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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1891

J. C. BANCROFT DAVIS

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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.

Mr. Justice Bradley died at his residence, in Washington, on the morning of January 22, 1892.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1891.

SPARHAWK *v.* YERKES.

SPARHAWK *v.* CACKLEY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 56, 57. Argued October 28, 1891. — Decided December 7, 1891.

In December, 1871, Y., who was a member of the stock exchanges in New York and in Philadelphia, was declared to be a bankrupt. At that time his seat in the New York Exchange was worth about $4000, and the other about $2000. By the rules of each, membership, in case of failure, was suspended until settlement with its members who were creditors, and the seat in each was liable to be sold and the proceeds applied to the payment of the debts of such of its members. At the time of his failure the indebtedness of Y. to members of the New York Exchange amounted to about $8500, and to members of the Philadelphia Exchange to nearly $22,000. The assignees notified each exchange of their appointment, but took no steps to adjust the debts or to acquire the seats, which were appraised as of no value. Within two years Y. notified them that assessments on the seats were overdue. They told him he was the proper party to pay them, and that what he might pay would be recognized as properly to be refunded, in case the seats should be sold by them. Y. was discharged in bankruptcy in 1873. From his private means he paid all assessments overdue and from time to time maturing, and eventually settled with all the creditor members. Such members had proved their

Statement of the Case.

debts against his estate in bankruptcy, and in the several settlements he had the benefit of the dividends (28 per cent) paid by the assignees. Having thus settled all such debts he was, in June, 1883, reinstated in his membership in the Philadelphia board, and in December, 1883, in his membership in the New York board. At that time the value of the Philadelphia seat was about $6000, and of the New York seat about $20,000. In November, 1885, the assignees filed bills against Y. and each board, to have these memberships decreed to be assets of the bankrupt's estate. *Held,*

(1) That the assignees must be deemed to have elected not to accept these rights as property of the estate;

(2) That Y. was not their trustee in expending his own money to give value to a property which was worthless and abandoned;

(3) That the assignees could not be permitted to avail themselves of the result of his action, or to take the property to work out a return of the dividends paid to these particular creditors.

THE court stated the case as follows:

Charles T. Yerkes, Jr., made a voluntary assignment for the benefit of creditors to Joseph M. Pile, October 21, 1871. On December 13, 1871, he was adjudicated a bankrupt in the District Court of the United States for the Eastern District of Pennsylvania, on a creditors' petition, filed November 10, 1871, and appellants were appointed his assignees, January 12, and the assignment of the bankrupt estate was duly made to them, January 24, 1872. In February, 1872, the bankruptcy court directed a transfer by Pile of the estate unadministered by him to the bankrupt's assignees, and this was subsequently executed and delivered.

Ninety-nine creditors proved debts in the aggregate sum of $829,198.45, upon which dividends were declared and paid as follows: July 19, 1872, ten per cent; May 12, 1873, nine per cent; April 5, 1878, eight per cent; and January 30, 1880, one per cent.

At the time of the adjudication Yerkes was a member of the New York and Philadelphia Stock Exchanges, which, it is conceded, were unincorporated associations. These memberships were included in the schedules filed in the bankruptcy proceedings, and therein stated to be "of no specific value," and in the inventory and appraisment of the estate subsequently made they were appraised as of no value. The

Philadelphia membership was then worth not over $2000 and the New York membership about $4000, but the bankrupt was indebted to members of the Philadelphia Stock Exchange in the sum of $21,842.11, and to members of the New York Stock Exchange in the sum of $8522.99, and under the rules of both associations membership was suspended until settlement with creditors, and, unless settlements were made as provided, the seats were to be sold and the proceeds divided among the creditor members. The assignees sent to the associations notice of their appointment, in January, 1872, and an additional notice to the New York Exchange, in May, 1873, stating that it was their duty to realize the value of the seat, and asking the president to indicate what form, if any, was prescribed by the rules for transfer or sale. They also addressed a communication to the Philadelphia board, and perhaps to both, in November, 1883.

At some time within two years after the assignment, Yerkes brought to the assignees a notice of an assessment or charge due to one of the associations on account of the membership, and asked them what they were going to do about its payment; they answered that as the claim had been made upon him, they thought he was the proper party to pay it, and that anything he paid would be recognized as properly to be refunded out of anything the assignees might realize for the seats.

On October 3, 1873, the bankrupt was discharged. In 1876 *Hyde* v. *Woods*, 94 U. S. 523, was decided, sustaining the validity of rules of stock exchanges providing for the application of the proceeds of sales of memberships to the debts due by members, which the assignees in these cases had previously been advised by counsel was the law. As testified by one of the assignees, they had not the slighest expectation of paying dividends aggregating over thirty-five per cent, and did not suppose that they could realize anything from the Philadelphia seat, because the indebtedness of the bankrupt to its members was largely in excess of its value, and of any dividend they expected his estate would pay (which was also true of the New York seat); they supposed *Hyde* v. *Woods* ruled the New York as well as the Philadelphia case, and

were instructed by counsel that the seats could not be made available so long as they were encumbered with an indebtedness to members of the guilds to which Mr. Yerkes belonged; and they did not propose to take any steps until they learned, in the fall of 1883, of Judge McKennan's decision, announced the 28th of the preceding March, in *In re Werder*, 15 Fed. Rep. 789.

Yerkes testified to several conversations, in which it was generally conceded by the assignees that they had no rights in the memberships, and that he had no idea that they ever expected to make such claim; while one of the assignees said that after the decision in *Hyde* v. *Woods* there was a conversation between Yerkes and them, in which it was admitted, that, for the time being, their proceedings were suspended as to further action, but that they never withdrew the claim.

From 1871 to 1876 the assignees took no steps to compel a conveyance or sale of the seats, and assumed no liability or responsibility for the assessments and charges, nor did they for eight years thereafter. In the meantime, Yerkes by personal solicitation persuaded the members of the associations to withhold for his personal benefit any demand for a sale. He paid from year to year the periodical assessments, and also either in money out of his own earnings or in services, the debts due the members, which debts had been reduced by the dividends paid by the estate. On June 18, 1883, the bankrupt was reëlected to membership in the Philadelphia Exchange, and on December 27, 1883, to membership in the New York Exchange, having made his settlements some time before. The value of the seats in both exchanges increased considerably in the lapse of time. In the New York board the value increased to some $20,000 in 1883, and in the Philadelphia board to about $6000 in the same year. Subsequently the New York seats rose in value to between thirty and thirty-four thousand dollars and the Philadelphia seats to between five and eight thousand dollars. As has been stated, by the rules of the exchanges, insolvency of a member or a failure to fulfil his contracts (bankruptcy being also specifically named in the Philadelphia rules), in effect worked suspension of mem-

bership, and there was a provision for the sale of seats after one year, on failure of the suspended member to settle with his creditors. In the rules of the New York board there was a provision for an extension of the time for settlement. Under both sets of rules a suspended member might be reinstated if the governing committee reported favorably upon his application. On April 28, 1884, the assignees presented a petition in the bankruptcy court for the sale of the memberships, which was dismissed, and on November 14, 1885, filed two bills in equity to accomplish the same purpose against the bankrupt and members of the New York and Philadelphia boards. The bills prayed that it might be decreed that the memberships were assets of the bankrupt's estate and vested in the complainants as his assignees; that they be sold and complainants' vendees admitted to membership in place of Yerkes; that if the court should determine that Yerkes was entitled to be reimbursed for any moneys paid by him for or on account of the memberships, such reimbursement should be decreed out of the proceeds of the sale, or if it should be determined that Yerkes was entitled to retain the memberships, he be ordered to account for the market value of the same and to pay complainants such amounts as they had paid as dividends upon the debts owed by Yerkes to his fellow-members of the association at the time of his insolvency and bankruptcy.

The cases were brought to issue, evidence taken, and a master's report made, to which exceptions were filed and hearing had thereon. The master (Mason) held that, by virtue of the assignment in bankruptcy, the assignees' rights in this peculiar property in these memberships were to settle and arrange the bankrupt's affairs to the satisfaction of his creditors, members of the associations, and having made satisfactory proof of settlement, to apply for readmission, which could be obtained with the consent of two-thirds of the governing committee in New York and of at least fourteen out of eighteen in Philadelphia, or, if they failed to effect a settlement in one year, then to have the memberships sold and the proceeds paid *pro rata* to the bankrupt's creditors in the exchanges; that the assignees exercised neither of these rights, and the member-

ships to which, ten years after his discharge, the bankrupt was again admitted constituted in effect after-acquired property; that there was no assumption of original rights *de jure;* and that the lapse of time was fatal to the assignees' claim, particularly in view of the section of the bankrupt law as to the limitation of actions.

The exceptions to the master's report were overruled, and the Circuit Court dismissed the bills upon the ground of laches. From these decrees appeals were prosecuted to this court.

Mr. Wayne McVeagh for appellants.

I. Yerkes, in dealing with his fellow-members of the stock exchanges, and in procuring his personal reinstatement to the seats from which he had been suspended, acted in effect as agent or trustee for the assignees and the body of his creditors, and his acquisition of the seats enured to their benefit.

Section 5046 of the Revised Statutes amounts to a plain statutory declaration that the title to these seats, subject to the claims of the members of the boards, vested in the assignees. "Assignees' duties relate chiefly to unsecured creditors." Mr. Chief Justice Waite, in *McHenry* v. *La Société Française d'Epargnes*, 95 U. S. 58. "The leading purpose of the bankrupt law is to secure an equal distribution of the bankrupt's property among his creditors." Mr. Justice Davis in *Avery* v. *Hackley*, 20 Wall. 407, 413. Speedy distribution is second in importance to equality of distribution. Mr. Justice Miller in *Baily* v. *Glover*, 21 Wall. 342. "Equal distribution of the property of the bankrupt *pro rata* is the main purpose which the Bankrupt Act seeks to accomplish." Mr. Justice Clifford, in *Buchanan* v. *Smith*, 16 Wall. 277, 301; *Wager* v. *Hall*, 16 Wall. 584, 601; *Merchants' Nat. Bank* v. *Cook*, 95 U. S. 342. "And fraud upon the equality of right among creditors of the bankrupt is committed when proof of debt is made by a secured creditor without mentioning lien." Bennett, J., in *Starks* v. *Curd*, 88 Kentucky, 164.

That a stock exchange seat is property or estate within the statute, and that it passes to assignees in bankruptcy, has been

already decided by this court. *Hyde* v. *Woods*, 94 U. S. 523. See also *In re Warder*, 10 Fed. Rep. 275; *In re Werder*, 15 Fed. Rep. 789; *Powell* v. *Waldron*, 89 N. Y. 328; *Grocers' Bank* v. *Murphy*, 60 How. Pr. 426; *Clute* v. *Loveland*, 68 California, 254; *Habenicht* v. *Lissak*, 78 California, 351.

So far as the payment of money was a redemption, the fact was that the assignees furnished more money to redeem the New York seat; the only money paid by Yerkes to New York Stock Exchange creditors being, as he states, $643.59, while the assignees paid in dividends to them $2263.29. It is submitted that the claim is no more meritorious as against the assignees who had not disclaimed title, than would be the claim of any third person who might have paid off the debts due the members of the stock exchanges, and then, had the rules of the exchanges permitted, procured his admission to the suspended memberships without a formal sale and purchase of the seats.

Suit by a bankrupt (or even possession by him) is protected only until intervention and claim by the assignee. *Cohen* v. *Mitchell*, 25 Q. B. D. 262; *Thatcher* v. *Rockwell*, 105 U. S. 467; *Hill* v. *Harding*, 131 U. S. App. cc. Indeed, the title of a stranger voluntarily redeeming such seats would be better than Yerkes's, for the former would be free from the objection fatal to Yerkes's claims that his trust relation to the estate forbade him from reaping an advantage at the expense of his creditors.

The provisions of the Bankrupt Act of 1867 all show the bankrupt to be charged with the duty of disclosure and delivery of his property to the assignees. See sections 5110, 5083; and *Means* v. *Dowd*, 128 U. S. 273; *Peters* v. *Bain*, 133 U. S. 670. Sec. 5051 provides "that the debtor shall . . . at the request of the assignee and at the expense of the estate, make and execute any instrument, deeds and writings which may be proper to enable the assignee *to possess himself* fully of all the assets of the bankrupt." This provision is without any limitation of time.

A principle applies similar to that which forbids a technical trustee purchasing at his own sale, or those having confidential

relations in respect to property from reaping an advantage in dealing with it. The rule which discountenances such transactions rests on the moral obligation to refrain from placing one's self in relations which, ordinarily, excite a conflict between self interest and integrity. *Michaud* v. *Girod*, 4 How. 503; *Van Epps* v. *Van Epps*, 9 Paige, 237; *Ringo* v. *Binns*, 10 Pet. 269; *Bennett* v. *Austin*, 81 N. Y. 308; *Schrenkeisen* v. *Miller*, 9 Ben. 55; *Hampton* v. *Rouse*, 22 Wall. 263.

The action of the bankrupt in seeking to possess himself of the property in these seats assumed the existence of some right to them remaining in him after the assignment to the assignees. But it is very clear that he had no possible claim upon it or right to deal with it. A bankrupt debtor after assignment has only a right to the surplus, or rather a hope or expectation of such right after the debts are paid. *Ex parte Sheffield*, 10 Ch. D. 434; *Bartlett* v. *Teah*, 1 Fed. Rep. 768.

It is insisted, therefore, that with the plain letter of the statute vesting title in the assignees, with the duty devolving upon the bankrupt of permitting the assignees to realize for his creditors everything possible out of the estate assigned to them, and with no plain and unmistakable refusal by them to appropriate these specific properties, this bankrupt was not entitled either at law or in equity to redeem the seats in question and hold them and their emoluments against the assignees.

There was absolutely no evidence to warrant the assumption by the master reporting as register that the assignees took only a "suspended membership;" that is, that the memberships were suspended before the rights of the assignees attached thereto. The position is unsound because there is nothing in the nature of a stock exchange seat which justifies it. The fact that the privileges of the seat are suspended upon insolvency, does not abolish the property in it. It does not become annihilated; it does not go to the exchange or to the other members. The seat retains its identity, and upon the continuance of the insolvency is sold under the rules as a distinct thing, and the purchaser takes that particular property, and, when elected, exercises the privileges accompanying it.

The master assumed that its character was given to it by the incident of an election or reëlection or restoration to membership being necessary in order to give the possessor of the thing all the privileges attaching to it. Instead of this being the fact, its character is given to it by its position as property, and the rules of the organization as to election to membership are strictly subsidiary. If the master's position were correct that the reinstatement to membership must be made within the times prescribed by the rules, or be lost, there would be an annihilation of membership on failure of the owner to claim it. But that this is not the case is shown by the rule which provides for sale of the seat, and payment out of the proceeds (1) of the debts of members, and (2) to the owner.

The right to readmission to the privileges of a stock exchange seat is very analogous to the right of renewal of a lease. It is held that this right is an essential part of the property of an expiring lease, and an assignee for creditors cannot be deprived of it by the bankrupt, or the bankrupt's vendee, procuring a new lease in his own name after bankruptcy. *Jones* v. *Slauson*, 33 Fed. Rep. 632.

Even where there is no covenant to renew, but merely an expectancy of renewal based upon occupancy of the premises, and where actual renewal depends upon the favor of the lessor, the property in the new lease attaches to the old lease and belongs to the owner of the latter. *Phyfe* v. *Wardell*, 5 Paige, 268; *S. C.* 28 Am. Dec. 430; *Gibbes* v. *Jenkins*, 3 Sandf. Ch. 130; *Mitchell* v. *Reed*, 84 N. Y. 556.

The master's conception of a membership obtained by readmission as distinct from a suspended membership, is purely of an academic and metaphysical character. It finds no basis in the facts proven, or the law governing, as to the nature of a stock exchange seat. It was evidently suggested by way of argument to sustain the remaining and principal grounds upon which the cases were determined.

II. As to the assignees' abandonment of their title. It is well understood to be the law that assignees in bankruptcy are not bound to accept property of an onerous or unprofitable

character. *American File Company* v. *Garrett*, 110 U. S. 288, 295. The master and the court were too quick to assume, notwithstanding the evidence, that the present were proper cases for applying this law, and for holding that the assignees had, as matter of fact, abandoned this property, and had therefore no further claim upon it.

But it is settled law that merely leaving a pledge in the hands of a pledgee with no offer to redeem, but also with no demand by the creditor for payment, is not of itself abandonment, and is not even evidence sufficient to justify submitting the question of abandonment to a jury. *Reynolds* v. *Cridge*, 131 Penn. St. 189.

The acceptance and appropriation of the pledge or property by the assignees by the continuous payment of dividends upon the stock exchange debts proved, which were liens against the seats, and which payments went to the reduction of the incumbrances upon them, was of itself ample to indicate their claim of title. *Welsh* v. *Myers*, 4 Camp. 368; *Thomas* v. *Pemberton*, 7 Taunt. 206.

After twenty years a presumption of abandonment would arise of course; but until that time elapses no such presumption arises. *Union Canal Co.* v. *Woodside*, 11 Penn. St. 176; *Steevens* v. *Earles*, 25 Michigan, 40.

III. As to the assignees being guilty of laches in asserting their title.

It is not understood to be contended that this claim is barred by the provision in the Bankrupt Act for a two years' limitation of suits. Rev. Stat. 5057. Lest, however, this contention should be made, it is proper to dispose of it at this point.

The act declares that no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy, and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. This provision is a substantial reënactment of the 8th section of the Bankrupt Act of 1841. It has been

held, under these acts, that the limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt, which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before assignment. *In re Frederick J. Conant*, 5 Blatchford, 54; *Stevens* v. *Hauser*, 39 N. Y. 302; *Sedgwick* v. *Casey*, 4 Nat. Bank. Reg. 496.

"The interest adversely claimed, and which the statute protects, if not sued for within two years, is an interest in a claimant other than the bankrupt." *Clark* v. *Clark*, 17 How. 315, 321; *Phelps* v. *McDonald*, 99 U. S. 298, 306; *French* v. *Merrill*, 132 Mass. 525.

But even if Yerkes be deemed, for any purpose, a claimant to an adverse interest within the statute, that interest did not begin until his admission to the stock exchange in 1883. Under the act of 1841 it was held that the limitation does not run till the taking of adverse possession. *Banks* v. *Ogden*, 2 Wall. 57. And the same doctrine has been maintained in interpreting the act of 1867 and other acts of the kind. *Beson* v. *Shively*, 28 Kansas, 574; *Gray* v. *Jones*, 14 Fed. Rep. 83.

The assignees filed their petition in the bankruptcy court for sale of these interests early in 1884. Their petition being dismissed, they continued the claim by bill filed in the Circuit Court, November 19, 1885. The present suits, for purposes of the limitation of the statute, are to be deemed a continuance of the proceedings begun in the bankruptcy court. *Marshall* v. *Knox*, 16 Wall. 551; *Adams* v. *Collier*, 122 U. S. 382, 389.

There is, therefore, no bar. And even if advantage cannot be taken of the time of beginning the proceedings in the bankruptcy court, the bill filed in the New York Stock Exchange case was quite within the two years.

IV. The appellants are at least entitled to be subrogated to the rights of the stock exchange creditors as against those seats to the extent of the dividends received by these secured creditors from the bankrupt's estate.

The right of subrogation is not doubtful. "A lien creditor proving his claim as unsecured does not extinguish his lien, but waives it *for the assignee's benefit as subrogatee*." *Starks*

v. *Curd*, 88 Kentucky, 164; *Cook* v. *Farrington*, 104 Mass. 212, 213; *Hiscock* v. *Jaycox*, 12 Nat. Bank. Reg. 507, 512.

V. The bankrupt is not entitled to be reimbursed the moneys paid by him to his creditors of the stock exchange.

The dues and assessments actually paid by Yerkes, it is conceded, should be returned to him, for they were paid under an understanding with the assignee that he should be reimbursed for such outlays. But further than this he has no claim upon the assignees.

Mr. Frank P. Prichard for appellees. *Mr. John G. Johnson* was on the brief for Yerkes, appellee, and *Mr. J. Rodman Paul* and *Mr. George W. Biddle* were on it for the Philadelphia Stock Exchange and the New York Stock Exchange, appellees.

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

In *Hyde* v. *Woods*, 94 U. S. 523, it was ruled that the ownership of a seat in a stock and exchange board is property, not absolute and unqualified, but limited and restricted by the rules of the association; that such rules in imposing the condition upon the disposition of memberships that the proceeds should be first applied to the benefit of creditor members are not open to objection on the ground of public policy, or because in violation of the bankrupt act; and that in the case of the bankruptcy of a member his right to a seat would pass to his assignees, and the balance of the proceeds upon sale could be recovered for the benefit of the estate. While the property is peculiar and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors. *Ager* v. *Murray*, 105 U. S. 126; *Stephens* v. *Cady*, 14 How. 528; *Powell* v. *Waldron*, 89 N. Y. 328; *Belton* v. *Hatch*, 109 N. Y. 593; *Habenicht* v. *Lissak*, 78 California, 351; *Weaver* v. *Fisher*, 110 Illinois, 146.

Under the rules of the exchanges in question, suspension of membership followed upon insolvency, and if the debts due

members were not settled, the seats were to be sold, and the proceeds, after the charges due the associations were deducted, were to be distributed *pro rata* among those creditors. Reinstatement in or readmission to membership was provided for upon a settlement in full by the suspended member, and the action of the governing board in his favor. By the assignment in bankruptcy, all the bankrupt's rights of action for property or estate and of redemption, together with his right and authority to sell, manage, dispose of and sue for the same, as they existed at the time the petition was filed, passed to the assignees. Rev. Stat. § 5046. They might, therefore, as the master pointed out, have settled and arranged the bankrupt's affairs with the creditor members, and applied for readmission and a transfer in such manner, with the assent of the exchanges, as would have enabled them to avail themselves of the seats. They could have properly required the bankrupt to assist them in taking the necessary steps as between him and them and the associations, and in case of necessity might have resorted to the courts.

They were not bound, however, to accept property of an onerous and unprofitable nature, which would burden instead of benefiting the estate, and they could elect whether they would accept or not, after due consideration and within a reasonable time, while, if their judgment was unwisely exercised, the bankruptcy court was open to the creditors to compel a different conclusion. *Glenny* v. *Langdon*, 98 U. S. 20; *American File Co.* v. *Garrett*, 110 U. S. 288.

At the time of the filing of the petition in bankruptcy, November 10, 1871, and of the bankrupt's discharge, October 3, 1873, these suspended memberships were confessedly of no value to the estate and were so appraised, because no possible dividend could be paid equal to the excess of the debts due members over the then value of the memberships.

It may be assumed that the assignees regarded the expenditure of money in the payment of annual dues and charges, and in settlement with creditor members, as not justifiable under the circumstances. At all events, for twelve years after their appointment, and ten years after the bankrupt's discharge,

they took no steps to obtain possession, and asked no assistance in that regard from either the bankrupt or the courts; made no payments to the associations and attempted no settlements with the creditor members; considered the realization of anything as substantially impracticable in view of the situation and of judicial decision; and contented themselves with the hope that masterly inactivity might enable them to assert a claim if by the efforts of the bankrupt the load of debt which weighed down the right to the seats was lifted, and in the progress of years the value of such seats happened to increase instead of diminish.

Nor did they seek a sale, nor to compel the creditor members to realize upon or agree to a valuation of the seats and prove only for the balance of their claims, under Rev. Stat. § 5075, if applicable, or otherwise to gain the benefit of such reduction as might thus be obtained, but, on the contrary, allowed these creditors to prove their debts in full, and paid dividends thereon, without objection.

Except that they notified the exchanges of their appointment, they did nothing in the way of taking possession or of the preservation of the property, and for several years prior to the reinstatement they communicated neither with the bankrupt nor the exchanges in regard to the matter. Their conduct can be viewed in no other light than that of an election not to accept these rights as property of the estate.

The policy of the bankrupt law was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities and enable him to take a fresh start. Henceforward his earnings were his own, and after his adjudication and the surrendering of his property to be administered, he was as much at liberty to purchase any of the property so surrendered as any other person. *Traer* v. *Clews*, 115 U. S. 528.

In order to reacquire his seats Yerkes paid the annual dues to the exchanges and the assessments for their gratuity or trust funds, a scheme of life insurance for the benefit of members, which added to the value of the memberships when payments were kept up, and which funds were established after

the bankruptcy. He induced his creditor fellow-members, out of personal consideration for him, and for his personal benefit, to withhold a demand for a sale under the rules, and finally paid them all in full. Those payments were made, in cash or personal services, out of his earnings subsequent to his bankruptcy, and, as appears from his sworn answer, as well as his testimony, under the belief that the assignees never expected to set up any claim to the seats.

The assignees admit in substance that they knew that Yerkes wished to retain his seats; that he was of opinion that they could do nothing with them; that he was preventing by his own exertions any sale by the board creditors; and that he was paying off their claims.

Thus, by the devotion of his own time and earnings, this worthless and abandoned property became valuable, and the assignees acquiesced in the transmutation, as it was accomplished, without action and without objection.

It is to be observed that Yerkes was in no sense the agent or trustee for the assignees or for the creditors, in thus expending his money and labor for the preservation of the seats. Whatever information he could impart, or assistance he could render, in facilitating the action of the assignees in the line of their duties, was to be expected of him, and up to the time of his discharge he could have been compelled by summary order to assist in perfecting possession in the assignees of property which had passed to them, and which they had accepted; but he was not bound to contribute his own time and money to the removal of burdens which they declined to assume, and whose existence put the rights to readmission out of the category of available assets, and justified the election of the assignees not to accept them.

We hold that the assignees, after sedulously avoiding for years any responsibility in the premises, the assumption of any relations to the exchanges, the taking of any steps to free the rights from encumbrance, or to realize upon them as encumbered, and allowing the bankrupt, by the use of after acquisitions, to create a value not theretofore possessed, cannot be allowed to come into a court of equity, and, in spite of

laches and acquiescence of the most pronounced character, invoke its aid to wrest from him the fruit of his independent and lawful exertions, and reap where they had not sown. Under such circumstances they do not come with clean hands.

Clearly the sale of the present memberships to a nominee of the assignees, and the admission of such nominee upon the ouster of Yerkes cannot now be coerced, and if Yerkes's title is not open to attack he cannot be decreed to account for the market value thereof to the extent, in whole or in part, of the dividends which the creditor members received. In order to obtain the seats their claims had to be settled in full, and such settlement was not waived by their being proved in the bankruptcy proceedings, without objection then or for thirteen years thereafter. The dividends were not paid in order to protect the rights of the assignees or to save the memberships, and while, by reason of the extinguishment of the debts *pro tanto*, Yerkes may be said to have paid less than he otherwise would, yet he paid much more than the value of the seats at the time of the bankruptcy, in addition to the amount of the dividends. The parties well understood that the dividends could not at best reach more than a certain percentage, and that the debts due the members of the association, after that percentage was deducted, far exceeded the value of the seats. The assignees deemed it unwise and impracticable to attempt to speculate upon a future rise in that value, and, declining to settle with the creditor members, to pay the periodical charges, and to enter into relations with the exchanges and those creditors, proceeded to close up the estate, without regard to these remote expectancies, apparently with commendable promptitude. As we have said, they cannot now be permitted to avail themselves of the results of what Yerkes did and they did not do, nor can they lay hold of his property to work out a return of what the estate paid to these particular creditors in common with the others. *Decrees affirmed.*

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

Mr. Justice Harlan and myself dissent from the foregoing opinion and judgment.

By the assignment in 1871 the memberships in the two exchanges were transferred to the assignees. They were then worth $6000. By the rules of the exchanges, debts to members were a prior lien. Those debts then amounted to $30,365.10. In other words, the assignees took title to property worth $6000, subject to a lien of $30,365.10. If then sold, the debts of the bankrupt would have been reduced by the amount of $6000. By making the sale the assignees would have assumed no special obligation for the balance of the debts having a lien upon these memberships. They should have sold at once, or waited to see if there was a rise in value. They chose the latter. They never, in terms, relinquished their claim upon the property. The *ad interim* payments made by the bankrupt only kept alive certain insurance, which on his death would have enured to the heirs, and not gone to the assignees. Such payments, therefore, were wholly for his benefit, and not for the assigned estate, or for the creditors.

The assignees have paid dividends aggregating 28 per cent, or to the creditors holding such liens $8502.22. The bankrupt, the assignor, availing himself of this payment, by services and money, pays off the balance of these lien claims and appropriates to himself the seats in the exchanges, now worth $35,000 to $42,000. The result is that the delay of the assignees, wise as it would seem from the increased value of the property, is adjudged an abandonment. Property then worth $6000 is not appropriated to the reduction of the debts against the estate; on the contrary, the bankrupt gets the benefit of $8500 paid out of the estate assigned for the benefit of creditors, uses that payment to reduce the claims against this property, and, paying off the balance, repossesses himself of the property, now worth over $35,000.

We see neither equity nor law in this conclusion, and therefore dissent.

Mr. Justice Bradley and Mr. Justice Gray did not hear the argument, and took no part in the decision of these cases.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY *v.* JOPES.

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

No. 104. Argued November 24, 1891. — Decided December 7, 1891.

When a bill of exceptions is signed during the term, and purports to contain a recital of what transpired during the trial, it will be presumed that all things therein stated took place at the trial, unless from its language the contrary is disclosed.

The law of self-defence justifies an act done in honest and reasonable belief of immediate danger; and, if an injury be thereby inflicted upon the person from whom the danger was apprehended, no liability, civil or criminal, follows.

If an act of an employé be lawful and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor.

A railroad company is not responsible for an injury done to a passenger in one of its trains by the conductor of the train, if the act is done in self-defence against the passenger and under a reasonable belief of immediate danger.

New Jersey Steamboat Co. v. *Brockett*, 121 U. S. 637, distinguished.

THE court stated the case as follows:

On July 24, 1886, the defendant in error, plaintiff below, was a passenger on the train of the plaintiff in error. While such passenger, and at Nicholson station in Hancock County, Mississippi, he was shot by Carlin, the conductor, and seriously injured. For such injury, he brought his action in damages in the Circuit Court of that county. The case was regularly removed to the United States Circuit Court for the Southern District of Mississippi; and a trial resulted in a verdict and judgment on May 15, 1888, in his favor, for the sum of $9500, to reverse which judgment the defendant sued out this writ of error. Of the fact of the shooting by the conductor, and the consequent injuries, there was no dispute. The testimony in the case was conflicting as to some matters, and there was

Counsel for Plaintiff in Error.

testimony tending to show that the plaintiff approached the conductor with an open knife in his hand, and in a threatening manner, and that the conductor, fearing danger, shot and wounded the plaintiff in order to protect himself. The bill of exceptions recited that in its general charge "the court instructed the jury that if the evidence showed that the plaintiff was a passenger on the train, and that he was shot and wounded by the conductor whilst he was such passenger and whilst prosecuting his journey, and such shooting was not a necessary self-defence, the plaintiff was entitled to recover compensatory damages; but if the jury believe the plaintiff, when shot, was advancing on the conductor or making hostile demonstrations towards him with a knife in such a manner as to put the conductor in imminent danger of his life or of great bodily harm, and that the conductor shot plaintiff to protect himself, the plaintiff was not entitled to recover; but if it appeared that the conductor shot the plaintiff, whilst such passenger and prosecuting his journey, wantonly and without any provocation at the time, then the jury might award exemplary damages." And further, that, "responding to the request of defendant that the court should instruct the jury that if they believed from the evidence that when Carlin shot the plaintiff, he, Carlin, had reasonable cause to believe, from Jopes's manner and attitude, that he, Jopes, was about to assault Carlin with the knife, and that it was necessary to shoot him to prevent great bodily harm from Jopes, then that the jury should find for defendant, whether Jopes was intending to do Carlin great bodily harm or not, the court declined to instruct, but instructed that, in that state of the case, if Carlin shot under the mistaken belief, from Jopes's actions, that he was in danger of great bodily harm then about to be done him by Jopes, when in fact Jopes was not designing or intentionally acting so as to indicate such design, the plaintiff should be entitled to compensatory damages and not punitive damages." To this last instruction an exception was taken, and this presented the substantial question for consideration.

Mr. Edward Colston (with whom was *Mr. John W. Fewell* on the brief) for plaintiff in error.

Argument for Defendant in Error.

Mr. Calderon Carlisle for defendant in error. (*Mr. Marcellus Green* and *Mr. S. S. Calhoon* filed a brief for same.)

It is nowhere shown that the exceptions, or any of them, were taken *at the trial*, which is a fatal defect. *Walton* v. *United States*, 9 Wheat. 651; *French* v. *Edwards*, 13 Wall. 506; *Brown* v. *Clarke*, 4 How. 4; *Sheppard* v. *Wilson*, 6 How. 260; *Phelps* v. *Mayer*, 15 How. 160. Nor is it anywhere shown that any exception was taken *while the jury were at the bar*. *United States* v. *Breitling*, 20 How. 252; *Barton* v. *Forsyth*, 20 How. 532; *Phelps* v. *Mayer*, 15 How. 160.

The grounds of the objection are not given in any instance. *Coddington* v. *Richardson*, 10 Wall. 516. If the exception to the instructions of the court be regarded as taken to *all* the propositions set forth in the instructions, the exception must be overruled if *any one* of the propositions be sound. *Johnston* v. *Jones*, 1 Black, 209; *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 Wall. 328.

The verdict was clearly right on the evidence, and there is no probability of any difference in another trial with this evidence in; and it is highly improbable that it had the effect to produce or modify the verdict. Its effect in producing the verdict, or making it larger, is imaginary. *McLanahan* v. *Universal Ins. Co.*, 1 Pet. 170. It was competent in any point of view, as a legal proposition, both as part of the *res gestæ* of the shooting, and because it was the verbal act of the agent of the company, as its conductor, made to a passenger, and while the contract of transportation still existed between the passenger and the railroad company, and while the railroad conductor was still in the discharge of his functions, as such conductor, and agent of the company, towards that passenger. *New Jersey Steamboat Co.* v. *Brockett*, 121 U. S. 637.

But the principles applicable to the trial of Carlin upon indictment for the assault and those governing the case at bar differ widely.

The cause of action was breach of the contract to carry safely. The defence sought excuse for the non-performance, in that plaintiff had abandoned the contract and made an

assault upon the servant of defendant to whose care he was committed, and that, therefore, defendant could not perform by reason of plaintiff's own act. Under this the facts must exist to excuse the breach. Not that the servant had reasonable cause to believe they existed, but that they existed in fact. Under the criminal law if there is a reasonable doubt it suffices to excuse, but the non-performance of contracts cannot be excused upon beliefs. The reasonable ground for belief has no existence, even in estoppel *in pais*.

The doctrine contended for that the court will institute a comparative blame inquiry, and, if the corporation or master was less to blame than the passenger, though the servant may be more to blame than the passenger, the master will be excused, is as surprising as it is untenable. Under it a corporation, being incorporeal, could never be liable, for it can only work through servants. *Qui facit per alium facit per se* would exist no longer in jurisprudence if this was the law.

The conductor was the company, *Chicago, Milwaukee &c. Railway* v. *Ross*, 112 U. S. 377, 390, and during the journey for which Jopes had taken passage he was charged with the duty of carrying him safely and protecting him. Any declarations made by the conductor during the journey were competent, just as those of any personal master would have been.

If the rights are to be measured by the criminal law applicable, the declarations of Carlin were competent. *Kendrick* v. *The State*, 55 Mississippi, 436.

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

A preliminary question is raised by counsel for the defendant in error. It is insisted that the bill of exceptions does not show that this exception was taken at the trial, and while the jury was at the bar, and therefore not in time. In support of this contention several authorities are cited. While it is doubtless true that if the exception was not taken until after the trial it would be too late, and to that effect are the authorities, yet we do not think the record shows that such was the

fact in this case. The trial commenced on the 14th, and was concluded on the 15th, and the bill of exceptions was sealed and signed on the 16th of May. The motion for a new trial was not overruled until the 26th. The bill of exceptions recites in the ordinary form the coming on of the case to trial, the empanelling of a jury, the testimony offered and the instructions given and refused. In respect to one matter of testimony, the bill of exceptions recites: "Whereupon the court refused to allow the testimony, to which ruling the defendant excepted." So, following the recital in respect to the last matter of instructions, is the statement "to which defendant excepted." It is true the words used are not "then and there excepted," neither is it said that the court "then and there instructed;" but as the bill purports to be a recital of what took place on the trial, it is to be assumed that the instructions were given, and the exceptions taken, during and as a part of the trial. The statement as to the exception follows that as to the instructions, and the only fair and reasonable intendment from the language is that as the one was given, so the other was taken, at the trial. The same form of recital was pursued in the case of *United States* v. *Breitling*, 20 How. 252, and held sufficient. In the case of *Barton* v. *Forsyth*, 20 How. 532, it appeared that after the verdict and judgment the defendant filed a motion, supported by affidavit, which was overruled. Following the recital of this fact, the record added, "to all which decisions, rulings and instructions defendant then and there excepted;" and it was held that such recital showed that the exceptions were taken at the time of the overruling of the motion. In the case of *Phelps* v. *Mayer*, 15 How. 160, the verdict was rendered on the 13th of December, and the next day the plaintiff came into court and filed his exceptions, and there was nothing to show that any exception was reserved pending the trial. In *Brown* v. *Clarke*, 4 How. 4, it was a matter of doubt whether the exceptions were taken to the instructions or to the refusal to grant a new trial. Of course, in the latter case they would not have been available. In the case of *Walton* v. *United States*, 9 Wheat. 651, it appeared that the exception was not taken until after the judgment.

The reasoning of all these cases makes in favor of the sufficiency of this bill of exceptions, and it may be laid down as a general proposition, that where a bill of exceptions is signed during the term, purporting to contain a recital of what transpired during the trial, it will be assumed that all things therein stated took place at the trial, unless from its language the contrary is disclosed. We hold, therefore, that the record shows that the exception to this instruction was duly taken, and pass to a consideration of the principal question, and that is, whether such instruction contains a correct statement of the law applicable.

Its import is, that if the conductor shot when there was in fact no actual danger, although, from the manner, attitude and conduct of the plaintiff, the former had reasonable cause to believe, and did believe, that an assault upon him with a deadly weapon was intended, and only fired to protect himself from such apprehended assault, the company was liable for compensatory damages. In this view of the law we think the learned court erred. It will be scarcely doubted that if the conductor was prosecuted criminally, it would be a sufficient defence that he honestly believed he was in imminent danger, and had reasonable ground for such belief. In other words, the law of self-defence justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is, that if one approaches another, pointing a pistol and indicating an intention to shoot, the latter is justified by the rule of self-defence in shooting, even to death; and that such justification is not avoided by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defence does not rest on the actual, but on the apparent facts and the honesty of belief in danger. By the Revised Code of Mississippi (1880) section 2878, (and this section is common to the homicide statutes of several States,) homicide is justifiable when committed in the lawful defence of the person when there shall be reasonable ground to apprehend a design to do some great personal injury, and imminent danger of such design being accomplished. In 1 Wharton's Criminal Law, 9th ed. section 488, the author says: "It is conceded on

all sides that it is enough if the danger which the defendant seeks to avert is *apparently* imminent, irremediable and actual." *Bang* v. *The State*, 60 Mississippi, 571; *Shorter* v. *The People*, 2 N. Y. (2 Comstock) 193; *Logue* v. *Commonwealth*, 38 Penn. St. 265. And the same rule of immunity extends to civil as to criminal cases. If the injury was done by the defendant in justifiable self-defence, he can neither be punished criminally nor held responsible for damages in a civil action. Because the act was lawful, he is wholly relieved from responsibility for its consequences. 3 Bl. Com. 121. The case of *Morris* v. *Platt*, 32 Connecticut, 75, fully illustrates the extent to which immunity goes. In that case it appeared that the defendant when assaulted had fired in self-defence, and, missing the assailant, had wounded an innocent bystander, and the court held that the party thus assailed was free from both civil and criminal liability. The act which he had done was lawful and without negligence, and no one, not even a third party, not an assailant, but an innocent bystander, could make him answer in damages for the injury occasioned thereby.

It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity. That such is the ordinary rule is not denied; but it is earnestly insisted by counsel that where the employer is a common carrier, and the party injured a passenger, there is an exception, and the proposition is laid down that the contract of carriage is broken, and damages for such breach are recoverable, whenever the passenger is assaulted and injured by an employé without actual necessity therefor. It is urged that the carrier not only agrees to use all reasonable means to prevent the passenger from suffering violence at the hands of third parties, but also engages absolutely that his own employés shall commit no assault upon him. We quote from the brief the contention:

"The cause of action was breach of the contract to carry safely. The defence sought excuse for the non-performance, in that plaintiff had abandoned the contract and made an assault upon the servant of defendant to whose care he was

committed, and that, therefore, defendant could not perform by reason of plaintiff's own act. Under this the facts must exist to excuse the breach. Not that the servant had reasonable cause to believe they existed, but that they existed in fact. Under the criminal law if there is a reasonable doubt it suffices to excuse, but the non-performance of contracts cannot be excused upon beliefs."

