

No. 1180. NEW YORK AND NEW ENGLAND RAILROAD COMPANY *v.* WOODRUFF. Error to the Supreme Court of Errors of the State of Connecticut. December 19, 1890: Dismissed, per stipulation, on motion of *Mr. Simeon E. Baldwin* for plaintiff in error. *Mr. Simeon E. Baldwin* for plaintiff in error. *Mr. Henry C. Robinson* for defendants in error.

No. 1365. NEW YORK AND NEW ENGLAND RAILROAD COMPANY *v.* WOODRUFF. Error to the Superior Court of Hartford County, State of Connecticut. December 19, 1890: Dismissed, per stipulation, on motion of *Mr. Simeon E. Baldwin* for plaintiff in error. *Mr. Simeon E. Baldwin* for plaintiff in error. *Mr. Henry C. Robinson* for defendants in error.

No. 196. MISSLER *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiff in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 1704. NYBLADH *v.* HATERIUS. Error to the Circuit Court of the United States for the Northern District of Illinois. April 7, 1891: Docketed and dismissed, with costs, on motion of *Mr. John Paul Jones* for the defendants in error.

No. 1548. OAKLAND ELECTRIC LIGHT AND MOTOR COMPANY *v.* KEITH. Error to the Circuit Court of the United States for the Northern District of California. November 10, 1890:

Docketed and dismissed, with costs, on motion of *Mr. John Ridout* for defendant in error.

No. 63. O'Bryan *v.* Senter. Error to the Circuit Court of the United States for the Eastern District of Arkansas. November 10, 1890: Judgment affirmed, with costs, and interest. *Mr. S. F. Clark* and *Mr. J. M. Moore* for plaintiffs in error. *Mr. U. M. Rose* and *Mr. G. B. Rose* for defendants in error.

No. 397. Omaha Horse Railway Company *v.* Cable Tramway Company. Appeal from the Circuit Court of the United States for the District of Nebraska. March 24, 1891: Dismissed, with costs, per stipulation. *Mr. G. E. Pritchett* for appellant. *Mr. J. C. Cowin* for appellee.

No. 1372. One Distilling Apparatus, by A. Wehrle, Claimant *v.* United States. Error to the Circuit Court of the United States for the Northern District of Ohio. November 10, 1890: Dismissed, per stipulation, on motion of *Mr. Attorney General* for defendant in error. *Mr. George H. Lothrop* for plaintiff in error. *Mr. Attorney General* and *Mr. Alphonso Hart* for defendant in error.

No. 188. Owsley *v.* Murray. Error to the Supreme Court of the Territory of Montana. January 30, 1891: Dismissed, with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Montana. *Mr. E. W. Toole* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 1335. Pacific Express Company *v.* McDowell. Error to the Circuit Court of the United States for the Eastern District of Texas. January 5, 1891: Judgment affirmed, with costs and interest, by a divided court. *Mr. Sawnie Roberson*

and *Mr. C. A. Culberson* for plaintiff in error. *Mr. William A. McKenney* for defendant in error.

No. 419. PACIFIC EXPRESS COMPANY *v.* PICKARD, COMPTROLLER. Error to the Supreme Court of the State of Tennessee. March 13, 1891: Judgment reversed, with costs, by consent of counsel for defendants in error, who confessed error, and cause remanded to be proceeded in according to law and justice. *Mr. R. J. Morgan* and *Mr. L. B. McFarland* for plaintiff in error. *Mr. George W. Pickle* for defendants in error.

No. 571. PACIFIC MAIL STEAMSHIP COMPANY *v.* O'ROURKE. Error to the Circuit Court of the United States for the Northern District of California. September 22, 1890: Dismissed, pursuant to the 28th rule. *Mr. Milton Andros* for plaintiff in error. *Mr. W. W. Morrow* for defendant in error.

No. 173. PAILLARD *v.* JACOT. Appeal from the Circuit Court of the United States for the Southern District of New York. November 26, 1890: Dismissed per stipulation. *Mr. Paul Goepel* for appellants. *Mr. Arthur v. Briesen* for appellees.