Special reference is made to the case of *Steamboat Co.* v. *Brockett*, 121 U. S. 637, in which this court held that "a common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment;" a proposition which was fortified in the opinion by reference to several authorities. But it will be noticed that that which, according to this decision, the carrier engages absolutely against is the misconduct or negligence of his employé. If this shooting was lawfully done, and in the just exercise of the right of self-defence, there was neither misconduct nor negligence. It is not every assault by an employé that gives to the passenger a right of action against the carrier. Suppose a passenger is guilty of grossly indecent language and conduct in the presence of lady passengers, and the conductor forcibly removes him from their presence, there is no misconduct in such removal; and, if only necessary force is used, nothing which gives to the party any cause of action against the carrier. In such a case, the passenger, by his own misconduct, has broken the contract of carriage, and he has no cause of action for injuries which result to him in consequence thereof. He has voluntarily put himself in a position which casts upon the employé both the right and duty of using force. There are many authorities which in terms declare this obligation on the part of the carrier, and justify the use of force by the employé, although such force, reasonably exercised, may have resulted in injury. But if an employé may use force to protect other passengers, so he may to protect himself. He has not forfeited his right of self-defence by assuming service with a common carrier; nor does the common carrier engage aught

against the exercise of that right by his employé. There is no misconduct when a conductor uses force and does injury in simply self-defence; and the rules which determine what is self-defence are of universal application, and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to his passengers for the assaults of his employés is of a most stringent character, far greater than that of ordinary employers for the actions of their employés, yet they all limit the liability to cases in which the assault and injury are wrongful. Upon this general matter, in 2 Wood's Railway Law, 1199, the author thus states the rule: "In reference to the application of this rule, so far as railroad companies and carriers of passengers are concerned, it may be said that they are not only bound to protect their passengers against injury and unlawful assault by third persons riding upon the same conveyance, so far as due care can secure that result, but they are bound absolutely to see to it that no unlawful assault or injury is inflicted upon them by their own servants. In the one case their liability depends upon the question of negligence, whether they improperly admitted the passenger inflicting the injury upon the train, while in the other the simple question is whether the act was unlawful." And in Taylor on Private Corporations, sec. 347, 2d ed., it is said: "While a carrier does not insure his passengers against every conceivable danger, he is held absolutely to agree that his own servants engaged in transporting the passenger shall commit no wrongful act against him. . . . Recent cases state this liability in the broadest and strongest language; and, without going beyond the actual decisions, it may be said that the carrier is liable for every conceivable wrongful act done to a passenger by its train hands and other employés while they are engaged in transporting him, no matter how wilful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have been done in furtherance of the carrier's business." See also *Peavy* v. *Georgia Railroad & Banking Co.*, 81 Georgia, 485; *Harrison* v. *Fink*, 42 Fed. Rep. 787.

In most of the cases in which an injury done by an employé has been the cause of the litigation, the defence has been, not that the act of the employé was lawful, but that it was a wanton and wilful act on his part, outside the scope of his employment, and therefore something for which his employer was not responsible. And if the act was of that character, the general rule is that the employé alone, and not the employer, is responsible. But, owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and wilful, and outside the scope of the employment. Noticeable instances of this kind are the cases of *Craker* v. *Chicago & Northwestern Railway*, 36 Wisconsin, 657, in which, when a conductor had forcibly kissed a lady passenger, the company was held responsible for the unlawful assault; and *Goddard* v. *Grand Trunk Railway*, 57 Maine, 202, in which, when a brakeman had committed a gross and offensive assault upon an invalid passenger, the company was held liable in damages.

But here the defence is that the act of the conductor was lawful. If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? Suppose we eliminate the employé, and assume a case in which the carrier has no servants, and himself does the work of carriage; should he assault and wound a passenger in the manner suggested by the instruction, it is undeniable that if sued as an individual he would be held free from responsibility, and the act adjudged lawful. Can it be that if sued as a carrier for the same act a different rule obtains, and he be held liable? Has he broken his contract of carriage by an act which is lawful in itself, and which as an individual he was justified in doing? The question carries its own answer; and it may be generally affirmed that if an act of an employé be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor.

Syllabus.

For the error of the court in respect to this instruction the judgment must be

Reversed, and the case remanded for a new trial, and it is so ordered.

PEARCE *v.* RICE.

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

No. 51. Argued October 26, 27, 1891. — Decided December 7, 1891.

F. owed H. & Co. on account about $22,000. He settled this in part by a cash payment, and in part by a transfer of promissory notes payable to himself, the payment of two of which, for $5000 each, was guaranteed by him in writing. H. & Co. transferred these notes to a bank as collateral to their own note for about $13,000. They then became insolvent, and assigned all their estate to P. as assignee for distribution among their creditors. The bank sued F. on his guaranty. He set up in defence that his indebtedness to H. & Co. grew out of dealings in options in grain and other commodities, to be settled on the basis of "differences," and that it was invalidated by the statutes of Illinois, where the transactions took place. The court held that he could not maintain this statutory defence as against a *bona fide* holder of the guaranteed notes, and gave judgment against him. Execution on this judgment being returned unsatisfied, a bill was filed on behalf of the bank to obtain a discovery of his property and the appointment of a receiver, to which F., and the maker of the notes, and R., with others, were made defendants. P., the assignee of H. & Co., was, on his own application, subsequently made a defendant. An injunction issued, restraining each of the defendants from disposing of any notes in his possession due to F. Subsequently to these proceedings F. assigned to R. the two notes which H. & Co. had transferred to the bank. P., as assignee of H. & Co., filed a cross-bill in the equity suit, showing that the judgment in favor of the bank was in excess of the balance due the bank by H. & Co. R. filed an answer and a cross-bill in that suit, setting up his claim to the said notes, and maintaining that the judgment in favor of the bank was invalid, as being in conflict with the statutes of Illinois. *Held*,

(1) That the liability of F. upon the guaranty was, as between the bank and him, fixed by the judgment in the action at law;

(2) That all the bank could equitably claim in this suit was the amount actually due it from H. & Co., which was considerably less than the amount of the face of the notes;

Statement of the Case.

(3) That the transfer and guaranty of the notes to H. & Co. were void under the Illinois statutes, and passed no title to them or their assignee;

(4) That R. was the equitable owner of the notes, and was entitled to receive them on payment to the bank of the amount of the indebtedness of H. & Co. to it;

(5) That the assignment to R., having been made in good faith and for a valuable consideration, he was a person interested in the object to be attained by the proceedings within the intent of the statute.

When, by filing a replication to a plea in equity issue is taken upon the plea, the facts, if proven, will avail the defendant only so far as in law and equity they ought to avail him.

Hughes v. *Blake*, 6 Wheat. 453, explained and distinguished from this case.

The case was stated by the court as follows:

This case involves the conflicting claims of the appellant and the appellee to the balance due upon a judgment in favor of Huntington W. Jackson, receiver of the Third National Bank of Chicago, and to two promissory notes in his or its hands.

The history of that judgment, and the circumstances under which the bank got possession of the notes are as follows:

Hooker & Co., June 29, 1876, rendered to Ira Foote an account for $22,165.72, which the latter settled in part by delivering to that firm four notes, of $5000 each, executed to him by the trustees of the estate of Ira Couch deceased. The balance, $2165.72, was paid at the time in cash through James H. Rice. Upon each of two of the Couch notes due respectively on the first days of July and October, 1877 — the ones here in dispute — was the following endorsement: "I hereby guarantee the payment of the within note for value received at maturity. Ira Foote, by J. H. Rice, attorney in fact."

On the 30th of December, 1876, Hooker & Co. made their note to the Third National Bank of Chicago for $13,912.97, payable ninety days after date, with interest at the rate of ten per cent per annum, and, as collateral security for its payment, deposited several promissory notes with the bank, including the above two notes guaranteed by Foote.

For the purpose of making a distribution of their estate among creditors, that firm executed, February 28, 1877, an

assignment to J. Irving Pearce of all their property of every kind.

The bank, by its receiver, brought suit against Foote, April 26, 1878, in the court below, upon the above guaranty of the two Couch notes. He pleaded that he did not promise in manner and form as alleged; also, that the promises alleged had no other consideration than the buying and selling by Hooker & Co. for him upon the Chicago Board of Trade deals and options in grain, wheat, lard, pork and other commodities, wherein neither party had or was to deliver or receive any articles so bought or sold, and which transactions were to be settled entirely upon the basis of "differences." He pleaded, in addition, a set-off for money lent and advanced, money paid, laid out and expended, etc. The issues were found for the bank, and judgment was rendered against him for the sum of $14,635.55. In that case, the court said that while Foote may have contemplated dealing wholly in "differences" to such an extent as would make the transactions, under the decisions of the courts of Illinois, wager or gambling contracts at common law, he did not, according to the evidence, intend that his brokers should make for him such contracts — options to buy or sell at a future time property that was not to be delivered — as were expressly made illegal by the Illinois statutes. It was said among other things: "The defendant having delivered these notes with his guaranty upon them to Hooker & Co. in settlement of their demand against him, even though their demand was tainted as a gambling claim at common law, he cannot be allowed to set up the illegality of the dealings between himself and Hooker & Co. as a defence to these guarantees in the hands of a *bona fide* holder. He has put this paper, with his guaranty affixed to it, afloat upon the market. Unless a clear case of violation of the statute is made out, and the burden of making such a case is upon the defendant, this guaranty in the hands of a *bona fide* holder for value is valid, and not tainted by any of the defences between the original parties." *Jackson* v. *Foote*, 11 Bissell, 223; *S. C.* 12 Fed. Rep. 37, 41.

Execution against Foote having been returned no property

found, the bank, to obtain satisfaction of its judgment, brought the present suit, September 21, 1882, to obtain a discovery of his property and effects, and the appointment of a receiver. To this suit Foote, Rice, the trustees of Couch's estate, and others were made defendants. An injunction was issued restraining the defendants from selling, assigning, negotiating, receiving, collecting, or in any manner disposing of, any debts, bonds or notes due Foote, whether in his possession, or held by other persons in trust for his use or benefit. A receiver having been appointed, Foote was directed, by an order of court, to execute and deliver a general assignment of all his property and effects. This was done by him November 1, 1882. Pearce was made a defendant, on his own petition, and with leave of the court filed a cross-bill showing, among other things, that the judgment of the bank against Foote was largely in excess of the balance really due it from Hooker and Co., and claiming that he, as assignee of that firm, was entitled not only to the above two notes but to such balance as might be realized on that judgment after paying the amount due from his assignors to the bank.

Rice filed an answer and cross-bill asserting his ownership of the two Couch notes by assignment from Foote. That assignment was made February 16, 1885, and is in these words: "For value received I hereby sell, assign, transfer and set over unto James H. Rice, of Chicago, Illinois, all my right, title, interest, claim and demand in and under two (2) certain notes executed by the trustees of Ira Couch's estate to my order, each of said notes being for the sum of five thousand dollars ($5000.00), and are dated the first day of July, 1876, and are now in the hands of Huntington W. Jackson, receiver of the Third National Bank of Chicago, said notes being held by said Jackson, receiver as aforesaid, as collateral security for a certain indebtedness due said Third National Bank from S. G. Hooker & Co. I hereby give said Rice full power and authority to prosecute, in my name or his own, any and all suits touching said notes in any manner that he may deem best." The principal consideration for this assignment was the taking care of Foote by Rice. The evi-

dence of Rice on this point is uncontradicted. He testified: "I have spent a good deal of money on him, taking care of him. He had no money of his own, except what I let him have. He has been an invalid and had to have somebody to look after him and have somebody to attend to him. . . . I had paid out money for Mr. Foote. He had got suits on his hands that he had to carry out, and I had become responsible for some of his fees, attorney's fees, and, in fact, had advanced him money to carry on his cases. It had gone so far that I didn't care about taking a great many chances more, and he assigned that [the two Couch notes] to me. . . . There are a good many other considerations besides the advancement of money that Mr. Foote is indebted for; he has made his home with me; been provided with nurses and doctors and taken good care of. Outside of the friendship I have for Mr. Foote there would be no money consideration for what I have gone through with." Again: "Mr. Foote has made his home with me for nine years. He has been very feeble, especially for the past two years. He is in his sixty-eighth year. He has had to travel for his health, and has been away both winter and summer. He has had no money within the last five years, except what I have furnished him; no nurses or doctors except what I have paid for since he has been sick."

Rice's answer and cross-bill proceed upon the ground that the original transaction between Hooker & Co. and Foote was based upon a mere wager or bet upon the price of grain or provisions, constituting an option contract prohibited and declared void by the statutes of Illinois; and, therefore, that the consideration of Foote's guaranty upon the two notes failed, no title to them passing to Hooker & Co. The relief asked by him was, that the judgment rendered in favor of the bank against Foote be vacated and set aside; that if for any reason that could not be done, then that the judgment be set aside upon the payment to the bank of any balance due from Hooker & Co., which payment he offered to make upon the surrender of the above notes to him; and that the bank be ordered to return the notes to him. He asked such other relief as equity required.

Argument for Appellant.

Foote adopted the answers of Rice to the original and cross-bills of Pearce as his own. The bank and Pearce each relied upon the judgment against Foote in bar of the claim asserted by Rice. They denied that the original transactions between Foote and Hooker & Co. were in violation of law, or that Rice was a *bona fide* owner for value of the Couch notes.

Upon final hearing it was adjudged that the bank was entitled to be paid upon its judgment against Foote the balance due on the note of Hooker & Co., after crediting all payments thereon, including one by Pearce as assignee of Hooker & Co. The cross-bill of Pearce was dismissed for want of equity.

In respect to the claim of Rice, it was adjudged that he was the equitable owner of the two notes in question; that, they having been transferred by Foote to Hooker & Co. for a gambling consideration, the transfer was void as between those parties; that upon payment by Rice to the bank of the amount due upon the indebtedness to it of Hooker & Co., he, as assignee of Foote, was entitled to have the notes delivered to him, together with a transfer of the bank's judgment against Foote, the judgment to be satisfied of record by Rice upon the collection by him of the notes or enough thereon to satisfy the amount to be paid to the bank, together with his costs and expenses; and that upon such payment within thirty days from the date of the decree the bank should deliver the notes to Rice, with an assignment duly executed of its judgment against Foote. Pearce alone appealed from the decree.

Mr. Huntington W. Jackson for appellant.

I. The facts in the pleas of the bank and Pearce to which replications were filed by Rice having been proved, the cross-bill should have been dismissed. *Cammann* v. *Traphagan*, 1 N. J. Eq. (Saxton) 230; *Meeker* v. *Marsh*, 1 N. J. Eq. (Saxton) 198, 202; *Myers* v. *Dorr*, 13 Blatchford, 22; *Hughes* v. *Blake*, 6 Wheat. 453.

II. A decision of a controversy by a court of competent jurisdiction upon a full and fair trial on the merits cannot be

reëxamined, or the matter in controversy again drawn into question, unless in an appellate forum. *Wright* v. *Washington*, 5 Grattan, 645; *West* v. *Carter*, 129 Illinois, 249; *S. C.* 25 Ill. App. 245; *Giddens* v. *Lea*, 3 Humph. 133; *Clay* v. *Fry*, 3 Bibb, 248; *Jeune* v. *Osgood*, 57 Illinois, 340; *LeGuen* v. *Gouverneur*, 1 Johns. Cas. 436, 492; *Hempstead* v. *Watkins*, 6 Arkansas, 317; *Hendrickson* v. *Hinckley*, 17 How. 443; *Arrington* v. *Washington*, 14 Arkansas, 218; *Bank of the United States* v. *Beverly*, 1 How. 134; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Hopkins* v. *Lea*, 6 Wheat. 109; *Campbell* v. *Goodall*, 8 Ill. App. 266; *Bennitt* v. *Wilmington Star Mining Co.*, 119 Illinois, 9.

III. Rice not being a party to the judgment against Foote, and the judgment at the time of its rendition not affecting any of his rights, he is not a party in interest and should not be permitted to file his cross-bill to set aside the judgment. *Stone* v. *Towne*, 91 U. S. 341; *Carter* v. *West*, 129 Illinois, 249.

IV. The transactions between Hooker & Co. and Foote were not prohibited by the Illinois statutes. *Jackson* v. *Foote*, 11 Bissell, 223.

Mr. Lewis H. Bisbee for appellee. *Mr. Robert H. Kern* and *Mr. Frank F. Reed* were with him on the brief.

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

Does the bank's judgment against Foote preclude inquiry, in this suit, between the respective assignees of Foote and of Hooker & Co., as to whether the original claim of that firm against Foote, and Foote's transfer of the Couch notes to it with guaranty of payment, were void under the laws of Illinois?

The statute of Illinois referred to — being the part of the Criminal Code of that State, relating to "Gambling and Gambling Contracts" — provides:

Sec. 130. "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company,

or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts so to do, in relation to any of such commodities, shall be fined not less than $10 nor more than $1000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

Sec. 131. "All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any . . . wager or bet upon any . . . chance, . . . or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such . . . bet, to any person or persons so gaming or betting, . . . shall be void and of no effect."

Sec. 135. "All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements and other acts, deeds, securities or conveyances, given, granted, drawn or executed, contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser or other person interested therein; or if a judgment, the same may be set aside on motion of any person aforesaid, on due notice thereof given."

Sec. 136. "No assignment of any bill, note, bond, covenant, agreement, judgment, mortgage or other security or conveyance as aforesaid, shall, in any manner, affect the defence of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein." Rev. Stats. Illinois, 1874, pp. 372, 373, c. 38.

The appellant invokes the general rule that a judgment is final and conclusive, in any subsequent suit, between the same parties or their privies, as to all matters actually determined,

or which were necessarily involved, in the first suit; also, the rule, recognized in the courts of the United States, that equity will not, at the instance of one against whom a judgment at law has been rendered, restrain the operation or effect of that judgment, unless there be equitable circumstances justifying its interference, or unless such person was prevented by fraud or accident, unmixed with fault or negligence upon his part, from making full defence at law.

The courts of Illinois have not regarded these rules as strictly applicable in cases under the law relating to gaming and gambling contracts. In *Mallett* v. *Butcher*, 41 Illinois, 382, 385, the Supreme Court of that State, construing the statute in question, held that all contracts having their origin in gaming were void, not voidable only, and that it was entirely immaterial when or how the fact was disclosed to the court; consequently, a suit in equity would lie to set aside a judgment at law on a note given for money lost in gaming with cards, where the obligor failed to make defence. The same question arose in *West* v. *Carter*, 129 Illinois, 249, 254, which was also a suit in equity to set aside a judgment — obtained without a real defence being made — upon a contract void under the gaming statute. It was there contended that sections 131 and 135 of the statute had no application to judgments except those rendered by confession; in other words, that those sections, in their application to judgments, affected only such as resulted from the voluntary act of the defendant. But the court refused to so restrict the operation of section 131. The judgments, promises and instruments therein specified being void and of no effect, "it is not," said the court, "in the power of the party to whom made, granted, given or executed, or in whose interest they are drawn or entered into, to give the contract validity. Nor can the court, at the instance of such party, any more than it could by the confession or consent of the defendant, vitalize the contract, and by its judgment defeat the effectiveness of the proceeding in equity authorized by the 135th section of the statute to set aside the void contract. . . . The rule in equity, that courts of chancery will not take jurisdiction when there is an adequate defence or remedy

at law, must yield to the requirements of this statute, that relief may be granted in a court of equity to vacate and set aside judgments and contracts obtained in violation of this provision."

These cases, in effect, decide that the judgments which the statute permits to be vacated, upon bill in equity or motion, embrace those on confession, as well as those rendered upon default, or without a direct issue, fully and fairly tried, between proper parties. It is consistent with those cases to hold — as upon any sound interpretation of the statute, and in obedience to the principles of equity obtaining in the courts of the United States, we must hold — that Foote's liability upon his guaranty of the Couch notes was, as between the bank and him, fixed by the judgment upon the direct issue in the suit at law, as to such liability, and which judgment has not been modified or reversed. Neither he nor Rice, claiming under an assignment executed after that judgment, could have it annulled by decree in a court of the United States, except upon some ground recognized in the courts of the United States as sufficient for the interference of equity.

Still, it is clear that the result for which the appellant contends does not follow. The two Couch notes were held by the bank only as collateral security for its claim against Hooker & Co. According to some adjudged cases, if the point had been made in the suit at law, the judgment against Foote would have been restricted to the real amount of the bank's claim. It is an undisputed fact that the amount due from Hooker & Co. to the bank, at the date of its judgment against Foote, April 17, 1882, computing the interest at ten per cent per annum, was less than one-half of the sum for which it took judgment. The excess over the amount really due from Hooker & Co., did not, in any view, equitably belong to the bank; but, as between it and Pearce, to the latter. Its interest in Foote's guaranty was measured by the amount of the indebtedness of Hooker & Co. to it at the date of the judgment against Foote. If the bank had collected the entire amount of that judgment from Foote, it would have been bound to account to the assignee of Hooker & Co. for the bal-

ance remaining after its demand against that firm was satisfied; and this for the reason that it could not be deemed a *bona fide* holder for value except to the extent of its demand against Hooker & Co. Story on Prom. Notes, § 195; *Mayo* v. *Moore*, 28 Illinois, 428; *Williams* v. *Smith*, 2 Hill, 301; *Stoddard* v. *Kimball*, 6 Cush. 469; *Chicopee Bank* v. *Chapin*, 8 Met. (Mass.) 40; *Farwell* v. *Importers' and Traders' Bank*, 90 N. Y. 483, 488; *Allaire* v. *Hartshorne*, 21 N. J. Law, (1 Zabr.) 665; *Maitland* v. *Citizens' Nat. Bk. of Baltimore*, 40 Maryland, 540, 570; *Union Nat. Bank* v. *Roberts*, 45 Wisconsin, 373, 379; *Tarbell* v. *Sturtevant*, 26 Vermont, 513, 517; *Valette* v. *Mason*, 1 Indiana, 89; *First Nat. Bk. of Dubuque* v. *Werst*, 52 Iowa, 684, 685; *Citizens' Bank* v. *Payne*, 18 La. Ann. 222. All the bank can equitably claim in this suit is the amount due it from Hooker & Co., which was admitted and found to have been only $8459 at the date of the decree in this case. And its substantial rights were not disturbed by the decree under review; for its judgment against Foote, which was only collateral security for that claim, was not set aside, but the payment of the above amount made a condition precedent to its surrender of the Couch notes, and the assignment of that judgment. Neither the bank nor Rice complains of the decree in that form.

So, that the real question before us is as to the respective claims of the assignee of Hooker & Co. and the assignee of Foote to the possession of the Couch notes, and to the right of the appellant to enforce the judgment against Foote after the amount due the bank is paid. In determining these matters, must we assume, as between those assignees — neither having taken any greater rights than their assignors had — that the transfer of the Couch notes to Hooker & Co. by Foote, and the latter's guaranty of those notes, were valid contracts under the above statutes of Illinois? Did the judgment of the bank establish the validity of those contracts as between Foote and Hooker & Co.? These questions must receive a negative answer. Hooker & Co. were not parties to the action at law, and there was no issue in it between them and Foote. Within the law of estoppel, there was no privity be-

tween the bank and Hooker & Co.; certainly none that entitled the latter to rely upon the bank's judgment as conclusively establishing their claim against Foote. Hooker & Co. had no right to control, in anywise, the proceedings in that suit. While liable to the bank upon their own note, they were not liable to it upon the Couch notes or upon Foote's guaranty of them, for they simply deposited the notes, thus guaranteed, with the bank as collateral security, without endorsing them. It is true they had a pecuniary interest in the bank's succeeding in its action against Foote, and it may be that the same facts that would constitute a good defence, under the statute, for Foote, if sued by Hooker & Co., would equally have protected him against liability to the bank upon that guaranty. But these circumstances do not show such privity between the bank and Hooker & Co. as to conclude Foote, the bank having been successful, or to have concluded Hooker & Co. if Foote had succeeded, in respect to matters in dispute between him and that firm. In no legal sense was Hooker & Co. represented in the action upon Foote's guaranty. If they had sued him upon his guaranty, and, pending that action, the Couch notes had been transferred to the bank with the guaranty of payment endorsed thereon, there would have been such privity between Hooker & Co. and the bank as, perhaps, to have made the judgment against Foote conclusive for, and a judgment in his favor conclusive against, both Hooker & Co. and the bank, in respect to the matters litigated; for, in the case supposed, Hooker & Co. would have been parties to the judgment, and the bank, although not a party, would have succeeded to the rights asserted by that firm after the institution of the suit, and from a party thereto. *Orthwein* v. *Thomas*, 127 Illinois, 554, 571; 1 Greenl. Ev. §§ 523, 524. In respect to the two Couch notes in question, the issue is presented in this suit for the first time between Hooker & Co. and Foote as to whether the transfer and guaranty of those notes to that firm were upon such a consideration as rendered the transfer and guaranty void under the statute. The bank's judgment against Foote having enured, in equity, to its benefit only to the extent of its demand against Hooker

& Co. neither he, nor his assignee, nor any person interested, was estopped thereby from proving as against Hooker & Co. or their assignee the real nature of the transactions on the Chicago Board of Trade in which that firm represented Foote. Any other view would tend to defeat the manifest object for which the statute was enacted.

In respect to the character of the transactions resulting in the claim of Hooker & Co. against Foote for $22,165.72, which the latter settled by a transfer of the four Couch notes, with guaranty of their payment, but little need be said. What the evidence was upon this point in Jackson, Receiver, &c. *v.* Foote, we are not informed otherwise than by the opinion of the court in that case. But the evidence before us is overwhelming to the effect that the real object of the arrangement between Hooker & Co. and Foote was, not to contract for the actual delivery, in the future, of grain or other commodities — which contracts would not have been illegal (*Pickering* v. *Cease*, 79 Illinois, 328, 330) — but merely to speculate upon the rise and fall in prices, with an explicit understanding, from the outset, that the property apparently contracted for was not to be delivered, and that the transactions were to be closed only by the payment of the differences between the contract price and the market price at the time fixed for the execution of the contract. There was no material part of the claim of Hooker & Co. that was not based upon a palpable violation of the statute. The parties deliberately engaged in what is called gambling in differences. It results that both the transfer and guaranty of the Couch notes to Hooker & Co. were void under the statute, and passed no title to them or to their assignee. It was so ruled by the Supreme Court of Illinois in *Pearce* v. *Foote*, 113 Illinois, 228, (decided after *Jackson, Receiver, &c.* v. *Foote*,) which was a suit by Pearce, as assignee of Hooker & Co., on one of the four Couch notes transferred to that firm by Foote. See also *Tenney* v. *Foote*, 95 Illinois, 99; *Lyon* v. *Culbertson*, 83 Illinois, 33; *Pickering* v. *Cease*, 79 Illinois, 328; *Irwin* v. *Williar*, 110 U. S. 499; *Barnard* v. *Backhaus*, 52 Wisconsin, 593; *Love* v. *Harvey*, 114 Mass. 80; *Flagg* v. *Baldwin*, 38 N. J. Eq. (11 Stewart,) 219; *Bigelow* v. *Benedict*, 70 N. Y. 202.

It is contended, however, that, under the pleadings and the rules of practice adopted for the equity courts of the United States, no decree could properly have been rendered, except one dismissing the cross-bill of Rice. The bank filed a plea and answer together; the plea setting up the proceedings and judgment at law in bar of Rice's cross-suit, and saving to the bank the benefit thereof. Pearce, as assignee of Hooker & Co., filed an answer, the first part of which, as did the plea of the bank, set out the proceedings and judgment in the action at law upon Foote's guaranty, relying upon them in bar of Rice's cross-suit, and praying that he might have the same benefit as if he had pleaded them. To the plea and answer of the bank, and to the answer of Pearce, general replications were filed by Rice, whereby, it is insisted, Rice admitted the sufficiency in law of the matters pleaded in bar; and, as the facts relating to the action at law were proven, the cross-bill of Rice, it is contended, should have been dismissed, as of course.

In support of this contention *Hughes* v. *Blake*, 6 Wheat. 453, 472, is cited. It was there said: "The truth of the plea being thus made out, what is to be the consequence? If the rule of courts of equity in England is to be applied, there can be no doubt. If a plea, in the apprehension of the complainant, be good in matter, but not true in fact, he may reply to it, as has been done here, and proceed to examine witnesses in the same way as in case of a replication to an answer; but such a proceeding is always an admission of the sufficiency of the plea itself, as much so as if it had been set down for argument and allowed; and if the facts relied on by the plea are proved, a dismission of the bill on the hearing is a matter of course." That case was decided at February term, 1821, of this court. The rule there announced was undoubtedly in accordance with the long established practice in courts of equity. *Farley* v. *Kittson*, 120 U. S. 303, 314; Story's Eq. Pl. § 697; 1 Daniell's Ch. Pl. & Pr. 695; 1 Smith's Ch. Pr. 234; Mitford's Ch. Pl. 302–3; *Harris* v. *Ingledew*, 3 P. Wms. 91, 94. But, at the succeeding term, in 1822, of this court, rules of practice for the equity courts of the United States were adopted under the authority conferred by the act of May 8, 1792, 1 Stat. 275,

c. 36. Rule 19 of that series provided: "The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." 7 Wheat. x. This subsequently became, and is now, equity rule 33. It clearly takes from the establishment of the plea the effect it had under the old law. When, by filing a replication, issue is taken upon a plea, the facts, if proven, will now avail the defendant only so far as in law and equity they ought to avail him. Under the existing rule the court may, upon final hearing, do, at least, what, under the old rule, might have been done when the benefit of a plea was saved to the hearing. "When," says Cooper, "the benefit of the plea is saved to the hearing, the decision of the cause does not rest upon the truth of the matter of the plea; but the plaintiff may avoid it by other matter, which he is at liberty to adduce." Cooper's Eq. Pl. 233. See also Story's Eq. Pl. § 698; Mitford's Eq. Pl. 303; *Hancock* v. *Carlton*, 6 Gray, 39, 54. See also *United States* v. *Dalles Military Road Co.*, 140 U. S. 599, 616, 617.

So far as the bank is concerned, it obtained by the decree below all it was entitled to demand; for the conclusiveness of its judgment against Foote is recognized to the full extent of its actual interest in it, namely, the amount of its claim against Hooker & Co. for which the guaranteed notes were held as collateral security. It has no cause to complain, and does not complain.

In respect to the assignee of Hooker & Co., he was not entitled to a dismissal of the cross-bill upon proof merely of the proceedings and judgment in the bank's suit against Foote; because, under the evidence in the cause, and for the reasons already given, that judgment did not estop Foote or his assignee from showing, as has been done, the illegal character of the transactions out of which arose the claim of Hooker & Co. against Foote, and the transfer by the latter of the Couch notes with guaranty of payment. Consequently, the facts stated in the pleadings of Pearce as to the proceedings and judgment in the action against Foote, although established, cannot properly

avail him in this suit. The court was at liberty to determine, under the pleadings and evidence, the relief to which the respective parties were entitled.

It is further contended that Rice, the assignee of Foote, was not one of those authorized by the statute to proceed by bill in equity or by motion to set aside or vacate a judgment, mortgage, assurance, bond, note, bill, specialty, covenant, agreement, act, deed, security or conveyance, given or executed, in violation of the statute relating to gaming and gambling contracts. We think he was. The evidence shows that the assignment to him was in good faith and for a valuable consideration. It is clear that he was a person interested in the object to be attained by the proceeding which the statute authorizes.

These views sustain the decree below, and it is

Affirmed.

Mr. Chief Justice Fuller and Mr. Justice Gray did not hear the argument, nor take part in the decision of this case.

FARNSWORTH *v.* DUFFNER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 69. Argued November 4, 1891. — Decided December 14, 1891.

In a suit in equity for the rescission of a contract of purchase, and to recover the moneys paid thereon on the ground that it was induced by the false and fraudulent representations of the vendor, if the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained: and *a fortiori* he is precluded from rescinding the contract and from recovery of the consideration money if it appears that he availed himself of those means, and made investigations, and relied upon the evidences they furnished, and not upon the representations of the vendor.

Statements by a vendor of real estate to the vendee, (made during the negotiations for the sale,) as to his own social and political position and religious associations, are held, even if false, not to be fraudulent, so as to work a rescission of the contract of sale.

It is no ground for rescinding such a contract that the agents of the vendors, who had received the full purchase money agreed upon, misappropriated a part of it.

Statement of the Case.

THE court stated the case as follows:

On February 26, 1879, a tax deed was executed by the clerk of the County Court of Upshur County, to George Henning and others, for a tract of land supposed to contain forty thousand acres. The grantees in this tax deed were twenty-two in number, who had entered into a written agreement on December 11, 1877, to purchase the land at a tax sale in that month. On April 24, 1883, this agreement for the purchase of this land was executed:

"We, the undersigned, agree to and with George Henning & Co., and bind ourselves to do certain things (through and with the committee of said company, viz., D. D. T. Farnsworth, Jackman Cooper and P. Thomas) as follows: We agree to pay to said committee fifteen thousand dollars for a certain tract of 40,000 acres of land, known as the Wm. H. Morton land, that was sold for non-payment of the taxes and bought by said George Henning and others, to whom the State of West Virginia made deed, etc., one hundred dollars of which sum in hand paid to said committee, two thousand dollars to be paid to said committee at the Buckhannon Bank on the 4th of May, 1883, the residue of said fifteen thousand dollars to be paid at the time of the making of a deed for said land, said deed to be made within forty days or as soon thereafter as possible. The deed shall convey all the rights and title to said land as conveyed by the State in a deed made to said company; the deed to be made to Joseph Duffner, Charles Duffner and Matthew Duffner (the undersigned), with the guarantee that the said tract of land shall contain at least twenty thousand acres not legally held by actual settlers within the boundary of said tract of 40,000 acres; but in the making of the deed for said land it shall provide that all the actual settlers within boundary who have been in peaceable possession for ten years according to law, and have paid the taxes on their claim or title shall not be disturbed by any attempt in law from their boundaries so held by deed or title; all the rest of said 40,000 acres is to be held by the under-

signed. Now, if the said D. D. T. Farnsworth, Jackman Cooper and P. Thomas shall make or cause to be made to us, the undersigned, a deed as above stated for said 40,000 acres, we will faithfully perform our obligations herein made."

"Witness our hands and seals this day and year of our Lord, April 24, 1883.

"CHARLES DUFFNER. [SEAL.]
"JOS. DUFFNER. [SEAL.]
"MATTHEW DUFFNER. [SEAL.]

"P. S. We agree also to pay the taxes on said land for the year 1883."

Thereafter a deed was made in pursuance of this agreement. The deed was dated May 12, 1883, but not in fact delivered until July 14, 1883. It purported to grant "all the rights, title and interest vested" in the grantors by the tax deed heretofore referred to, which was specifically described. It also contained this provision, in reference to settlers on the tract:

"The parties of the first part herein named convey the above-named 40,000 acres of land to said parties of the second part herein named with the provisions that all of the actual settlers within the boundaries of said survey, who have been in peaceable possession for ten years previous to this date, according to law, and, having paid all of the taxes on their claim of title to any of said land, shall not be disturbed by any attempt or action in law from their boundaries so held by them by deed as aforesaid; but all of the residue of said 40,000 acres is herein conveyed to the parties of the second part and held by them with the guarantee that said tract or survey of land shall contain at least 20,000 acres not legally held by actual settlers, as above named and provided for, within said boundary of 40,000 acres; but if in case the quantity of land in said survey should prove to be less than 20,000 acres after deducting the number of acres legally claimed and held by actual settlers, as above herein named, then the parties of the first part, grantors, who now constitute the legal owners of said tract of land which was sold for the non-payment

of the taxes due thereon in the name of William H. Morton, are to refund back to the said Duffners, parties of the second part, in proportion per acre for any deficiency of land below or less than 20,000 acres in said survey."

On February 12, 1886, Joseph Duffner, who had in fact advanced all the money for the purchase of this land, and who had succeeded to the rights of his associates in the deed, filed his bill in the District Court of the United States for the District of West Virginia, setting forth the fact of his purchase and the amount of money paid, and alleging that the purchasers were induced to purchase through the false and fraudulent representations of the several grantors, such false and fraudulent representations being set out in full; also, that the tax deed was void, and conveyed no title to any land by reason of three matters specifically pointed out; and praying a decree that the several grantors be adjudged to return to him the moneys by him paid, in proportion to their several interests as grantors in the conveyance. To this bill the defendants answered separately. Thereafter, on pleadings and proofs, the case was submitted to the court, and a decree entered in favor of the plaintiff in accordance with the prayer of the bill, setting aside the contract of April, 1883, and adjudging that the several defendants pay to the plaintiff their proportionate amounts of the moneys paid by him. The amounts thus decreed against two of the defendants, Daniel D. T. Farnsworth and Philip Thomas, being each over five thousand dollars, they have appealed to this court.

Mr. H. J. May, (with whom was *Mr. A. H. Garland* on the brief,) for appellants, cited: *Randall* v. *Howard*, 2 Black, 585; *Adams* v. *Alkine*, 20 West Va. 480; *Overton* v. *Davisson*, 1 Grattan, 211; *Shank* v. *Lancaster*, 5 Grattan, 110; *Slaughter* v. *Gerson*, 13 Wall. 379; *Yeates* v. *Pryor*, 11 Arkansas, 58; *Farrar* v. *Churchill*, 135 U. S. 609; *Thompson* v. *Jackson*, 3 Randolph, 504; *Carroll* v. *Wilson*, 22 Arkansas, 32; *Jackson* v. *Ashton*, 11 Pet. 229; *Sutton* v. *Sutton*, 7 Grattan, 234; *Abbott* v. *Allen*, 2 Johns. Ch. 519; *Gouverneur* v. *Elmendorf*, 5 Johns. Ch. 79, 84; *Hill* v. *Bush*, 19 Arkansas, 522; *Walker*

v. *Hough*, 59 Illinois, 375; *Pasley* v. *Freeman*, 3 T. R. 51, 56; *Ludington* v. *Renick*, 7 West Va. 273; *Summers* v. *Kanawha County*, 26 West Va. 159; *Whiting* v. *Hill*, 23 Michigan, 399; *Pratt* v. *Philbrook*, 41 Maine, 132; *Bridge* v. *Penniman*, 105 N. Y. 642.

Mr. Henry M. Russell, for appellee, cited: *Andrus* v. *St. Louis Smelting &c. Co.*, 130 U. S. 643; *Boyce* v. *Grundy*, 3 Pet. 210; *Farrar* v. *Churchill*, 135 U. S. 609; *Halsted* v. *Buster*, 140 U. S. 273; *Dickinson* v. *Railroad Co.*, 7 West Va. 390, 425; *Stewart* v. *Wyoming Ranch Co.*, 128 U. S. 388; *Barton* v. *Gilchrist*, 19 West Va. 223; *McCallister* v. *Cottrille*, 24 West Va. 173; *Simpson* v. *Edmiston*, 23 West Va. 675.

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

This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained. In *Slaughters' Administrator* v. *Gerson*, 13 Wall. 379, 383, this court said: "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks

from other quarters means of verification of the statements made, and acts upon the information thus obtained." See also *Southern Development Co.* v. *Silva*, 125 U. S. 247; *Farrar* v. *Churchill*, 135 U. S. 609. In *Ludington* v. *Renick*, 7 West Va. 273, it was held that "a party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied." In the case of *Attwood* v. *Small*, decided by the House of Lords, and reported in 6 Cl. and Finn. 232, 233, it is held that "if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations." And in 2 Pomeroy's Equity Jurisprudence, section 892, it is declared that a party is not justified in relying upon representations made to him — "1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties."

But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, *a fortiori* is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations.

It becomes necessary now to state some facts appearing in the record, facts that are undisputed, and coming from the lips of plaintiff and his witnesses. Matthew Duffner, the son of plaintiff and one of the three parties in the contract and deed, was in partnership with a man by the name of Wood.

This partner informed him that he had a cousin, one Colonel Wood, living near Oakland, Maryland, who had lands for sale. A few weeks after receiving this information Duffner called on Colonel Wood, and was shown by him a map of this land, located within a few miles of Buckhannon, in Upshur County, West Virginia. By arrangement the three Duffners met Colonel Wood at Clarksburg, and went with him to Buckhannon with a view of examining the land. Soon after their arrival Colonel Wood became intoxicated and took no further part in the transaction. While there they met the two appellants and Jackman Cooper (and this was the first interview or communication between the parties) and entered into the contract of April 24, 1883, with them as a committee on behalf of all the owners. Prior, however, to this they had gone on to the land in company with Watson Westfall, who was, or had been for years, the surveyor of the county, spending the time from Saturday morning until Tuesday night in going to, examining, and returning therefrom. After executing this contract the Duffners returned to Cleveland. Having been advised that the deed was executed and ready for delivery, and in July following, this plaintiff, with a lawyer from Cleveland — Mr. Fish, a gentleman who had been acting as his counsel for fifteen or twenty years, a lawyer of experience, sixty-four years of age — went to Buckhannon. He took Mr. Fish with him for the purpose of having him examine the title and the deed. On arriving at Buckhannon, Mr. Fish proceeded to make such investigation as he deemed sufficient; and after three days passed in an examination of the records and a study of the statutes of the State, he advised Mr. Duffner to take the deed; and on the giving of such advice Mr. Duffner received the deed and paid the balance due on the contract. After this, having missed the train, Mr. Fish remained another day in Buckhannon, and continued his examination of the records; and on his way home stopped at the State capital to see if proper returns had been made to the State auditor's office. The result of all his investigations was satisfactory; and, as both plaintiff and Mr. Fish testify (and their testimony is corroborated by many witnesses, and contradicted by none), it

was after Mr. Fish advised him to take the deed that he took it and paid his money.

But one conclusion can be deduced from these facts — and that is, that the plaintiff did not rely upon any representations made to him by the defendants, but through his own counsel made investigation of the title, and purchased on the strength of that counsel's opinion thereof. Within settled rules, he is, therefore, now precluded from rescinding this contract on the ground of such representations.

But the case does not rest on this alone. Thus far we have considered only such facts as are disclosed by the testimony of the plaintiff, his son, and his counsel. Let us look at some of the testimony produced by the other side. Frederick Brinkman, an apparently disinterested witness, testifies that he met plaintiff on his several visits to West Virginia; and, hearing from him that he was coming there to buy land, cautioned him against West Virginia land titles, calling them "polecat" titles, and advised him before purchasing to consult some of the local lawyers, naming three or four of them. To which plaintiff replied that he would be careful, and that before purchasing he would bring his own counsel from Cleveland; and added that he was a good lawyer, and one in whom he had confidence. Again, while Mr. Fish was making his examination of the records in the county office, three or four of the defendants were present; and some one or more of them said to him, in the presence of the plaintiff, that some people called their title a wildcat title; and they wanted him to make a full examination, and be satisfied that it was good, "for they wanted no after-claps or further trouble about the land thereafter." So we have not only equal means of knowledge, but also an actual examination by the purchaser through his counsel; a completion of the contract when, and only when, his counsel advises him that the title is satisfactory; a prior caution to the purchaser that land titles in West Virginia were doubtful, and his reply that he proposed to rely upon the advice of his own counsel; and the further declaration of the defendants to such counsel, in the presence of the purchaser, before the completion of the contract, that they de-

sired a full examination, in order that there might be no after trouble. Surely, if there ever was a case in which the doctrine of *caveat emptor* applies, this is one.

It may be well now to notice the three matters which are alleged in the bill as invalidating the title: First, that there was no note or record of any kind in the office of the clerk of the county court of Upshur County of the sheriff's report of his sale, until the 10th day of January, 1878, which was more than ten days after the sale; which omission, counsel says, has been decided by the Supreme Court of West Virginia to invalidate a tax deed. But this was a defect apparent on the records, the very records which Mr. Fish was examining. Second, that William H. Morton, in whose name the land was returned delinquent for the non-payment of the taxes of 1876, never had any valid title; his only claim of title resting in a series of fraudulent papers, admitted to record in the county of Upshur on the 16th day of February, 1876. Then follows a statement of the instruments in that chain of title, to which the bill adds: "From this it will be seen that all of these papers except the last were admitted to record upon certificates purporting to have been made on the 24th day of February, 1867, which was Sunday, by one Frederick Bull, who only goes so far as to certify to the papers as copies of the papers which were then produced before him." But this chain of title, as the bill avers and the testimony shows, was on the records, and was examined by Mr. Fish; and it also appears that Mr. Fish noticed that one of these instruments at least, thus placed on record, was not an original instrument, but only a copy. So the defect was not only one which could have been noticed by Mr. Fish, but also, so far as the objection runs to the record being of a copy of an instrument, was in fact perceived by him. Thereafter he examined to see that this tract of land was listed for that year in the name of Morton only; and concluded that, as tax proceedings are proceedings *in rem* against the land, they were not vitiated by any defect in the chain of title to the party in whose name the land was listed. Third, it was alleged that the title under the tax deed was void, because the tract of land described therein was and is

owned by other persons claiming under and owning by superior patents. And then the bill sets out some eleven patents, issued between 1785 and 1793, for large tracts of land, which patents, the bill alleges, covered and included the tract in controversy. But these, too, were facts appearing on the public records.

It is worthy of remark here, that in the latter part of the eighteenth century it was a common practice for the State of Virginia to make grants of large tracts of lands in the then unoccupied portions of the State now included in the State of West Virginia, the boundaries of which grants were often conflicting and overlapping. Hence arose, under authority of the statutes, a form of patent known as an "inclusive" grant. Grants of that nature were before this court, and considered in the cases of *Scott* v. *Ratliffe*, 5 Pet. 81; *Armstrong* v. *Morrill*, 14 Wall. 120; and *Halsted* v. *Buster*, 140 U. S. 273. So the exact tract of land which any of these patentees actually acquired could only be determined after surveys, and a comparison of the dates of the entries, surveys and patents. And as the descriptions in tax proceedings followed those in patents and other deeds, — lands being listed in the names of the owners according to the system then obtaining in that State, — the same uncertainty of boundary existed as to lands held by tax titles. But with reference to all these matters, alleged as defects in the title, it is enough to say that they were apparent on the records, were open to the inspection of plaintiff and his counsel, and as to one of them at least, it was a defect first noticed by Mr. Fish, and deemed by him insufficient to destroy the tax title.

So far as respects the matter of settlers on the land — settlers having occupied portions long enough to acquire title by occupancy — both the contract and the deed give notice of that fact, and make provision therefor. It also appears that the Duffners made a general examination of the land before the contract was entered into, and spent three nights at the house of Isaac W. Simons, a settler claiming title by occupancy, who, as he testifies, notified them of his claim of title. As the plaintiff after his purchase never caused a survey to be made of the

land, and never sought to find out how much of the ground was occupied by these settlers, it is still an unsettled question how much of the forty thousand acres described in the tax deed was within the limits of prior grants, or in fact so occupied.

We now pass to a notice of the particular matters of fraud alleged in the bill; and the first is, that the defendants knew that their title was worthless, and with this knowledge, deliberately represented it to be good for the sake of inducing the purchase. The matters in the testimony which are relied upon to substantiate this charge are, that the title was in fact worthless; that there was talk in the community to that effect, which had come to the knowledge of defendants; that such an opinion had been given by a prominent lawyer, at one time a judge of the Supreme Court of that State, as was known to them; the presumption from their long residence in the community that all would have known, and the fact that some did know, of the existence of these conflicting grants; and the testimony of Mr. Fleming, a lawyer in Buckhannon, that these appellants stated to him he might be called upon to advise as to the title, and intimated that an opinion in its favor was desired, and that they would pay him for his services. But, as against these matters, it appears that these defendants were not lawyers, but farmers and business men, not possessing or pretending to possess that knowledge of the law which would enable them to determine as to the validity of the title; that they advanced not only the money for the purchase in the first instance, but continued during the succeeding years and until this sale to pay the taxes, the amount of taxes thus paid being, as stated by the county clerk, $2983.82, and the total amount paid by these defendants in one way and another, towards perfecting their title, according to the testimony of one of the defendants, being $3150.67; that they did not pretend that the title they were selling was other than a tax deed; and that they indicated in the papers the tax deed on which their title was based, and referred the purchaser to the records by which the validity of their title could be determined. While they may have known, as is generally known, that there is an uncertainty about a tax title, yet they had confidence enough in it to invest

their money therein for a series of years, and to invite the purchaser to an examination of the record evidences thereof. So far as respects the testimony of Mr. Fleming, the lawyer, it is proper to say that he does not testify that there was any direct suggestion to the alleged effect, but simply that he obtained an impression from the general tone of the conversation, while these appellants positively deny that there was any suggestion or thought on their part of anything improper; and say that they simply notified him that they might be asked to name some local lawyer to examine the title for the purchaser, and that they should take pleasure in recommending him.

Again, it is charged that these defendants surrounded this purchaser and his counsel and succeeded in preventing them from having conversations with other citizens, or making inquiries of them, and ascertaining such facts or reports as might have been gathered from such inquiries. But any attempt of this kind is denied by all. It was natural that they should be interested in making a sale, and that they should do what they could to show attentions to the purchaser and his counsel, and should be often with them; but it does not appear that they hindered them in any way from making such inquiries and investigations as they desired. On the contrary, their testimony is that they urged them to make full inquiry and investigation before consummating the purchase.

It is further charged in the bill that, "in order to induce said plaintiff to accept and confide in the said representations as to the validity of the said title, and in order to prevent the said plaintiff from making inquiries in other directions respecting the same, the said Daniel D. T. Farnsworth, at the time of making the said representations respecting the said title, also represented to the said plaintiff that he, the said Daniel D. T. Farnsworth, had been governor of the State of West Virginia and a member of the senate of the same State, and was at the time of making such representations the president of a bank and the president of a railroad company and a member of the Baptist Church, and had heretofore built a church edifice, which he pointed out to the said plaintiff, and that he was not such a man as would deceive or take advantage of the said plaintiff,

or would have anything to do with titles to land unless they were good titles."

According to the plaintiff's testimony, it would appear that these statements were made before the signing of the original contract. According to Mr. Farnsworth, that, while he did make statements of that character, it was only after the contract was signed, and while walking about the city with the plaintiff, and in response to inquiries made by him. But, further, the testimony of Mr. Farnsworth is that those matters concerning himself, thus stated, were true, and there is no suggestion anywhere that they were not true. If true, they certainly were not false and fraudulent representations, and, if false, they were not of a character to invalidate a contract. It would hardly do to hold that a party was induced into a contract by false and fraudulent representations, because one of the vendors represented that he had been governor of the State, and was a member of the church, and president of a bank and a railroad company.

One other matter alone requires notice. It appears that in the talk preceding the contract of purchase the committee had named $20,000 as the price of the land, and had asked a further sum of $1500 for their own services; but that the final outcome of the negotiations was the fixing of $15,000 as the price of the land, and $6500 to be paid to these two appellants for their services. It is enough to say, that whatever wrong these appellants were guilty of in making this change, was a wrong to their associates and not to the purchaser. It is not a matter he can complain of. The full amount which he had to pay was the amount they named in the first instance, to wit, $21,500, and if in fraud of the rights of their associates they changed the distribution of that sum, it was a wrong which only the parties injured can take advantage of.

This is the whole case presented by the record. The vendors pretended to sell only a tax title. They specially guarded themselves against any rights of actual settlers. The validity of their title and the extent of it were matters apparent on the records, and open to the inspection of the purchaser. He did not act on their representations that the title was good, but

brought his own counsel from home to examine those records, and acted upon his judgment of the title. The conduct of the defendants supports their testimony, that they believed there was validity to their title. The particular statements complained of as against one of these appellants were true in fact, and, if not true, were not of a character to avoid the purchase. The wrong which these two appellants are specially charged to have been guilty of was a wrong against their associates and not against the purchaser, nor one of which he can take advantage. It follows, therefore, that there was no such showing made as would justify a court in rescinding the contract of purchase, and decreeing a repayment of the money.

The decree will be reversed, and the case remanded, with instructions to dismiss the bill as to these appellants.

Mr. Justice Gray did not hear the argument or take part in the decision of this case.

FINN *v.* BROWN.

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

No. 106. Argued November 24, 25, 1891. — Decided December 14, 1891.

Fifty shares of the stock of a national bank were transferred to F. on the books of the bank October 29. A certificate therefor was made out but not delivered to him. He knew nothing of the transfer and did not authorize it to be made. On October 30 he was appointed a director and vice-president. On November 21 he was authorized to act as cashier. He acted as vice-president and cashier from that day. On December 12 he bought and paid for 20 other shares. On January 2 following, while the bank was insolvent, a dividend on its stock was fraudulently made, and $1750 therefor placed to the credit of F. on its books. He, learning on that day of the transfer of the 50 shares, ordered D., the president of the bank, who had directed the transfer of the 50 shares, to retransfer it, and gave to D. his check to the order of D., individually, for $1250 of the $1750. The bank failed January 22. In a suit by the receiver of the bank against F. to recover the amount of an assessment

of 100 per cent by the Comptroller of the Currency in enforcement of the individual liability of the shareholders, and to recover the $1750: *Held*,

(1) In view of provisions of §§ 5146, 5147 and 5210 of the Revised Statutes, it must be presumed conclusively that F. knew, from November 21, that the books showed he held 50 shares;

(2) F. did not get rid of his liability for the $1250, by giving to D. his check for that sum in favor of D. individually.

THE court stated the case as follows:

This is an action at law, brought in the Circuit Court of the United States for the District of Colorado, by the receiver of the First National Bank of Leadville, Colorado, against Nicholas Finn, to recover $8750, with interest upon $7000 thereof from September 28, 1885, and upon $1750 thereof from January 2, 1884. The bank was a national banking corporation; and, it becoming insolvent, the Comptroller of the Currency, on the 24th of January, 1884, appointed one Ellsworth receiver of the bank, who afterwards resigned, and the plaintiff became his successor.

The amended complaint alleges, that the defendant, on the 29th of October, 1883, became the holder of 50 shares of the capital stock of the bank, and, on the 12th of December, 1883, the holder of 20 others of such shares, the shares being of the par value of $100 each; that certificates of stock were duly issued to the defendant for such shares respectively; that, on the 28th of September, 1885, the Comptroller of the Currency, under § 5151 of the Revised Statutes, determined that, in order to provide the money necessary to pay the debts of the bank, it was necessary to enforce the individual liability of its shareholders to the full extent of 100 per centum of the par value of the shares of its capital stock, and thereupon, on that day, made an assessment to that effect, and directed the plaintiff to take the necessary proceedings to enforce such individual liability; that thereupon there became due from the defendant $7000; that due notice was thereupon served upon him; but that he had paid no part of the assessment.

The amended complaint then sets forth, as a second cause of action, that on the 2d of January, 1884, and for a long time

prior thereto, the defendant was a shareholder and director, and acting cashier, of the bank; that, on that date and for a long time prior thereto, the bank was insolvent; that on that date, by its board of directors, it fraudulently and wrongfully declared a dividend of 25 per cent on its capital stock, to be paid to its shareholders; that the defendant, as such director, was present at the meeting of the board at which such dividend was declared, and united in such action, with full knowledge of such insolvency; that on that date, the defendant received from the bank $1750, as his proportion, on said 70 shares, of said dividend, and retained, and still retains, that sum, with full knowledge that at that date there were then no net profits of the bank, and that the dividend was wrongfully withdrawn from its capital stock; and that repayment of the $1750 had been demanded by the defendant, and refused.

The answer denies that the defendant ever became the holder of the 50 shares of stock, or that there was issued to him a certificate for 50 shares, but admits that on the 12th of December, 1883, he became the holder of 20 shares, and that there was issued to him a certificate therefor. It admits the defendant's liability for $2000 on the 20 shares of stock, and alleges that, after the commencement of the suit, he paid to the plaintiff the $2000. It denies that, at the time stated in the second cause of action set forth in the amended complaint, as to the $1750, the defendant was a director of the bank, or that he ever was its acting cashier. It takes issue as to the declaring of the 25 per cent dividend, and denies that the defendant, as a director of the bank or otherwise, was present at the meeting of the board at which it was declared, or that he united in such alleged action with any knowledge of the insolvency of the bank or otherwise, and denies that he received the $1750 as his proportion of such dividend, but admits that he received $500 as a dividend of 25 per cent upon the 20 shares.

The cause was tried before the court and a jury, and a verdict was rendered for the plaintiff, for $7833.33, and a judgment for the plaintiff for that amount was entered. The defendant has sued out a writ of error to review that judgment. There is a

bill of exceptions, which contains all the evidence given on the trial.

The facts of the case appear to be as follows: The doors of the bank were closed on the 22d of January, 1884. Immediately thereafter Ellsworth was appointed receiver, and continued to be such until February 1, 1884, when, on his resignation, the plaintiff was appointed in his place. According to the stubs of the book of certificates and as shown by the stock register, 50 shares of the stock were transferred to the defendant, by issuing a certificate for 50 shares, dated October 29, 1883, 40 shares of which were issued to the defendant from the stock of one McNany, and ten shares from the stock of Frank W. De Walt, the president of the bank. Those 50 shares constituted the only stock which stood in the name of the defendant, until December 12, 1883. On the 30th of October, 1883, at a directors' meeting, the defendant was appointed a director; and on the same day, at a directors' meeting, he was appointed vice-president of the bank. On the 21st of November, 1883, at a directors' meeting, at which the defendant was present and voting, the resignation of P. J. Sours, the cashier, was accepted and the defendant, as vice-president, was authorized to act as cashier until a new cashier should be regularly appointed. On the same day, the defendant and De Walt, the president, were authorized to pass judgment on all notes, etc., offered for discount. The defendant discharged the duties of vice-president from the 21st of November, 1883, until the bank failed. It appeared from the book of share certificates, that the defendant, at the time of the failure of the bank, was the owner of 70 shares of its stock. It also appeared that, since this suit was brought, he had paid the $2000 assessment on the 20 shares. It further appeared that the defendant, as vice-president, wrote a number of letters to correspondents of the bank, notifying them of the resignation of Sours as cashier and enclosing the defendant's signature, which was to be recognized on bills of exchange, etc., subsequent to that time; and that he signed, as vice-president, between November 21 and December 12, 1883, and also between December 12, 1883, and January 22, 1884, a large number of

certificates of deposit and bills of exchange issued by the bank. No regular stock book was kept in the bank, but a list of stockholders and transfers of stock appeared in one of its books, in which was entered a credit to the defendant of 50 shares of stock on October 29, 1883, and of 20 shares more, purchased by him from Sours, on December 12, 1883. It appeared that no demand had been made upon De Walt or McNany to pay the assessment on the 50 shares. The defendant claimed that the 50 shares were transferred to him without his knowledge or consent; that no transfer appeared upon the books, to the credit of either De Walt or McNany from the defendant, of any sum of money for the 50 shares; and that the certificate for the 50 shares was not among the papers of the bank, so far as the receiver could ascertain. The defendant, on cross-examination as a witness, gave evidence tending to show that, in connection with De Walt, he had fulfilled the duties of cashier of the bank from the time of his election as vice-president. The books of the bank showed that it was insolvent on January 2, 1884. Sours owned 20 shares of the stock on the 29th of October, 1883. On that day he tendered his resignation to the president, and on the same day the president instructed him to issue a certificate of stock for 50 shares in the name of the defendant, transferring 40 shares thereof from the stock of McNany, and ten shares from the stock of De Walt. Sours wrote the certificate, signed it as cashier, and left it in the book of certificates, but did not deliver it to the defendant. On the 21st of November, 1883, Sours attended a meeting of the directors, at which time his resignation as cashier was accepted; and, at that meeting, the defendant was elected a director, and on the same day, at a meeting attended by the defendant, the latter was elected vice-president. On December 12, 1883, the defendant paid Sours $2400 for his 20 shares, and Sours handed to him the certificate therefor, duly assigned. It was customary for Sours, as cashier, to sign new certificates of stock as issued. He resigned because he was not satisfied with the manner in which the bank was conducted and had his fears of coming disasters. He knew that no cashier had been elected to take his place, and that the

duties of that office had been performed by the defendant; and Sours ceased his active connection with the bank after the defendant had been elected vice-president and before he disposed of his stock to the defendant.

The defendant testified that he knew nothing of the transfer of the 50 shares of stock to his name, and was absent from Leadville at the time; that after he returned, he was urged by De Walt to invest in the stock of the bank and become one of its active officers, which he consented to do; that on the 21st of November, 1883, he was elected a director, he being present at the meeting; that, at the same meeting, he was elected vice-president, and entered at once upon the discharge of his duties; that he was then urged to obtain some stock in the bank, and was informed by the president that 20 shares of the stock could be secured from Sours for a premium of $20 per share, and was advised by the president to take it, the latter representing the bank to be in a prosperous condition; that the defendant then purchased the 20 shares from Sours, and had them transferred to his name on the books, and took a certificate therefor; that, from the time of his election as vice-president, he performed some of the business of the bank, had his headquarters in the bank, wrote some letters, and signed some certificates of deposit and bills of exchange, the business being of a routine character, and he having little knowledge of the books and no knowledge of the condition of the bank, and relying almost entirely upon the representations and management of the president; and that he never had a certificate for the 50 shares or any other shares, except the 20 shares.

On the 2d of January, 1884, a dividend of 25 per cent on the capital stock of the bank was declared, and the sum of $1750 was transferred to the credit of the defendant, as his share of such dividend on 70 shares of stock. At that time, the bank was wholly insolvent, and the declaration of the dividend was fraudulent. According to the record of the directors' meeting at which the dividend was declared, the defendant was present and seconded the motion to declare the dividend. The entry in the book of records of the bank of

the declaration of the dividend was thought to be in the handwriting of a female relative of the president. The defendant testified that on the 2d of January, 1884, he was informed by De Walt, the president, that a dividend of 25 per cent had been declared, and, by some one else, that the sum of $1750 on account of such dividend had been transferred to his credit by order of De Walt; that, being the owner of only 20 shares, he at once inquired of De Walt about it, when, for the first time, he was informed that the 50 shares had been transferred to his credit and stood in his name on the books of the bank, in consequence of which $1250 had been transferred to his credit as soon as the dividend was declared; that he inquired of De Walt why the 50 shares were in his name, and was informed that they had been so transferred merely because De Walt thought the defendant might desire to purchase them as a good investment; that the defendant at once repudiated the transaction, and refused to purchase the stock or have anything to do with it, and ordered De Walt to retransfer the same back to his own name without delay; that the defendant immediately sat down and drew his check for $1250 to the order of De Walt individually, and handed it to the latter; that the check was duly charged on the books of the bank to the defendant and credited to the account of De Walt; that almost immediately thereafter, the defendant was summoned on a jury, and was kept in attendance thereon almost constantly until the 21st of January, 1884, the day but one before the suspension of the bank; that, during a part of such jury service, he was confined with the other jurors, and not permitted to separate from them; that the next day after the agreement of the jury, he was engaged in looking after the affairs of the bank, and did not think of the stock or whether it had been transferred by De Walt; and that the bank almost immediately suspended.

The defendant also gave evidence tending to show that he never attended a meeting of the directors for the purpose of declaring the dividend of January 2, and knew nothing about the fact that the books contained such an entry; and that he had no knowledge of the declaration of the dividend beyond

the statement of De Walt to that effect. He recognized the handwriting of the entry of the meeting at which the dividend was declared as being that of a lady cousin of De Walt; and testified that, according to the best of his information, the entry was written at the house of De Walt and not at the bank; that he never examined the book of certificates of shares, or any other entry or any other book, with reference to the shares; that he had no knowledge of the insolvent condition of the bank, and was assured by De Walt that the bank was doing a large business and making money, and that the shares were a profitable investment; that to the best of his recollection he had not sworn that the bank was in good condition on January 1, but, as one of the directors, he attested a sworn statement of its condition, which was verified by the president; that at the time the dividend was declared, he was of the belief that the president had the right to set apart from the profits of the bank such an amount as would represent the dividend which might be declared; that he paid no further attention to it after that; and that he was not aware that the bank was then insolvent and not in a condition to pay its debts, nor aware, at the time of the suspension of the bank, that there was less than $100 in currency on hand.

At the close of the evidence, the court refused to submit the cause to the jury, to which refusal the defendant excepted. The court then instructed the jury that, under the evidence of the defendant himself, as well as under the testimony for him, he was estopped from denying his ownership of the 50 shares; and that, inasmuch as he had not repaid the $1250 of dividend to the bank, but had paid it to De Walt, he had not refunded that amount in the manner in which he should have done. The court thereupon instructed the jury to find a verdict for $5000, the par value of 50 shares at $100 per share, and interest on such par value at the rate of ten per cent per annum from the date of the demand for payment by the plaintiff, together with $1750 dividend on the 70 shares of stock. The defendant excepted to that instruction. The defendant then asked the court to give seven several instructions, which were refused, and to each refusal the defendant excepted.

Argument for Plaintiff in Error.

The defendant then moved for a new trial, which was denied by the court, in an opinion reported in 34 Fed. Rep. 124. The ground of the denial of the motion for a new trial was stated by the court in its opinion to be, that the defendant was chargeable with notice of the transfer of the 50 shares to him, he having acted as vice-president and cashier during the time when those shares were transferred to him; that any investigation of the books of the bank would have led to the discovery that he was a stockholder to the extent of the 50 shares in question; that, when he was informed of the dividend of January 2, all he did was to pay the $1250 to De Walt, who, he supposed, was the owner of the shares; and that he did not return the money to the bank.

Mr. T. M. Patterson for plaintiff in error. *Mr. C. S. Thomas* and *Mr. C. C. Parsons* were on the brief.

The first assignment of error is based upon the refusal of the court to permit the said cause to go to the jury, and instructing them to find a verdict against the plaintiff in error, and that the plaintiff in error was estopped from denying the ownership of the 50 shares of stock standing in his name upon the books of the bank. Shares of stock in a corporation subject their owners to individual liability. The ownership of it is not, therefore, necessarily beneficial, but may impose liabilities which are greater than the advantages arising from its possession, and hence, in the transfer of corporate stock, which necessarily carries with it all the responsibilities attaching to the ownership, there is no presumption of acceptance. It is especially clear that, where an attempt is actually made to enforce the liability of the transferee, no presumption will prevent his right to refuse the transfer. *Cartmell's Case*, L. R. 9 Ch. 691; *Robinson* v. *Lane*, 19 Georgia, 337; *Skowhegan Bank* v. *Cutler*, 49 Maine, 315. In all cases, however, in which the transfer of the stock has originally been made without the knowledge and consent of the transferee, he has the right to repudiate the transaction, providing he has not already confirmed it. *Ex parte Hennessey*, 2 Macn. & Gord. 201; *Webster* v. *Upton*, 91 U. S. 65; *Turnbull* v. *Payson*, 95 U. S. 418; *Keyser* v. *Hitz*, 133 U. S. 138.

Argument for Plaintiff in Error.

The transfer of stock to a person upon the books of a company is not sufficient in itself to make him an owner of the same and subject to the liabilities thereof, unless he shall have done something which shall constitute an acceptance of the transfer, or which estops him to deny his ownership. *Tripp* v. *Appleman*, 35 Fed. Rep. 19; *Turnbull* v. *Payson*, *supra*. What will amount to an acceptance in the transfer of stock is a question of fact not as yet regulated by any general rules of law. *Pim's Case*, 3 DeG. & Sm. 11; *Sanger* v. *Upton*, 91 U. S. 56.

In the transfer of personal property — and corporate stock is personal property and subject to all the general rules of law regulating it — it may be safely said: There is no acceptance unless the transferee has exercised his option to receive or reject the property transferred, or has done something which will operate to deprive him of his option. *Gillman* v. *Hill*, 36 N. H. 311, 320; *Shepherd* v. *Pressey*, 32 N. H. 55; *Messer* v. *Woodman*, 22 N. H. 172, 181; *S. C.* 53 Am. Dec. 241; *Belt* v. *Marriott*, 9 Gill, 331; *Clark* v. *Tucker*, 2 Sandford, (N. Y.) 157.

In the light of these authorities, it is very clear that the plaintiff in error should have been allowed to go to the jury with the defence which he had made. That defence involved questions of fact, of the truth of which it was the sole judge. *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 284; *Pawling* v. *United States*, 4 Cranch, 219, 222; *Chicago, Rock Island &c. Railway* v. *Lewis*, 109 Illinois, 120, 124; *Lord* v. *Pueblo Smelting & Refining Co.*, 12 Colorado, 390.

The second assignment is based upon the error of the Circuit Court in instructing the jury that under the evidence of the defendant, as well as the testimony of the defence, the defendant was estopped from denying the ownership of the stock in controversy, (which has been discussed,) and that, inasmuch as he had repaid the $1250 in dividends, not to the bank, but to Frank W. De Walt, he did not refund the amount thereof in the manner which he should have done — in other words, that he should have paid the $1250 to the bank instead of to Frank W. De Walt. This was fallacious.

Immediately upon the declaration of a dividend by the

directors of a company, it becomes a debt due and payable from the company to the stockholders. *King* v. *Paterson & Hudson River Railroad*, 5 Dutcher (29 N. J. Law) 82, 504; *March* v. *Eastern Railroad*, 43 N. H. 515; *Foote, Appellant*, 22 Pick. 299; *Fawcett* v. *Laurie*, 1 Drew. & Sm. 192. The $1250 in question was a 25 per cent dividend upon the 50 shares of stock here involved. This dividend, as soon as it was declared, became the property of the owner of that stock at the time of declaring the dividend. The court below instructed the jury that this should have been paid to the bank, and that when Finn failed to repay it to the bank he did not return it in the proper manner. Certainly the bank was not the owner of this stock, nor could it be the owner of its own stock under the National Banking Law, save as security for a preëxisting debt. If it was not the owner of the stock, it had no more right to the dividend than any stranger.

It was urged at the trial in the court below, and accepted by the presiding judge as the law, that the 50 shares of stock having been transferred upon the stock books as above described, and standing in the name of the defendant in error upon the stubs at the time of his election, he would be estopped from denying their ownership and would be conclusively presumed to be the owner of the same because he had accepted the office of director.

In Morse on Banks and Banking, p. 117, it is said, referring to the statutory prerequisite for qualification as director: "This regulation, however, simply prescribes the requisite qualification for his election to the office. If a person not thus qualified is elected, and seeks to enter upon the office without qualifying by the purchase of the requisite number of shares, he may be ousted by legal process, but his acting as a director will not make him in any manner liable for this number of shares. Neither can he be regarded either at law or in equity, or for any purpose, as the constructive owner of them. His entering upon the enjoyment of the office does not in any case estop him from alleging his non-ownership of the requisite number of shares to qualify him for the position." By how much the stronger is the rule to be applied when the director

shall have qualified himself, in fact, by the purchase of 20 shares in addition to those upon which this constructive liability is sought to be enforced.

The same rule has been laid down with the same certainty in England in *Ex parte Marquis of Abercorn*, 4 DeG., F. & J. 95; *Roney's Case*, 4 DeG. J. & S. 426.

There can be no question from the foregoing authorities, that the mere acceptance of the office of director will not constitute one so accepting a shareholder in the company, in the absence of an express agreement between him and the company that he will in fact become so; and it is no less true that the only obligation imposed upon the one so accepting is that he shall, within a reasonable time, in case he accepts and enters upon the duties of his office, qualify himself as a director by the purchase of the requisite number of shares.

Mr. J. B. Henderson for defendant in error. *Mr. Edward O. Wolcott*, *Mr. Joel F. Vaile* and *Mr. Henry F. May* filed a brief for same.

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

The contention on the part of the defendant is that the Circuit Court erred in not allowing the cause to go to the jury. It is undoubtedly true, as contended by the defendant, that, as the 50 shares of stock were transferred to him originally without his knowledge and consent, he had a right to repudiate the transaction; but he is presumed to be the owner of the stock when his name appears upon the books of the bank as such owner, and the burden of proof is upon him to show that he is in fact not the owner. *Webster* v. *Upton*, 91 U. S. 65, 72; *Turnbull* v. *Payson*, 95 U. S. 418, 421; *Keyser* v. *Hitz*, 133 U. S. 138. We think it entirely clear, on the evidence, that the defendant did not sustain such burden of proof; and that there was no question thereon for the jury.

It is provided as follows, in regard to national banks, by § 5146 of the Revised Statutes: "Every director must, during

his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory or district in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place." Section 5147 reads as follows: "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office."

The meaning of § 5146 is that every director must own in his own right, during his whole term of service, at least 10 shares of the stock; and that, if he does not own such 10 shares, he cannot become or continue a director. In the absence of any proof on the subject, it is to be presumed that the defendant took the oath prescribed in § 5147, when he was appointed, that he owned 10 shares of the stock. As he was appointed a director and vice-president at least as early as November 21, 1883, and acted as such from that time, and did not purchase the 20 shares from Sours until December 12, 1883, he was violating the law during that interval, unless he owned during that space of time at least 10 shares of the stock; and if he took the oath prescribed by § 5147, he took it untruly if he did not own when he took it 10 shares of the stock. According to his own testimony, he was elected vice-

president on the 21st of November, and acted as such from that time, and also from that time fulfilled the duties of cashier of the bank, covering the period prior to December 12, when he purchased the 20 shares from Sours. The only state of facts consistent with the truth, according to the books of the bank, is that he owned the 50 shares from October 29, 1883, the day those shares were transferred to him, and the day before the records of the bank show that he was elected a director. It would appear that those 50 shares may have been transferred to him at par; and he paid a premium of $20 a share for the 20 shares which he purchased from Sours.

It is provided as follows by § 5210 of the Revised Statutes: "The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

It was the duty of the defendant, as acting cashier, and in the absence of any regular cashier, and of any other person authorized to act as cashier, to cause to be kept, under § 5210, the list of shareholders and of the number of their shares, therein specified; and the conclusive presumption must be that he kept such list and was cognizant of its contents. It necessarily showed his ownership of the 50 shares. Irrespective of the general duties imposed by law upon the cashier of a bank, or a person who acts as such cashier, the statute imposed upon him, in the present case, the specific duty mentioned in § 5210; and it must be presumed conclusively that he knew, from the 21st of November, 1883, that the books showed that he was a shareholder to the amount of the 50 shares. The instruction of the Circuit Court to that effect was, therefore, proper.

In regard to the dividend of 25 per cent it was clearly fraudulent and unlawful. The defendant did not get rid of his liability for the $1250 by drawing his check for that sum in favor of De Walt individually and handing the same to De Walt. The money belonged to the bank, and ought to have been restored to the bank. The dividend being unlawful, and the $1250 having been paid to the defendant by the bank, by being transferred to his credit by the bank on its books, it was not for him to take the place of the bank and to pay the money to De Walt. Whatever might have been the case if the dividend had been a lawful one and if the $1250 had been transferred by the bank to the credit of the defendant through inadvertence, the $1250 was no more the lawful property of De Walt than if the 50 shares (10 of which had been the property of De Walt) had not been transferred to the defendant by the instruction of De Walt to Sours to that effect.

The various instructions asked by the defendant and refused, were all of them predicated, in substance, on the assumption that the conduct of the defendant and his connection with the bank were not such as to estop him from denying his ownership of the 50 shares of stock, and upon the alleged fact that the defendant, by paying the $1250 to De Walt in respect of the 25 per cent dividend on the 50 shares, had freed himself from his liability to repay such dividend to the bank.

No general rule can be laid down as to what will constitute, in any particular case, an acceptance of the transfer of stock or the equivalent thereof, in a case where the transferee is in fact ignorant of the fact of transfer; but each case must be decided on its own facts. In the present case, the defendant testifies that on the 2d of January, 1884, when he was informed of the 25 per cent dividend and of the transfer to his credit of $1250 thereof, he at once repudiated the transaction and ordered De Walt to transfer the 50 shares to his own name without delay. But this was of no more effect than his drawing his check for the $1250 to the order of De Walt individually, and handing it to De Walt. The defendant, as vice-president and acting cashier of the bank, had the power himself to transfer

the 40 shares back to McNany and the 10 shares back to De Walt. He did not do so, but, knowing that the 50 shares had been transferred to his credit and stood in his name upon the books, he suffered the matter to remain in that shape for twenty days, until the doors of the bank were closed. He states that he did not go upon the jury until after the transaction which resulted in the drawing of the check to the order of De Walt for $1250. It was the defendant's duty, and he had the power, himself to make the transfer upon the books of the bank, *Whitney* v. *Butler*, 118 U. S. 655, 662; *Richmond* v. *Irons*, 121 U. S. 27, 58; and it made no difference as to his power to transfer, that the certificate for the 50 shares had not been delivered to him. *Pacific National Bank* v. *Eaton*, 141 U. S. 227, 233. It appears by the evidence that the bank had a stock register and a book of certificates of shares, and that a list of stockholders and of transfers was kept in one of its books, although it had no regular stock book.

The jury would not have been justified in holding the defendant not liable for the assessment on the 50 shares or for the $1750 dividend. The dividend was undoubtedly fraudulent, and the records of the bank were falsified in showing that the defendant was present at the meeting at which the dividend was declared. It was declared, probably, by De Walt himself alone, for the purpose of showing a fictitious prosperity and of concealing from the public and the directors the real condition of the affairs of the bank. The defendant had had no previous connection with banking business, and was deceived by De Walt. But all this cannot relieve him from liability. The statutes of the United States are explicit as to the necessary ownership of stock in a national bank by a director thereof, and as to his taking an oath to that effect, and as to the keeping by the cashier of a correct list of the shareholders and of the number of shares each of them holds; and it cannot be held, with any safety to the interests of the public and of those who deal with national banks, that a director, who also is vice-president and acts as cashier, can shield himself from liability by alleging ignorance of what appears by the books of which he has charge.

It has been held in England, that the fact that a person acts as director will not of itself make him liable as a holder of the number of shares required to qualify him to be a director, *Marquis of Abercorn's Case*, 4 De G., F. & J. 78, 95, 110; *Roney's Case*, 4 De G., J. & S. 426; but we decide this case on the fact that the defendant appeared by the books of the bank to be the holder of the 50 shares prior to the time when he became a director or vice-president, and prior to the time when he began to act as cashier; and we hold that, acting in those capacities down to the time when the doors of the bank were closed, he must be presumed conclusively to have had knowledge, during that interval, of what the books of the bank showed in regard to his holding the 50 shares; and that his action in respect of the 25 per cent dividend, after he learned of it on the 2d of January, 1884, was such as not to relieve him from his liability for the $1250.

In some of the English cases cited, there was no requirement that, in order to be a director, there should be ownership of a specified number of shares. In the present case, the statute required an ownership of at least 10 shares, to become or to continue a director; and as the books of the bank showed that 50 shares were transferred to the defendant before he was elected a director, and that those shares were in one certificate, the defendant could not have been advised that he held 10 shares, without learning at the same time that he held 50 shares. But, in view of the requirements before referred to, of the statute of the United States, no rule of law deduced from the English authorities can apply.

Judgment affirmed.

HAMMOND *v.* JOHNSTON.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 114. Argued November 25, 30, 1891. — Decided December 14, 1891.

In an action of ejectment in a state court in Missouri, both parties claimed under the New Madrid act, February 17, 1815, 3 Stat. 211, c. 45. In 1818 one Hammond entered on the premises, and occupied it until about 1825, claiming title from one Hunot, whose claim, under a Spanish grant, was confirmed by Congress, April 29, 1816, 3 Stat. 328, c. 159. The plaintiffs claimed as heirs of Hammond. The defendant claimed under an execution sale on a judgment obtained in a state court against Hammond in 1823, under which possession had been taken and maintained. This was fortified by a patent issued, in 1859, to Hunot, or his legal representatives. At the trial of the action in the state court, it was held that, although the legal title to the tract in dispute was in the United States at the time of the sale under the execution, yet Hammond had an equitable interest in it, which was subject to sale under execution, and that, under the statutes of Missouri, the sheriff's deed passed all his interest in the premises to the purchaser. Some Federal questions were also raised and decided adversely to the plaintiffs. Judgment being rendered for the defendant, the plaintiffs sued out this writ of error. *Held*, that this ruling of the state court involved no Federal question, and was broad enough to maintain the judgment, without considering the Federal questions raised, and that the writ of error must, therefore, be dismissed for want of jurisdiction, — following *Hopkins* v. *McLure*, 133 U. S. 380; *Hale* v. *Akers*, 132 U. S. 554; and *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679.

THE court stated the case as follows:

This was an action of ejectment, for a lot described, brought in the Circuit Court of St. Louis County, June 15, 1874.

The facts necessary to be considered in the disposition of the case are as follows: Joseph Hunot claimed a head right of 800 arpents of land, under the Spanish government, dated in 1802, and located in what is now New Madrid County, Missouri. On May 12, 1810, he conveyed this land by warranty deed to Joseph Vandenbenden, and on November 4, 1815, Vandenbenden conveyed the same by a like deed to Rufus Easton. January 31, 1811, the claim was presented for confirmation to the

old board of commissioners and rejected; but on November 1, 1815, Recorder Bates recommended the claim for 640 acres for confirmation, and it was confirmed by act of Congress of April 29, 1816, 3 Stat. 328, c. 159. August 12, 1816, Recorder Bates issued a certificate, No. 161, stating that the tract had been materially injured by earthquakes, and that under the act of Congress of February 17, 1815, 3 Stat. 211, c. 45, Joseph Hunot, or his legal representatives, (who had already received a certificate for 160 acres,) were entitled to locate 480 acres of land on any of the public lands of the Territory of Missouri, the sale of which was authorized by law. On June 16, 1818, Rufus Easton made application to the surveyor general to locate the said certificate on certain lands in township 45, range 7 east, being the same on which it was subsequently located. June 23, 1819, Joseph C. Brown, United States deputy surveyor, returned to the surveyor general's office a plat and description of the 480 acres surveyed for Joseph Hunot or his legal representatives. This survey, which was numbered 2500, was returned to the recorder of land titles on January 8, 1833, and on February 2, 1833, Frederick R. Conway, the recorder, issued and delivered to Peter Lindell patent certificate No. 404, for said survey, in favor of Joseph Hunot or his legal representatives. July 10, 1819, Rufus Easton and wife, by deed of that date, conveyed to William Stokes 234 acres of this survey, described particularly by metes and bounds. September 29, 1823, Rufus Easton, by deed of that date, acknowledged October 9, 1823, and recorded February 9, 1824, in which he recited that he had previously, on September 3, 1818, executed his bond to Samuel Hammond and James J. Wilkinson for the same land, conveyed to Samuel Hammond 240 acres, being the whole of the Hunot survey, as located by Rufus Easton by virtue of certificate No. 161, except 234 acres of the tract, which he had conveyed to Stokes. The lot in question in this suit is part of the 240 acres. Samuel Hammond occupied, fenced and cultivated this land between 1818 and 1823. In 1824 or 1825 he left St. Louis and went to South Carolina, where he continued to reside until 1842, when he died leaving five children. On the 12th of

Statement of the Case.