No. 163. PEAK *v.* SWINDLE. Error to the Supreme Court of the State of Texas. January 21, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. C. Foster* for plaintiff in error. No appearance for defendants in error.

No. 1306. PEASE *v.* RITCHIE. Error to the Supreme Court of the State of Illinois. November 6, 1890: Dismissed, with costs, on motion of *Mr. Henry A. Gardner* in behalf of counsel for plaintiffs in error. *Mr. S. S. Gregory*, *Mr. Wm. M. Booth* and *Mr. James S. Harlan* for plaintiffs in error. No appearance for defendants in error.

Cases not Otherwise Reported.

No. 278. PENNSYLVANIA RAILROAD COMPANY *v.* LAUGHLIN. Error to the Circuit Court of the United States for the District of New Jersey. March 30, 1891: Dismissed, per stipulation. *Mr. J. B. Vredenburgh* for plaintiff in error. *Mr. Cortlandt Parker* for defendant in error.

No. 1109. PEOPLE OF THE STATE OF NEW YORK *ex rel.* THOMAS C. PLATT *v.* WEMPLE. Error to the Supreme Court of the State of New York. December 2, 1890: Dismissed, per stipulation. *Mr. W. W. MacFarland* for plaintiff in error. *Mr. Charles F. Tabor* for defendant in error.

No. 1588. PHELPS *v.* ELLIOTT. Appeal from the Circuit Court of the United States for the Southern District of New York. March 23, 1891: Dismissed, with costs, except the cost of printing the record and the clerk's fees in connection therewith. *Mr. Edward Lander* for appellant. *Mr. John Selden* and *Mr. William G. Choate* for appellees.

No. 386. PLANO MANUFACTURING COMPANY *v.* GRAHAM. Appeal from the Circuit Court of the United States for the Northern District of Illinois. March 18, 1891: Decree reversed, without cost to either party, in this court, and cause remanded with directions to dismiss the bill of complaint at complainant's cost, per stipulation of counsel. *Mr. L. L. Coburn* and *Mr. J. M. Thacher* for appellant. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for appellees.

No. 600. POOLE *v.* WEST POINT BUTTER AND CHEESE ASSOCIATION. Appeal from the Circuit Court of the United States for the District of Nebraska. March 24, 1891: Dismissed, per stipulation, on motion of *Mr. John W. Cary* in behalf of counsel. *Mr. W. C. Goudy* for appellants. *Mr. Elihu Root* for appellees.

Cases not Otherwise Reported.

No. 192. REINS *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 193. RICHARDSON *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 213. ROACH *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiff in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiff in error. *Mr. Walter H. Smith* for defendant in error.

No. 451. ROBERTSON *v.* HERRMAN. Error to the Circuit Court of the United States for the Southern District of New York. May 11, 1891: Dismissed, with costs, on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. E. B. Smith* for defendants in error.

No. 1336. ROBERTSON *v.* PATUREL. Error to the Circuit Court of the United States for the Southern District of New York. May 11, 1891: Dismissed, with costs, on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Edward Hartley* and *Mr. Walter H. Coleman* for defendant in error.

Cases not Otherwise Reported.

No. 85. ROBERTSON *v.* WEDDIGAN. Error to the Circuit Court of the United States for the Southern District of New York. November 18, 1890: Dismissed, with costs, on motion of *Mr. Solicitor General* for the plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Stephen G. Clarke* for defendants in error.

No. 824. ROUNTREE *v.* DAIL. Error to the Circuit Court of the United States for the Eastern District of North Carolina. October 27, 1890: Dismissed, with costs, on motion of *Mr. Frederic D. McKenney* of counsel for plaintiffs in error. *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for plaintiffs in error. No appearance for defendants in error.

No. 201. SANDS *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 96. SAYLOR *v.* UNITED STATES. Error to the Circuit Court of the United States for the Eastern District of Michigan. November 24, 1890: Dismissed, pursuant to the 10th rule. *Mr. Benton Hanchett* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 1442. SEEBERGER *v.* GROMMES. Error to the Circuit Court of the United States for the Northern District of Illinois. January 12, 1891: Dismissed, with costs, on motion of *Mr. Attorney General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendants in error.

No. 1475. SEEBERGER *v.* OWSLEY. Error to the Circuit Court of the United States for the Northern District of Illinois.

January 12, 1891: Dismissed, with costs, on motion of *Mr. Attorney General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendants in error.

No. 423. SCHELL'S EXECUTORS *v.* JOHNSON. No. 424. SAME *v.* WISE. No. 425. SAME *v.* LOTTNER. No. 429. SAME *v.* SORCHAN. No. 431. SAME *v.* ISELIN. No. 486. SAME *v.* RICKARDS. No. 487. SAME *v.* MORRISSON. No. 492. SAME *v.* WOODBRIDGE. No. 494. SAME *v.* BODART. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Judgments affirmed, with costs and interest, per stipulation of counsel. *Mr. Attorney General* for plaintiffs in error. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for defendants in error.

No. 165. SCHELL'S EXECUTORS *v.* POLLITZ. Error to the Circuit Court of the United States for the Southern District of New York. January 12, 1891: Dismissed, with costs, on motion of *Mr. Attorney General Miller* for plaintiffs in error. *Mr. Attorney General* for plaintiffs in error. *Mr. S. F. Phillips*, *Mr. A. W. Griswold* and *Mr. Frederic D. McKenney* for defendants in error.

No. 214. SCHMIDT *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 699. SCHOONER "W. P. SAYWARD," ETC., COOPER, OWNER *v.* UNITED STATES. Appeal from the District Court of the United States for Alaska. January 12, 1891: Dismissed, on motion of *Mr. Calderon Carlisle* for appellant. *Mr. Joseph H. Choate*, *Mr. Calderon Carlisle* and *Mr. Charles Strauss* for appellant. *Mr. Attorney General* for appellee.

Cases not Otherwise Reported.

No. 107. SHICKLE, HARRISON AND HOWARD IRON COMPANY *v.* SOUTH ST. LOUIS FOUNDRY COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. August 29, 1890: Dismissed, pursuant to the 28th rule. *Mr. R. H. Parkinson* for appellant. *Mr. George H. Knight* for appellees.

No. 1739. SLOCUM *v.* BRUSH. Appeal from the Circuit Court of the United States for the Southern District of New York. May 11, 1891: Decree affirmed, with costs. *Mr. R. J. Haire* and *Mr. George A. Hooper* for appellant. *Mr. Charles F. Tabor* for appellee.

---

253. SMALE *v.* MITCHELL. Error to the Circuit Court of the United States for the Northern District of Illinois. March 24, 1891: Dismissed, with costs, by plaintiffs in error. *Mr. John I. Bennett* for plaintiffs in error. *Mr. William Prescott* for defendant in error.

No. 1672. SMILER *v.* BRUSH. Appeal from the Circuit Court of the United States for the Southern District of New York. May 11, 1891: Decree affirmed, with costs. *Mr. R. J. Haire* for appellant. *Mr. Charles F. Tabor* for appellee.

No. 430. SORCHAN *v.* SCHELL'S EXECUTORS. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Dismissed, with costs, per stipulation of counsel. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for plaintiffs in error. *Mr. Attorney General* for defendants in error.

No. 21. SPILL *v.* CELLULOID MANUFACTURING COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. October 23, 1890: Dismissed, with costs, pursuant to the 15th rule, on motion of

Mr. Thomas N. Williams in behalf of counsel for appellee. *Mr. H. M. Ruggles* for appellant. *Mr. W. D. Shipman* and *Mr. J. E. Hindon Hyde* for appellee.

No. 199. STEEL *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 1799. STOCKTON, ATTORNEY GENERAL OF NEW JERSEY *v.* BALTIMORE AND NEW YORK RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of New Jersey. May 25, 1891: Docketed and dismissed, with costs, on motion of *Mr. William A. McKenney* for the appellees.