March, 1819, Relfe, Chew and Clark instituted suit against Samuel Hammond in the St. Louis Circuit Court, which resulted in a judgment against him for the sum of $6841.80½, which judgment was finally affirmed by the then Supreme Court at the May term, 1823. An execution was issued on this judgment, May 23, 1823, and delivered to the sheriff of St. Louis County, by virtue of which he levied upon the 240 acres, as the property of Samuel Hammond, and, after advertisement, the land was sold by him, October 8, 1823, to Relfe and Chew, who were the highest and best bidders for the same, whereupon the sheriff executed his deed to said purchasers in due form of law, dated November 4, 1823. This deed was duly acknowledged and recorded. The land was subsequently sold and conveyed by Relfe and Chew to Peter Lindell, to whom Joseph Hunot and wife had also conveyed. On August 30, 1859, on Lindell's application, a patent was issued by the United States and recorded in the General Land Office, conveying the said survey, with certain exceptions, to Joseph Hunot or his legal representatives. The patent, although dated August 30, 1859, was under consideration in the Department of the Interior until November 12, 1860, when the Secretary decided in favor of issuing it.

Plaintiffs in error derive their claim to the land as heirs of Samuel Hammond or through conveyances made in 1873 and 1874 by such heirs. The defendants Johnston and Baker claim title to the particular lot sued for under one of the heirs of Peter Lindell.

The trial of the action having resulted in a judgment for the defendants, the case was taken to the Supreme Court of Missouri on appeal, by which court the judgment of the Circuit Court was affirmed. The opinion will be found reported in 93 Missouri, 198. Thereupon a writ of error was sued out from this court.

The errors assigned here are: First, that the Supreme Court erred in holding that Hammond had any title to the land in controversy, which could be levied upon by the sheriff and sold upon execution against him, for the reason that the United States survey No. 2500, made under said certificate

No. 161, was not returned to the recorder of land titles for the Territory of Missouri until January 8, 1833, and recorded February 2, 1833; Second, that the court erred in holding that the patent to Joseph Hunot or his legal representatives, dated August 30, 1859, though not delivered until 1860, took effect from its date, by which error it was claimed that Samuel E. Hammond, one of the original plaintiffs, who lived in Tennessee, was erroneously held to be barred.

The Supreme Court of Missouri considered, in its opinion, and overruled, certain objections of plaintiffs to the deed of the sheriff under the execution in the suit of Relfe, Chew and Clark *v.* Hammond. These objections were that only a certified copy of the deed was offered in evidence; that the deed was void for uncertainty of description; that, at the time of the sale under the execution, Hammond had no interest in the land subject to sale; and that Easton had no interest in the property, because the surveyor general had not, at the date of Easton's deed to Hammond, returned a plat of the survey to the recorder of land titles, and did not do so until 1833.

Plaintiffs in error contended that, at the time when Easton conveyed to Hammond, and when the sheriff sold the land under the execution, the title to the land was in the United States. The court conceded that the legal title was in the United States, but held that there was an equitable interest in Easton and those claiming under him, which was subject to sale under execution, and that, under the statutes of Missouri, the sheriff's deed was effectual in passing to the purchaser all the estate and interest which the debtor had at the time of the judgment. And the court used this language: "Under the view we have taken of the sheriff's deed, and the force and effect we have given to it, the title is in the defendants, and the judgment will be affirmed. This result as to the effect of the sheriff's deed rendered it unnecessary to pass upon the other question presented by the record, but we have ruled upon them in order that there may be no embarrassment to either party in a review of this judgment in the Supreme Court of the United States."

Argument for Plaintiffs in Error.

Mr. George F. Edmunds and *Mr. D. J. Jewett* (with whom was *Mr. Henry H. Denison* on the brief) for plaintiffs in error.

On the trial of this case, the plaintiffs in error asked the trial court to give the following instructions: "The court is requested to declare the law to be, that, under all the documentary evidence in the case, there was in 1823 no legal nor equitable title in Samuel Hammond to any part of the land in what is known as United States survey No. 2500, in the city of St. Louis, and for that reason (having no reference to any other) no title, legal or equitable, to any part of said land, was acquired by the purchasers under the levy and sale by Sheriff Walker, on execution against said Hammond, in September and October, 1823, as put in evidence by defendants in this case." This instruction was given by the trial court, but was overruled by the Supreme Court.

The defendants also asked the trial court to give, and that court gave the following instruction: "When the patent to Joseph Hunot, or his legal representatives, read in evidence by defendants, was issued, the same related at least as far back as the time of the passage of the Act of Congress of April 26, 1822, if not to June 23, 1819, which is the time the field survey was made of the land for which said patent was issued." This instruction was given by the trial court, and was sustained by the Supreme Court of Missouri, as appears by their opinion.

Thus it appears that the vital question at issue, fatal to one side or the other, is the proper construction and meaning, the force and effect, of the Act of Congress of February 17, 1815, before referred to, and known as the New Madrid Act. That is to say, whether or not there was on the 8th day of October, 1823, any title out of the United States by virtue of the provisions of said act, that would be called an equity under the laws of Missouri, and subject to sale on execution.

It also fully appeared by the opinion of the Supreme Court of Missouri, that in giving judgment against the rights claimed by the plaintiffs in error, under the said New Madrid statute,

they construed the force and effect of that statute, and denied to the plaintiffs in error the right they claimed under it, and, as plaintiffs allege, misconstrued said statute so as to give rights to the defendants in error under it, to which they were not entitled under the provisions of said law.

The case of *Murdock* v. *The City of Memphis*, 20 Wall. 590, is considered a leading case upon the question of jurisdiction, and in that case this court says (p. 637): Plaintiffs claim a right under an act of the United States which was decided against them by the Supreme Court of Tennessee, and this claim gives jurisdiction to this court. Of course, the right claimed must involve the construction of a statute of the United States. The plaintiffs in error here claim a right to this land under the proper construction of the before named New Madrid statute. See also *Rector* v. *Ashley*, 6 Wall. 142; *Lessieur* v. *Price*, 12 How. 59; *Gibson* v. *Chouteau*, 13 Wall. 92.

Mr. J. B. Henderson for defendant in error. *Mr. James L. Lewis* also filed a brief for same.

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

It is well settled that where the Supreme Court of a State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. *Hopkins* v. *McLure*, 133 U. S. 380; *Hale* v. *Akers*, 132 U. S. 554; *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679.

Tested by this rule,

The writ of error must be dismissed, and it is so ordered.

NEW ORLEANS *v.* NEW ORLEANS WATER WORKS COMPANY.

CONERY *v.* NEW ORLEANS WATER WORKS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Nos. 632, 639. Argued November 2, 3, 1891. — Decided December 14, 1891.

If it appear in a case, brought here in error from a state court, that the decision of the state court was made upon rules of general jurisprudence, or that the case was disposed of there on other grounds, broad enough in themselves to sustain the judgment without considering the Federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach.

Before this court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.

In order to constitute a violation of the constitutional provision against depriving a person of his own property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived.

The contract between the city of New Orleans and the Water Works Company, which forms the basis of these proceedings, was void as being *ultra vires;* and, having been repudiated by the city, cannot now be set up by it as impaired by subsequent state legislation.

A municipal corporation, being a mere agent of the State, stands in its governmental or public character, in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation; but such a corporation, in respect of its private or proprietary rights and interests, may be entitled to constitutional protection.

There was no contract between the city and the Water Works Company, which was protected against state legislation by the Constitution of the United States.

The repeal of a statute providing that a municipal government may set off the taxes of a water company against the company's rates for water, and the substitution of a different scheme of payment in its place, does not deprive the municipality of its property without due process of law, in the sense in which the word "property" is used in the Constitution of the United States.

Statement of the Case.

THE court stated the case as follows:

This was a motion to dismiss the writs of error in these cases upon the ground that no Federal question was involved. The suit was originally begun by the filing of a petition in the Civil District Court for the parish of Orleans by Edward Conery, Jr., and about forty others, resident tax-payers of the city of New Orleans, against the New Orleans Water Works Company and the city, to enjoin the city from making any appropriations or drawing any warrants in favor of the Water Works Company under a certain contract set forth in the bill.

The petition set forth in substance —

1. That the legislature in 1877 incorporated the New Orleans Water Works Company for the purpose of furnishing the inhabitants of the city with an adequate supply of pure water, granting it the exclusive privilege of furnishing water to the city and its inhabitants, by means of pipes and conduits, for fifty years from the passage of the act; that the eleventh section of the act provided that the city should be allowed to use all water for municipal purposes free of charge, and in consideration thereof the franchises and property of the company should be exempt from taxation, municipal, state or parochial; that in 1878 the act was amended in such manner as to make the company liable to state taxes; and that the act was accepted by the city, by the Water Works Company and by all others interested, and the property purchased by the city from the Commercial Bank was transferred to the corporation.

2. That at the time the company was incorporated it was known by every intelligent person in the State that the legislature had no power to exempt property from taxation, except such as was used for church, school or charitable purposes; that for several years the Water Works Company supplied the city with water, and the city demanded of the company no taxes; that in the year 1881 the city brought suit against the company for the sum of $11,484.87, taxes assessed upon its property for that year; that the Water Works Company reconvened in that suit and demanded payment for the water

it had furnished; that in the Civil District Court, where the case was tried, judgment was rendered in favor of the city for the taxes, and also in favor of the company against the city for the value of the water supply for that year, namely, $40,281.87; that the city appealed, and in the Supreme Court the judgment in favor of the city was affirmed, but the judgment in favor of the company was reduced to $11,484.87, the exact amount of the taxes for that year; and that the Supreme Court decided that, under the act of 1877, the company had no right to recover from the city any sum for the water supply greater than the city taxes for that year.

3. That the company, in 1884, procured an act of the legislature, providing that the city should be required to pay the company the value of all the water it had supplied or should supply during any year for which taxes had been levied for municipal purposes; that unless the city should provide and appropriate a sum sufficient for this purpose the company should not be compelled to deliver water to it; that the taxes imposed should not be exacted until the city should have provided for the payment of the water supply for the same year; and that the city should be empowered to contract with the company, and determine upon the terms and conditions, and fix a price for obtaining from said company such supply of clear or filtered water.

4. That, acting under this statute, the city council, in September, 1884, passed an ordinance, No. 909, authorizing the mayor to enter into a contract with the company, and in pursuance thereof the mayor did enter into such contract, binding the city, during the whole of the remainder of the charter of the company, to pay it the sum of $60 for every fire-plug, fire-hydrant and fire-well connected with the mains or pipes of the company, "of which there are now 1139, and which number shall ever be the least measure of the annual sum to be paid said company," and to pay $60 each for every additional hydrant, etc. This contract was executed October 3, 1884.

5. That said ordinance, No. 909, and said contract were not authorized by the act of 1884; that the legislature did not

contemplate that the contract relations between the city and the company, as set forth in its charter and interpreted by the Supreme Court, should be in any manner changed, except for the purpose of enabling the company to furnish clear and filtered water to the city; that the only proper interpretation of said act was, that the city, before it demanded the taxes from the Water Works Company, should provide in its budget for the payment of the amount due to the company under its charter as interpreted by the Supreme Court, for the water furnished in that year by the company, and that the value of the water mentioned did not mean new value to be fixed by contract between the company and the city, but the value as fixed in the charter of the company, which was binding upon both parties; that, if the act did contemplate a new and different contract, stipulating what the value of the water was, it was unconstitutional, null and void, in that — First, it violated that provision of the state constitution which declares that, "The General Assembly shall not pass any local or special law creating corporations, or amending, renewing, extending or explaining the charter thereof." Second, that it violated Article 57, which declares that "The General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State or to any parish or municipal corporation therein." Third, that it violated Article 234, which provides against remitting the forfeiture of the charter of any corporation, or renewing, altering or amending the same, or passing any general or special law for the benefit of said corporation, "except on the condition that said corporation shall thereafter hold its charter subject to the provisions of this constitution." Fourth, that it also violates Article 45, because it embraces more than one object.

6. That, in accordance with this unlawful contract, the city appropriated, for the year 1885, $68,340, to be paid to the Water Works Company for the water supply for that year, of which it had already been paid $39,875; that the petitioners presented a petition to the council protesting against this con-

tract, calling attention to its unconstitutionality and illegality, and asking the council to repudiate it; that the council neglected to take any action; and that they believe it did not intend to do so, but would continue to recognize the contract from year to year and make appropriations to pay it.

Wherefore they prayed an injunction against the city from making any appropriation under the contract, and that the contract of October 3, 1884, and ordinance No. 909, and the act of the legislature of 1884, be declared unconstitutional, null and void, and both parties be enjoined from setting up the contract as valid and binding. Exceptions were filed to this petition, which were sustained and the petition dismissed. An appeal was thereupon taken to the Supreme Court of the State. It does not appear clearly what became of this appeal, though the decree of the court below seems to have been reversed, as an answer was subsequently filed in the court of original jurisdiction, admitting most of the allegations of fact in the bill, but denying the construction put upon the contract, and denying that the price contracted to be paid by the city was unfair or exorbitant. Judgment was subsequently entered to the effect that the contract, the ordinance No. 909 of September 23, 1884, and the act of the legislature of 1884, were unconstitutional, null and void, and an injunction was issued according to the prayer of the bill. An appeal was taken to the Supreme Court of the State, upon the hearing of which the judgment of the lower court was reversed, and the bill dismissed and the injunction dissolved. 41 La. Ann. 910. Thereupon writs of error were sued out from this court, both by the city of New Orleans and by Conery and the other taxpayers. The record being filed, this motion was made to dismiss.

The cases were argued on the merits as well as on the motions.

Mr. Carleton Hunt for the plaintiffs in error, and in opposition to the motions.

Mr. J. R. Beckwith, *Mr. G. A. Breaux* and *Mr. F. P.*

Poché for the defendants in error, and in support of the motions. *Mr. H. H. Hall* was on their brief.

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

In order to sustain the jurisdiction of this court upon the ground that a Federal question is presented, it should appear either that such question was apparent in the record, and that a decision was made thereon, or that, from the facts stated, such question must have arisen, and been necessarily involved in the case. If it appear either that the decision of the state court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds, broad enough in themselves to sustain the judgment without considering the Federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach.

(1) Was there a Federal question involved in this case? None such appears upon the face of the bill, the basis of which is a conflict between the act of 1884, and the ordinance and contract thereunder and the constitution of the State. Four clauses of the constitution are cited, all of which this act is alleged to violate; but in none of them is there a suggestion of a conflict with the Federal constitution or laws. On May 27, 1887, the city of New Orleans filed a brief answer to the bill denying, all and singular, the allegations therein contained, etc., and praying judgment against the plaintiffs' demand. On November 3, 1888, without withdrawing its first answer, it filed an amended or supplemental answer, in which it assumed an entirely different position, averring that by the terms of the act of 1877 the city was entitled to its supply of water free of charge, "and that the guaranty of this law to the city, securing to it the benefits of free water, has not been and cannot be diminished without impairing the obligation of contracts, and thereby violating Article 1, section 10 of the Constitution of the United States;" and that the ordinance No. 909 was an attempt to frustrate and set at naught the terms of the act of 1877.

The second answer further proceeded to allege the illegality of the contract of October 3, 1884, also of the ordinance No. 909, which was charged to be in direct violation of the act of 1884; and that the decision of the Supreme Court gave a judicial construction to section 11 of the act of 1887, and determined the effect of the legislative contract between the city and the Water Works Company by virtue of the act of 1877, and declared that the latter, under said contract, had no power to demand or require from the city of New Orleans in any year any sum for the water supply, which it was bound under its charter to furnish to the city, greater than the amount of the city taxes for that year.

The answer, in its further averments, is a substantial iteration of the charges made in the bill, and sets forth that in case the courts should decide that the act of 1884 did authorize the city and the company to enter into a new contract, stipulating the value of the water to be supplied, the act itself was unconstitutional, in that it violated no less than six articles of the state constitution.

The District Court, in giving its reasons for judgment, held that, notwithstanding the act of 1884, the obligation of the company to furnish the water supply still subsisted, subject only to the qualifications that compensation equal in amount to the taxes exacted might be claimed; and that, in requiring the city to pay for all the water it received, (in the event of its demanding the tax,) and in providing specially that, unless it set apart a sufficient sum to make such payment, the company should not be compelled to deliver water as provided in its charter, the legislature was releasing or extinguishing an obligation which had been ascertained and defined by the Supreme Court of the State, from the Water Company to the city of New Orleans, within the meaning of the State constitutional provision, Article 57, which provided that "the General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any parish or municipal corporation therein." The court, therefore, sustained the prayer of

the bill and granted an injunction. There was no reference in this opinion to any Federal question.

On appeal to the Supreme Court, the judgment of the District Court was reversed, the majority of the court holding that the decision of the court in the prior case annulling the exemption from taxation contained in section 11 of the act of 1877 did not regulate the contract between the parties for the future as to the price of the water to be furnished by the company, since that would be making a contract for the parties which they never intended, and which was not warranted by any promises in the water works charter; that there was no other section of the act imposing any obligation upon the company to furnish free water to the city for any franchise or privilege granted by the State, and that the city could not impose any obligation upon it contrary to the original grant, without its consent. The court further held that there was no proof in the record of any fraud or undue advantage obtained by the Water Works Company over the city, and that, independent of any statutory provision subsequently enacted, authorizing the city to contract for its water supply, (alluding to the act of 1884,) it had full and plenary power to do so under the provisions of its charter. The court also held that the act of 1884, and the ordinance and the contract made in pursuance of it, violated no provision of the state constitution and were valid. No allusion was made in this opinion to any Federal question.

The Chief Justice, dissenting, was of the opinion that the judgment in the prior suit settled forever the question of the respective liability of both corporations, the one for the water supplied, the other for the taxes demandable ; that its effect was to close the door for all time to those litigants on the subject of such reciprocal liability, the one to the other; that the moment it was rendered it became the property of each party, who then acquired the right of using it as an effectual shield for protection against any further demand; that it was designed to establish firmly for the future, during the term of the existence of the company, that in no case would it ever claim from the city for water supply any amount in excess of

that which the city would have the right to demand for taxes due her; that, while the city of New Orleans was a functionary created by the sovereign, it did not follow that the sovereign could divest it of its property, appropriate it to its own use, or give it away, or impair the obligation of contracts in its favor; and that it was incompetent for the legislature to deprive the city of its right of ownership to the judgment in its favor whereby it was to be relieved from all amount exceeding the taxes due it by the Water Works Company. This is the only opinion which contains any suggestion of a Federal question. There was another dissenting opinion, but the dissent was based solely upon the ground of a conflict between the act of 1884 and the state constitution, and upon the theory that the prior judgment operated by way of estoppel against any subsequent agitation of the questions therein decided.

While there is in the amended and supplemental answer of the city a formal averment that the ordinance No. 909 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay. Thus in *Millingar* v. *Hartupee*, 6 Wall. 258, it was held that to bring a case within that provision of the Judiciary Act, which declares that the final judgment of a state court may be reëxamined, where is drawn in question the validity of an authority exercised under the United States, there must be something more than a bare assertion of the exercise of such authority. In delivering the opinion of the court the Chief Justice observed: "The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States. In respect to the question we are now considering, 'authority'

stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a state court, that the right claimed did not exist." This language was used in connection with the first clause of section 709 of the Revised Statutes, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity," but it is equally applicable to the next clause, which covers the case under consideration, "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity."

Applying the principle of this decision to the present case, we think that before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired; and that to constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived.

(2) The contract relied upon in this case is that contained in section 11 of the act of 1877, which provided that the city should be allowed the free use of water for municipal purposes in consideration whereof the franchise and property of the Water Company should be exempted from taxation. There are several reasons, however, why the city cannot claim that this contract was impaired by subsequent legislation: first, because the contract itself, which was in reality between the State and the Water Works Company, was *ultra vires* and void, and was so declared by the Supreme Court of Louisiana in the case between the city and the Water Works Company, 36 La. Ann. 432; second, because the city repudiated its contract by bringing suit against the company for its taxes; and

it does not now lie in the mouth of its counsel to claim that the obligation of such contract was impaired by subsequent legislation, when such legislation was rendered necessary by, or at least was the natural outgrowth of, its own repudiation of the contract; third, the city being a municipal corporation and the creature of the state legislature, does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed or even abolished at the will of the legislature. In *The Dartmouth College Case*, 4 Wheat. 518, 660, 661, in which the inviolability of private charters was first asserted by this court, a distinction is taken, in the opinion of Mr. Justice Washington, between corporations for public government and those for private charity; and it is said that the first being for public advantage, are to be governed according to the law of the land; and that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. "Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cestui que trust* of the foundation." Mr. Justice Story was also of opinion, page 694, that, "corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control."

In the case of *East Hartford* v. *Hartford Bridge Company*, 10 How. 511, 533, 534, the constitutionality of an act of the legislature discontinuing a ferry, the franchise of which for more than one hundred years had belonged to the town of Hartford, and subsequently to that of East Hartford, was drawn in question. It was claimed by the town that the State had impaired the obligation of its contract; but it was held that "the parties to this grant did not, by their charter, stand in the attitude toward each other of making a contract by it such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political

corporations on the other. . . . The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the legislature. . . . Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and, therefore, to be considered as not violated by subsequent legislative changes."

So in *Laramie County* v. *Albany County*, 92 U. S. 307, 311, it was held that the legislature had power to diminish or enlarge the area of a county whenever the public convenience or necessity required. "Institutions of the kind," said Mr. Justice Clifford, "whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact." So in the recent case of *Williamson* v. *New Jersey*, 130 U. S. 189, 199, it was held that the power of taxation on the part of a municipal corporation is not private property or a vested right of property in its hands; but the conferring of such power is an exercise by the legislature of a public and governmental power which cannot be imparted in perpetuity, and is always subject to revocation, modification and control, and is not the subject of contract. Said Mr. Justice Blatchford: "We are clearly of opinion that such a grant of the power of taxation, by the legislature of a State, does not form such a contract between the State and the township as is within the protection of the provision of the Constitution of the United States which forbids the passage by a State of a law impairing the obligation of contracts."

At the last term of this court, in the case of *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, it was held, the Chief Justice speaking for the court, that an executive agency created by a State for the purpose of improving public highways, and empowered to assess the cost of its improvements upon adjoin-

ing lands, and to purchase such lands as were delinquent in the payment of the assessment, did not by such purchase acquire a contract right in the land so bought, which the State could not modify without violating the provisions of the Constitution of the United States. But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the Water Works Company, than it would have had if such contract had been made directly with the State. The State, having authorized such contract, might revoke or modify it at its pleasure.

Equally untenable is the claim that the Supreme Court of the State gave a construction to this act of 1877, which constitutes a contract between the Water Works Company and the city, which subsequent legislation could not impair. In construing section 11, the Supreme Court held that the exemption from taxation was invalid, and that the reconventional demand of the Water Works Company for the water supplied was sustainable only to the exact amount of taxes for the same year. This, however, was not the making of a new contract between the Water Works Company and the city, but the nullification of an old one, and a determination of the respective rights of the city and the company under that section of the act. Courts have no power to make new contracts or to impose new terms upon parties to contracts without their consent. Their powers are exhausted in fixing the rights of parties to contracts already existing. But conceding that the decision of the Supreme Court amounted simply to an interpretation of an existing contract, by which the company agreed to furnish the city with water in consideration of the amount of its taxes, yet the contract was, for the reasons already

stated, so far as the city was concerned, subject to the will of the legislature. As was justly remarked in the concurring opinion of Mr. Justice Poché in this case: "It surely cannot be seriously urged that the legislature is stripped of its power to authorize a contract to have effect in the future by judicial interpretation of a contract, and which at the time had reference to the present and to the past only. A very large proportion of the legislation in all the States is prompted by the decisions of the courts, and is intended to remedy some mischief pointed out by or resulting from the utterances of the courts of the country."

Our conclusion upon this branch of the case, therefore, is, that there was no contract between the city and the Water Works Company which was protected by the constitutional provision in question.

(3) Has the city been deprived of its property without due process of law? It certainly has not been deprived of its property in the judgment of the Supreme Court in its favor for the taxes, since the judgment was paid and satisfied. The only property it is assumed to have, then, arises from the interpretation put by the Supreme Court upon the act of 1877, which, it is argued, created an indefeasible right on the part of the city to set off its taxes against the claim of the Water Works Company for water, of which it could not be deprived. But such interpretation determined only the respective rights of the parties as they then existed, and, for the reasons already stated, such rights, at least so far as the city is concerned, were subject to change at the will of the legislature. Indeed, under the act of 1884 and ordinance No. 909, the right of the city to its taxes remains unimpaired; the only change made is in the creation of a new basis of liability of the city in respect to its water supply for municipal purposes. The only property of which it was deprived was the right it had possessed under the act of 1877 of paying for its water supply in taxes; but, if this were property at all, even within the liberal definition of that word given by Mr. Justice Bradley, in *Campbell* v. *Holt*, 115 U. S. 620, 630, it was not such a vested right as was beyond the control of the legislature. An adjudication of the

rights of two private parties to a contract, with respect to the terms of such contract, does not prevent their agreeing upon other and different terms for the future. The fact that such parties are a private and a public corporation is immaterial, so long as the right to contract exists.

(4) Little need be said with regard to the appeal of Conery and the other taxpayers; they sue in the right of the city, the rights of the city are their rights, and they have no other or greater rights upon this appeal than has the city. Indeed, the city has, in its amended and supplemental answer, joined with them in the assertion of its rights, and they are bound by the disposition of the case against it. As there is no Federal question properly presented in this case,

The motion to dismiss is granted.

Mr. Justice Harlan is of opinion that this court has jurisdiction, and that the judgment below should be affirmed.

FRANKLIN COUNTY v. GERMAN SAVINGS BANK.

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

No. 1234. Submitted November 23, 1891. — Decided December 14, 1891.

Where a court, having complete jurisdiction of the case, has pronounced a decree upon a certain issue, that issue cannot be retried in a collateral action between the same parties, even although the evidence upon which the case was heard be sent up with the record. *Brownsville* v. *Loague*, 129 U. S. 493, examined and explained.

The court stated the case as follows:

This was an action by the German Savings Bank of Davenport, Iowa, upon 128 coupons cut from bonds issued by the county of Franklin in payment of its subscription to the capital stock of the Belleville and Eldorado Railroad Company. The allegation of the declaration was that such bonds

had been issued on the 10th day of November, 1877, by the said defendant, "being thereunto duly authorized by an affirmative vote of the legal voters of said county, as required by law." There was a further averment that plaintiff became the owner of twenty of these bonds, whose numbers were given, from which the coupons in suit had been cut. To this declaration a plea of *non assumpsit* and a replication thereto were filed. A jury being waived, the cause was tried by the court, which found in favor of the plaintiff, and a judgment was rendered on February 4, 1891, in its favor for the sum of $5120, damages and costs. The bonds purported on their face to have been "issued under the provisions of an act of the General Assembly of the State of Illinois, entitled 'An act to incorporate the Belleville and Eldorado Railroad Company,' approved February 22, 1861, authorizing subscriptions to the capital stock of said railroad, and in accordance with the majority of votes cast at an election held in said county on the 11th day of September, 1869, in conformity with the provisions of said act."

Upon the trial of the case, the plaintiff bank, after presenting the bonds and coupons set forth in the declaration, put in evidence the record of a suit in equity, begun in the same court, and carried to a final decree on July 3, 1883. The bill was originally filed by the county of Franklin in the Circuit Court of Franklin County, Illinois, on the 4th day of August, 1880, against the Belleville and Eldorado Railroad Company, the clerk, sheriff and collector of said county, the auditor of public accounts of the state of Illinois, the state treasurer of Illinois, several private individuals, and the unknown holders of bonds issued by the said Franklin County in aid of the said railroad company. The bill alleged the issuing by the county of $150,000 of its bonds, dated November 13, 1877, to the Belleville and Eldorado Railroad Company; $100,000 of which were subscribed and issued under the act of the General Assembly of Illinois, entitled, "An act to incorporate the Belleville and Eldorado Railroad Company," approved February 22, 1861, authorizing a subscription to the capital stock of said company, and $50,000 of which were subscribed and

issued under an act of the general assembly, entitled, "An act to authorize cities and counties to subscribe stock to railroads," approved November 6, 1849. The bill alleged that both classes of bonds were subscribed and issued in pursuance of the vote of the people of the county at an election held the 11th day of September, 1869; and that the order of the county court submitting the proposal to the voters named certain conditions to be complied with before the bonds should be issued, one of which was that the railroad should be commenced in the county of Franklin within nine months from the date of the election, and completed through the county by the 1st day of June, 1872. The bill further alleged that the orders submitting the question to the voters were never complied with, and particularly that the road was not completed within the time provided; that all of the orders and resolutions of the county court and the board of supervisors subscribing, and attempting to subscribe, stock to said railroad company were in conflict with the constitution of the State, and were void; that the state auditor had no right to levy taxes for the purpose of paying the principal or interest of said bonds; that the state treasurer had no right to receive or pay out the same; and that the act to provide for paying railroad debts by counties, approved April 16, 1869, was unconstitutional, contrary to public policy, and void. The bill prayed an injunction restraining the officers of the State from collecting or paying out taxes in liquidation of said bonds, and that the individual defendants and unknown holders of the bonds be enjoined from suing the county upon any of the coupons attached to such bonds.

A temporary writ of injunction was issued as prayed. Service by publication was made upon the unknown holders of the bonds. Upon the 27th day of October, 1880, a decree was taken by default. At the October term, 1881, the German Savings Bank appeared in the cause, had the decree opened, and removed the case to the Circuit Court of the United States for the Southern District of Illinois, to which it was submitted upon proofs taken, and upon a stipulation that the defendant was the *bona fide* holder of the bonds set up in its answer, and

purchased the same for value without notice of any defence. The answer of the bank, which was also adopted by other defendants intervening for their own interests, put in issue every material averment of the bill, and prayed that, as to the bonds and coupons held by it, the bill might be dismissed for want of equity and the injunction dissolved. On July 3, 1883, a decree was entered declaring that all bonds involved in the case, and purporting on their face to have been issued under the provisions of the Railroad Act of November 6, 1849, were issued without authority of law, and were, therefore, void, and decreeing that, as to the holders of such bonds, the injunction be made perpetual. The decree further provided that, as to the specific bonds designated by their numbers, and among others the bonds belonging to the German Savings Bank, "purporting on their face to be of the series issued under the charter of the said Belleville and Eldorado Railroad Company, approved February 22, 1861, the court doth decree in favor of said defendants, the said several respective holders thereof, and that the said several bonds and the coupons thereof are valid and legal obligations against the county of Franklin; and as to said last-mentioned series of said bonds and coupons thereunto attached, as held as aforesaid, the court doth decree that the injunction issued in this cause be dissolved, and complainant's bill be dismissed for want of equity."

The German Savings Bank in June, 1885, appealed from so much of this decree as adjudged that nine bonds, which had been issued under the act of 1849, and were held by the bank were void, and upon such appeal this court affirmed the decree of the Circuit Court. *German Savings Bank* v. *Franklin County*, 128 U. S. 526. The county of Franklin, however, did not appeal from the decree establishing the validity of the bonds issued under the act of 1861.

After the plaintiff had put in the said record, decree and mandate of this court, in the equity case, it introduced in evidence the eighteen bonds which, with the coupons thereof, had been decreed to be valid and legal obligations against the county, and also put in evidence coupons cut from two other bonds which had also been adjudged to be valid. The defend-

Argument for Plaintiff in Error.

ant introduced no evidence, but claimed that the evidence contained in the record introduced by the plaintiff showed that the bonds and coupons therefrom, upon which this action was brought, were invalid. The plaintiff contended that the validity of said bonds and coupons had been established in the said equity case, and that the question was *res adjudicata*, and the court so decided. To reverse the judgment of the Circuit Court in this behalf, this writ of error was sued out.

Mr. Daniel M. Browning and *Mr. William S. Cantrell* for plaintiff in error.

Municipal bonds in Illinois, issued since the adoption of the constitution of 1870, are *prima facie* invalid, and the burden of proof rests upon the plaintiff to show affirmatively that they were authorized by a vote of the people prior to that time. *Jackson County* v. *Brush*, 77 Illinois, 59; *People* v. *Jackson County*, 92 Illinois, 441; *People* v. *Bishop*, 111 Illinois, 124; *Prairie Township* v. *Lloyd*, 97 Illinois, 179; *Eddy* v. *The People*, 127 Illinois, 428; *McClure* v. *Oxford Township*, 94 U. S. 429; *Buchanan* v. *Litchfield*, 102 U. S. 278.

Bonds issued after the time fixed by the vote expires, and after the adoption of the constitution of 1870, are void, even in the hands of innocent purchasers. *German Savings Bank* v. *Franklin County*, 128 U. S. 526; *Richeson* v. *The People*, 115 Illinois, 450; *Eagle* v. *Kohn*, 84 Illinois, 292; *Eddy* v. *The People*, *supra*.

When a decree has been rendered that is not self-executing and the beneficiary thereof again goes into court for a complete remedy, the latter court will not enforce the decree if it appears erroneous. *Wadhams* v. *Gay*, 73 Illinois, 415. Where the payment of judgments rendered upon municipal bonds issued to a railroad company was sought to be enforced by a petition for a mandamus, and it appeared that the bonds upon which the judgments were rendered were issued without authority of law, the petition was denied. *Brownsville* v. *Loague*, 129 U. S. 493. There is no allegation in any of the pleadings in this case invoking the doctrine of estoppel or *res*

judicata, but the evidence introduced by the defendant in error was for the purpose of proving what the law required it to prove, that the bonds were issued under existing laws, and were authorized by a vote of the people of the county prior to the adoption of the constitution; and this evidence having shown that they were not so issued, but were void, the court should have found for the plaintiff in error.

A party cannot present evidence to a court, thus vouching for its being true, and then ask the court to disregard such portions of it as he may deem to be unfavorable to him.

Mr. E. E. Cook and *Mr. Samuel P. Wheeler* for defendant in error.

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

As both parties claim an estoppel by virtue of the decree in the equity suit between the parties to this suit, it only becomes necessary to consider the effect of this decree. It contains two separate and distinct findings: First, so far as the nine bonds held by the German Savings Bank, and issued under the act of November 6, 1849, were concerned, the decree pronounced them to be void, and as to them the injunction was made perpetual. From this part of the decree the bank appealed to this court, by which the decree was affirmed. 128 U. S. 526. Second, as to the eighteen bonds issued under the act of 1861, and the coupons cut from two other bonds issued under the same act, also held by the German Savings Bank, and purporting on their face to be of the series issued under the charter of said Belleville and Eldorado Railroad Company, approved February 22, 1861, the decree adjudged in favor of the defendant bank, and that the said several bonds and the coupons thereof were legal and valid obligations against the county of Franklin, and as to this series the injunction was dissolved and the complainant's bill dismissed. No appeal was taken from this part of the decree by the county of Franklin, but it now insists that these bonds are void for the same reasons that the bonds issued under the act of November 6, 1849, were adjudged

to be void, namely, because both series were issued pursuant to the same vote and subject to the same conditions.

The record of the equity suit does not show clearly the ground upon which the court based its distinction between the two classes of bonds; nor is it necessary to be ascertained here. It is sufficient for the purposes of this suit to know that the validity of these bonds was directly put in issue by the pleadings, and determined adversely to the county. The plaintiff alleged in its bill that these bonds were invalid by reason of the non-compliance of the road with certain conditions precedent upon which they were issued, setting up with great particularity all the proceedings prior to the issue of the bonds; reciting the laws under which they were claimed to have been authorized; and demanding their cancellation and surrender upon the ground that the acts of the county officers were unauthorized and void, and the laws under which they were issued unconstitutional. The entire question of their validity was presented and tried upon the merits, and the court could not have dismissed the bill as to these bonds without holding that they were valid, and the further finding that the several bonds and coupons thereof "are valid and legal obligations" added nothing to the force of the decree dismissing the bill.

The defendant's position in this connection is, that as the entire record taken together shows that these bonds were void, this court ought not to treat the decree of the court below, adjudging them to be valid, as *res adjudicata.* It is true that there are certain authorities to the effect that, in the case of deeds, if the truth plainly appears on the face of the deed, there is, generally speaking, no estoppel, meaning simply, as stated by Mr. Bigelow, (Bigelow on Estoppel, 351,) "that all parts of the deed are to be construed together; and that if an allegation in the deed which alone would work an estoppel upon the parties is explained in another part of the deed, or perhaps another deed to which reference is made for the purpose, there is ordinarily no estoppel." Lord Coke also states certain exceptions to the conclusive effect of records, one of these being, "where the truth appears in the same record, as

where the defendant is sued by the wrong name and enters into a bail bond *prout* the writ, as he must, and then put in bail by his right name, he who was arrested is not estopped from pleading in abatement; or where the record shows that the judgment relied on as an estoppel has been reversed in error." But we know of no case which goes to the extent of holding that where a court having complete jurisdiction of the case has pronounced a decree upon a certain issue, such issue may be retried in a collateral action, even although the evidence upon which the case is heard is sent up with the record. If this were possible, then in every such case where a judgment or decree is pleaded by way of estoppel, and the record shows the evidence upon which it was rendered, the court in which the estoppel was pleaded would have the power to retry the case, and determine whether a different judgment ought not to have been rendered. The case of *Brownsville* v. *Loague*, 129 U. S. 493, 503, 505, has perhaps gone as far in the direction indicated by the defendant as any case reported in the books, but it is far from being an authority for the position assumed here. That was a petition for a mandamus to enforce the collection of judgments of a Circuit Court upon certain bonds which this court had held to be invalid. The court denied the application of the relator upon the ground that, in his pleadings, he did not rely exclusively upon the judgments, but opened the facts which attended the judgments for the purpose of counting upon a certain act of the legislature as furnishing the remedy which he sought, and that by so doing he in effect asked the court to order the levy of a tax to pay the coupons, and relied upon the judgments principally as creating an estoppel of a denial of the power to do so. "Thus invited," said the Chief Justice, "to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments themselves such effect, by way of estoppel, as to entitle the plaintiff, *ex debito justitiæ*, to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued? . . . But where application is made to collect judgments by pro-

cess not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." This, however, does not touch the question of the binding effect of judgments when offered in evidence in a distinct and collateral action. We know of no case holding their probative effect to be anything else than conclusive. Had the plaintiff county desired further to test the validity of these bonds, it was its duty to have appealed from this decree, as did the bank with respect to the bonds which that court held to be invalid, when the question of the validity of both issues could have been heard and determined by this court.

There was no error in the finding of the court below, and its judgment must be

Affirmed.

COGHLAN *v.* SOUTH CAROLINA RAILROAD COMPANY.

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

No. 47. Argued October 21, 22, 1891. — Decided December 7, 1891.

When a contract for the payment of money at a future day, with interest meanwhile payable semi-annually, is made in one place, and is to be performed in another, both as to interest and principal, and the interest before maturity is payable according to the legal rate in the place of performance, the presumption is, in the absence of attendant circumstances to show the contrary, that the principal bears interest after maturity at the same rate.

The report of the master in a suit in equity to foreclose a railroad mortgage, to whom it had been referred to take proof of the claims, found as to a bondholder, that his bonds were due and unpaid, that certain coupons had been paid, and that certain other subsequent coupons had been paid, but made no mention of the intervening coupons. No exception was taken to this report. *Held*, that it was a reasonable inference that the claimant did not offer these coupons in proof, and that the failure to find as to them could not be urged as an objection to the final decree.

Statement of the Case.

THE court stated the case as follows:

By an act of the general assembly of South Carolina, of December 19, 1835, the Cincinnati and Charleston Railroad Company was incorporated with power to construct a railroad from Charleston, South Carolina, to Cincinnati, Ohio. 8 Stats. So. Car. 409. See also 8 Stats. So. Car. 354, 355, 380, 384, 406. Subsequently, December 21, 1836, the name of that company was changed to that of the Louisville, Cincinnati and Charleston Railroad Company. 8 Stats. So. Car. 96. By a later act, passed December 19, 1843, the name of the latter company was changed to that of the South Carolina Railroad Company, which acquired, subject to certain conditions, the rights, privileges, and property of the South Carolina Canal and Railroad Company incorporated December 19, 1827. 11 Stats. So. Car. 273.

The Louisville, Cincinnati and Charleston Railroad Company, before its change of name, and by virtue of an act of December 20, 1837, and an act amendatory thereof, passed December 19, 1838, 6 Stats. So. Car. 571, 604, issued its bonds for the sum of about four hundred and fifty thousand pounds sterling, redeemable on the first day of January, 1866, and bearing interest at the rate of five per cent per annum, some in denominations of £500, others of £250. The £500 bonds were in the following form:

"£500 st'g. £500 st'g.

"UNITED STATES OF AMERICA, STATE OF SOUTH CAROLINA.

"*Five Per Cent Loan.*

"The Louisville, Cincinnati and Charleston Railroad Company, under the guarantee of the State of South Carolina, promise to pay to bearer five hundred pounds sterling, redeemable on the first day of January, one thousand eight hundred and sixty-six, and not before without the consent of the holder of this certificate, with interest thereon at the rate of five per cent per annum from the date hereof, the said interest to be paid semi-annually, on the first days of January and July, on presenting the proper coupons for the same at the house of

Palmers, Mackillop, Dent & Co., London, where the principal will also be redeemed on the surrender of this certificate.

"In witness whereof the said company has
"[SEAL.] caused its corporate seal to be hereunto affixed, at Charleston, this 31st day of December, 1838.

"ROB'T Y. HAYNE, *President.*

"E. H. Edwards, *Sec'y & Treas'r.*"

To each bond a warrant or coupon was attached in this form: "Louisville, Cincinnati and Charleston Railroad Company, warrant No. 49, for £12 10*s.*, being half yearly interest on bond C. No. 18, payable January 1, 1863. E. H. Edwards, Treas'r." These warrants were endorsed: "Payable at Messrs. Palmers, Mackillop, Dent & Co."

The £250 bonds were in the same form as the ones of larger amount, the coupons or warrants calling only for £6 5*s.* interest.

Upon the back of each bond was endorsed the above act of December 20, 1837, in these words:

"An act to lend the credit of the State to secure any loan which may be made by the Louisville, Cincinnati and Charleston Railroad Company, and for other purposes.

"*Be it enacted* by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the faith and funds of the State of South Carolina be, and the same are hereby, pledged to secure the punctual payment of any contract which shall be made for borrowing money by the Louisville, Cincinnati and Charleston Railroad Company from any person or persons, company or companies, corporation or corporations, to any amount not exceeding two millions of dollars, either in the United States or in Europe; and when such contract or contracts shall be made by bond or bonds, certificate or certificates, or other instrument or instruments, signed by the president of the said company, under its seal, and countersigned by the secretary thereof, it shall be the duty of the comptroller general of this State to endorse thereon that the faith and funds of the State

of South Carolina are pledged to the faithful performance of the said contract or contracts, both as it respects the punctual payment of the principal and of the interest, according to the terms of the said contract or contracts: *Provided*, that the interest to be received thereby and made payable thereon shall not exceed the rate of five per cent per annum; *and provided*, also, that the comptroller general shall not endorse any such contract until five hundred thousand dollars shall be paid to the company on the stock thereof, in which event he shall pledge the funds and faith of the State for one million of dollars; and when five hundred thousand dollars more shall be paid to the company on the stock thereof, the comptroller general shall pledge the funds and faith of the State for one other million of dollars."

Immediately following this copy of the act, on each bond, was this guaranty: "The condition of the above act, having been faithfully complied with, I do hereby, for and in behalf of the State of South Carolina, endorse her guaranty on this bond for the payment and redemption of the principal and interest of the same. Wm. Ed. Hayne, Comptroller."

The appellant, being the owner of six of the £500 bonds, and of twelve of the £250 bonds, with seven semi-annual coupons attached to each, and also some odd coupons, brought this suit, April 4, 1881, in one of the courts of the State of South Carolina, against the South Carolina Railroad Company and others, and prayed that the property covered by the mortgage created by the act of December 20, 1837 — which mortgage the State had failed to foreclose, and could not be compelled by suit to foreclose — be sold, and the proceeds applied, first, to the expenses of the suit, and then to the payment of the bonds held by the plaintiff and other creditors of the same class, with interest up to the time of payment and exchange on London.

The suit was removed into the Circuit Court of the United States for the District of South Carolina, a receiver of which court held possession of the property, under an order made September 19, 1878, in the case of Calvin Claflin *v.* South Carolina Railroad Company.

Statement of the Case.

It is stated in an opinion of the court below, [Record, 132,] that after the bonds matured in 1866, various plans to arrange the debt were suggested, adopted and abandoned; that, finally, the railroad company offered to settle past-due sterling bonds by issuing in exchange first mortgage bonds, not guaranteed by the State, so that for each sterling bond of £250 and the interest due thereon, the holder would get a first mortgage bond of £300, and for each bond of £500 and interest, a first mortgage bond of £600; that the proposed new bonds were dated July 1, 1868, called for semi-annual interest at five per cent, and were made payable, as were the guaranteed bonds, in London; and that Coghlan declined to exchange his bonds for the new ones, but consented to receive, and, in fact, received, payment of semi-annual instalments of interest, precisely as if he had made the exchange — that is, he received interest on his £500 and £250 bonds as if they were, respectively, for £600 and £300.

By a decree entered December 15, 1883, it was adjudged that the plaintiff's recovery for bonds held and proved by him should be as follows: Upon each bond for £500 and £250, respectively, and past-due coupons attached, so held and proved, the sums of £600 and £300, respectively, with interest thereon from 1st July, 1868, at the rate of five per cent per annum, payable semi-annually as if said bonds had on the latter date been exchanged for new bonds for £600 and £300, respectively, dated 1st July, 1868, less all amounts that may have been paid on account of the same by the South Carolina Railroad Company or the receiver thereof as semi-annual interest.

The cause was referred to a special master to take an account of the amount due on the bonds and coupons held by Coghlan. From that decree Coghlan took an appeal, which was, upon his motion, dismissed by this court, May 27, 1887, for the reason, no doubt, that the decree appealed from was only interlocutory. 122 U. S. 649. Upon the return of the cause the master reported that the amount due him up to July 1, 1887, upon the bonds, as if exchanged, calculating the interest at five per cent with semi-annual rests, and giving interest

upon interest at the same rate, was £10,620; and up to February 28, 1883, upon the same basis, was £8625$\frac{20}{100}$. He reported also that on the date last named a tender was made to the plaintiff's then attorney of $44,600. In making his calculations the master reported that the pound sterling in all payments was to be estimated at 4.44\frac{4}{9}$.

By the final decree, passed November 2, 1887, it was adjudged that the amount due the appellant was £10,798.19$\frac{9}{100}$, the principal and interest on the bonds held by him calculated according to the principles of the master's report; and, rating the pound at 4.44\frac{4}{9}$, the above amount was equivalent to $47,995.28; the interest, after the decree, to be at the rate of seven per cent per annum.

[This sum did not include the coupons for January and July, 1867, and January, 1868. The record was silent as to the reason for the omission.]

Mr. H. E. Young for appellant. *Mr. James Lowndes* was with him on the brief.

The first thing that will strike this court is that the Circuit Court has held that the appellant has done that which he declared he would not do — has not in fact done — and which the respondent's agent assured him he had not done, viz. converted his bonds of 1838, with the State's guarantee on them — with no limit on the value of the pound sterling — with the question of the rate of interest after maturity open — into bonds without this guarantee; with the value of the pound sterling fixed arbitrarily at an amount below its true value with the rate of interest after maturity fixed at five per cent and with the surrender of three coupons, which to the date of the decree, even calculated as the Circuit Court ordered, at five per cent with interest on interest at same rate, amount to £1128 15*s.*, or at the 4.44\frac{4}{9}$ rate, to $5113.24.

The questions now before this court are: (1) By what law is the rate of interest on these overdue bonds fixed, that of England (five per cent) or of South Carolina (seven per cent)? (2) Is not the appellant entitled to his three unpaid half yearly interest coupons which have been simply ignored by the Circuit Court?

Argument for Appellant.

I. The appellant claims that upon all past-due coupons and past-due bonds, he is entitled that interest be calculated according to the rate fixed by law in South Carolina, viz. seven per cent. That this is the rate in South Carolina upon both overdue bonds and coupons, was not disputed. But if it is doubted now, it is enough to refer to the case of *Langston* v. *South Carolina Railroad Co.*, 2 So. Car. 249.

It has also been held in South Carolina that where a person entered into a bond, conditioned for the payment of four per cent interest on legacies till the legatee comes of age, to pay him his proportion of the principal, the legatees are entitled to seven per cent interest (*i.e.* the legal interest of the State) from the time the bond becomes due. *Gaillard* v. *Ball*, 1 Nott & McCord, 67.

In *Brewster* v. *Wakefield*, 22 How. 118, in which the opinion was delivered by Chief Justice Taney, the court held, as to the mode of computing interest where the note did not, by the contract, carry the interest expressed until its full satisfaction, that, when it fell due, the statute must interpose and regulate it. See also *Walnut* v. *Wade*, 103 U. S. 683.

Also in South Carolina when the interest is payable at certain times, interest is calculated on interest from the dates it fell due. *O'Neall* v. *Bookman*, 9 Rich. (Law) 80, 82; *Wright* v. *Eaves*, 10 Rich. (Eq.) 582; *Sharpe* v. *Lee*, 14 So. Car. 341.

Though as fixed by this court in *Holden* v. *Trust Co.*, 100 U. S. 74, this "question of interest is always one of local law;" the rule of this court is the same as that of South Carolina. *Brewster* v. *Wakefield*, 22 How. 118; *Aurora City* v. *West*, 7 Wall. 82; *Bernhisel* v. *Firman*, 22 Wall. 179; *Holden* v. *Trust Co.*, 100 U. S. 72; *Ohio* v. *Frank*, 103 U. S. 697; *Mass. Benefit Association* v. *Miles*, 137 U. S. 690.

As to the question of the rate. Does the law of South Carolina, seven per cent, govern? or does the law of England, five per cent, govern? We submit that the law of South Carolina does!

No question of law has been more unsettled than this — whether the *lex fori* or the *lex loci contractus* shall prevail. It has never been definitely settled. See 16 Am. Law Review, 497;

Story Conflict of Laws, 7th ed. § 296, *a*. One of the most recent and satisfactory solutions is by Professor Bar of Gœttingen. He says: "If in some foreign country where a subject of this country has an estate or a trading house, a higher rate of interest than ours is allowed and is in use by reason that capital is more scarce or the security is not so good, then the foreign lender, with whose money the estate has been improved or the trading concern extended, is entitled even in our courts to demand his higher rate of interest as was arranged. The restrictions on the rates of interest are local taxes upon the price of money. The opposite theory, instead of benefiting our citizens, would destroy their credit."

In our case, no rate of interest after maturity is fixed, nor is any place fixed for its payment after maturity — no agent is appointed in England, to accept service of legal proceedings — nor was it in any way possible to obtain a judgment in England which could be enforced against the company's property. The only remedy Coghlan had was to appeal to the State, or, as that, since the close of the war, is notoriously useless, to enforce the statutory mortgage given to the State to secure their bonds.

The cases in the United States Supreme Court show the same apparent discrepancy, though real agreement on the point suggested by Professor Bar that, after maturity, the rate of interest allowed is that of the place where the money is really used. *De Wolf* v. *Johnson*, 10 Wheat. 367; *Andrews* v. *Pond*, 13 Pet. 65; *Cook* v. *Moffat*, 5 How. 295; *Miller* v. *Tiffany*, 1 Wall. 298.

II. As to the coupons ignored by the decree. These coupons are still attached to the bonds, in the hands of the appellant, who is also the holder of the bonds. That they are not barred by time was not questioned. They became due January and July, 1867, and January 1, 1868. This suit was begun on the 4th April, 1881. Twenty years is the bar to the bonds in South Carolina. *Shubrick* v. *Adams*, 20 So. Car. 49, 52; *The City* v. *Lamson*, 9 Wall. 477; *Lexington* v. *Butler*, 14 Wall. 282; *Clark* v. *Iowa City*, 20 Wall. 583; *Bond Debt Cases*, 12 So. Car. 200, 273.

Mr. William E. Earle for appellee.

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

We have seen that the bonds in suit were redeemable on the first day of January, 1866, and not before without the consent of the holder, and were payable in pounds sterling with interest at the rate of five per cent per annum from date, the interest to be paid semi-annually on named days, "on presenting the proper coupons for the same at the house of Palmers, Mackillop, Dent & Co., London, where the principal will also be redeemed on the surrender of this certificate." The contract, therefore, was one which in all its parts was to be performed in England. Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate, seven per cent, fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. For, as said by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 1, 48, it is a principle, universally recognized, that "in every forum a contract is governed by the law with a view to which it was made." And by Lord Mansfield, in *Robinson* v. *Bland*, 2 Burrow, 1077, 1078: "The parties had a view to the law of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. Now here the payment is to be in England; it is an English security, and so intended by the parties." Referring to these and many other cases, this court, speaking by Mr. Justice Matthews, held, upon full consideration, in *Pritchard* v. *Norton*, 106 U. S. 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively, incorporated into it as constituting its obliga-

tion. This doctrine was reaffirmed in *Liverpool &c. Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 458, where it was said that, according to the great preponderance, if not the uniform concurrence of authority, the general rule was, "that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view." The elaborate and careful review of the adjudged cases, American and English, in the two cases last cited, leaves nothing to be said upon the general subject.

What law, then, did the parties have in view as determining the legal consequences resulting from the non-performance of the contract between them? Presumptively, the law of England, where the contract was to be entirely performed. The bonds and coupons were to be presented and paid there, and not elsewhere. They were to be paid in pounds sterling at a designated house in London. The fair inference is that the railroad company negotiated the bonds abroad, and made them payable in that city, in order to facilitate a sale of them to foreign buyers. Every circumstance connected with the contract tends to show that the parties intended that all questions in respect to performance or the legal consequences of a failure to perform, were to be determined by the law of the place, and the only place, where the obligation to make payment could be discharged, and where the breach of that obligation would occur, if payment was not made at the appointed time and place. In this view of the contract, the rate of interest, after the maturity of the obligations, was not determinable by the law of South Carolina. This is abundantly established by the authorities.

In *De Wolf* v. *Johnson*, 10 Wheat. 367, 383, the court said: "The legal fulfilment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract." In *Andrews* v. *Pond*, 13 Pet. 65, 77, Chief Justice Taney, speaking for the court, said: "The general

principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." So, in *Carnegie* v. *Morrison*, 2 Met. (Mass.) 381, 397, Chief Justice Shaw, after stating the general rule to be that the *lex loci contractus* determines the nature and legal quality of the act done, whether it constitutes a contract, etc., said: "But a contract, made in one country, may contemplate the execution of deeds, or other contracts, making payments or doing other legal acts, in another; in regard to which, the law of the foreign country, where the act is to be done, will govern the contract." In *Cooper* v. *The Earl of Waldegrave*, 2 Beavan, 282, 284, which was an action against the acceptor of bills of exchange, drawn in Paris, where the drawer and acceptor were at the time resident, and made payable in London, the bills, on their face, did not state any particular rate of interest. Lord Langdale, Master of the Rolls, after observing that the law of the country where a contract, merely personal, is made, determines its validity and interpretation, while the law of the forum regulates the mode of suing, and the time within which suit must be brought for non-performance, said: "The contract of the acceptor, which alone is now to be considered, is to pay in *England;* the non-payment of the money when the bill becomes due is a breach in *England* of the contract which was to be performed in *England.* Upon the breach, the right to damages or interest immediately accrues; interest is given as compensation for the non-payment in *England* and for the delay of payment suffered in *England;* and I think that the law of *England*, that is, the law of the place where the default has happened, must govern the allowance of interest which arises out of that default." See also, *Boyce* v. *Edwards*, 4 Pet. 111, 123; *Miller* v. *Tiffany*, 1 Wall 298, 310; *Scudder* v. *Union National Bank*, 91 U. S. 406, 412; *Scotland County* v. *Hill*, 132 U. S. 107, 116; Story's Conflict of Laws, § 291; 2 Kent. Com. 459, 460, 461; *Scofield*

v. *Day*, 20 Johns. 102; *Dickinson* v. *Edwards*, 77 N. Y. 573; *Frees* v. *Brownell*, 35 N. J. Law (6 Vroom) 285, 287; *Pecks* v. *Mayo*, 14 Vermont, 33, 38; *Ex parte Heidelbach*, 2 Lowell, 526, 530; *Hunt's Executor* v. *Hall*, 37 Alabama, 702, 704; *Arnold* v. *Potter*, 22 Iowa, 194, 198.

The cases of *Tilden* v. *Blair*, 21 Wall. 241, 247, and *Equitable Trust Co.* v. *Fowler*, 141 U. S. 384, are in entire harmony with these principles. *Tilden* v. *Blair* was an action by the holder of a bill drawn at Chicago, Illinois, upon parties in New York, and accepted payable at a bank in New York. The defence was usury, and the question was presented as to whether the contract was a New York or an Illinois contract. If a New York contract, there could have been no recovery; for, by the law of that State, if a contract was usurious, it was void, and no recovery could have been had of principal or interest. The court held it to be an Illinois contract and its validity determinable by the laws of that State, for the reason that before the acceptance had any operation, before it became a bill, the acceptors (for whose accommodation the bill was drawn) sent it to Illinois to be there negotiated, and, by that act, indicated a purpose to create an Illinois bill. The court also based its judgment, in part, upon an Illinois statute providing that when any contract or loan is made in that State, or between its citizens and the citizens of any other State or country, bearing interest at a rate that was legal in Illinois, it should be lawful to make the principal and interest payable in any other State or Territory, or in London, in which case the contract or loan should be deemed and considered as governed by the laws of Illinois, and not be affected by the laws of the place where it was to be performed. Rev. Stats. Illinois, 1874, p. 615, c. 74.

It was because of that statute that a note given in Illinois by a citizen of that State to a Connecticut corporation, payable in New York, for money loaned by the latter to the former, and secured by mortgage upon real estate in Illinois, was held, in *Equitable Trust Co.* v. *Fowler*, not to be a New York contract in respect to the interest that might be taken, but to be, in that regard, governed by the laws of Illinois.

Opinion of the Court.

The presumption arising from the face of the bonds, that the legal consequences of a failure to pay them, according to their terms, were to be determined by the law of the place of performance, is strengthened by the practical construction the parties put upon the contract after the bonds matured. Seven coupons, with the instalment of interest for July 1, 1866, all held by appellant, were "capitalized" upon the basis of treating the £500 bonds as bonds for £600, and the £250 bonds as bonds for £300. The appellant refused to surrender his bonds, for fear that by so doing he would lose the benefit of the State's guaranty of them; yet he received interest from time to time as if they had been exchanged. On the 13th of April, 1869, a payment was made to him of interest due July 1, 1868, which was endorsed on his bonds, in this form: "Paid on this bond £15, half-yearly dividend due 1st July, 1868, as if it had been exchanged for a new bond." A similar endorsement was made on his bonds for each half-year's dividend or interest up to July 1, 1880. When the receiver, in Claflin *v.* South Carolina Railroad Company, made payments of interest, such payments were stamped upon the bonds in this form: "Paid £30 sterling, interest due July 1, 1878, and January 1, 1879." For the interest paid to him for July 1, 1879, appellant executed a receipt in this form: "Received of Baring Brothers & Co., as agents of John H. Fisher, receiver of the South Carolina Railroad Company, ninety pounds sterling, being interest due July 1, 1879, on bonds of the Louisville, Cincinnati and Charleston Railroad Company, of £500 each, with eight coupons attached, representing 600 pounds sterling, and numbered, respectively, as follows: 18, 19, 20, 22, 23." Receipts of the same kind were given for him, by his London bankers, for the interest due January 1, 1880. Similar payments of interest were made and endorsed, throughout the whole period from July 1, 1868, to July 1, 1880, on the twelve original £250 bonds, differing from the others only in showing that the half-yearly interest paid on those bonds was £7 10*s*. The receipts or endorsements on both series of bonds show that, commencing regularly with the interest due July 1, 1868, but including the instalment due July 1, 1866, Coghlan received interest, at the rate of five per

cent per annum, upon the £500 and £250 bonds, respectively, as if exchanged for £600 and £300 bonds. He admits, in his deposition, that the only demand ever made by or on his behalf of interest at the rate of seven per cent on the bonds was by his original complaint in this suit filed August 28, 1880. These facts make it clear that the claim of interest, after the maturity of the bonds, at the rate of seven per cent instead of the rate of five per cent, was an afterthought upon his part.

In what has been said, we have assumed that the allowance of interest at the rate of five per cent per annum was in conformity with the law of the place of payment. The court was not informed by the pleadings or proof as to what that law was, and judicial notice could not, therefore, be taken of it. *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 445, and authorities there cited. The railroad company makes no complaint of the allowance that was made of interest, and the appellant does not claim that a larger allowance was required by the law of the place of performance. He insists only that he was entitled, of right, after the maturity of the bonds and the respective coupons, to interest at the rate, seven per cent, fixed by the laws of South Carolina; and this, notwithstanding the guaranty by the State of the faithful performance of the contract of loan was upon the condition that "the interest to be received thereby and made payable thereon" should not exceed the rate of five per cent per annum. For the reasons already stated, we are of opinion that the law of that State did not determine the rate of interest, and that this interpretation of the contract, if it were doubtful, is sustained by the practical construction placed upon it by the conduct of the parties.

One other question in the case requires notice at our hands. The railroad company did not prove payment of the instalments of interest due January and July, 1867, and January, 1868, although the evidence shows payment of the interest due July 1, 1866, and the interest accruing on and after July 1, 1868, up to July 1, 1880. A reversal is asked upon the ground, among the others already examined, that the court erred in

not requiring the interest due on the above dates, respectively, to be paid with interest after maturity to the date of the final decree. No mention is made in the special master's report of May 5, 1882, or in the interlocutory decree of 1883, or in the master's report of 1887, or in the final decree of 1887, of the interest due January and July, 1867, and January, 1868. There was no exception to the reports of 1882 and 1887, upon the ground that they did not include interest for those three periods of six months. The reasonable inference is that the appellant did not produce before the master and prove the interest coupons for those periods, or did not ask that they be included in the report as to the amount due upon the basis fixed in the interlocutory decree of 1883. Having failed to except to the report upon the ground that it did not include them, we do not think that the appellant should be now heard to urge this as an objection to the final decree. Besides, as by the evidence the interest due July 1, 1866, was included with the interest due July 1, 1868, in the capitalization whereby the £500 and £250 bonds were treated as if exchanged for £600 and £300 bonds, it would be strange if the instalment of interest due for the intermediate periods of January and July, 1867, and January, 1868, were not embraced by that arrangement. There is no explanation of this in the record. It is not an unreasonable presumption, in view of all the circumstances, that in some way, not disclosed by the evidence, those coupons were settled, or treated as settled, when the railroad company commenced in 1869 to pay, and the appellant received, interest on the bonds, as if exchanged for new bonds of £600 and £300. Be this as it may, we are not inclined to disturb the decree upon the ground that it does not make provision for the interest coupons due January and July, 1867, and January, 1868.

Decree affirmed.

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

HALL *v.* CORDELL.

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

No. 90. Argued November 12, 1891. — Decided December 7, 1891.

This court is bound by the finding of a jury in an action at law, properly submitted to them, on conflicting evidence.

A bill of exchange is not negotiated within the meaning of § 537, Rev. Stats. Missouri ed. 1879, (§ 723, ed. 1889,) while it remains in the ownership or possession of the payee.

The obligation to perform a verbal agreement, made in Missouri, to accept and pay, on presentation at the place of business of the promissor in Illinois, all drafts drawn upon him by the promissee for live stock to be consigned by the promissee from Missouri to the promissor in Illinois, is to be determined by the law of Illinois, the place of performance, and not by the law of Missouri.

THE case was stated by the court as follows:

This was an action of assumpsit. It was based upon an alleged verbal agreement made on or about April 1, 1886, at Marshall, Missouri, between the defendants in error, plaintiffs below, doing business at that place as bankers, under the name of Cordell & Dunnica, and the plaintiffs in error, doing business at the Union Stock Yards, Chicago, Illinois, under the name of Hall Bros. & Co. There was a verdict and judgment in favor of the plaintiffs for $5785.79.

The alleged agreement was in substance that Hall Bros. & Co. would accept and pay, or pay on presentation, all drafts made upon them by one George Farlow, in favor of Cordell & Dunnica, for the cost of any live stock bought by Farlow and shipped by him from Missouri to Hall Bros. & Co. at the Union Stock Yards at Chicago.

There was proof before the jury tending to show that, on or about July 13, 1886, Farlow shipped from Missouri nine car loads of cattle and one car load of hogs, consigned to Hall Bros. & Co. at the Union Stock Yards, Chicago; that such cattle and hogs were received by the consignees, and by them

Counsel for Plaintiffs in Error.

were sold for account of Farlow; that out of the proceeds they retained the amount of the freight on the shipment, the expenses of feeding the stock on the way and at the stock yards, the charges at the yards and of the persons who came to Chicago with the stock, the commissions of the consignees on the sale, the amount Farlow owed them for moneys paid on other drafts over and above the net proceeds of live stock received and sold for him on the market, and two thousand dollars due from Farlow to Hall Bros. & Co. on certain past-due promissory notes given for money loaned to him; that at the time of the above shipment Farlow, at Marshall, Missouri, the place of agreement, made his draft, of date July 13, 1886, upon Hall Bros. & Co., at the Union Stock Yards, Chicago, in favor of Cordell & Dunnica for $11,274, the draft stating that it was for the nine car loads of cattle and one car load of hogs; that this draft was discounted by Cordell & Dunnica, and the proceeds placed to Farlow's credit on their books; that the proceeds were paid out by the plaintiffs on his checks in favor of the parties from whom he purchased the stock mentioned in the draft, and for the expenses incurred in the shipment; that the draft covered only the cost of the stock to Farlow; that upon its presentation to Hall Bros. & Co. they refused to pay it, and the same was protested for non-payment; and that, subsequently, Cordell & Dunnica received from Hall Bros. & Co. only the sum of $5936.55, the balance of the proceeds of the sale of the above cattle and hogs, consigned to them as stated, after deducting the amounts retained by the consignees, out of such proceeds, on the several accounts above mentioned.

The contract sued upon, having been made in Missouri, the defendant contended that it was invalid under the statutes of that State which are cited in the opinion of the court, *infra*, and could not be made the basis for a recovery in Illinois. This contention being overruled, the defendant excepted, and, (judgment having been given for the plaintiff,) sued out this writ of error.

Mr. J. A. Sleeper for plaintiffs in error.

Opinion of the Court.

The contract for the breach of which this action was brought, being made in Missouri, is governed by the laws of that State. If those laws, at the time when this verbal agreement was made, required agreements to accept bills of exchange to be in writing, that law governed the Circuit Court in determining whether any contract was made or not, or whether any contract existed. *Bond* v. *Bragg*, 17 Illinois, 69; *Stacy* v. *Baker*, 1 Scammon, 417; *Adams* v. *Robertson*, 37 Illinois, 45; *Evans* v. *Anderson*, 78 Illinois, 558.

The statutes of that State at that time required such a contract to be made in writing, and the verbal promise on which the plaintiffs below relied was consequently a nullity. *Flato* v. *Mulhall*, 4 Mo. App. 476; *Flato* v. *Mulhall*, 72 Missouri, 522; *Rousch* v. *Duff*, 35 Missouri, 312; *Valle* v. *Cerre*, 36 Missouri, 575; *S. C.* 88 Am. Dec. 161; *Ford* v. *Angelrodt*, 37 Missouri, 50; *S. C.* 88 Am. Dec. 174.

Mr. Ashley M. Gould for defendants in error. *Mr. Frank P. Sebree* and *Mr. Henry C. McDougal* were with him on the brief.

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

There was evidence on behalf of the defendants tending to show that no such agreement was made as that alleged. But the issues of fact were fairly submitted to the jury, and we must assume, on this writ of error, that the jury found from the evidence that the alleged agreement was made between the parties.

Our examination must be restricted to the questions of law involved in the rulings of the court below. And the only one which, in our judgment, it is necessary to notice is that arising upon the instructions asked by the defendant, and which the court refused to give, to the effect that the agreement in question, having been made in Missouri, and not having been reduced to writing, was invalid under the statutes of that State, and could not be recognized in Illinois as the basis of an action there against the defendants.

Opinion of the Court.

The statute of Missouri referred to is as follows: "§ 533. No person within this State shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. § 534. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration. § 535. An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration. § 536. Every holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and a refusal to comply with such request shall be deemed a refusal to accept, and the bill may be protested for non-acceptance. § 537. The preceding sections shall not be construed to impair the right of any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such promise, on his refusal to accept such bill." 1 Rev. Stats. Missouri, ed. 1879, p. 84; ed. 1889, p. 253, §§ 719, 723; Wagner's Stats. Missouri, 1872, p. 214, §§ 1 to 5.

The contention of the plaintiffs in error is that the rights of the parties are to be determined by the law of the place where the alleged agreement was made. If this be so, it may be that the judgment could not be sustained; for the statute of Missouri expressly declares that no person, within that State, shall be charged as an acceptor of a bill of exchange, unless his acceptance be in writing. And the statute, as construed by the highest court of Missouri, equally embraces, within its inhibitions, an action upon a parol promise to accept a bill, except as provided in section 537. *Flato* v. *Mulhall*, 72 Missouri, 522, 526; *Rousch* v. *Duff*, 35 Missouri, 312, 314. But, if the law of Missouri governs, this action could not be maintained under that section; because, as held in *Flato* v. *Mulhall*, above cited, the plaintiffs, being the payees in the bill

drawn by Farlow upon Hall Bros. & Co., could not, within the meaning of the statute, be said to have "negotiated" it. The Missouri statute is a copy of a New York statute, in respect to which, Judge Duer, in *Blakeston* v. *Dudley*, 5 Duer, 373, 377, said: "We think, that to negotiate a bill can only mean to transfer it for value, and that it is a solecism to say that a bill has been negotiated by a payee, who has never parted with its ownership or possession. The fact that the plaintiffs had given value for the bill when they received it, only proves its negotiation by the drawer — its negotiation to, and not by them. . . . Their putting their names upon the back of the bill, was not an endorsement, but a mere authority to the agent whom they employed, to demand its acceptance and payment. The manifest intention of the legislature in § 10 [similar to § 537 of the Missouri statutes] was to create an exception in favor of those who, having transferred a bill for value, on the faith of the promise of the drawee to accept it, have, in consequence of his refusal to accept, been rendered liable and been subjected to damages, as drawers or indorsers." The plaintiffs in error, therefore, cannot rest their case upon section 537.

We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that State can have no application to an action brought to charge a person, in Illinois, upon a parol promise, to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the State of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties. *Coghlan* v. *South Carolina Railroad Co.*, *ante*, 101, and the authorities there cited. In this connection it is well to state that in *New York & Virginia State Stock Bank* v.

Gibson, 5 Duer,,574, 583, a case arising under the statute of New York above referred to, the court said: "Those provisions manifestly embrace all bills, wherever drawn, that are to be accepted and paid within this State, and were the terms of the statute less explicit than they are, the general rule of law would lead us to the same conclusion: that the validity of a promise to accept a bill of exchange depends upon the law of the place where the bill is to be accepted and paid," citing *Boyce* v. *Edwards*, 4 Pet. 111.

Looking, then, at the law of Illinois, there is no difficulty in holding that the defendants were liable for a breach of their parol agreement, made in Missouri, to accept and pay, or to pay upon presentation, in Illinois, the bills drawn by Farlow, pursuant to that agreement, in favor of the plaintiffs. It was held in *Scudder* v. *Union National Bank*, 91 U. S. 406, 413, that, in Illinois, a parol acceptance of, or a parol promise to accept, upon a sufficient consideration, a bill of exchange, was binding on the acceptor. *Mason* v. *Donsay*, 35 Illinois, 424, 433; *Nelson* v. *First Nat. Bank of Chicago*, 48 Illinois, 36, 40; *Sturges* v. *Fourth National Bank of Chicago*, 75 Illinois, 595; *St. Louis National Stock Yards* v. *O'Reilly*, 85 Illinois, 546, 551.

The views we have expressed were substantially those upon which the court below proceeded in its refusal of the defendants' requests for instructions, as well as in its charge to the jury. The suggestion that there was a material variance between the averments of the original and amended declaration, and the proof adduced by the plaintiffs, is without foundation. The real issue was fairly submitted to the jury, and their verdict must stand.

Judgment affirmed.

Mr. Justice Gray was not present at the argument and did not participate in the decision.

CHEVER *v.* HORNER.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 116. Submitted December 2, 1891. — Decided December 14, 1891.

The plaintiff and the defendant in an action of ejectment in a state court in Colorado both claimed title under a valid entry of the original site of the city of Denver, made by the probate judge under the town site act of May 23, 1844, 5 Stat. 657, c. 17, as extended to Arapahoe County in Colorado by the act of May 28, 1864, 13 Stat. 94, c. 99. The deed under which the defendant claims was executed by the probate judge and delivered several years before that executed and delivered by his successor to the plaintiff. The elder deed was assailed as defective by reason of failure in the performance by the grantee of some of the requirements of a Territorial statute, prescribing rules for the execution of the trust arising under the act of Congress. The Supreme Court of the State held that that deed, being regular on its face, and purporting to have been executed in pursuance of authority, was not open to attack in a collateral proceeding for defects or omissions in the initiatory proceedings. *Held*, that this decision proceeded upon the proper construction of a Territorial law, without regard to any right, title or privilege of the plaintiff under an act of Congress, and that the writ of error must be dismissed for want of jurisdiction.

EJECTMENT. The case is stated in the opinion of the court.

Mr. J. Q. Charles, for plaintiff in error, submitted on his brief.

No counsel appeared for defendants in error.

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

Charles G. Chever brought an action of ejectment against Horner and Rogers to recover the possession of lot ten, block 176, in the east division of the city of Denver, claiming ownership in fee simple. The case is stated, in substance, by counsel for plaintiff in error thus: The lot in dispute constituted a part of the original site of Denver, entered by James Hall, probate judge of Arapahoe County, Colorado, May 6, 1865. This entry was made under and by virtue of an act of Congress approved May 23, 1844, entitled "An act for the relief of the citizens of towns upon the lands of the United

States, under certain circumstances;" 5 Stat. 657, c. 17, and an act approved May 28, 1864, entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado." 13 Stat. 94, c. 99.

In conformity with the provisions of the first act the legislature of Colorado Territory passed an act, approved March 11, 1864, prescribing rules and regulations for the execution of the trust arising under the provisions of said acts of Congress. Sess. Laws, Colorado, 1864, 139, 149; Rev. Stats. Colorado, 1868, 619, 629. This act became applicable to the Denver town site when entered by the probate judge under and by virtue of the act of Congress of May 28, 1864.

Chever and Horner, both deraign title to the lot in dispute under the entry above mentioned, by virtue of the foregoing acts of Congress and the act of the legislature of Colorado Territory.

Upon the trial of the cause by the District Court of Arapahoe County, a jury being waived by the parties, Chever, the plaintiff, in support of his title, proved that he had filed upon the lot in question, in the office of the probate judge, on the 7th of August, 1865, in conformity with section 4 of said act of the legislature of Colorado Territory, approved March 11, 1864. And he adduced evidence tending to show his rights of possession and occupancy under the provisions of the acts of Congress above mentioned. In further support of his title, the patent from the United States to James Hall, probate judge of Arapahoe County, as trustee, was put in evidence; also deeds conveying the unexecuted portions of the trust from Hall to Kent, his successor in office; from Kent to Downing, his successor; from Downing to Clough, his successor; from Clough to Kingsley, his successor, and also a deed for the lot in question from William C. Kingsley, probate judge of Arapahoe County, Colorado, to him, dated May 7, 1875. Plaintiff also offered in evidence a book kept by probate judge Hall of the filings of claimants to the lots in the Denver town site for the purpose of showing who filed claims for said lots under section 4 of the act of the territorial legislature, and who did not, to which objection was made and sustained by the court, and plaintiff excepted.

The defendants admitted ouster and that the lot in dispute was a portion of the Denver town-site entry.

Defendant Horner, in support of his title to the lot, introduced in evidence a deed from probate judge Downing to John Hughes, dated October 24, 1867; also a deed from Hughes to himself for an undivided half of said lot, and a decree of the District Court of Arapahoe County in partition proceedings, vesting in him the other undivided half of the lot. To the introduction of this evidence plaintiff objected and reserved an exception.

In rebuttal, plaintiff offered evidence tending to show that John Hughes, to whom probate judge Downing conveyed the lot in dispute, never filed upon the same as required by section four of the territorial act of 1864; that at the time of the execution of the deed to Hughes, there were two filings upon said lot undetermined, one by plaintiff and the other by one Veasey; that Hughes was not a beneficiary under the acts of Congress creating the trust; and that he was not an occupant or entitled to the possession of said lot, and had no improvements thereon. Plaintiff also offered to prove that on or prior to May 23, 1873, he was in possession of said lot and had a fence around the same; and that on or about the 30th of May, 1873, defendant Horner broke through the fence, moved a frame house on the lot, took possession of it, and ousted plaintiff therefrom. These offers were objected to by defendants and the objections sustained, and plaintiff excepted.

The court found for the defendants. A motion for a new trial was interposed and denied, and judgment rendered on the finding. The cause was then taken to the Supreme Court of Colorado by appeal. The Supreme Court held: First, That the deed executed by probate judge Downing, as trustee, to John Hughes, dated October 24, 1867, by virtue of which the defendant Horner derived title, was analogous to the granting of a patent by the Land Department of the government; that the same presumptions in favor of the regularity of such deed existed as in the case of a patent issued by the government, and that this presumption was conclusive as between the parties to the suit, not open to attack in an action of eject-

ment, and only assailable, if at all, by direct proceedings in a court of equity. Second, That the deed executed to the plaintiff by probate judge Kingsley did not relate back to the date when the plaintiff filed his claim for said lot under section four of the act of the territorial legislature, namely, August 7, 1865. The opinion, by Beck, C. J., will be found reported in 11 Colorado, 68. The judgment of the District Court was affirmed and the cause brought here on writ of error.

It is admitted by counsel that "there is no controversy with respect to the patent issued to probate judge Hall upon the entry of the Denver town site by him. Both parties claim title under this patent, and the provisions of the acts of Congress and territorial legislature, creating the trust and regulating its execution." Counsel further states that "the question presented by the pleadings and evidence is, which one of these deeds conveys the older and superior title to the lot in dispute — the one issued by probate judge Kingsley to the plaintiff, or that of probate judge Downing to John Hughes, under which the defendant Horner claims to derive title?"

The errors assigned in this court are: That judgment should have been given for the plaintiff and against the defendants; that the Supreme Court of Colorado erred in holding "that the deed executed by probate judge Downing to John Hughes, under and by virtue of the said act of Congress for the relief of the citizens of Denver, approved May 28, 1864, and the act of the legislature of the Territory of Colorado, prescribing rules and regulations for the execution of the trust arising under said act of Congress, could not be impeached in this action by showing that the said Hughes never became a beneficiary under the said act of Congress by filing a statement of his claim to the said lot in controversy as prescribed in section three of said act of said territorial legislature, and that said deed could not be assailed in this suit by showing such a violation of said acts of Congress and of said territorial legislature by said probate judge in the execution of said deed;" and also "in holding that the issuance of deeds by the probate judge under and by virtue of said acts of Congress and of the territorial legislature was analogous to the granting of a

patent by the Land Department of the United States government, and that in the issuance of such deeds it must be conclusively presumed that the probate judge complied with all the conditions of said acts;" and also "in holding that the said deed issued by said probate judge to said Hughes was the elder deed in point of date, and that the said deed issued to said plaintiff in error by probate judge Kingsley under and by virtue of said acts did not relate back to the date of the filing by said Chever of his statement of claim to said lots as prescribed by the rules and regulations adopted by said territorial legislature and as provided by said act of Congress."

The act of Congress of May 23, 1844, provided: "That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing preëmption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so settled and occupied, in trust, for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated. . . . *And provided, also*, That any act of said trustees, not made in conformity to the rules and regulations herein alluded to, shall be void and of none effect. . . ." 5 Stat. 657, c. 17.

The act of May 28, 1864, extended the provisions of the former act, so as to authorize the probate judge of Arapahoe County, in the Territory of Colorado, to enter certain legal subdivisions of land mentioned, "in trust for the several use and benefit of the rightful occupants of said land and the *bona fide* owners of the improvements thereon, according to their respective interests;" and also provided "that in all respects, except as herein modified, the execution of the foregoing pro-

visions shall be controlled by the provisions of said act of twenty-third May, eighteen hundred and forty-four, and the rules and regulations of the Commissioner of the General Land Office." 13 Stat. 94, c. 99.

The Supreme Court of Colorado said: "Under the acts of Congress above mentioned, and the provisions of the act of the territorial legislature in aid thereof, the probate judge holding the title to the town site in trust for the beneficiaries, was authorized to convey the lots and parcels of land therein to those entitled to the same. This was a general jurisdiction over the subject matter, analogous to the jurisdiction of the Land Department of the government over the issuing of patents to lands subject to entry under the land laws of the United States. Being invested with title and jurisdiction, probate judge Downing conveyed the lot in controversy to John Hughes, from whom appellee Horner deraigned title more than seven years prior to the conveyance by his successor, Judge Kingsley, to the appellant Chever. If, then, the deed from Judge Downing to Hughes is regular upon its face, and purports to have been executed in pursuance of the authority vested in the grantor, it is not open to attack in this collateral proceeding for defects or omissions in the initiatory proceedings." And it was accordingly held, as the deed was of that character, that the presumption was that the proper initiatory steps had been taken in conformity with law.

We cannot perceive that any title, right or privilege was specially set up and claimed by Chever under the acts of Congress, and that the decision of the state court was against such title, right or privilege. The decision proceeded upon the proper construction of a territorial law prescribing rules and regulations for the execution of the trust in question, and enacted in pursuance of the acts of Congress. And the rulings in regard to the deeds issued by the probate judges were rulings not involving the denial of a title, right or privilege specially set up under the acts of Congress, by Chever as against Horner, but compliance with requirements of the territorial act. The question was whether, under the law of

Colorado, the title which had passed from the United States to the probate judge, passed from Judge Downing to Hughes or from Judge Kingsley to Chever. There was no pretence that the proceedings prescribed by the territorial act were not in due execution of the trust imposed by the town-site acts, and the conclusion reached was based purely upon the local law. Both parties admitted the title of the probate judge, and the real controversy related to the transfer of that title to one party or the other. Under these circumstances the writ of error cannot be sustained, and it must be

Dismissed.