No. 544. STORY *v.* SIMPSON. Error to the Superior Court of the State of Massachusetts. November 26, 1890: Dismissed, per stipulation. *Mr. Charles Theodore Russell* and *Mr. Charles Theodore Russell, Jr.*, for plaintiffs in error. *Mr. Thomas Savage* for defendant in error.

No. 258. STRAIGHT *v.* CARTER. Error to the Circuit Court of the United States for the Northern District of Illinois. July 31, 1890: Dismissed, pursuant to the 28th rule. *Mr. Edwin W. Keightly* for plaintiff in error. *Mr. William J. Campbell* for defendants in error.

No. 903. SUTPHIN *v.* SWIFT. Error to the Circuit Court of the United States for the Northern District of Illinois. June 12, 1890: Dismissed, pursuant to the 28th rule. *Mr. Charles H. Wood* for plaintiff in error. *Mr. Albert H. Veeder* for defendant in error.

Cases not Otherwise Reported.

No. 589. SWEETLAND *v.* BLATCHFORD. Appeal from the Supreme Court of the District of Columbia. October 21, 1890: Dismissed, with costs, on motion of *Mr. M. F. Morris* for appellant. *Mr. J. J. Darlington*, *Mr. Wm. E. Earle* and *Mr. M. F. Morris* for appellant. *Mr. Walter D. Davidge* for appellee.

No. 220. TALBOTT *v.* BOARD OF COMMISSIONERS OF SILVER BOW COUNTY, MONTANA. Error to the Supreme Court of the Territory of Montana. March 16, 1891: Dismissed, and cause remanded to the Supreme Court of the State of Montana. *Mr. J. W. Forbis* for plaintiff in error. *Mr. J. H. McGowan* for defendant in error.

No. 191. TALENT *v.* MURRAY. Error to the Supreme Court of the Territory of Montana. January 22, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana, on motion of *Mr. George F. Edmunds* for plaintiffs in error. *Mr. George F. Edmunds* and *Mr. Hiram Knowles* for plaintiffs in error. *Mr. Walter H. Smith* for defendant in error.

No. 1652. TENNANT *v.* COX. Appeal from the Circuit Court of the United States for the Northern District of Texas. November 24, 1890: Docketed and dismissed, with costs, on motion of *Mr. Halbert E. Paine* for appellees.

No. 1471. TEXAS LAND AND CATTLE COMPANY (LIMITED) *v.* SCOTT. Error to the Circuit Court of the United States for the Western District of Texas. November 10, 1890: Dismissed for the want of jurisdiction. *Mr. C. W. Ogden* for plaintiff in error. *Mr. A. W. Houston* for defendant in error.

No. 440. TOWN OF DANVILLE *v.* BROWN. Appeal from the Circuit Court of the United States for the Western District of Virginia. June 14, 1890: Dismissed, pursuant to the 28th

rule. *Mr. J. Randolph Tucker*, *Mr. G. C. Cabell* and *Mr. H. H. Marshall* for appellant. *Mr. Frank P. Clark* for appellees.

No. 1183. ULRICHS *v.* HARRISON. Error to the Circuit Court of the United States for the Southern District of California. June 4, 1890: Dismissed, pursuant to the 28th rule. *Mr. A. L. Rhodes* for plaintiffs in error. *Mr. William Matthews* for defendant in error.

No. 154. UNITED STATES *v.* BADEAU. Error to the Circuit Court of the United States for the Southern District of New York. January 16, 1891: Dismissed, on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. S. G. Clarke* and *Mr. E. B. Smith* for defendant in error.

Nos. 358 and 359. UNITED STATES *v.* BALL. Error to the Circuit Court of the United States for the District of Oregon. April 27, 1891: Dismissed, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendants in error.

No. 112. UNITED STATES *v.* BRIGGS. Error to the Circuit Court of the United States for the Northern District of California. December 3, 1890: Dismissed, on motion of *Mr. Attorney General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. W. W. Morrow* for defendants in error.