VAN STONE *v.* STILLWELL & BIERCE MANUFACTURING COMPANY.

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

No. 113. Submitted November 25, 1891. — Decided December 21, 1891.

In regard to bills of exceptions Federal courts are independent of any statute or practice prevailing in the courts of the State in which the trial was had.

Under the pleadings as framed and the issues as made up in this case the court was bound to admit evidence.

In the absence of a specification wherein evidence offered was improper or irrelevant this court is bound to presume that it was properly admitted.

A matter resting in the discretion of the trial court is not assignable for error here.

The overruling of a motion for a new trial in the court below cannot be assigned for error.

A general exception to the charge of the court as a whole cannot be considered here.

A mechanics' lien is a creature of statute, not created by contract, but by statute, for the use of the materials, work and labor furnished under the contract, and the contract is presumably entered into in view of the statute.

It is settled law in Missouri that a contractor does not waive his right to file a mechanics' lien by receiving from the owner of the building a promissory note for the amount due, payable at a time beyond the expiration of the period within which he is required to file his lien; but,

Statement of the Case.

within the period within which suit must be commenced to enforce the lien, the taking of the note merely suspends the right of action.

The plaintiff agreed to construct a flour mill for the defendant, the work to be done at a specified day. After the expiration of that day defendant wrote to plaintiff that the mill was satisfactory, but that the corn-rolls did not work to his satisfaction, and that when they were made to do satisfactory work he should be ready to pay for the entire work. This was completed and accepted within about two months. *Held*, that this amounted to an agreement to pay if the completion was done within a reasonable time, and that this was a question for the jury to determine under proper instructions from the court.

The court stated the case as follows:

This was an action under a statute of Missouri to have a mechanics' lien declared and enforced against certain described property, consisting of a mill and grounds, situated in Marshall in that State. It was originally brought in one of the state courts by the Stillwell and Bierce Manufacturing Company, an Ohio corporation, claiming under an assignment from one Fred. J. Schupp, against the plaintiff in error, C. H. Van Stone, and was subsequently removed into the Federal court, on the ground of diverse citizenship of the parties.

The amended petition, framed under the code practice of the State, contained three counts. The first was a declaration on a written contract between Schupp and Van Stone, dated January 16, 1885, by the terms of which the former agreed to construct in the elevator building of the latter, in Marshall, a flouring mill, on the improved roller process, with a capacity of making from fifty to seventy-five barrels of flour a day and of grinding from three hundred to four hundred bushels of corn into meal in a day of twenty-four hours. The contract further stipulated that the mill should be constructed in a good and workman-like manner, and, when completed, should be up to the standard of other mills, and particularly a certain mill known as the Aulville mill, at Aulville in that State, and should be satisfactory to one Frank Summerville, whose opinion in that respect was to be binding on both parties to the contract; and that the materials used in its construction, with the exception of such as were on the premises, should be furnished by Schupp,

who was also to be at all the expense of such construction, the mill to be completed and ready for use before August 1, 1885. The price agreed upon for the construction of the mill was $8200, $500 to be paid April 1, 1885, $500, May 1, 1885, $1200, upon the delivery of the mill, and for the remainder, $6000, Van Stone was to give to Schupp his three equal promissory notes of $2000 each, due in one, two and three years, respectively, with interest at 7 per cent per annum, payable annually, and which were to be "well secured" on real estate, the sufficiency of such security to be determined by one William H. Wood, Esq., of Marshall, or, in the event of his failure to act, by J. H. Cordell of the same city.

The petition further alleged that Schupp complied fully with the terms of the above contract, except as to the time when the mill was to be completed, the machinery for grinding corn not working satisfactorily at that time, but that, upon this point, the defendant by an instrument in writing waived his right to demand a full compliance, and agreed to pay for the entire work when that portion of it was completed, at the same time accepting all that part of the work intended for making flour; and that afterwards, to wit, on the 16th of October, 1885, the mill was completed to the satisfaction of said Summerville and was accepted by the defendant, and was turned over to him, he waiving all exceptions on account of its not having been completed within the time specified in the contract, and at various stated times previous thereto having paid thereon a total sum of $3044.12. It was then alleged that the defendant failed and refused to pay the remainder due on the contract, or to execute his notes therefor, as agreed upon, whereupon Schupp took such proceedings under the Missouri statute as entitled him to a mechanics' lien on the mill and the grounds on which it was situated, for the balance due him on the contract, to wit, $5392.53; and that Schupp, afterwards, for a valuable consideration, assigned and transferred to the plaintiff all his accounts against the defendant arising out of the contract, or in anywise connected with it, including said mechanics' lien, wherefore plaintiff became entitled to recover from the defendant said sum of $5392.53, with interest, etc.,

and also to a mechanics' lien upon the property referred to; for which amount it prayed judgment and asked that the same be made a lien upon the property aforesaid, as provided by law.

The second count was in the nature of a count in assumpsit for labor performed, materials furnished, money paid out, expended, etc., etc., and sought a recovery against the defendant for the value of the work and labor performed and material furnished by Schupp in the construction of a mill for the defendant, in a like amount as in the first count stated, and asked an enforcement of a mechanics' lien upon the mill property, as was done in the first count.

The third count was for extra labor and materials furnished by Schupp in building a mill under a contract with the defendant, and like relief was asked.

The answer admitted the contract declared upon in the first count, but denied every other allegation of the petition, especially those respecting the performance by Schupp of his part of the contract, and the waiver by defendant as to the time of the completion of the mill; and claimed damages for the failure of Schupp to complete the mill within the time specified in the contract, in excess of the amount claimed by the plaintiff to be due thereon.

A replication was filed, and the case proceeded to trial before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for the sum of $5898.85, including interest, which judgment was made a lien upon the mill property, under the provisions of the state statute. To reverse that judgment this writ of error was sued out.

There was no assignment of errors annexed to and sent up with the record, as provided by Rev. Stat. § 997, but in the brief of counsel for plaintiff in error the following assignment occurs:

"(1) The court erred in admitting any evidence in the case.

"(2) The court erred in submitting the case to the jury, and entering up a judgment upon the verdict.

"(3) The court erred in refusing to sustain the demurrer to the evidence offered by plaintiff in error.

Argument for Plaintiff in Error.

"(4) The court erred in overruling the motion for new trial asked by plaintiff in error.

"(5) The court erred in overruling the motion in arrest of judgment, asked by plaintiff in error.

"(6) The court erred in entering up judgment recognizing and enforcing a mechanics' lien.

"(7) The court erred in construing exhibit 'A' (which is letter of Van Stone to Schupp, found at page 16 of printed record) to be a waiver of the time in which the mill was to be completed.

"(8) The court erred in overruling the demurrer to the evidence."

Mr. S. M. Stockslager and *Mr. Samuel M. Boyd* for plaintiff in error.

Under the contract in this case all cash payments provided for therein, and about $830 more, had been paid prior to the completion of the mill, and by the express terms of the contract the remainder of the contract price was to be paid by notes and deed of trust on real estate, the notes payable in one, two and three years after the completion of the mill. The contract itself shows that the intent of the parties was that there should be no mechanics' lien.

That class of cases in which the taking of a promissory note is declared not to be a waiver of the lien, are cases where, under the original contract, the contractor's right to a lien was not excluded, and where by his work the right to the lien had accrued. He could then waive it.

But under a contract, like the one in this case, where the existence or creation of the lien was by the terms of the contract prohibited or prevented, there could be no such thing as a waiver of lien. There could be none to waive or lose.

Even if by any breach of the contract by the owner, the contractor could have been entitled to a lien, he certainly could not become entitled to it by his own wrong.

In this case the contract was to have the mill completed by August 1, then to have it tested, and, if not up to contract, the contractor to have fifteen days in which to complete it.

He did not complete it for nearly two months, and then demanded to be paid more money than the contract price.

He was certainly in fault in not completing the mill in time, and wrong in demanding anything in excess of his contract. Can he, under such circumstances, abandon a contract by which he was to be paid in one, two and three years, and demand immediate payment? It would seem to be allowing him to have an advantage from his own wrong.

No counsel appeared for defendant in error.

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

It is manifest from an inspection of this assignment that it is entirely too general to meet the requirements of the 21st rule of this court. It was evidently framed with reference to the code practice of the State in which the cause was tried; but nothing is better settled in this court than the proposition that "in regard to . . . bills of exceptions, courts of the United States are independent of any statute or practice prevailing in the courts of the State in which the trial was had." *Fishburn* v. *Chicago, Milwaukee &c. Railway Co.*, 137 U. S. 60. We shall, however, refer to the errors assigned, in detail, more for the purpose of showing the insufficiency of most of them, under the rule, than to go into the merits of the case upon the questions thus attempted to be raised.

It requires nothing more than a mere statement to show that the first error assigned is without foundation. Under the pleadings as framed and the issues thus made up, it was not only *not* error for the court to admit evidence in the case, but it would have been a grave error to have refused to allow the admission of evidence. Moreover, the record fails to show that any objection of any kind or character was made by plaintiff in error to the introduction of evidence.

With respect to the third and eighth errors assigned, it may be said that they are as untenable as the first. A general demurrer to the evidence was interposed by the plaintiff in error at the close of the testimony offered by the plaintiff below,

(defendant in error,) and the same was overruled, to which ruling an exception was taken and duly noted. There had been *some* evidence offered in support of the contention of the plaintiff, and the weight of it, under the law, was for the jury to determine. It is not specified wherein the evidence offered was improper or irrelevant to prove the issue; and in the absence of such showing we are bound to presume that the court committed no error in this respect. The assignment is too general, under the rule. Moreover, such a motion or proceeding is addressed more to the discretion of the court than to the merits of the cause. In the language of this court in *Suydam* v. *Williamson*, 20 How. 427, 436: "A demurrer to evidence is defined by the best text writers to be a proceeding by which the court in which the action is depending is called upon to decide what the law is upon the facts shown in evidence, and it is regarded in general as analogous to a demurrer upon the facts alleged in pleading. When a party wishes to withdraw from the jury the application of the law to the facts, he may, by consent of the court, demur in law upon the evidence, the effect of which is to take from the jury and refer to the court the application of the law to the facts, and thus the evidence is made a part of the record, and is considered by the court as in the case of a special verdict. A mere description of the proceeding is sufficient to show that it is the evidence, and nothing else, that goes upon the record. Since it was determined that a demurrer to evidence could not be resorted to as a matter of right, it has fallen into disuse; and as long ago as 1813 it was regarded by this court as an unusual proceeding, and one to be allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case;" citing *Young* v. *Black*, 7 Cranch, 565; *United States Bank* v. *Smith*, 11 Wheat. 171; *Fowle* v. *Common Council of Alexandria*, 11 Wheat. 320. Being a matter resting in the discretion of the trial court, the action of that court in the premises is not assignable for error.

With respect to the fourth error assigned, it is sufficient to say that the overruling of a motion for a new trial in the court below cannot be assigned for error, and no authorities need be cited in support of the proposition.

The second error assigned is equally vague and without merit. It could not have been error on the part of the court to submit the cause to the jury upon the evidence adduced. The evidence was relevant upon the issues as framed, and the weight to be given to it lay with the jury, who were the proper arbiters of the facts in the case. There was a general exception to the charge of the court as a whole, but such an exception cannot be considered here, under well-settled rules of law. *Lucas* v. *Brooks*, 18 Wall. 436; *Burton* v. *West Jersey Ferry Co.*, 114 U. S. 474. The verdict was responsive to the issues, and the judgment of the court followed, as a matter of course. *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592, 598.

The fifth and sixth alleged errors go more to the merits of the action than any we have yet considered. "A motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, and the evidence is no part of the record for this purpose." *Bond* v. *Dustin*, 112 U. S. 604, 608; *Carter* v. *Bennett*, 15 How. 354. To bring the case within this rule it is argued that no evidence was offered tending to show a compliance on the part of the plaintiff or its assignor with the mechanics' lien law of Missouri; and that, upon the verdict rendered by the jury, the court was without authority to enter up a judgment recognizing and enforcing such a lien. It is manifest that the motion in arrest of judgment can be sustained only upon the theory that the court was without any authority to enter up a judgment recognizing and enforcing a mechanics' lien upon the property, since that would be the only defect upon the face of this record which we could consider upon such a motion.

The argument against the right of the court to enter up a judgment recognizing and enforcing a mechanics' lien is based on the theory that the contract between Schupp and Van Stone, under which the mill was built, providing, as it did, for the payment of the price in instalments to become due after the time limited by the statute (9 months) within which an action to enforce the lien is required to be commenced, which deferred payments were to be secured upon real estate of the plaintiff in error, was an express waiver of the lien, and

the breach of that contract by Van Stone did not restore to the contractor his right to claim a lien.

This argument rests upon a misconception as to the nature and character of a mechanics' lien. This lien is a creature of the statute, and was not recognized at common law. It may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon. 15 Amer. & Eng. Encyc. Law, 5. Now, it is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute.

The rule seems to be established in Missouri, and it is so in many of the other States, that a contractor does not waive his right to file a mechanics' lien by receiving from the owner of the building a promissory note for the amount due, payable at a time beyond the expiration of the period within which he is required to file his lien, but within the period within which suit must be commenced to enforce the lien, the taking of the note merely suspending the right of action. *McMurray* v. *Taylor*, 30 Missouri, 263; *Ashdown* v. *Becker*, 31 Missouri, 465; *Jones* v. *Hurst*, 67 Missouri, 568, 572. This rule is based upon the principle, recognized in that State, that the execution of a note for a preëxisting debt is not a payment of the debt, but only presumptively so; but a party relying upon that principle must, in an action on the original debt, produce the note for cancellation. Authorities last cited; *Brooks* v. *Mastin*, 69 Missouri, 58; *Doebling* v. *Loos*, 45 Missouri, 150.

Under this rule of law, the contention of the plaintiff in error must fail. For, *a fortiori*, would the right to file the lien remain, where, as in this case, no notes were given at all, but the agreement to give them was broken by the owner of

the building and premises. That agreement out of the way, the contractor or builder or material man occupied a status created by the law, viz., was possessed of a right to claim a mechanics' lien. This claim, it is admitted in the record, he asserted in accordance with the law, and this suit was brought by his assignee for the enforcement of such claim. The original contract for payment of the amount due on the contract in instalments having been broken by the plaintiff in error, the defendant in error had the right to elect to declare the whole sum due at once, and proceed to the enforcement of its lien. It follows, therefore, that there was no error in the action of the court in entering up a judgment recognizing and enforcing such lien. That being true, there was no error, so far as this record shows, in overruling the motion made in arrest of judgment.

But one alleged error remains to be considered, viz., the seventh. Exhibit "A," referred to therein, is a letter from Van Stone to Schupp, as follows:

"Marshall, Mo., Aug. 6, 1885.

"F. J. Schupp, Esq., Marshall.

"Dear Sir: The flour mill put up by you for me is satisfactory to me and is hereby accepted. The corn-rolls do not work to my satisfaction. Whenever such rolls are put in or shall do satisfactory work, I shall be ready to pay for the entire work.

"C. H. Van Stone."

It is urged that the court below erred in construing this letter to be a waiver of the time within which the mill was to be built. So far as concerns that portion of the letter relating to the part of the mill used for the manufacture of flour, it is an unconditional acceptance. It could not be made more positive. Nor do we think the latter part of the letter relating to the corn-rolls is susceptible of any other construction than the one put upon it by the court. By the language there used the plaintiff in error bound himself to pay for the entire work whenever it should be completed so that the corn-rolls

would do satisfactory work. There is nothing in that letter to indicate that any particular time was in the minds of the parties as to when such work was to be completed. Of course, the law implies that the completion of the work should not be unnecessarily prolonged. It should be done in a reasonable time. It was completed on or before October 16, 1885, for on that day it was accepted as satisfactory by Summerville, who, as before stated, had been agreed upon as a referee to determine when the mill did satisfactory work. Whether the period between August 6 and October 16, during which time the corn-rolls were being perfected, was an unreasonable time, or too great a delay, was in reality a question for the jury to determine, under proper instructions from the court. As no error is assigned to the charge of the court in this respect, and no exception was taken to the charge as given, except to it as an entirety, it must be presumed that no error was committed in this behalf; and that the jury found all the elements of an acceptance, by the plaintiff in error, of the completed mill.

Judgment affirmed.

WAUTON *v.* DEWOLF.

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

No. 1450. Submitted December 7, 1891. — Decided December 21, 1891.

This court has no jurisdiction over an appeal from a Circuit Court taken July 27, 1891, from a decree entered July 7, 1890, in a case where the jurisdiction of that court depended upon the diverse citizenship of the parties.

THIS was a motion to vacate an order docketing and dismissing this case, made on the 3d of last November, on the motion of appellees' counsel, and for leave to the appellant to docket the case and file the record. The case is stated in the opinion.

Mr. W. Hallett Phillips for the motion.

Mr. A. B. Browne (with whom was *Mr. A. T. Britton*) opposing.

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

This cause was docketed and dismissed November 3, 1891, upon a certificate of the clerk of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the Northern District of California, to the effect that in a certain cause pending in that court, wherein Florence W. Wauton was complainant and Frank E. DeWolf, Isabella C. DeWolf, and Horace M. Barnes were defendants, a final decree was rendered on the 7th of July, A.D. 1890, in favor of defendants and against the complainant, and that on the 29th of September, 1890, complainant prayed an appeal to the Supreme Court of the United States, which was allowed. A motion is now made to set aside the order of dismissal and for leave to docket the case and file the record.

The transcript submitted with the motion shows that, as stated in the certificate, the decree of the Circuit Court was entered July 7, 1890, and an appeal was allowed September 29, 1890, but nothing was done, and the case was not docketed here at the October term, 1890. On July 27, 1891, a bond on appeal was presented to and approved by the Circuit Judge, who on the same day signed a citation returnable to this court on September 19, 1891.

When the term elapsed at which the appeal of September 29, 1890, was returnable, without the filing of the record, that appeal had spent its force, *Evans* v. *State Bank*, 134 U. S. 330, and appellees caused the case to be docketed and dismissed as above stated.

Conceding that the approval of the bond, July 27, 1891, and the signing of the citation, were equivalent to the allowance of a second appeal, returnable to the present term, the transcript of record was not filed on or before the return day, nor delivered to our clerk until November 18, 1891; and the sole excuse for this delay which appellant presents, is that it was supposed that the clerk of the Circuit Court would transmit the transcript

when it was completed. It appears from the record that the suit involves land situated in California, and was commenced in the state court against the defendants who were citizens of Rhode Island and New York, and after summons by publication, was removed on their application to the Circuit Court. The ground of Federal jurisdiction was diverse citizenship.

By the act of March 3, 1891, (26 Stat. 826, c. 517,) establishing the Circuit Courts of Appeals, the jurisdiction of this court, in cases dependent upon diverse citizenship, was taken away; but by the joint resolution of March 3, 1891, (26 Stat. 1115,) the jurisdiction was preserved as to pending cases and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891.

So far then as this second and independent appeal is concerned, it came too late, and as, if the case were now docketed under that appeal, it would have to be dismissed for want of jurisdiction, we are, without passing upon the question of laches, compelled to deny the motion.

Motion denied.

CLAASSEN *v.* UNITED STATES.

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

No. 1191. Argued December 10, 11, 1891. — Decided December 21, 1891.

An indictment on Rev. Stat. § 5209, is sufficient, which avers that the defendant was president of a national banking association; that by virtue of his office he received and took into his possession certain bonds (described), the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use.

In a criminal case, a general judgment upon an indictment containing several counts, and a verdict of guilty on each count, cannot be reversed on error if any count is good and is sufficient to support the judgment.

Upon writ of error, no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record.

Statement of the Case.

THIS was an indictment on section 5209 of the Revised Statutes (which is copied in the margin[1]) containing forty-four counts, to all of which (except four afterwards abandoned by the prosecution) the defendant demurred; and his demurrer being overruled, he pleaded not guilty to all the counts. At the trial the district attorney elected to go to the jury upon eleven of the counts; and on May 28, 1890, the jury found the defendant guilty of the offences charged in five of those counts, and acquitted him upon the other six.

The first of the five counts upon which the defendant was convicted alleged that on January 23, 1890, he, being the president of a certain national banking association known as the Sixth National Bank of the city of New York, organized under the act of Congress of June 3, 1864, c. 106, and acting and carrying on a banking business in the city of New York, "did, by virtue of his said office and employment, and while he was so employed and acting as such president as aforesaid, receive and take into his possession certain funds and credits, to wit," certain bonds and obligations of railroad and other corporations, particularly described, of the value in all of $672,000, "then and there being the property of the said association, and which he held for and in the name and on account of the said association, and did then and there, wilfully and unlawfully and with intent to injure and defraud the said association, embezzle the said bonds and written obligations

[1] "Every president, director, cashier, teller, clerk or agent of any association who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

and convert them to his own use, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

Another of these counts averred that, on January 22, 1890, the defendant, being president as aforesaid, "did, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit and advantage of one James A. Simmons, certain moneys and funds then and there being the property of the said association, to wit, the sum of sixty thousand dollars, in the manner and by the means following — that is to say, he, the said Peter J. Claassen, being then and there such president as aforesaid, did, without the knowledge and consent of said association or its board of directors, procure the making by one Andrew E. Colson, who was then and there the cashier of said association, of a certain writing and check, commonly known and called a cashier's check, bearing date the twenty-second day of January in the year of our Lord one thousand eight hundred and ninety, which said check did then and there authorize and direct the said association to pay to the order of the said James A. Simmons the sum of sixty thousand dollars, although, as he, the said Peter J. Claassen, then and there well knew, the said sum of sixty thousand dollars was not then and there on deposit with the said association to the credit of him, the said James A. Simmons, and was not then and there due and owing from the said association to him, the said James A. Simmons, and the repayment thereof to the said association was not then and there in any way secured, and the said James A. Simmons had no manner of right and title to the same, and he, the said Peter J. Claassen then and there unlawfully devising and intending that he, the said James A. Simmons, should appropriate and convert to his own use the said sum of sixty thousand dollars from and out of the moneys and funds of the said association, which said sum of money was, upon and pursuant to the direction and authorization contained in the said check, thereafter, to wit, on the twenty-third day of January in the year of our Lord one thousand eight hun-

dred and ninety, paid by the said association from and out of the moneys and funds of the said association to the said James A. Simmons, and was then and there appropriated and converted to the use of the said James A. Simmons, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

The other three counts were precisely like this, except in the names of the persons to whose use and benefit the funds were converted.

A motion for a new trial and in arrest of judgment was heard, upon a case settled by the presiding judge, and denied on December 24, 1890. On March 18, 1891, the defendant was sentenced to imprisonment for a term of six years in a penitentiary.

On March 21, 1891, he sued out a writ of error from this court under the act of March 3, 1891, c. 517, § 5, and the joint resolution of the same date, No. 17, (26 Stat. 827, 1115,) and filed in the Circuit Court an assignment of errors, setting forth specifically, and in the manner of a bill of exceptions, errors in the admission and rejection of evidence, and in the judge's instructions to the jury; but assigned no error in the indictment or the sentence. To this assignment of errors the United States pleaded *in nullo est erratum*, as follows: "And afterwards, to wit, on the second Monday of April in said term, the said defendant in error, by Edward Mitchell, their attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid. And he prays that the said Supreme Court before the justices thereof now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, etc."

The plaintiff in error, in his brief filed in this court, specified the insufficiency of each of the counts on which he was convicted, as well as the matters stated in the assignment of errors filed in the Circuit Court.

Argument for Plaintiff in Error.

Mr. Hector M. Hitchings (with whom was *Mr. Samuel Shellabarger*) for plaintiff in error.

I. The counts of the indictment upon which plaintiff in error was convicted, are insufficient — do not charge a crime; and the demurrers interposed to the same were improperly overruled.

The acts named in § 5209 which are made, each respectively, to constitute a crime are: (1) Embezzling the bank's property: (2) Abstracting it: (3) Wilfully misapplying it: (4) Issuing or putting in circulation its notes: (5) Issuing or putting forth certificates of deposit, or an order or bill of exchange: (6) Making an acceptance: (7) Assigning a note, bond, draft, bill of exchange, mortgage or judgment — these "with intent, in either case, to injure or defraud the association," or to deceive a bank examiner: (8) Aiding or abetting in doing either of these.

Neither of the *four* counts named contains any averment which brings, or tends to bring, the defendant within any other of the eight classes just named than the 3d. In other words, there is nothing in either of these counts which charges, or tends to charge, the defendant with any other act or offence than "wilful misapplication" of the property named.

In construing this very section this court has said: "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning like the words 'embezzle,' as used in the statutes, or the words 'steal, take and carry away,' as used in common law. They do not, therefore, of themselves fully and clearly set forth every element of the offence charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made and that it was an unlawful one." *United States* v. *Britton*, 107 U. S. 655, 670. See also *United States* v. *Cook*, 17 Wall. 168, 174; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Cruikshank*, 92 U. S. 542.

And in all pleadings, and especially in criminal pleadings, all doubts are resolved against the pleader. *United States* v. *Linn*, 1 How. 104.

Now it has been decided that four classes of misapplications under section 5209 are not criminal. *United States* v. *Britton*, 108 U. S. 193. It was incumbent upon the pleader to negative these exceptions in the indictment, and to show positively and beyond cavil or question, that the offence charged fell within a class of misappropriation made criminal by the statute. This was not done.

II. If this court find any of the counts on which plaintiff was convicted, bad, it must reverse the conviction.

We may state our legal proposition in the following words of the Supreme Court of Massachusetts: "The rule that where the same offence is charged in different counts of an indictment, the whole indictment may be submitted to the jury, with instructions, if they find the defendant guilty upon any count, to return a general verdict of guilty, is not applicable in a case where one count of the indictment is bad and the evidence applicable to such count is submitted to the jury, with the rest, against the objection of the defendant."

In the present case the defendant made objections to each of the counts upon which he was convicted by means of his demurrer. This objection was, therefore, made a permanent and continuing exception of record, and was, therefore, made in the most significant and available way which was possible. In the further prosecution of the trial, it was not requisite that he should further or again object to the delivering in of evidence as to any particular count — this because he had, in the record, objected to delivering in evidence under, or in support of each, and either count, and he had been, by the court, in that regard, overruled.

The legal principle just stated is fully considered in the case of *Commonwealth* v. *Boston & Maine Railroad*, decided in 1882, 133 Mass. 383, 392, where the question was most elaborately considered, and the proposition which we have above quoted is in the words of the last paragraph of the head note in that case. See *Wood* v. *State*, 59 N. Y. 117.

III. This court has full authority to examine into the errors made at the trial in the admission and exclusion of evidence, and which are specified in the assignment of errors and in the statement of errors heretofore set out, and for that purpose must treat the assignment of errors as in the nature of a bill of exceptions.

Mr. Solicitor General for defendants in error.

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

There can be no doubt of the sufficiency of the first count on which the defendant was convicted. It avers that the defendant was president of a national banking association; that by virtue of his office he received and took into his possession certain bonds, (fully described,) the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged. *United States* v. *Britton*, 107 U. S. 655, 669; *The King* v. *Johnson*, 3 M. & S. 539, 549; Starkie Crim. Pl. (2d ed.) 454; 3 Chitty Crim. Law, 981; 2 Bishop Crim. Pro. §§ 315, 322.

This count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered.

In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is "that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad." *Peake* v. *Oldham*, Cowper, 275, 276; *Rex* v. *Benfield*, 2 Bur. 980, 985. See also *Grant* v. *Astle*, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to

show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 7 Cranch, 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Bond* v. *Dustin*, 112 U. S. 604, 609; 1 Bishop Crim. Pro. § 1015; Wharton Crim. Pl. & Pract. § 771.

The opposing decision of the House of Lords, in 1844, in the well known case of *O'Connell* v. *The Queen*, was carried, as appears by the report in 11 Cl. & Fin. 155, by the votes of Lord Denman, Lord Cottenham and Lord Campbell against the votes of Lord Lyndhurst and Lord Brougham, as well as against the opinions of a large majority of the judges consulted, and the universal understanding and practice of the courts and the profession in England before that decision. It has seldom, if ever, been followed in the United States.

In *Commonwealth* v. *Boston & Maine Railroad*, 133 Mass. 383, 392, and in *Wood* v. *State*, 59 N. Y. 117, 122, relied on by the plaintiff in error, the general rule was not impugned, and judgment upon a general verdict was reversed because of erroneous instructions, duly excepted to by the defendant at the trial, expressly authorizing the jury to convict upon an insufficient count.

In the case now before us, the record does not show that any instructions at the trial were excepted to, and the jury did not return a general verdict against the defendant on all the counts, but found him guilty of the offences charged in each of the five counts now in question. This being the case, and the sentence being to imprisonment for not less than five years nor more than ten, which was the only sentence authorized for a single offence under the statute on which the defendant was indicted, there is no reason why that sentence should not be applied to any one of the counts which was good.

The objections assigned and argued to the rulings and instructions at the trial cannot be considered by this court. Upon writ of error, no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record. The case settled by the judge presiding at the trial, pursuant to a rule of the Circuit Court, was for the

single purpose of a hearing in banc in that court, as upon a motion for a new trial, and is no part of the record on error. No bill of exceptions was, or, as we have already adjudged, could have been allowed by the Circuit Court to the rulings and instructions at the trial, because the conviction of the defendant was before the passage of the Judiciary Act of March 3, 1891, c. 517, and while the laws did not provide for or permit a bill of exceptions in such a case as this. Neither the assignment of errors, nor the plea of *in nullo est erratum*, can give this court jurisdiction of errors not appearing on the face of the record. *In re Claassen*, 140 U. S. 200.

Judgment affirmed.

SIMMONS *v.* UNITED STATES.

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

No. 1296. Argued December 11, 1891. — Decided December 21, 1891.

When it is made to appear to the court during the trial of a criminal case that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused, the jury may be discharged, and the defendant put on trial by another jury; and the defendant is not thereby twice put in jeopardy, within the meaning of the Fifth Amendment to the Constitution of the United States.

The judge presiding at a trial, civil or criminal, in any court of the United States, may express his opinion to the jury upon the questions of fact which he submits to their determination.

This was an indictment on section 5209 of the Revised Statutes for aiding and abetting one Claassen in embezzling and misapplying the funds of a certain national bank in the city of New York. The defendant pleaded not guilty.

On January 26, 1891, the case came on for trial upon the issue thus joined; a jury was empanelled and sworn; Goodnow, one of the jurors, stated on his *voir dire* that he had no acquaintance with the defendant and had never seen him to

his knowledge; the case was opened to the jury; and on that and following days witnesses were examined on behalf of the United States.

Before the coming in of the court on Friday, February 6, the district attorney received, and exhibited to the defendant's counsel, and to the judge, an affidavit of one Ward to the effect that during four months in 1884 the juror Goodnow and the defendant occupied adjoining rooms in a building in the city of New York, and were often seen conversing together in the halls of that building. The court thereupon adjourned the trial until Monday, February 9.

In the afternoon of February 6, the district attorney received from the defendant's counsel a letter, commenting upon the statements in Ward's affidavit and denying their truth, asserting that Ward had had a quarrel of long standing with the defendant, and stating that he had sent a copy of the letter to the daily papers; and the substance of this letter was published in the morning papers of February 7.

On the coming in of the court on February 9, the district attorney read affidavits to the foregoing facts, together with Ward's affidavit, the letter of the defendant's counsel and the publication in the newspapers; and thereupon moved the court "to withdraw a juror, for the reason that, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

In opposing this motion, the defendant's counsel admitted the making of Ward's affidavit, its communication to the counsel on both sides and to the court, and the writing and publication of the letter; but submitted an affidavit of the defendant denying that he had ever known Goodnow or had ever to his knowledge seen him before the trial, as well as an affidavit of the counsel explaining his action, and stating that he wrote and published his letter because he had been informed that the reasons for the adjournment of the court had been made public by the district attorney.

The judge gave his decision upon the motion as follows: "I am of the opinion that the facts presented make it neces-

sary to discharge the present jury from further consideration of this case, in order to prevent the defeat of the ends of justice, and to preserve the rights of the people and also to preserve the rights of the accused to be tried by a jury, every member of which can render a verdict free from constraint. It is manifest that the knowledge respecting the statement made by Ward, conveyed to the jury by the publication of the letter of the defendant's counsel, makes it impossible that in the future consideration of this case by the jury there can be that true independence and freedom of action on the part of each juror which is necessary to a fair trial of the accused." And after Goodnow and other jurors, being asked by the judge, had answered that they had read the publication in the newspapers, he added: "Therefore such a publication under the peculiar circumstances attending it affords, in my opinion, a sufficient ground to discharge the jury at this time." The judge thereupon ordered a juror to be withdrawn and the jury discharged. The defendant excepted to this order, and moved for an acquittal because of such discharge of the jury, and excepted to the denial of his motion.

On February 12 the case came on for trial before another jury, and a motion of the defendant to file a plea in bar on the ground of former jeopardy was opposed by the district attorney and denied by the court; and to this denial the defendant excepted.

The case was then tried, and was submitted by the judge to the jury on March 10 under instructions beginning as follows: "I have the right, under the laws of the United States, to give you my opinion on questions of fact, but I refrain from doing so because I am well satisfied of your capacity to understand what has been testified to in all these days that we have been here engaged. I shall confine myself to stating to you the law by which you are bound, simply calling your attention to the questions of fact which are to be decided by you, for, as you know, juries decide questions of fact, and not the court."

On the next day the jury came into court and asked to be discharged from further consideration of the case. To this request the court, after ascertaining by inquiry that the jury

required no further instructions in matter of law, replied as follows: "This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Whenever in the opinion of the court the testimony is convincing, it is the duty of the court to hold the jury together. Therefore I must decline your request to be discharged."

The defendant excepted to the judge's statement to the jury that he regarded the testimony as convincing, and, being found guilty and sentenced to imprisonment for six years in a penitentiary, tendered a bill of exceptions, which was allowed by the judge, and sued out this writ of error.

Mr. John Jay Joyce (with whom was *Mr. Samuel Shellabarger*) for plaintiff in error.

I. The right of the trial court to discharge the jury before verdict is to exist in cases of "extreme and absolute necessity" (*People* v. *Goodwin*, 18 Johns. 187; *S. C.* 9 Am. Dec. 203), "inevitable necessity" (*Mitchell* v. *State*, 42 Ohio St. 383, 393), "legal necessity" (*Nolan* v. *State*, 55 Georgia, 521), "imperative necessity" (*McCorkle* v. *State*, 14 Indiana, 39), only if "some inevitable occurrence shall interpose and prevent the rendering of a verdict" (*United States* v. *Shoemaker*, 2 McLean, 114). The discretion of the court in reference to such a discharge is a "legal discretion, and to be exercised according to known rules" (*McKee's Case*, 1 Bailey (So. Car. Law) 651; *S. C.* 21 Am. Dec. 499; *Mount* v. *State*, 14 Ohio, 295; *S. C.* 45 Am. Dec. 542), "a discretion to be used only under very extraordinary and striking circumstances." *United States* v. *Coolidge*, 2 Gall. 364. Such a discretion cannot be absolute and irreviewable, for then there would be no protection against its wildest abuse, and it is a rule in criminal proceedings that nothing be done within the discretion of the court to the prejudice of the defendant, (*United States* v. *Shoemaker*, *supra*,)

and in fact in almost all of the cases cited below in treating of "jeopardy," the very character of the discussion shows, even where it is not directly asserted, that the court of error exercised the right to review the action of the court below in discharging the jury; see also *United States* v. *Shoemaker*, *ubi supra*, where it is said "the first trial might be considered an experiment to draw forth the evidence in the case and ascertain if it be insufficient whether, on another trial, it might not be made strong enough to convict — nor could this right be safely exercised under the discretion," *i.e.* an unlimited discretion of the court. What shall govern this discretion? And as to the position of the accused "a right which depends on the will of the magistrate is no right at all." *O'Brian* v. *Commonwealth*, 9 Bush, 333.

The true rule is that the finding of the facts on which the discharge of the jury is based by the court below is final, but the determination whether such facts constitute a case of necessity is a question of law and open to review when such facts appear upon the record.

The great majority of the authoritative text writers hold that when the jury, being full, is sworn and added to the other branch of the court, and all the preliminary things of record are ready for trial, the prisoner has reached the jeopardy, from the repetition of which our constitutional rule protects him. 1 Bishop Crim. Law, §§ 1015, 1019; Cooley Const. Lim. (6th ed.) 399; Bigelow on Estoppel (5th ed.) 89. See also *Mitchell* v. *State*, 42 Ohio St. 383, 393, and cases there cited; *Nolan* v. *State*, 55 Georgia, 521; *Lovett* v. *State*, 80 Georgia, 255; *State* v. *Callendine*, 8 Iowa, 288; *State* v. *Tatman*, 59 Iowa, 471; *Josephine's Case*, 39 Mississippi, 613; *Teat* v. *State*, 53 Mississippi, 439; *People* v. *Barrett*, 2 Caines, 100; *King* v. *People*, 5 Hun, 297; *Commonwealth* v. *Cook*, 6 S. & R. 577; *Commonwealth* v. *Fitzpatrick*, 121 Penn. St. 109; *Hilands* v. *Commonwealth*, 111 Penn. St. 1; *McCorkle* v. *State*, 14 Indiana, 39; *Adams* v. *State*, 99 Indiana, 244; *Powell* v. *State*, 17 Texas App. 345; *People* v. *Gardner*, 62 Michigan, 307; *O'Brian* v. *Commonwealth*, 9 Bush, 333; *Commonwealth* v. *Hart*, 149 Mass. 7; *Lee* v. *State*, 26 Arkansas, 260; *People* v.

Cage, 48 California, 323; *State* v. *McKee*, 1 Bailey (So. Car.) Law, 651.

II. It is not denied that in the Federal courts the trial judge in submitting a case to the jury may express his opinion upon the facts.

But it will be found from an examination of the authorities that the tendency is to confine the right of the court in this respect within well-defined limits, and that in criminal cases, especially, such an expression of opinion must be closely coupled with words giving the jury to understand that they are not to be bound by it, but that the determination of all matters of fact was within their province alone.

Mr. Attorney General appeared for the defendant in error, but the court declined to hear argument.

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

The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged, without his consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: "We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in

capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this descretion rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office." *United States* v. *Perez*, 9 Wheat. 579.

A recent decision of the Court of Queen's Bench, made upon a full review of the English authorities, and affirmed in the Exchequer Chamber, is to the same effect. *Winsor* v. *The Queen*, L. R. 1 Q. B. 289, 390; *S. C.* 6 B. & S. 143, and 7 B. & S. 490.

There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused. As was well said by Mr. Justice Curtis in a case very like that now before us, "It is an entire mistake to confound this discretionary authority of the court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case." *United States* v. *Morris*, 1 Curtis C. C. 23, 37.

Pending the first trial of the present case, there was brought to the notice of the counsel on both sides, and of the court, evidence on oath tending to show that one of the jurors had sworn falsely on his *voir dire* that he had no acquaintance with the defendant; and it was undisputed that a letter since written and published in the newspapers by the defendant's counsel, commenting upon that evidence, had been read by that juror and by others of the jury. It needs no argument to prove that the judge, upon receiving such information, was

fully justified in concluding that such a publication, under the peculiar circumstances attending it, made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury; and the defendant was not thereby twice put in jeopardy, within the meaning of the Fifth Amendment to the Constitution of the United States.

The only other exception argued is to the statement made by the judge to the second jury, in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he had told them, in so many words, that the facts were to be decided by the jury, and not by the court. And it is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545; *United States* v. *Philadelphia & Reading Railroad*, 123 U. S. 113; *Lovejoy* v. *United States*, 128 U. S. 171.

Judgment affirmed.

McELVAINE *v.* BRUSH.

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

No. 1125. Argued December 7, 1891. — Decided December 21, 1891.

The provisions in the New York Code of Criminal Procedure, (§§ 491, 492,) respecting the solitary confinement of convicts condemned to death, are not in conflict with the Constitution of the United States, as they are construed by the Court of Appeals of that State.

This court follows the adjudications of the highest court of a State in the construction of the statutes of that State.

Medley, Petitioner, 134 U. S. 160, explained. *In re Wood*, 140 U. S. 278, followed.

THE case is stated in the opinion.

Mr. George M. Curtis for appellant.

The court declined to hear argument for the appellee. *Mr. Charles F. Tabor*, Attorney General of the State of New York, filed a brief for appellee.

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

Charles McElvaine was convicted in the Court of Sessions, Kings County, in the State of New York, on October 23, 1889, of the crime of murder in the first degree, committed August 22, 1889, and on October 25, 1889, was sentenced to death. From the judgment of conviction an appeal was duly taken by McElvaine to the Court of Appeals of the State of New York, where the judgment was reversed and a new trial granted. *People* v. *McElvaine*, 121 N. Y. 250. A new trial was had and resulted on September 29, 1890, in a conviction for the aforesaid crime, and on October 1, 1890, McElvaine was again sentenced to death. A second appeal was taken to the Court of Appeals and the judgment was affirmed February 24, 1891. *People* v. *McElvaine*, 125 N. Y. 596.

The Court of Appeals sent down its remittitur to the Court of Sessions to enforce the judgment, as rendered against McElvaine, according to law, and thereafter the judgment of the Court of Appeals was made the judgment of the Court of Sessions. On March 6, 1891, it was ordered and adjudged that the judgment of conviction and sentence thereon of October 1, 1890, be enforced and executed in the manner provided by law during the week beginning on Monday the 20th of April, 1891; and the court issued its warrant under the hands of the judges thereof (including the presiding judge) to the agent and warden of Sing Sing prison, commanding him to execute said

judgment and sentence, by putting the condemned to death, "in the mode, manner and way, and at the place, by law prescribed and provided."

April 21, 1891, McElvaine, by his attorney, presented to the judge of the Circuit Court of the United States for the Southern District of New York a petition praying that a writ of *habeas corpus* issue to Augustus A. Brush, the then agent and warden of Sing Sing prison, requiring him to produce the body of said McElvaine before said court at some time to be designated in said writ, and afterwards such proceedings were had that on said 21st day of April, 1891, an order was made denying the prayer of said petition, from which order McElvaine appealed to this court, which appeal was allowed by the said judge; and the clerk of the court was directed to transmit a transcript of the petition, decision and order thereon, and of the appeal. This transcript was accordingly transmitted, and, by stipulation, is accompanied by a certified copy of the warrant for McElvaine's execution.

We have examined and considered all the grounds alleged in the petition for the allowance of the writ, but deem it unnecessary to refer to any, save those presented in the brief and argument of petitioner's counsel.

Sections 491 and 492 of the New York Code of Criminal Procedure are as follows:

"§ 491. When a defendant is sentenced to the punishment of death the judge or judges holding the court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the sheriff of the county, a warrant stating the conviction and sentence, and appointing the week within which sentence must be executed. Said warrant must be directed to the Agent and Warden of the State prison of this State designated by law as the place of confinement for convicts sentenced to imprisonment in a State prison in the judicial district wherein such conviction has taken place, commanding such Agent and Warden to do execution of the sentence upon some day within the week thus appointed. Within ten days after the issuing of such warrant the said sheriff must deliver the defendant,

together with the warrant, to the Agent and Warden of the State prison therein named. From the time of said delivery to the said Agent and Warden, until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at said State prison, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

"§ 492. The week so appointed must begin not less than four weeks and not more than eight weeks after the sentence. The time of the execution within said week shall be left to the discretion of the Agent and Warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided." N. Y. Code Crim. Proc. 1890, pp. 128, 129.

It is contended that the solitary confinement thus provided for constitutes cruel and unusual punishment, and brings the statute within the inhibition of the Eighth Amendment to the Federal Constitution.

The first ten articles of amendment were not intended to limit the powers of the States in respect of their own people, but to operate on the Federal government only; but the argument is, that so far as those amendments secure the fundamental rights of the individual, they make them his privileges and immunities as a citizen of the United States, which cannot now, under the Fourteenth Amendment, be abridged by a State; that the prohibition of cruel and unusual punishments is one of these; and that that prohibition is also included in that "due process of law" without which no State can deprive any person of life, liberty or property.

We held in the case of *Kemmler*, 136 U. S. 436, that this statute in providing for the punishment of death by electricity, was not repugnant to the Constitution of the United States when applied to a convict who committed the crime for which he was convicted after the act took effect; that the enactment of the statute was in itself within the legitimate sphere of the

legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence; and that as the legislature of the State of New York had determined that it did not inflict cruel and unusual punishment, and its courts had sustained that determination, we were unable to perceive that the State had thereby abridged the privileges or immunities of petitioner or deprived him of due process of law.

That case is decisive of this, although the character of the confinement of the condemned pending his execution was not alluded to.

All that was held in *Medley, Petitioner*, 134 U. S. 160, was that a statute passed after the commission of the crime of murder, which added to the punishment of death, (that being the punishment when the crime was committed,) the further punishment of imprisonment in solitary confinement until the execution, was, when attempted to be enforced against a convict so situated, an *ex post facto* law, and that the sentence inflicting both punishments was void. The language of the opinion upon the subject of solitary confinement tended to illustrate the conclusion arrived at, but did not enlarge it.

And in *Holden* v. *Minnesota*, 137 U. S. 483, it was assumed that a similar statutory provision was not open to constitutional objection.

It is further urged that the warrant did not direct the infliction of solitary confinement; that it indicated no specific mode of death; and that the mode and manner of the infliction of the death penalty were not specified. But as the warrant commanded the warden to cause the judgment and sentence to be executed and enforced, and the condemned to be put to death "in the mode, manner and way and at the place by law prescribed and provided," this would seem to be ample authority to him for the confinement, as well as the infliction of the penalty of death, as prescribed by the statute; and, so far as the confinement had taken place under the first sentence and warrant, that resulted from the voluntary act of the petitioner in prosecuting an appeal.

In *People* v. *Brush*, reported in advance of the official series in the Northeastern Reporter, vol. 28, p. 533, it was

held by the Court of Appeals of New York, that an appeal from a judgment sentencing a defendant for murder in the first degree, operates only as a stay of execution of the death penalty, and not of the confinement of the defendant in the penitentiary pending the appeal, under the Code of Crim. Proc. of N. Y. sec. 528, which provides that "when the judgment is of death, an appeal to the Court of Appeals stays the execution, of course, until the determination of the appeal;" and it was also held that under the statute providing for execution by electricity, a warrant which directed that execution be done by putting defendant to death in the mode, manner and way and at the place by law prescribed and provided, was sufficient.

The general rule of decision is that this court will follow the adjudication of the highest court of a State in the construction of its own statutes; and there is nothing in this case to take it out of that rule. We are of opinion that the record does not disclose that the petitioner is restrained of his liberty in violation of the Constitution and laws of the United States; and, as observed by Mr. Justice Harlan in *In re Wood*, 140 U. S. 278, 289, it was not intended by Congress that the courts of the United States should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the States through their own tribunals.

The judgment must be affirmed, and the mandate issue at once, and it is so ordered.

TREZZA *v.* BRUSH. Appeal from the Circuit Court of the United States for the Southern District of New York. No. 1123. Decided December 21, 1891.

MR. CHIEF JUSTICE FULLER: Trezza was convicted of murder in the first degree in the Court of Sessions of Kings County, New York, June 6, 1890, and sentenced to death. The warrant for the execution of the judgment and sentence was duly issued to the agent and warden of the state prison at Sing Sing, and under it Trezza was committed to his custody.

Syllabus.

An appeal was taken to the Court of Appeals and the judgment affirmed, (125 N. Y. 740,) whereupon, March 6, 1891, the Court of Sessions ordered the judgment of conviction and sentence of death to be executed and enforced in the manner provided by law, and issued a second warrant to the warden. Trezza then presented his petition for a writ of *habeas corpus* to the judge of the Circuit Court of the United States for the Southern District of New York, and brings the order of that court denying its prayer to this court on appeal.

Petitioner claimed that by his imprisonment under the first warrant he had been once punished for the offence for which he had been convicted, and that solitary confinement amounted to cruel and unusual punishment, and hence that he was restrained in violation of the Fifth and Eighth Amendments to the Constitution of the United States; and he objected also that the warrant was not sufficiently definite and specific.

The record has not been printed nor have briefs been filed on either side, and appellant was not represented by counsel when the cause came on for hearing. We have, however, carefully examined the transcript, and find no ground upon which to arrive at a different conclusion from that just announced in the case of McElvaine.

The judgment is affirmed, and the mandate ordered to issue at once.

KNIGHT *v.* UNITED STATES LAND ASSOCIATION.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 824. Argued October 23, 26, 1891. — Decided December 21, 1891.

This court takes judicial notice of facts concerning the pueblo of San Francisco, (not contradictory of the findings of the referee in this case,) which are recited in former decisions of this court, in statutes of the United States and of the State of California, and in the records of the Department of the Interior.

It is settled law that a patent for public land is void at law if the grantor State had no title to the premises embraced in it, or if the officer who issued it had no authority to do so; and that the want of such title or authority can be shown in an action at law.

The power to make and correct surveys of the public lands belongs exclu-

Statement of the Case.

sively to the political department of the government, and the action of that department is unassailable in the courts, except by a direct proceeding.

In matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving on the government, by reason of the laws of Congress, or under treaty stipulations respecting the public domain, the Secretary of the Interior is the supervising agent of the government, to do justice to all claimants, and preserve the rights of the people of the United States.

The Secretary of the Interior had ample power to set aside the Stratton survey of the San Francisco pueblo lands, (although approved by the surveyor general of California, and confirmed by the Commissioner of the General Land Office, with no appeal taken,) and to order a new survey; and his action in that respect is unassailable in a collateral proceeding.

The method of running the shore line of the bay of San Francisco in the Von Leicht survey was correct.

The well-settled doctrine that, on the acquisition of the territory from Mexico, the United States acquired the title to lands under tide water in trust for the future States that might be erected out of the territory, does not apply to lands that had been previously granted to other parties by the former government, or had been subjected to trusts that would require their disposition in some other way.

The patent of the United States is evidence of the title of the city of San Francisco under Mexican laws to the pueblo lands, and is conclusive, not only as against the United States and all parties claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico, anterior in date to that confirmed by the decree of confirmation.

The court stated the case as follows:

This was an action of ejectment brought in the superior court in and for the city and county of San Francisco, California, by the United Land Association, a corporation of that State, and one Clinton C. Tripp, against Thomas Knight, to recover a block of land in that city bounded by Barry, Channel, Seventh and Eighth Streets, and known as block number forty. The controversy involves an interesting question of title to the property described, the plaintiffs asserting that the premises were below the line of ordinary high-water mark at the date of the conquest of California from Mexico, and, therefore, upon the admission of the State into the Union in 1850, enured to it in virtue of its sovereignty over tide lands; and

the defendant insisting that the lands are a portion of the pueblo of San Francisco, as confirmed and patented by the United States.

The complaint, filed on the 23d of November, 1880, alleged that the plaintiffs were the owners in fee of the premises described, and were entitled to the possession thereof, and that they had been wrongfully dispossessed thereof by the defendant, who continued to hold such unlawful possession, to their damage in the sum of $100, and to their loss of the rents and profits thereof in the sum of $500. Wherefore they prayed a judgment of restitution and damages aforesaid.

The answer consisted of a general denial of all the allegations of the complaint; and the cause, being at issue, was, by stipulation of counsel, referred to a referee, to take testimony, "try all the issues and report his findings and judgment thereon."

In obedience to the order of the court the referee tried the case, making an elaborate finding of facts and concluding, as matter of law, that judgment should go for the plaintiffs. Accordingly, on the 2d of June, 1888, a judgment was entered in the superior court in favor of the plaintiffs. That judgment was afterwards affirmed by the Supreme Court of the State on appeal; and, after two separate rehearings, the judgment of affirmance was adhered to by a bare majority of the court, three of the judges dissenting. 85 California, 448, 474. This writ of error was then sued out.

It appears from the bill of exceptions that, on the trial of the case before the referee, the plaintiffs, to sustain the issues on their behalf, introduced evidence tending to show the location of the premises to be as alleged in the complaint, and also a complete and good title in themselves under a grant from the State and certain mesne conveyances, provided the title to the premises was originally in the State, and provided certain deeds (which were also introduced) from the state tide-land commissioners, dated, respectively, November 24 and 27, 1875, were effectual to convey said title. For the purpose of proving title in the State they offered parol testimony to show that in 1854 the premises were below the line of ordinary

high-water mark, and that Mission Creek (which is an estuary of the bay of San Francisco and runs alongside this block) was, at that time, navigable for a considerable distance above them. This evidence was objected to, on the ground that parol evidence was inadmissible to prove the boundary lines of the decree of confirmation of the pueblo lands, but the objection was overruled and an exception noted.

The plaintiffs then offered in evidence certain documents relative to the confirmation to the city of San Francisco of its pueblo lands, and also the first survey of those lands under the decree of confirmation, which survey, made by deputy surveyor Stratton, approved by the surveyor general of California and confirmed by the Commissioner of the General Land Office, did not include the premises in controversy. They also produced a witness who testified that the premises were below ordinary high-water mark, as laid down on such survey. To the introduction of this survey as evidence, and to the parol proof of the location of the premises with reference to the line of high tide, as delineated thereon, the defendant objected on the ground that the survey was not matter of record, that it did not tend to prove, as between the parties hereto, where the line of high tide was, being *res inter alios acta*, and that it had been cancelled and superseded by another survey subsequently made in accordance with instructions of the Secretary of the Interior. The objection was overruled, the survey was admitted in evidence, and the defendant duly excepted.

The plaintiffs also produced in evidence certain maps made by persons in official station in 1853, 1857, 1859 and 1864, showing the line of high tide at about the same line as on the aforesaid Stratton survey. Objections were made to these maps as evidence, but they were overruled and exceptions were noted.

The plaintiffs also introduced in evidence the original minute-book of the board of supervisors of the city and county of San Francisco, and read a resolution passed by the board on the 23d of December, 1878, that no appeal should be taken from the action of the Commissioner of the General Land Office

approving the Stratton survey. Objection was made to this evidence, but it was overruled and an exception was noted.

The plaintiffs then offered in evidence the deeds from the state land commissioners to one Ellis, (from whom they derived their title,) together with the letter of the attorney general of the State, advising the board to dispose of all the tide lands not in litigation, and where they could ascertain to whom the state title ought to go, in pursuance of the tide-land acts. The deeds embrace the property in dispute. The defendant objected to these deeds on the ground that they were incompetent, in that the board of tide-land commissioners had no power or jurisdiction to make them, and on the further ground that there was nothing to show that the board was advised by the attorney general to make such deeds. The objection was overruled, and an exception was noted. The plaintiffs thereupon rested their case.

The defendant, to sustain the issues on his part, offered in evidence the patent of the San Francisco pueblo lands, regularly issued to that city on the 20th of June, 1884, and also the plat of said pueblo lands surveyed under instructions from the United States surveyor general by deputy surveyor Von Leicht in December, 1883, which showed an endorsement of approval by the Commissioner of the General Land Office, under date of May 15, 1884, and was also endorsed as follows: "The field-notes of the survey of the pueblo lands of San Francisco, from which this plat has been made, are strictly in accordance with the instructions of the honorable Commissioner of the General Land Office received with his letter, dated November 25, 1883, as the same appear of record and on file in this office. United States surveyor general's office, San Francisco, California, January 17th, 1884. W. H. Brown, United States surveyor general for California."

It was admitted that the land in question is included within the exterior boundaries of the patent; but the patent was objected to as incompetent to show title in the city of San Francisco, as against grantees of the State of the premises, for the following reasons:

"1st. The State of California acquired her title by virtue of

her sovereignty on her admission into the Union, and her title could not be overthrown by declarations of the United States made after title had vested in her.

"2d. That as to lands acquired by virtue of her sovereignty, the State was not the owner of a private land claim, and was not bound to present her claims to the board of land commissioners, organized under the act of Congress entitled, 'An act to ascertain and settle the private land claims in the State of California,' passed March 3, 1851, nor is she concluded as to her rights by not presenting them as provided in section 13 thereof, nor by any decision on the claim of another person. The act did not apply to her or her property.

"3d. The only authority for the patent was a decree of the United States Circuit Court, which court was not vested with jurisdiction over the State or the property of the State, although it was vested with jurisdiction over natural persons and corporations. Neither the decree nor any proceedings under the decree could affect the title of the State or furnish evidence against her.

"4th. The State was not a party to the record in the case of The City, &c. *v.* The United States, nor is she affected as a natural person or corporation would be by a failure to attend before the United States surveyor general and object to a survey, as provided in section one of the act of Congress approved July 1, 1864, and entitled 'An act to expedite the settlement of titles to lands in the State of California.' But, being a stranger to the entire record and proceeding, the patent is not competent evidence against her or her property.

"5th. The first survey is the final adjudication of the land office of the location of the premises described in the decree, because —

"(*a.*) In confirming a survey under the acts of March 3, 1851, and July 1, 1864, the Commissioner acts in a special judicial capacity, and his decisions are not appealable to the Secretary of the Interior.

"(*b.*) The city refused to appeal, and this refusal appears in the record, and there was no appeal.

"(*c.*) The first confirmed survey is better evidence of the

location in this case than the patent, and the patent is void to the extent that it departs from it.

"(*d.*) The decree confirms to the city only the land above or within the ordinary high-water mark at the date of the conquest.

"The premises are outside that specific boundary, and, as the surveyor general had no authority under the acts of Congress to survey, nor the land office to patent, land not confirmed to the claimant, the decree controls, and the patent is void to the extent that it departs from the specific boundary given in the decree."

The evidence was admitted, but the referee refused to find thereon in favor of the defendant, and an exception was noted.

The defendant also introduced in evidence the judgment roll in a case tried in a state court between this defendant and the city and county of San Francisco, in which a judgment was rendered in his favor in November, 1868, quieting his title to the premises.

That was all the evidence introduced, and upon it the referee found the material facts of the case substantially as follows: The premises in dispute are below ordinary high-water mark as the same existed on the 7th of July, 1846, (the date of the conquest of Mexico,) and are below and outside of a survey of the pueblo claim made by deputy surveyor Stratton, and approved by the surveyor general of California on the 13th of August, 1868, and confirmed by the Commissioner of the General Land Office, November 11, 1878, but are within a subsequent survey of the pueblo, made by deputy surveyor Von Leicht in 1884, which was not approved by the surveyor general of California, but was certified by him to have been made in accordance with orders from the Secretary of the Interior. The patent for the pueblo lands was issued on this second survey, and recited, among other things, the proceedings had in relation to the perfecting of the pueblo title, including the decree of confirmation and the confirmatory acts of Congress. The plaintiffs derived their title from the State through certain mesne conveyances, regular and legal in all

respects, while the defendant did not connect himself with the title of the State.

Upon the foregoing facts the referee found as conclusions of law that —

(1) The State of California upon her admission into the Union, September 9, 1850, became seized in fee of the premises in dispute;

(2) This title subsequently became vested in the plaintiffs, by virtue of certain conveyances described;

(3) This title of the plaintiffs was subject to defeat by the decree of the Circuit Court confirming the claim of the pueblo, but the premises being without the confirmed survey of 1878, and outside of the specific boundary given in the decree, remained the property of the State;

(4) "The second (Von Leicht) survey was illegal because it was not approved by the surveyor general of California, no appeal was taken to the Secretary of the Interior from the decision of the Commissioner of the General Land Office approving the prior survey; and because the second survey was not retained in the office of the United States surveyor general for ninety days, and no notice of the same was given to enable parties in interest to file protests, as required by law; and because, in approving said prior survey, said Commissioner of the General Land Office was acting in a judicial capacity and his judgment thereon is not reversible and was not legally reversed"; and,

(5) The description of the premises contained in the patent being in excess of the premises described in the prior survey and in the decree, the patent, to the extent that it covered land of the State not confirmed to the claimant, was invalid, and did not operate to convey the State's title to the premises in controversy.

The judgment of the Supreme Court of the State was based upon substantially the same grounds as that of the referee; and the correctness of the propositions of law involved therein is drawn in question by this writ of error.

To understand precisely the exact nature of the questions involved in this case a somewhat more detailed statement of

facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings, and are recited in former decisions of this court, statutes of the United States, and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice.

The pueblo of San Francisco has been a fruitful subject of litigation for many years, both in the Land Department of the government and in the state and Federal courts. For the purposes of this case a brief history only of the litigation is deemed essential.

The city of San Francisco, as the successor of a Mexican pueblo of that name, presented its claim to the board of land commissioners created by the act of Congress approved March 3, 1851, for the confirmation to it of a tract of land to the extent of four square leagues, situated on the upper portion of the peninsula of San Francisco. In December, 1854, the board confirmed the claim for only a portion of the four square leagues, and both the city and the United States appealed to the District Court of the United States. The United States subsequently withdrew its appeal, but the case remained in the District Court undisposed of until September, 1864, when, under the provisions of the act of Congress of July 1, 1864, it was transferred to the United States Circuit Court, which sustained the contention of the city and entered a confirmatory decree in its favor on the 18th of May, 1865. 4 Sawyer, 553, 577. The language of that decree is as follows: "The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, (as the same existed at the date of the conquest of the country, namely, the seventh of July, A.D. 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues — said tract being bounded on the north and east by the bay of San Francisco; on the west by the Pacific Ocean; and on the south by a due east and west line drawn so as to include the area aforesaid," subject to certain exceptions and deductions not necessary to be stated.

Both the United States and the city appealed from that decree — the United States from the whole decree, and the city from so much of it as included the aforesaid deductions and exceptions in the estimate of the quantity of land confirmed. While these appeals were pending Congress passed the act of March 8, 1866, "to quiet the title to certain lands within the corporate limits of the city of San Francisco." This act is as follows:

"*Be it enacted, etc.*, that all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the Circuit Court of the United States for the northern district of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby, relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely, that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: *Provided, however*, That the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof." 14 Stat. 4, c. 13.

The appeals to this court were thereupon dismissed. The measure of the city's title to the four square leagues of land is to be found in the decree of confirmation and the act of Congress just recited. The question of the city's title having been settled, it became necessary to fix the boundaries of its lands by a survey. This duty, under the law, devolved upon the

political department of the general government having charge of the public lands. Accordingly, in 1867 and 1868, under instructions of surveyor general Upson, deputy surveyor Stratton made a survey of the confirmed claim, and the same was approved by the surveyor general, and subsequently, after lying in the General Land Office, at Washington, for about ten years, it was confirmed by the commissioner on the 11th of November, 1878. 2 C. L. L. 1234. In making this survey Stratton ran its lines along the line of ordinary high-water mark of the bay of San Francisco until he came to Mission Creek, a small stream or estuary of the bay, and then followed the tide line up the creek, and crossing over, ran down on the other side. This plan seems also to have been followed with reference to a few other small estuaries. The city protested against this method of survey, and, through her attorney of record, gave notice of appeal from the action of the Commissioner of the General Land Office to the Secretary of the Interior, claiming that the proper method of running the line along the bay was to follow the tide line of the main body of water and cut across the mouths of all estuaries or creeks which are arms of the bay. The board of supervisors of the city, however, decided not to appeal from the decision of the Commissioner of the General Land Office confirming the Stratton survey, and, declaring that the action of the attorney was unauthorized, discharged him. Thereafter the board passed a resolution, addressed to the Secretary of the Interior, in which it was stated that, in its opinion, the Stratton survey was entirely correct and legal, and should be approved.

Notwithstanding this action of the board, the Secretary of the Interior sent for the papers in the case, and, upon an elaborate examination of the points involved, reversed the action of the Commissioner of the General Land Office approving the Stratton survey, thus substantially sustaining the original protest of the city to the running of the boundary line of the grant up the estuaries of the bay.

Upon motion for review, a subsequent Secretary of the Interior sustained the action of his predecessor, and ordered a survey made in conformity with the views of the department.

2 Land Dec. 346. It was under those instructions that the Von Leicht survey was made, upon which the patent was issued. Subsequently an application was made to a succeeding Secretary to have the patent recalled and cancelled, and a new patent issued; but it was denied, the Secretary holding that he had no power under the law to grant the application, and that even if he had, he should decline to exercise it, because he considered the views of his predecessors sound and correct. 5 Land Dec. 483.

Mr. Edward R. Taylor for plaintiff in error. *Mr. Samuel M. Wilson* was with him on the brief.

Mr. Charles N. Fox for defendants in error. *Mr. Philip G. Galpin* was with him on the brief, in which were cited: *United States* v. *Minor*, 114 U. S. 233; *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Jones* v. *Martin*, 13 Sawyer, 314, 317; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Wright* v. *Roseberry*, 121 U. S. 488; *Tubbs* v. *Wilhoit*, 138 U. S. 134; *Doolan* v. *Carr*, 125 U. S. 618; *Manning* v. *San Jacinto Tin Co.*, 7 Sawyer, 418, 427; *West* v. *Cochran*, 17 How. 403; *Stanford* v. *Taylor*, 18 How. 409; *Willott* v. *Sandford*, 19 How. 79; *Davis* v. *Wiebold*, 139 U. S. 507; *Attorney General* v. *Chambers*, 4 DeG. M. & G. 206; *Teschemacher* v. *Thompson*, 18 California, 11; *S. C.* 79 Am. Dec. 151.

Mr. Galpin also filed the following points for defendants.

I. The political department of the government known as the Department of the Interior has no power to carry into effect the provisions of the Treaty of Guadalupe Hidalgo, except in so far as that power is conferred by acts of Congress. No power in that regard is given save by the act of March 3, 1851, relative to settlement of private land claims and the acts amendatory thereof. 9 Stat. 631; 13 Stat. 332, § 7; 14 Stat. 218.

II. The Department of the Interior is not authorized to order a patent for land to any Mexican citizen or his successors in interest, in satisfaction of the treaty, except of land that has first been confirmed to that citizen by the judicial tribunals

appointed by Congress to ascertain and settle private land claims arising under the treaty.

III. Where a tract of land limited by specific boundaries has been so confirmed by the judicial tribunals authorized by Congress, a patent which includes lands (not public lands of the United States) outside of the boundaries given in the decree, does not operate to pass title to such outside lands.

IV. The patent is presumptive and persuasive evidence that its courses and distances do follow the specific boundary of the decree; but it is not conclusive.

The contestant in ejectment may prove to the trial court if he can, that the officer has exceeded his jurisdiction; and that the land included in the patent is in truth outside of the grant confirmed, and, therefore, outside the conveying power.

To deny this is to assert simply that the Department of the Interior, without authority to adjudicate upon what land shall be confirmed or conveyed, may issue a patent to land not confirmed; and the conveyance passes title to the outside land, until and unless the party affected by the overlap shall bring suit to cancel that part of the description, and reform the patent. That is to say, a patent to land outside of the jurisdiction of the officer, conclusively proves that the land is within it. So that, if the decree confirms the peninsula of San Francisco, the land office may patent the city of Oakland, and the patent passes the title to the land in the latter city! If this be so, the patent becomes more potent than the decree, and the court becomes an appendage of the land office.

V. If the court has confirmed a Spanish grant for a certain number of leagues to be located within certain larger exterior boundaries, (as has often occurred in this State,) the court by its decree has confirmed the grant to every part of the land up to the exterior boundaries, and the whole of that land is placed within the jurisdiction of the land office for the purpose of surveying and patenting the number of acres allotted to the claimant. This duty although in a measure judicial, (where no restriction of specific boundaries is contained in the decree,) is chiefly ministerial, and may be exercised anywhere within the exterior boundaries.

It results that so long as the survey and the patent are restricted to land within the exterior boundaries, the land is within the conveying power of the officer. It has been placed within his grasp by the decree of the court.

VI. But if a river, the sharp crest of a mountain ridge or the overflowing surface of the bay, impinging on the shore, defines the exterior boundary of the grant and the decree allots to the claimant, for instance, four square leagues in a square form lying next north and west of the specific boundary, and the surveyor chooses to patent land outside of the exterior boundary, and south and east of it, the land so patented, not being public land of the United States and unconfirmed to the claimant, is not within the conveying power of the officer.

Such is precisely this case; the land confirmed was no more than "so much of the extreme upper portion of the peninsula" "above ordinary high-water mark," and within an east and west, southern boundary line "as will contain" four leagues.

The surveyor, knowingly and remonstrating, was compelled, by order of the Secretary of the Interior, to cross this line and go outside of the exterior boundary of the land confirmed. The patent covered land which had not been the property of the United States after the admission of California into the Union in September, 1850.

VII. Nor is it any answer to say that notwithstanding the admission of California into the Union, she did not take this property discharged of the right of the government to use it, if necessary, in liquidation of the obligations of the treaty. Grant that this was so; still California did take the fee without grant and without patent, by virtue of her sovereignty, in September, 1850, subject to the right of the government to take it from her for the purposes aforesaid. But the government has not required it for that purpose; on the contrary, the decree of confirmation effectually removed that lien from the title of the State. It results that land below high tide was not within the conveying power of the Land Department, and the title of the State was not affected by the patent.

VIII. It will be said, "that the specific line of 'high-water mark' yields to the more general description of 'the bay:'

that, according to all the principles of map-making, a bay takes the contour line of the coast, and that, as the land is designated as lying between the ocean and the bay, the more general description of 'the bay' controls the words 'embracing so much of the extreme upper portion of the peninsula above high-water mark, etc., on which the city of San Francisco is situated, as will contain, etc.,' that the shore line of the bay does not follow the line of high tide; and the latter is to be abandoned."

It is manifest from the decree that the words "ocean" and "bay" are words of general description. The shores of each are described by the "line of ordinary high tide." There is no such thing possible as bay shore line visible under water. The result of this interpretation is, that the specific boundary of the line of high tide is eliminated whenever the surveyor chooses to depart from it. If such a construction is admissible at one point, it is of necessity at all others.

He may run anywhere from point to point and from headland to headland, and include the land of the State wherever he is disposed so to do. The result would be, possibly, that he would touch the line of high tide only at the extreme points which jutted into the sea, commencing at the Presidio and ending at the Potrero.

He could have disturbed the title to the water front of the city. An unknown, invisible and shifting boundary of a contour line which may be run this way a mile or two, or that way a mile or two, at the caprice of the surveyor, was not a desirable boundary for the city; and none such was then intended.

IX. The real and only question presented by this record is as to the exclusive and conclusive evidence of the patent. When the plaintiff in ejectment has located his land beyond the specific boundary given in the decree by evidence unassailed, does a patent to land unconfirmed to the claimant override all contrary proof, and conclusively establish that this patent is valid outside the boundaries of the decree, and that this land was confirmed to the claimant?

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

The case as presented by this record involves some very interesting questions. Ever since the decision in *Polk's Lessee* v. *Wendall*, 9 Cranch, 87, it has been the settled law of this court that a patent is void at law if the grantor State had no title to the premises embraced in it, or if the officer who issued the patent had no authority so to do, and that the want of such title or authority can be shown in an action at law. *Patterson* v. *Winn*, 11 Wheat. 380, 384; *Stoddard* v. *Chambers*, 2 How. 284, 318; *Easton* v. *Salisbury*, 21 How. 426; *Reichart* v. *Felps*, 6 Wall. 160; *Best* v. *Polk*, 18 Wall. 112; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447, 453; *Wright* v. *Roseberry*, 121 U. S. 488, 519; *Doolan* v. *Carr*, 125 U. S. 618, 625, and authorities there cited.

It is sought by the plaintiffs to bring this case within that rule; and it is, therefore, strenuously insisted that the patent for the San Francisco pueblo is void to the extent that it embraces lands below ordinary high-water mark of Mission Creek, as that line existed at the date of the conquest from Mexico in 1846. In order to sustain this proposition the claim is put forth that the Stratton survey was correct, and was never legally set aside; that the Von Leicht survey, upon which the patent was issued, was wholly unauthorized in law and void; and that the premises in dispute being excluded by the Stratton survey, and being proved by parol evidence to have been below the line of ordinary high-water mark, were never legally included in the patent, and were not included in the decree of confirmation.

It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding. *Cragin* v. *Powell*, 128 U. S. 691, 699, and cases cited. Under this rule it must be held that the action of the Land Department in determining that the Von Leicht survey correctly delineated

the boundaries of the pueblo grant, as established by the confirmatory decree, is binding in this court, if the Department had jurisdiction and power to order that survey. It is claimed, however, and the referee so determined, that no such power or authority existed in the Department, because it had been exhausted by the action of the Commissioner of the General Land Office in approving and confirming the Stratton survey in 1878. This contention is based upon the proposition that the Secretary of the Interior had no authority to set aside the order of the Commissioner approving and confirming the Stratton survey, especially in view of the fact that no appeal was taken from such order and the authorities of the city acquiesced in that survey. This proposition is unsound. If followed as a rule of law, the Secretary of the Interior is shorn of that supervisory power over the public lands which is vested in him by section 441 of the Revised Statutes. That section provides as follows: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . Second. The public lands, including mines." Sec. 453 provides: "The Commissioner of the General Land Office shall perform, *under the direction of the Secretary of the Interior*, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all [*agents*] [grants] of land under the authority of the government." Sec. 2478 provides: "The Commissioner of the General Land Office, *under the direction of the Secretary of the Interior*, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [The Public Lands] not otherwise specially provided for."

The phrase, "under the direction of the Secretary of the Interior," as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of

private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. As was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this pueblo case (5 Land Dec. 494): "The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter."

There is authority in this court for this holding. *Magwire* v. *Tyler*, 1 Black, 195, was a case involving the right of the Commissioner of the General Land Office, under the act of July 4, 1836, 5 Stat. 107, c. 352, reorganizing that bureau, and of the Secretary of the Interior, under the act of March 3, 1849, 9 Stat. 395, establishing that department, to take jurisdiction of surveys made in the upper Louisiana country upon confirmed Spanish titles. One of the questions presented was whether the Secretary of the Interior could reject such a survey and order a new one of the same claim, and issue a patent upon the second survey. By the act of March 3, 1807, the board of commissioners appointed to pass upon the merits of such claims was required to deliver to each party whose claim was confirmed a certificate that he was entitled to a patent for the tract of land designated. This certificate was to be presented to the surveyor general, who proceeded to have the survey made and returned, with the certificate, to the recorder of land titles, whose duty it was to issue a patent certificate, which, being transmitted to the Secretary of the Treasury, (then the head of the Land Department,) entitled the party to a patent. By the act of April 25, 1812, the duty of the Secretary of the Treasury was transferred to the Commissioner of the General Land Office. The act of April 18, 1814, required that accurate surveys should be made, according to the description in the certificate of confirmation, and that proper returns should be made to the Commissioner, of the certificate and survey, and of all such other evidence as the Commissioner might require. The court said: "These acts show that the surveys and proceedings must be, in regard to their correctness, within the jurisdiction of the Commissioner; and such has been the practice. Of necessity he must have power to adjudge the question of accuracy preliminary to the issue of a patent."

After referring to the act of July 4, 1836, which conferred plenary powers on the Commissioner to supervise all surveys of public lands, "and also such as relate to private claims of land and the issuing of patents," and also to the act of March 3, 1849, the third section of which vested the Secretary of the

Interior, in matters relating to the General Land Office, including the power of supervision and appeal, with the same powers that were formerly discharged by the Secretary of the Treasury, the court said: "The jurisdiction to revise on the appeal was necessarily coextensive with the powers to adjudge by the Commissioner. We are, therefore, of the opinion that the Secretary had authority to set aside Brown's survey of Labeaume's tract, order another to be made, and to issue a patent to Labeaume, throwing off Brazeau's claim." 1 Black, 202. See also *S. C.* 8 Wall. 650, 661.

A similar question arose in *Snyder* v. *Sickles*, 98 U. S. 203, 211, and was decided in the same way, the court going into an elaborate examination of the powers of the Secretary of the Interior to review the action of the Commissioner of the General Land Office, and reaffirming the doctrines of *Magwire* v. *Tyler*.

In *Buena Vista County* v. *Iowa Falls & Sioux City Railroad*, 112 U. S. 165, 175, a question arose whether the decision of the Commissioner of the General Land Office under the act of March 5, 1872, 17 Stat. 37, was intended to be final, from which no appeal would lie to the Secretary of the Interior. That act provides: "That the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selections of swamp lands in Lucas, O'Brien, Dickinson and such other counties in the State of Iowa as formerly presented their selections to the surveyor general of the district including that State, and allow or disallow said selections and indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made, without prejudice to legal entries and rights of *bona fide* settlers under the homestead or preëmption laws of the United States at the date of this act." It is to be observed that there was nothing in that act expressly giving an appeal from the Commissioner's decision to the Secretary. But the court said: "There is nothing in the act which alters the relation between the two officers as otherwise established, or puts the decisions of the Commissioner, under that act, upon a footing different from his other decisions."

The powers and duties of the Secretary of the Interior were no greater under the acts under consideration in the cases to which we have referred than they are under sections 441, 453 and 2478 of the Revised Statutes. They were practically, and to all intents and purposes, the same. The general words of those sections are not supposed to particularize every minute duty devolving upon the Secretary and every special power bestowed upon him. There must be some latitude for construction. In the language of this court in the late case of *Williams* v. *United States*, 138 U. S. 514, 524: "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice." See also *Lee* v. *Johnson*, 116 U. S. 48.

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

Furthermore, the power of supervision and control exercised by the Secretary of the Interior over all matters relating to the disposition and sale of the public lands, under § 453, Rev. Stat., is substantially the same as his power over the Bureau of Pensions, under § 471. That section provides: "The Commissioner of Pensions shall perform, *under the direction of the Secretary of the Interior*, such duties in the execution of the

various pension and bounty laws as may be prescribed by the President."

There is nowhere any express power given to the Secretary of the Interior to hear and determine appeals from the Commissioner of Pensions; and yet the power is exercised daily without question. And such power was expressly asserted in *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, and impliedly recognized in *Miller* v. *Raum*, 135 U. S. 200.

The same remarks apply to the powers of the Secretary of the Interior, under a similarly worded section of the Revised Statutes, (§ 463,) to supervise and control the management of the Bureau of Indian Affairs, which powers, so far as we are advised, have never been questioned.

But even if there was any doubt of the existence of such power in the Secretary of the Interior, as an original proposition, still the exercise of it for so long a period — going back to the organization of that department — without question, ought to be considered as conclusive as to the existence of the power. *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, and authorities there cited.

We conclude, on this branch of the case, that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leicht; and that his action in such matter is unassailable in the courts in a collateral proceeding. The Von Leicht survey, therefore, must be held as a correct survey of the pueblo claim as confirmed by the Circuit Court. Moreover, the method of running the shore line of the bay of San Francisco, adopted by the Von Leicht survey, was approved by the Circuit Court itself in *Tripp* v. *Spring*, 5 Sawyer, 209; and on this point we entertain no doubt.

The only remaining question in the case, as we understand it, and as we desire to consider it, may be thus stated: Admitting that the Von Leicht survey is correct and follows the decree of confirmation; admitting, also, that the patent followed the survey and the decree, and that the premises in dispute are embraced in the patent: Was parol evidence admissible to show that these premises were below the ordinary

high-water mark — not of the bay of San Francisco, but of *Mission Creek*, a navigable arm of the bay, as that line existed at the date of the conquest from Mexico in 1846? The contention on this branch of the case is, that, if all these admissions be taken as true, yet the land in dispute never was a portion of the pueblo of San Francisco, because, at the date of the conquest, it was below the ordinary high-water mark of Mission Creek, and, therefore, upon the admission of California into the Union in 1850, passed to the State in virtue of its sovereignty over tide lands.

To this contention we cannot give our assent; and in the view which we take of the question, we think there was error in admitting evidence to show that the land was below high-water mark of the creek, and that the Supreme Court erred in sustaining this ruling. For this and other reasons hereinbefore stated the judgment should have been for the defendant.

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. *Martin* v. *Waddell*, 16 Pet. 367, 410; *Pollard* v. *Hagan*, 3 How. 212, 229; *Goodtitle* v. *Kibbe*, 9 How. 471, 478; *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory. Authorities last cited. But this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. *San Francisco* v. *Le Roy*, 138 U. S. 656. For it is equally well settled that when the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo, 9 Stat. 922, they were bound, under the 8th article of that treaty, to protect all rights of property in

that territory emanating from the Mexican government previous to the treaty. *Teschemacher* v. *Thompson*, 18 California, 11; *Beard* v. *Federy*, 3 Wall. 478.

Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same. *Soulard* v. *United States*, 4 Pet. 511; *United States* v. *Perchéman*, 7 Pet. 51, 87; *Strother* v. *Lucas*, 12 Pet. 410, 436; *United States* v. *Repentigny*, 5 Wall. 211, 260.

These observations lead directly to the determination of the force and effect of the title of the pueblo of San Francisco, derived from the former government of Mexico, as opposed to the title which it is insisted passed to the State of California upon its admission into the Union by virtue of its sovereignty over all tide lands in the State below the high-water line, even including such as are situated within the limits of the pueblo.

If we have succeeded in showing that the tract in dispute was part of the land claimed by the city of San Francisco as successor of the Mexican pueblo of that name; that it is within the four square leagues described in the decree of the United States Circuit Court for the district of California, entered May 18, 1865; that that court decided and decreed that the claim of title was valid under the laws of Mexico; that the official survey of the United States officers is correct and followed the decree of confirmation; and that the patent of the government of the United States, following the survey and decree, embraced within its calls the property in dispute; we think it clearly follows that the patent of the government is evidence of the title of the city under Mexican laws, and is conclusive, not only as against the government and against all parties claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court.

The case of *San Francisco* v. *Le Roy*, 138 U. S. 656, 670, 672, is directly in point. That was a bill by Le Roy against the city of San Francisco to quiet his title to certain property

within the limits of the city. The plaintiff below claimed at the trial the benefit of a deed of the land from the tide-land commissioners of the State, which purported, for a consideration of $352.80, to release to the grantee the right, title and interest of the State of California to the premises therein described. The city relied on the patent of the government based on the confirmation of the United States Circuit Court for the district of California.