No. 376. UNITED STATES *v.* BRYAN, ADMINISTRATOR. Error to the Circuit Court of the United States for the District of Oregon. May 1, 1891: Dismissed, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. John F. Dillon* for defendants in error.

Cases not Otherwise Reported.

No. 293. UNITED STATES *v.* BULLARD. Appeal from the Circuit Court of the United States for the District of Kansas. April 2, 1891: Dismissed, on motion of *Mr. Solicitor General* for the appellant. *Mr. Attorney General* for appellant. No appearance for appellees.

No. 1666. UNITED STATES *v.* CARTER. Appeal from the District Court of the United States for the Eastern District of Tennessee. May 25, 1891: Decree reversed, and cause remanded with directions for further proceedings therein in conformity with the opinion of this court in the case of *United States* v. *Ewing*, No. 1117 of the present term, per stipulation of counsel and on motion of *Mr. Assistant Attorney General Cotton* for the appellant. *Mr. Attorney General* for appellant. *Mr. George A. King* for appellee.

No. 48. UNITED STATES *v.* CENTRAL PACIFIC RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of California. March 3, 1891: Dismissed and remanded to the Circuit Court of the United States for the Northern District of California, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. Joseph K. McCammon* and *Mr. Charles H. Tweed* for appellee.

No. 1435. UNITED STATES *v.* COLE. Appeal from the Supreme Court of the District of Columbia. April 9, 1891: Dismissed, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. M. F. Morris* and *Mr. George C. Hazleton* for appellee.

No. 129. UNITED STATES v. FORSE. Error to the Circuit Court of the United States for the Northern District of California. January 5, 1891: Dismissed, on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. L. D. Latimer* for defendant in error.

Cases not Otherwise Reported.

No. 1744. UNITED STATES *v.* JOHNSON. Appeal from the Supreme Court of the Territory of Utah. May 25, 1891: Dismissed by consent of *Mr. Assistant Attorney General Cotton* for the appellant, in open court, on motion of *Mr. George A. King* for the appellee. *Mr. Attorney General* for appellant. *Mr. George A. King* for appellee.

No. 1767. UNITED STATES *v.* MALONEY *et al.* Appeal from the Court of Claims. May 11, 1891: Docketed and dismissed, on motion of *Mr. Frank S. Bright* for appellees.

No. 32. UNITED STATES *v.* NORTHERN PACIFIC RAILROAD COMPANY. Appeal from the Supreme Court of the Territory of Montana. October 21, 1890: Dismissed and remanded to the Circuit Court of the United States for the District of Montana, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. James McNaught* for appellee.

No. 1197. UNITED STATES *v.* RICHMOND MINING COMPANY OF NEVADA. Error to the Circuit Court of the United States for the District of Nevada. October 21, 1890: Dismissed, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Thomas Wren* for defendant in error.

No. 312. UNITED STATES *v.* STAFFORD. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. March 30, 1891: Dismissed, on motion of *Mr. Attorney General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. C. E. Morgan, Jr.*, for defendant in error.

No. 1405. UNITED STATES TRUST COMPANY OF NEW YORK *v.* WABASH & WESTERN RAILWAY COMPANY. Appeal from the Circuit Court of the United States for the Southern District

of Iowa. March 2, 1891: Dismissed, with costs, by appellants. *Mr. Theodore Sheldon* for appellants. No appearance for appellee.

No. 354. UTAH AND NORTHERN RAILWAY COMPANY *v.* PALMER. Error to the Supreme Court of the Territory of Idaho. April 29, 1891: Dismissed, with costs, and remanded to the Supreme Court of the State of Idaho, on motion of *Mr. Harry Hubbard* for plaintiff in error. *Mr. John F. Dillon* for plaintiff in error. *Mr. H. W. Smith* for defendants in error.

No. 58. WESTERN ELECTRIC COMPANY *v.* REEDY. Appeal from the Circuit Court of the United States for the Southern District of Ohio. November 10, 1890: Decree affirmed, with costs, by a divided court. *Mr. George P. Barton* for appellant. *Mr. E. E. Wood* and *Mr. Edward Boyd* for appellee.

No. 377. WHEELER *v.* HART. Appeal from the Circuit Court of the United States for the Northern District of New York. April 29, 1891: Dismissed, with costs, on authority of counsel for appellants. *Mr. Edmund Wetmore* and *Mr. Edwin H. Risley* for appellants. No appearance for appellees.

No. 1449. WHITMAN *v.* ATWATER. Error to the Circuit Court of the United States for the District of Minnesota. January 5, 1891: Dismissed, with costs, on motion of *Mr. William A. McKenney* for plaintiff in error. *Mr. William A. McKenney* for plaintiff in error. *Mr. Charles H. Armes* for defendant in error.

No. 176. WILLIS *v.* JUNE. Appeal from the Circuit Court of the United States for the Southern District of New York. January 26, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. William A. Jenner* and *Mr. Jerome Buck* for appellant. *Mr. H. D. Donnelly* for appellee.

Cases not Otherwise Reported.

No. 1571. WOOD *v.* BEACH. Error to the Supreme Court of the State of Kansas. December 8, 1890: Docketed and dismissed, with costs, on motion of *Mr. A. B. Browne* for defendants in error.

No. 493. WOODBRIDGE *v.* SCHELL'S EXECUTORS. Error to the Circuit Court of the United States for the Southern District of New York. March 2, 1891: Dismissed, with costs, per stipulation of counsel. *Mr. A. W. Griswold*, *Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for plaintiff in error. *Mr. Attorney General* for defendants in error.

No. 1580. WOODIN *v.* CHAMBERLAIN. Appeal from the Supreme Court of the Territory of Idaho. January 5, 1891: Docketed and dismissed, with costs, on motion of *Mr. John Goode* for appellee.

APPENDIX.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1890, ENDING MAY 25, 1891.

1. *Original Docket.*

Number of cases	16
Number of cases disposed of	7
Leaving undisposed of	9

2. *Appellate Docket.*

Number of cases on the Appellate Docket at the close of October Term, 1889, not disposed of	1177
Number of cases docketed during October Term, 1890	623
Total	1800
Number of cases disposed of, October Term, 1890	610
Number of cases remaining undisposed of	1190
Number of cases continued under advisement from October Term, 1889	18
Argued	227
Submitted	108
Continued	39
Passed	5
Affirmed	248
Reversed	104
Dismissed — settled, and by authority of appt. or plff.-error	104
Dismissed — under Rules 6, 9, 10, 15, 16 and 19	153
Questions answered	1

INDEX.

COMMON LAW.

See COURTS OF GREAT BRITAIN.

CONFLICT OF LAWS.

See RECEIVER, 1.

CONSTITUTIONAL LAW.

CONSULAR COURTS.

See CONSTITUTIONAL LAW, 16, 17, 18.

CONTEMPT.

See MANDAMUS, 2.

CONTRACT.

1. A contract by a mortgagee, made on receiving the mortgage, that he will hold the securities, and that the mortgagor may "sell the property named in said deeds and make titles thereto, the proceeds of the sale to go to the credit of" the mortgagee, gives to the mortgagor power to sell for cash, free from the mortgage, but not to exchange for other lands; and does not cast upon the purchaser for cash, the duty of seeing that the mortgagor appropriates the proceeds according to the agreement. *Woodward* v. *Jewell*, 247.
2. Such a contract is not a power of attorney to the mortgagor to sell land of which the title is in the mortgagee, but only the consent of a lien holder to the release of his lien in case a sale is made, and it is not required by the laws of Georgia to be executed before two witnesses. *Ib.*
3. Several railroad companies combined to construct an elevator, to be connected with their respective roads, each to contribute an equal sum towards its cost, and each to receive corresponding certificates of stock in a corporation organized to take title to the elevator and to construct it. This arrangement was carried out. *Held*, (1) That the interest of each company in it was as a stockholder in the company which constructed it; (2) That no company had an interest in the property itself which it could mortgage; (3) That such stock would not pass to a mortgagee of one of the railroads under a general description as an appurtenance to the road. *Humphreys* v. *McKissock*, 304.

See INSURANCE, 1, 3;
JURISDICTION, A, 8.

COPYRIGHT.

1. A label placed upon a bottle to designate its contents is not a subject for copyright. *Higgins* v. *Keuffel*, 428.
2. In order to maintain an action for an infringement of the ownership of a label, registered under the provisions of the act of June 18, 1874, 18 Stat. 78, 79, c. 301, it is necessary that public notice of the registration should be given by affixing the word "copyright" upon every copy of it. *Ib.*

COURT AND JURY.

1. In an action against a railroad company by a passenger to recover damages for injuries received at the station of arrival by reason of its improper construction, if there be conflicting evidence, the case should

COURT MARTIAL.

COURTS OF GREAT BRITAIN.

CRIMINAL LAW.

CUSTOMS DUTIES.

JAPAN.

JUDGMENT.

JURISDICTION.

A. OF THE SUPREME COURT OF THE UNITED STATES.

LOUISIANA.

MANDAMUS.

MANDATE.

MISSISSIPPI.

PARDON.

PATENT FOR INVENTION.

PLEADING.

PRACTICE.

PRINCIPAL AND AGENT.

PUBLICATION OF NOTICE.

RAILROAD.

RECEIVER.

REHEARING.

REMOVAL OF CAUSES.

RIPARIAN RIGHTS.

SAILOR.

See SHIP AND SHIPPING.

SERVICE OF PROCESS.

See PUBLICATION OF NOTICE.

SHIP.

SPIRITUOUS LIQUORS.

See CONSTITUTIONAL LAW, 19.

STALE CLAIMS.

See PUBLIC LAND, 3.

STATUTE.

A. CONSTRUCTION OF STATUTES.

A law or treaty should be construed so as to give effect to the object designed, and to that end all its provisions must be examined in the light of surrounding circumstances. *In re Ross*, 453.

B. STATUTES OF THE UNITED STATES.

See CHINESE;
CONSTITUTIONAL LAW, 1, 16, 17, 19;
COPYRIGHT, 2;
CRIMINAL LAW, 4, 6, 8;
CUSTOMS DUTIES, 1;
FEES, 1 (7), 9;
INTERNAL REVENUE;
JURISDICTION, C, 1; D;
PUBLIC LAND, 1, 2;
TERRITORIAL LEGISLATURES.

C. OF THE STATES AND TERRITORIES.

Arkansas. *See* TAX AND TAXATION.
California. *See* CONSTITUTIONAL LAW, 10.
Illinois. *See* BANK CHECK; LEASE, 4.
Mississippi. *See* CONSTITUTIONAL LAW, 5.
Missouri. *See* INSURANCE, 2.
Oregon. *See* CONSTITUTIONAL LAW, 3; PUBLIC LAND; SWAMP LAND.
Virginia. *See* LOCAL LAW, 2.

SUBROGATION.

See MUNICIPAL CORPORATION, 1 (1).

SUPERVISORS OF ELECTIONS.

See FEES, 2, 3.

SWAMP LANDS.

The act of the legislature of Oregon of January 17, 1879, repealing the act of October 26, 1870, concerning the swamp and overflowed lands, and making new regulations concerning the same, did not invalidate an application, duly made before its passage, to purchase such lands; but such an application could be perfected by making the payments required by the act of 1870 after its repeal, but within the time prescribed by that act; and a title thus acquired is good against the State. *Pennoyer* v. *McConnaughy*, 1.

TAX AND TAXATION.

TERRITORIAL LEGISLATURES.

TRADE MARK.

See COPYRIGHT, 2.

TREATY.

See JAPAN;
STATUTE, A.

VESSEL.

See SHIP.

VIRGINIA.

See LOCAL LAW, 2.

WILL.

See EQUITY, 2.