The court held that the title of the city rests upon the decree of the court recognizing the title to the four square leagues of land, and establishing their boundaries; and that even if there were any tide lands within the pueblo the power and duty of the United States under the treaty to protect the claims of the city of San Francisco as successor to the pueblo were superior to any subsequently acquired rights of California over the tide lands. Upon the question involved the court said:

"We do not attach any importance, upon this question of reservation, to the deed of the tide-land commissioners, executed to Sullivan on the 3d of December, 1870, for the State did not at that time own any tide or marsh lands within the limits of the pueblo as finally *established by the Land Department.* All the marsh lands, so called, which the State of California ever owned, were granted to her by the act of Congress of September 28, 1850, known as the Swamp Land Act, by which the swamp and overflowed lands within the limits of certain States, thereby rendered unfit for cultivation, were granted to the States to enable them to construct the necessary levees and drains to reclaim them. 9 Stat. c. 84, p. 519. The interest of the pueblo in the lands within its limits goes back to the acquisition of the country, and precedes the passage of that act of Congress. And that act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect. As to tide lands, although it may be stated as a general principle — and it was so held in *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57, 65 — that the titles acquired by the United States to lands in California under tide

waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. *Townsend* v. *Greely*, 5 Wall. 326, 337. The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and, of course, of the city of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it, the United States, through its tribunals, recognized the validity of that title at the date of the treaty — at least, recognized the validity of the claim to the title as then existing, and in execution of its treaty obligations no one could step in between the government of the United States and the city seeking their enforcement. It is a matter of doubt whether there were any lands within the limits of the pueblo, as defined and established by the Land Department, that could be considered tide lands, which, independently of the pueblo, would vest in the State. The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide water flowed so continuously as to prevent their use and occupation. To render lands tide lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses or other uses to which upland

is applied. But even if there were such lands, their existence could in no way affect the rights of the pueblo. Its rights were dependent upon Mexican laws, and when Mexico established those laws she was the owner of tide lands as well as uplands, and could have placed the boundaries of her pueblos wherever she thought proper. It was for the United States to ascertain those boundaries when fixing the limits of the claim of the city, and that was done after the most thorough and exhaustive examination ever given to the consideration of the boundaries of a claim of a pueblo under the Mexican government. After hearing all the testimony which could be adduced, and repeated arguments of counsel, elaborate reports were made on the subject by three Secretaries of the Interior. They held, and the patent follows their decision, that the boundary of the bay, which the decree of confirmation had fixed as that of ordinary high-water mark, as it existed on the 7th of July, 1846, crosses the mouth of all creeks entering the bay. There was, therefore, nothing in the deed of the tide-land commissioners which could by any possibility impair the right of the city to exercise the power reserved in the Van Ness ordinance over such portions of the lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares and public buildings of the city. Such a reservation should have been embodied in the decree in this case."

In the case of *Beard* v. *Federy*, 3 Wall. 478, 491, the court, upon a question very similar to this in many of its aspects, followed a similar course of reasoning from which we think the conclusion we have reached is logically deducible. In that case the court uses the following language:

"The position of the defendants is, that as against them the patent is not evidence for any purpose; that as between them and the plaintiff the whole subject of title is open precisely as though no proceedings for the confirmation had been had, and no patent for the land had been issued. Their position rests upon a misapprehension of the character and effect of a patent issued upon a confirmation of a claim to land under the laws of Spain and Mexico.

"In the first place, the patent is a deed of the United States. As a deed its operation is that of a quit-claim, or rather a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner, and on such terms, as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunal, and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclu-

sive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rests would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, *or was not properly located*, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section [meaning the fifteenth section of the act of 1851, for the purpose of ascertaining and settling private land claims in California]. The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

Judgment reversed, and cause remanded with directions for further proceedings in conformity with this opinion.

Mr. Justice Field, concurring.

I concur in the judgment of this court and in the views expressed in its opinion. As a correct solution of the questions involved is of vital importance to the security of titles claimed under confirmed Mexican grants in California, followed by a survey made and a patent issued under the Land Department of the government, and as I have had personal knowledge of

all legal proceedings touching the claim of the pueblo of San Francisco from their commencement, I will venture to make some observations, in addition to those of my brethren, upon the propositions of law advanced by the court below. Those propositions, if maintained, would, in my judgment, unsettle titles held under patents issued upon such confirmed grants, and lead to great litigation in the State, to the serious detriment of its interests and those of its people.

The action is ejectment for the possession of certain premises within the limits of the city and county of San Francisco, and also within the boundaries of the tract of land confirmed to the city, as successor of a Mexican pueblo, as they are described in the official survey of the tract made under the direction and authority of the Land Department, and carried into the patent of the United States.

The tract confirmed is designated in the decree of confirmation rendered by the Circuit Court of the United States on the 18th of May, 1865, as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula, *above ordinary high-water mark*, (as the same existed at the date of the acquisition of the country, namely, the seventh day of July, A.D. 1846,) on which the city of San Francisco is situated as will contain an area of four square leagues; said tract being bounded on the north and east *by the bay of San Francisco;* on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid," subject to certain deductions not material to be mentioned here. The decree declares that the "confirmation is in trust for the benefit of the lot holders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city."

A survey and plat purporting to be of the tract were made by one Stratton, a deputy of the surveyor general of the United States for California, and was approved by the latter officer in August, 1868. The survey, instead of following from its commencement on the east side of the tract to its termination the line of ordinary high-water mark of the bay of

San Francisco, as it existed on the 7th of July, 1846, followed such line only a part of the way. Of its departures from that line it is sufficient to mention that, when the survey reached the mouth of the estuary or stream entering the bay, known as Mission Creek, it left the shore of the bay and ran up along the bank of the creek on its right side from its entrance for a distance of over a mile, then crossing the creek passed down on the other side to the bay, extending back from the creek on each side so as to exclude from the survey a large tract of what was called marsh land.

To the approval of the survey and plat, the city and county of San Francisco filed their protest and objections. The military officer of the United States in command of the Department of California also filed objections to so much of the survey as related to the military reservation within the limits of the tract.

Surveyor General Day succeeded the officer who had approved the survey, and he forwarded the protest and objections to the Commissioner of the General Land Office, accompanied by his opinion that the objections were well taken in several particulars, and recommended among other things that the plat and survey should be amended so as to include the marsh land lying on Mission Creek within the four square leagues, and by the resurvey of the southern and eastern boundary of the military reservation. The Commissioner, however, disregarded the objections and approved the survey, founding his conclusion upon the alleged long acquiescence of the city and county of San Francisco, from which he inferred a recognition of its correctness and a waiver of the protest and objections.

The confirmation was, as already stated, "in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city." The legislation of Congress releasing the interest of the United States to the city was also in trust for the beneficiaries named, (14 Stat. 4, c. 13;) so that the city of San Francisco had no interest in the lands within the confirmed tract other than as a trustee, except where parcels had been

acquired by purchase or conveyance from other sources than the pueblo. All pueblo lands she held simply in that character. It was incumbent upon her, therefore, to take such steps as were necessary to secure and perfect the title of her *cestuis que trust.* She accordingly retained counsel to protect their interests as well as her own, and he made a formal appeal for the benefit of both to the Secretary of the Interior from the decision of the Commissioner.

Certain lot-holders were also permitted to appear before the Secretary and argue the case, as parties interested in the title. An appeal was also taken by the military commander of the Department, on behalf of the United States, to correct alleged errors in the survey of the military reservation, which kept the whole survey open before the Secretary until it was finally determined. Any change, either by the enlargement or diminution of the reservation, necessarily affected other lines of the survey, reducing or extending them as the quantity embraced within the tract surveyed was increased or diminished.

Mr. Schurz was then at the head of the Interior Department, and he examined at great length the action of the Commissioner and of the surveyor general upon the survey; received a large amount of testimony upon the objections presented, and heard arguments of counsel thereon. And he held that the treatment of the survey by the Commissioner proceeded on the assumption that the United States had no interest in the matter, and that if the State and city were satisfied, the duty of the Department was to approve the survey. This the Secretary held to be a grave error, observing that if the excluded tracts which the city claimed under the protest were above high-water mark in 1846, they ought to be included in the survey, and then the southern boundary line would have to be moved further north, excluding a corresponding quantity which would fall into the public lands of the United States. No stipulation or agreement, therefore, said the Secretary, between the State and the city and county could estop or relieve the officers of the Department from the duty of executing the decree or of protecting the interests of the government, adding, that if the city and county should ask to withdraw the protest

or to have the same dismissed the government would still have the right to make use of the objections, and of the evidence filed in their support for its own protection as well as for properly surveying the claim in accordance with the decree. He therefore discarded entirely the ground which the Commissioner had advanced as the principal reason for approving the survey.

The protest and objections of the city and county referred to tracts of marsh land lying near and south of Mission Creek. They alleged that such lands were not overflowed by tide water, except at the spring tides; that the line of ordinary high-water mark upon them on the side of the bay was sharply defined by a growth of samphire, a marine reedy plant which grows down to such line and no further. The testimony before the Secretary showed that the line thus defined was traced with a blue pencil on the engraved map of the coast survey, made by officers of the United States between 1850 and 1857, and that the marsh lands, including the premises in controversy, were above the line thus designated. Testimony of old residents of San Francisco, some of whom had resided there as early as 1842 and others in 1849, and down to a period long after 1851, and were familiar with the character of the land fronting on the bay, corroborated from their personal knowledge the evidence of this map, as to the marsh lands excluded from the survey being above the ordinary line of high-water mark of the bay.

It also appeared before the Secretary, that by an act of the legislature of California, passed March 26, 1851, the State had granted to the city of San Francisco the use and occupation for ninety-nine years of certain lands designated as beach and water lots; and that in describing those lands it had made one of their boundaries the natural high-water mark of the bay, the line of such high-water mark extending to its point of intersection with the southern boundary of the city. The act provided that, within thirty days after its passage, the city of San Francisco should deposit in the offices of the secretary of State and of the surveyor general, and in the office of the surveyor of the city of San Francisco, "a correct map of

said boundary line, distinctly and properly delineated by a red line."

Such maps were made and deposited as required, and from that time afterwards they were referred to by all parties in the city as determining the true line of ordinary high-water mark as it had previously existed. A copy of one of them was before the Secretary. They represented, as he held, the line of ordinary high-water mark which had been established, sanctioned and recognized in the most solemn manner by the State and city for years, and was the best available evidence of ordinary high-water mark of 1846 around that portion of the city. That line, as traced on the maps, crossed the mouth of Mission Creek and the mouths of all other creeks which in 1851 emptied into the bay of San Francisco. He, therefore, ordered the Commissioner to direct the surveyor general to secure a correct and authentic copy of the map, designating the line of natural high-water mark, in accordance with the act of 1851, and make it the basis of a survey of so much of the exterior boundary of the claim as it represented, and to modify the Stratton survey in accordance therewith.

Subsequently, after Mr. Schurz had ceased to be the head of the Interior Department and Mr. Teller had become Secretary, application was made to the latter officer to review the decision of the former, and upon such application argument of counsel was heard and a most extended consideration of the whole matter was had. Secretary Teller observed that all the material questions relating to the boundaries of the tract confirmed were settled, except the single inquiry whether or not, in running the line of ordinary high-water mark of the ocean, and especially of the bay, the main shore or course line of such body of water identified by its larger description should be followed, cutting across the mouths of streams, estuaries and creeks which, intersecting the body of the peninsula, find their entrance into the ocean or bay, or whether such estuaries as fall below high tide should be segregated by following up the tide line on one side and down on the other, so as to make them as it were a part of the sea. He said that his predecessor had decided that the former was intended by the decree and ex-

pressed its true construction, and, after mature deliberation, he adhered to the same view.

"When we look," said the Secretary, "at the calls for boundary there is no ambiguity, no doubtful phraseology. Said tract being *bounded* on the north and east by the bay of San Francisco; on the west by the Pacific Ocean. The tract *bounds* upon the *bay* and *ocean*, not upon estuaries, creeks and streams intersecting such tract, even though they be navigable and technically termed arms of the sea." The boundary, he added, was not the stream, but the bay; consequently the ordinary high-water mark must be the high-water mark of the shore as pertaining to the sea, and not the high-water mark of the bank as pertaining to a river or stream; so that, although Mission Creek was alleged to have been as well a tidal inflow as an outlet for the inland waters, it nevertheless fell within banks instead of resting upon shores, and must be considered an inland water for all purposes. He added that it was plain that the high-water mark extended to the shore of the bay, leaving out any reference whatever to the inland channels of the streams intersecting the granted peninsula. He accordingly directed a substantial adhesion to the decision of his predecessor, and overruled the application for its review.

After much difficulty with the surveying officers a survey was made pursuant to the directions given, and was approved by the then Commissioner of the General Land Office, and upon that survey a patent was issued to the city of San Francisco, bearing date the 20th day of June, 1884. This patent was forwarded to the mayor of San Francisco, and was accepted on behalf of the city and county.

When Mr. Lamar succeeded Mr. Teller as the head of the Interior Department, application was made to him to recall the patent and issue a new one in accordance with the Stratton survey. In support of the application it was strenuously contended, by the same parties who had resisted the action of his predecessors, that there was a want of jurisdiction on their part to review the decision of the Commissioner of the Land Office. Such contention was urged upon the supposed meaning of the statute, and on the ground that the supervisors of

the city and county of San Francisco had by resolution directed that no appeal should be taken from his decision, and, when it was taken by counsel retained for the protection of the interests of the lot-holders as well as of the city, had declared that his action was unauthorized.

The Secretary, in considering the objections, referred to the fact that the supervisors, subsequently to those resolutions, had requested him, before whom they admitted the case was then pending relating to the boundaries of the military reservation, to take up and decide the case without further delay. And after a careful review of the question of jurisdiction, and the proceedings preliminary to the issue of the patent, he refused to recall the patent, holding that an order by him to that effect would be illegal and void, and that the matter presented for his consideration in the past proceedings of the case did not justify any recommendation to the legal department of the government to institute proceedings to recall, or modify, or in any manner interfere with the patent.

I have stated with as much brevity as possible the steps taken for the confirmation of the title of the city as successor of the Mexican pueblo, which are set forth more in detail in the opinions of the different Secretaries of the Interior laid before us on the hearing, for the statement is important to a clear perception of the character and import of the rulings of the referee and of the court below. An extended narrative of the proceedings would occupy a much greater space and would show that parties claiming an interest in the lands left out of the Stratton survey, and resisting the approval of the official survey subsequently made, had also applied to the Supreme Court of the District of Columbia and to Congress for aid to carry out their pretensions, and were met by the declaration that to obtain a remedy for any errors alleged, resort should have been had to the Secretary of the Interior, as the only revisory authority over the action of the inferior officers of the Land Department. It would also show that in obtaining a recognition of its claim, the city had met from them at every step the most strenuous opposition, and that every possible objection taken to the claim and survey since,

was then presented and fully considered by the different Secretaries of the Interior; so that with truth was it said in the recent decision of this court in *San Francisco* v. *Le Roy*, 138 U. S. 656, 672, that the boundaries of the pueblo were established by the United States after the most thorough and exhaustive examination ever given to the consideration of the boundaries of a claim of a pueblo under the Mexican government.

The parties who carried on the long and protracted contest in the Land Department, against the confirmation of the claim and its survey as finally approved, asserted the acquisition of an interest in those premises under certain deeds of the tide-land commissioners, created by the legislature of California.

On March 30, 1868, that legislature passed an act to survey and dispose of certain salt-marsh and tide-lands belonging to the State. It empowered the governor to appoint three persons, who were to constitute a board of tide-land commissioners, and authorized them to take possession of all the marsh and tide lands, and lands lying under water, situate along the bay of San Francisco and in the city and county of San Francisco, belonging to the State; to have the same surveyed and maps of the property prepared; to sell the interest of the State therein, and to execute conveyances to the purchasers. Laws of California, 1867–8, c. 543.

At that time one George W. Ellis had settled upon lands excluded from the Stratton survey, and after its passage he applied to the board of tide-land commissioners and obtained from it two deeds, dated in November, 1875, covering the premises. His grantees carried on the contest, but not in their own names, against the location and survey of the tract confirmed before the Interior Department, and in every possible way sought to defeat its action and secure such a survey as would leave the lands claimed by them without the limits of the pueblo. The interest which the plaintiffs below, the United Land Association and Clinton C. Tripp, had or claimed in the premises covered by the patent to the city of San Francisco was founded upon these conveyances of the tide-land commissioners. Relying upon a title from that source the present action was brought.

As stated above, it is an action of ejectment for the possession of premises within the limits of the pueblo survey and covered by the patent to the city of San Francisco. After issue was joined it was by consent of parties referred to a referee.

The plaintiffs claimed title to the premises in controversy under the deeds mentioned. The defendant relied upon the fact that the premises were within the boundaries of the tract patented. They were situated in what constituted in 1854 the channel of Mission Creek, above its mouth. A witness produced by the plaintiffs testified that he knew their location and had made surveys in their neighborhood in that year, and that they were then below the line of ordinary high-water mark. He did not add "of the bay;" but as the premises were where the water of the creek formerly ran, and where, for aught that appears in evidence, it may now run, it was to the high-water mark of that creek to which he had reference.

The plaintiffs also gave in evidence the final decree of confirmation of the claim of the city of San Francisco rendered by the Circuit Court of the United States, and the Stratton survey, mentioned above, with the certificate of approval of the surveyor general and the confirmation thereof by the Commissioner of the General Land Office. Objection was made to the introduction of this survey on the ground that it was not competent evidence, not being matter of record; and that it had been cancelled and superseded by another survey made in accordance with instructions of the Secretary of the Interior. The referee overruled the objections under the exception of the defendant, admitted the rejected survey, and, among other things, held that in approving that survey the commissioner was acting in a judicial capacity, and that his judgment thereon was not reversible and was not legally reversed.

The defendant, to show that no title ever vested in the plaintiffs under their alleged deeds from the tide-land commissioners, gave in evidence the patent of the United States issued to the city of San Francisco, dated the 20th of June, 1884; also the plat of the pueblo lands finally confirmed to the city

under instructions of the United States surveyor general, ordered by the Secretary of the Interior, and approved by the Commissioner of the General Land Office, upon which the patent issued.

It was conceded that the patent included within its boundaries the premises in question. The referee admitted the evidence thus offered of the patent and survey, with the concession that they included the demanded premises, but refused to find for the defendant thereon, and the defendant excepted.

The decree of confirmation, as seen above, bounds the tract confirmed on the north and east side by ordinary high-water mark of the bay of San Francisco. The Stratton survey and the proofs before the referee did not show that the premises in controversy were below that water mark of the bay, but only that they were below that water mark at a point in the channel of Mission Creek, and yet the referee held that the Stratton survey and the parol proofs in the case showed that the premises were outside of the specific boundary of the decree, and therefore remained the property of the State. He accordingly gave judgment for the plaintiffs.

His rulings on the trial exhibited several errors. He gave no effect to the general rule that in actions of ejectment a patent of the United States, issued upon a confirmation of a land claim to which protection had been guaranteed by treaty, cannot be collaterally assailed for mere error alleged in the action of the officers of the government. He admitted in evidence, against the objections of the defendant, the rejected survey of Stratton, in contravention of the principle that a rejected survey of officers of the Land Department is in law no survey, and inoperative for any purpose. It has so been held in numerous instances and never to the contrary. In the particulars in which the Stratton survey was modified by direction of Secretaries Schurz and Teller, it was of no more efficacy as a legal document than so much waste paper. He apparently perceived that there was something bizarre in receiving as evidence a rejected survey, or a modified survey, except in the particulars in which the modification was had, and sought to avoid this position by holding that the action

of the Commissioner in approving the survey was beyond the reach of the Interior Department, and that it was not, therefore, legally reversed; thus brushing aside the important functions of that Department over the surveys of private land claims, which it has exercised since its organization, and which has been always recognized by the courts of the United States. *Cragin* v. *Powell*, 128 U. S. 691, 697. In answer to his erroneous conclusions in this respect, nothing can be added to the force of the statement in the opinion of the majority.

There were several hundred claims to lands in California, under Mexican grants, presented for confirmation to the board of land commissioners created by the act of 1851. They embraced many millions of acres of land, and in a large number, probably the majority of cases, where the claim was confirmed, the survey thereof by the surveyor general for the State, after being considered and approved or rejected by the Commissioner of the General Land Office, passed under the supervision of and were in some respects modified by the Secretary of the Interior as the head of the Land Department of the United States. If the position taken by the referee, that the action on the survey of such claims by the Commissioner was final, could be sustained, every patent issued upon a survey of a claim which had been in any respect modified or changed by direction of the Secretary of the Interior would be open to attack, to the frightful unsettlement of titles in the State and to the infinite disturbance of the peace of its people.

When the patent to the city was brought before the referee, and it was conceded that the land in controversy was included within the boundaries embraced by the survey embodied in it, judgment should have been rendered for the defendant. The title under the patent necessarily antedated any possible claim of the State of California to the lands within the limits of the pueblo. It went back to the acquisition of the country from Mexico. When the United States acquired California the inhabitants were entitled by the law of nations to protection from the new government in all rights of property then possessed by them. Jurisdiction and sovereignty passed from one nation to the other by the cession, but not private rights of

property; their ownership remained as under the former government. And by the term property, as applied to land, all titles are included, legal or equitable, perfect or imperfect. "It comprehends," as said by this court in *Soulard* v. *The United States*, 4 Pet. 511, 512, "every species of title, inchoate or complete. It is supposed to embrace those rights which are executory, as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."

By the treaty of Guadalupe Hidalgo, the United States also stipulated for such protection, and that implied that rights of property, perfect or imperfect, held by the inhabitants previous to the acquisition of the country, should be secured to them, so far as such property was recognized by the laws and constitution of the new government; and for that purpose that the holders should receive from the new authorities such official and documentary evidence of their rights as would assure their full possession and enjoyment. Pueblos in that respect stood in the same position as private individuals. All their rights of property, legal or equitable, were alike entitled to protection. Whatever property was ceded to the United States from Mexico, whether marsh lands or tide lands, passed subject to the obligation to protect existing claims to them of all parties. The State could take no greater interest than the United States acquired; all lands she received went under her control charged with the equitable claims of others, which the United States were bound by the treaty and the law of nations to protect. The marsh lands granted to her by the act of Congress of September 28, 1850, were thus affected. And the same was true of the tide lands. Whatever lands of that nature passed to the United States were held for the future State, subject, however, to any trust from the former government which might require their disposition in some other way. The duty and power of the United States in the execution of their treaty obligations to protect the property claims of all persons, natural or artificial, were superior to any subsequently acquired interest of the State or of individuals. Mexico owned the tide

lands as well as the uplands, and it was, of course, in her power to make such disposition of them in the establishment and organization of her pueblos as she may have judged expedient. And whether she did make such disposition by her laws was a matter exclusively for the United States to ascertain and determine. As said by the Supreme Court of California in *Ward* v. *Mulford*, 32 California, 372: "In private proprietorship and in sovereign right the United States succeeded the Mexican government, and in both these respects California, so far as she acquired any right in either, succeeded the United States and became privy to the latter in estate in respect to all lands within her borders, whether such as may be held in private or in sovereign right. In this respect no distinction can be made between the lands acquired by her through Federal grants, and such as she took by virtue of her sovereignty."

The obligation of protection imposed upon the United States by the law of nations, and assumed by the treaty, was political in its character, to be performed in such a manner and on such terms as the United States might direct. As held by this court in *Beard* v. *Federy*, 3 Wall. 478, 492, they declared by the act of March 3, 1851, to settle private land claims in California, the manner and the terms upon which they would discharge this obligation. They there established a special tribunal, or board of commissioners, before which all claims to land in that State derived from Spanish or Mexican authority were to be investigated; they required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions rendered by the commissioners to the District Court, and from the decisions of that court to the Supreme Court of the United States, and declared that in the determination of the claims presented, the commissioners and those tribunals should "be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity and the decisions of the Supreme Court of the United States, so far as they were applicable." 9 Stat. c. 41, § 11, p. 633. It also made provision for the investigation and deter-

mination of the property rights of pueblos; and designated the officers who should in all cases survey and measure off the land when the validity of the claim presented was finally determined. When it appeared by the action of their officers and tribunals that the claim asserted was valid and entitled to recognition, and that its boundaries were ascertained, the government was to issue its patent to the claimant.

And what was the effect and operation of this instrument? It was not merely a quit-claim or conveyance of whatever interests the United States held in the lands embraced; it was something more; it was, as declared in the case cited, record evidence upon the title of the claimant from the former government. As there said: "By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, *and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government, so long as it remains unvacated, it is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent.*" The patent being thus conclusive, can only be resisted by those who hold paramount title to the premises from Mexico antedating the title confirmed, that is, by persons who can successfully resist any action of the United States in disposing of the property or in perfecting the title of the claimant.

In the case from which I have cited the court added, in order to impress the importance of this doctrine for the stability of titles in the State resting upon confirmed and patented Mexican grants: "It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interest in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee in every suit for his land to establish the validity of his claim, his right to its confirmation and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and

security to its possessors. The patentee would find his title recognized in one suit and rejected in another, and, if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest."

The doctrine of that case has never been departed from, but, on the contrary, has always been followed and approved. Numerous decisions of the Supreme Court of California, commencing with the 13th volume of its reports and extending down to a late period, express the same doctrine with equal clearness and emphasis. *Moore* v. *Wilkinson*, 13 California, 478, 484; *Yount* v. *Howell*, 14 California, 465; *Teschemacher* v. *Thompson*, 18 California, 11; *Leese* v. *Clark*, 18 California, 535; *Ward* v. *Mulford*, 32 California, 365; *Chipley* v. *Farris*, 45 California, 527; *People* v. *San Francisco*, 75 California, 388.

But notwithstanding the superior and conclusive character of the title presented by the patent, and the emphatic decision of the highest tribunal of the country, and repeated decisions of the State Supreme Courts to the same effect, that until vacated that instrument was conclusive against the government and parties claiming by title subsequent, the referee found otherwise and held that the plaintiffs, who derived whatever interest they possessed twenty-nine years subsequently to that of the city, held the better right and were entitled to judgment for the demanded premises; and such judgment was entered in one of the Superior Courts of the city. From that judgment an appeal was taken to the Supreme Court of the State, where it was affirmed. A rehearing being granted, a reargument was had, and a second time the judgment was affirmed by four judges of the court, the remaining three dissenting. From the latter judgment the case is brought to this court on a writ of error.

From the opinions upon both affirmances it appears that the court below, equally with the referee, lost sight of the principle that in actions at law a patent of the United States, upon a confirmation of a private land claim asserted by virtue of rights acquired under a foreign government, is not open to

collateral attack, but must be taken as correct until vacated, not only as to the validity of the claim confirmed, but as to the boundaries established. It is hardly necessary to say that any attempt to overthrow these conclusions in either particular, where the tribunal affirming the validity of the claim and the department establishing the boundaries had jurisdiction, is collaterally attacking the patent.

That the land commissioners and the Circuit Court of the United States had jurisdiction to hear and determine the validity of the claims asserted by the city of San Francisco is not open to question. The laws of the United States gave them such jurisdiction, and when that claim was confirmed the law directed by what officers its boundaries should be established and surveyed. It was the exclusive province of those officers to ascertain where the line of true boundary ran, subject to the control and supervision of the Interior Department. To say that those who directed and supervised the survey had not jurisdiction to perform that duty, is to deny efficacy to the laws of Congress.

The court below upon the first affirmance rejected the boundary as established and surveyed by the officers appointed by law for that purpose, and assumed that the line of ordinary high-water mark of Mission Creek running into the bay, was, as far as such line extended, the true boundary designated by the decree, and held that land below such line was the property of the State. In other words, it assumed that the boundary of the pueblo was to follow the line of high-water mark of the creek, and not be confined to the high-water mark of the bay. It thereupon stated that the question involved was whether the officers of the Land Department had power to patent land outside of the natural boundaries given in the decree of confirmation.

In this statement the learned court fell into an error. No such question was involved in the case. The approved survey upon which the patent was issued crossed the mouth of Mission Creek and included the lands above its mouth, among them the premises in controversy. The question involved, therefore, was whether in an action of ejectment for the pos-

session of those lands the plaintiffs could collaterally assail the correctness of the official survey upon which the patent was issued and establish another line as the true boundary, and then recover the lands on showing that they were outside of the new boundary thus established. I do not think that such a position was ever successfully asserted in any court. If there was error in the survey embodied in the patent it could not have been shown in this action. It could only have been corrected by direct proceedings for that purpose instituted by the government or by its authority. This is elementary law, and in vain will authorities be sought to contradict this view.

Proceeding on the assumption that a different line from the one officially established constituted the true boundary line of the tract confirmed, the court below declared that it was the duty of the surveyor to follow such different line — though otherwise directed by the highest officer of the Land Department, who had the sole right of control in the matter — and, that as the surveyor did not follow that different line, he included, according to its judgment, lands within his description not within the decree of confirmation.

I may speak of the decree with some confidence as a member of the court by which it was rendered, and a distinct recollection remains with me of the circumstances under which the language used was adopted. The original decree of confirmation was rendered in October, 1864, and stated the land confirmed to be "a tract situated within the county of San Francisco, and embracing so much of the upper portion of the peninsula on which the city of San Francisco is situated, as will contain an area of four square leagues," as described in the petition. A motion for a rehearing was made, which kept the case open until the following spring, the judge who pronounced the decree being absent from California in Washington in attendance upon the Supreme Court. On his return the question of a rehearing was brought up, when it was suggested by counsel that the decree needed correction, so as not to include in the claim confirmed the beach and water lots conveyed to the city by the act of the legislature of 1851. Reference was made to the map prepared under the directions

of that act, on which a line was drawn in red ink, marking the separation of lands above the ordinary high-water mark of the bay and lands below it, and it was suggested that the insertion in the decree of the words "above ordinary high-water mark, as the same existed at the date of the conquest of the country, namely, the seventh of July, 1846," would establish the line as indicated on the map, and that thus in the decree of confirmation lands granted to the city by the State would not be affected. Upon that suggestion, made by Mr. Gregory Yale, a lawyer of distinction at the bar, whose clients had become alarmed at the language of the original decree, the change was made.

In addition to this fact it may be observed that at the time the Circuit Court was not ignorant of the universal rule governing the measurement of waters, to which the Supreme Court of the State makes no reference in its decision, and of which it seems to have been entirely oblivious, that where a water of a larger dimension is intersected by a water of a smaller dimension, the line of measurement of the first crosses the latter at the points of junction, from headland to headland. The existence of tide lands in the intersecting water in no respect affects the result. For illustration, in the measurement of a body of water like Long Island Sound, when the Connecticut River is met the line of survey does not follow up that river to Hartford because the tide is felt at that place, but it crosses the mouth of the river from headland to headland. So, too, the measurement of Chesapeake Bay does not include the Potomac River up to Washington because the tide is felt at the site of the capital. It would be absurd to include in the measurement of the bay of San Francisco the waters of the river Sacramento as far as the city of that name, nearly a hundred miles above the bay, because the tide is felt there; or to embrace the river San Joaquin as far as Stockton because the tide reaches to that place. This is so plain that it excites surprise that any question should have been made upon the subject. And if a river extending a hundred miles or more could not be included in the bay, even though affected by the tides, neither can a stream of less dimensions, though not ex-

ceeding over one or two miles. Not only has this rule in the measurements of waters prevailed on the continent of Europe from the time of the Roman Empire, but it has been always accepted as controlling in England and in the United States, and never been, that I am aware, questioned except in the present case.

When the survey here was pending before one of the Secretaries of the Interior, application was made to the head of the Coast Survey of the United States for the rule adopted by that bureau in the measurement of waters, and the answer was the statement of the rule which I have given; and it is a singular fact that, as an illustration of its application, reference was had to the bay of San Francisco and Mission Creek, and the declaration made that in the measurement of the bay the line of the survey would cross the mouth of that creek. Admiral Rodgers, who was at one time the head of the Coast Survey in California, and had surveyed the line of ordinary high-water mark of the bay of San Francisco, filed his affidavit to the effect that he had since 1851 been stationed in California in charge of the United States survey of the coast thereof, including the peninsula of San Francisco; that the traced chart or map showing the line of ordinary high water along the eastern side of the peninsula of San Francisco from Rincon Point to and including Islais Creek, as surveyed by the Coast Survey of the United States in 1852, was prepared from the published surveys of the Coast Survey of the United States, and that the line laid down on that map in blue pencil, from Rincon Point, around Mission Bay, to and including Islais Creek, and crossing Mission and Islais Creeks, was a true delineation of the line of ordinary high-water mark as it existed when he first knew it in the year 1852. He added that "in determining a boundary line stated as the line of 'ordinary high-water mark,' on the bay of San Francisco, there can be no other course than to follow the stated line of ordinary high tide on the shore of the bay, crossing the mouths of all inferior tidal streams or estuaries, many of which enter into San Francisco Bay at different points, and not to follow the meanders of any such inferior tidal streams or estuaries."

The assumption, therefore, of the court below, that the decree of confirmation called for any other line than the one actually surveyed and embodied in the patent was an error. It was founded upon a misapprehension of the law governing the surveys of waters of that kind, or from overlooking its existence. The statement in the opinion of the court as to the requirement that the surveyor general in making the survey of a confirmed claim should follow the boundaries of the decree as near as practicable, whenever the decree specifically designates them, is undoubtedly correct, and it was the duty in this case of the surveying officers of the Land Department, under the supervision of the Secretary of the Interior, to ascertain what those boundaries were, and to follow the decree in making the survey. That they accomplished this is conclusively established, so far as the present action is concerned, by the official survey itself returned by them, and subsequently approved by the Commissioner of the Land Office.

The question as to what was the boundary line of the tract confirmed also became the subject of judicial inquiry in the Circuit Court of the United States in 1878. An action was brought by one Tripp, who is one of the plaintiffs in this case, for a parcel of land constituting a portion of a block in the city of San Francisco. The premises were situated where Mission Creek formerly ran, and distant about a mile from its mouth. All that part of the stream covered by the block in which the premises were situated had been filled in and buildings erected thereon, which were occupied as private residences. The plaintiff claimed title under the same conveyances of the board of tide-land commissioners upon which the plaintiffs below rely in this case, and the same contention was made there as here. The question presented was whether the title to those premises passed by the tide-land commissioners' deeds or whether they were within the limits of the pueblo claim as confirmed, although not at that time patented. The court said: "Whether the waters of the bay were ever carried by the tide over the lands is a matter upon which the evidence is conflicting. The creek was often swollen by water from the adjacent hills so as to overflow its banks, and the tide some-

times, though not regularly, forced back the waters of the creek so as to cause a similar overflow. But, from the view we take of the case, it is immaterial whether the lands could ever properly be termed tide lands or marsh lands, whether they were at any period covered by the daily tides, or lay beyond their reach at their highest flood. The record of the proceedings and the final decree in the Pueblo Case have been given in evidence, and from them it appears that the premises are situated within the limits of the tract confirmed to the city of San Francisco." The court added: "Mission Creek never constituted any portion of the bay of San Francisco any more than the Sacramento River constitutes a portion of the bay of Suisun, or the Hudson River a portion of the bay of New York. As the demanded premises lie where Mission Creek formerly existed, or where its banks were, they necessarily fall within the tract confirmed to the city. The boundary of that tract runs along the bay on the line of ordinary high-water mark, as that existed in 1846, crossing the mouth of all creeks running into the bay, and that of Mission Creek among others. The boundary would have been a very singular one had it followed the windings of that creek and its branches wherever the tide waters of the bay may have flowed. The laws of Mexico relating to lands to be assigned to pueblos required that such lands should be laid out in a square or prolonged form, according to the nature of the country, and, so far as practicable, have regular lines for boundaries. The decree of the United States Circuit Court in confirming the claim of the city followed this requirement, and gave the boundaries which could be easily ascertained, and which formed as compact a body as the situation of the country would permit." *Tripp* v. *Spring*, 5 Sawyer, 209, 212.

As thus appears, the identical question involved in this case was decided in that. No case was ever tried with more care, or greater consideration, and at the conclusion of a trial of several days the court decided that judgment must be entered for the defendant. The presiding justice stated the grounds of the decision orally, and observed that as the questions involved were deemed of great importance he would at a subse-

quent day file an opinion embodying their substance. It is a common practice with judges of the highest courts to give opinions orally and write them out subsequently, after the decision is rendered, and that fact in no way affects their authoritative character. The pressure of business before the court may often prevent any other course being pursued.

Counsel for the plaintiff then stated that special findings in the case were desired, in order that should the case reach the Supreme Court it might be finally determined there. Upon that suggestion the entry of judgment was stayed, and an adjournment of the court had, that such findings might be prepared. On the next day the case was dismissed by stipulation of parties.

The opinion of the court, pronounced at the close of the trial, and subsequently written out was, notwithstanding the dismissal, as much authority on the questions of law presented as though a formal judgment had been entered, although the judgment ordered, because not entered on account of the dismissal, could not be pleaded in bar of a future action.

The court below having assumed that another line than the one officially established was the true one, took the extraordinary ground that the error committed in that respect by the surveying officers, though acting under the express directions of the Land Department, was jurisdictional and fatal to their action, rendering it void, and opening the patent embodying the survey to collateral attack. And it proceeded to cite several decisions in supposed support of this view, but which only were to the effect that where the Land Department had no jurisdiction over the subject matter considered, its patent could be assailed collaterally.

In thus holding, the court failed to distinguish between what was, upon its own statement, mere error in the action of the Land Department, and matters which were entirely beyond its jurisdiction. The ascertainment of the true line of the boundaries of the claim confirmed was a matter especially entrusted to that department by the laws of Congress, as already stated. If the officers of that department in executing the survey made mistakes, ran erroneous lines and included

lands which they should have excluded, those facts did not justify the assertion that they acted without jurisdiction in making the survey, and that, therefore, their whole proceedings were void. If all that is asserted be true they only erred in the exercise of their jurisdiction, and the remedy for their errors before the issue of the patent lay in an appeal to higher officers of the department — from the surveyor general to the commissioner, and from his decision to the Secretary of the Interior; — and if after the issue of the patent like objections were urged, the remedy could be sought only by direct proceedings.

The distinction between errors committed where jurisdiction exists to take the proceeding in which the alleged error arises, and where there is an entire want of jurisdiction over the subject matter considered, is too familiar to be discussed. The distinction is constantly applied with reference to the proceedings of ordinary tribunals. If they have jurisdiction of the subject matter and the parties, their judgment cannot be collaterally assailed for mere errors committed in the proceedings leading to it. The remedy for errors must be sought by application for a new trial or by appeal for a review to an appellate court. The same distinction prevails with reference to the proceedings of the special tribunal or department of the government to which is entrusted the supervision of measures for the issue of its patent.

The cases referred to and dwelt upon as supposed to support the opposite doctrine are not susceptible of the meaning attributed to them. The principal cases cited are *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641; *Wright* v. *Roseberry*, 121 U. S. 488, and *Doolan* v. *Carr*, 125 U. S. 618. They assert no new doctrine, but law, which has always existed and been recognized, though seldom more misapplied than here. That the United States cannot convey by patent what it never owned, or has already parted with, no matter with what formality the instrument is issued, is a self-evident proposition. The government in that respect is under the same limitations as an individual. That is the only purport, so far as the point raised here is concerned, of the decision in *Wright* v. *Roseberry*,

where a patent of the United States for land claimed under the preëmption laws was defeated by showing that the premises in controversy were swamp and overflowed land previously conveyed to the State by the swamp land act of September 28, 1850. 9 Stat. 519. Nor could the United States authorize a patent for land to the pueblo, or to its successor, the city, if the former government of Mexico had conveyed the property to others. There are such cases within the limits of the pueblo, and the claims have been confirmed and patented under the Land Department to the grantees or their representatives. Whenever in the Pueblo Case it could be shown that grants had been made by Mexico of portions of the land claimed by the pueblo to other parties, such grants were excepted from the confirmation to the city. Nor can a patent of the United States be issued by officers of the Land Department for lands reserved from settlement and sale; and the want of authority in the officers can be shown at law to defeat a patent of that character. It is in such case an attempted conveyance of land not open to sale; as would be a patent for land within the Yellowstone or Yosemite Park. It was of land within the limits of a valid Mexican claim excluded from grant to the Central Pacific Railroad Company that the decision in *Doolan* v. *Carr* had reference. It was there held that the patent to the railroad company could be defeated by showing that the lands conveyed were thus excluded. There was nothing new in the doctrine that it could be shown in an action at law that the property patented was not subject to grant. Nor can it be questioned that if parties, not authorized by law to supervise the proceedings to a patent, should assume that function, that the objection might be taken when the patent was offered in evidence. As, for instance, if the supervisors of San Francisco should undertake to exercise the functions of the Land Department, any one prosecuted under their patent could assail it by showing that the power to execute such an instrument was vested in a different body. So, too, if the estate which the Land Department was authorized to convey was different from that transferred by the patent — as, for instance, a lease-hold interest, instead of the fee — that fact could be shown and the patent limited in its operation.

In *Smelting Co.* v. *Kemp*, the court treated at large of the conclusive presumptions attending a patent of the United States for lands, but added, that in thus speaking of them it assumed "that the patent was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

The attempt is futile to use these cases, or any other case, to establish the proposition that if an error can be shown in the action of an officer of the Land Department in a matter subject to its jurisdiction the proceeding of the officer may be treated as a nullity and the patent issued thereon be collaterally assailed. This view is untenable, and does not merit serious consideration. If it could be sustained it would be subversive of all security in the judgments of ordinary tribunals, as well as in those of special tribunals like the Land Department. Nor is there any pertinency in the observations as to the reservation from grant of the seashore under the law of the former government. No claim was ever made in the Pueblo Case for any part of the seashore. Those terms apply in this country only to land covered and uncovered by the daily tides. They cannot possibly have any application to the banks of creeks or to land under their waters. The rule of the civil law of Europe that lands covered and uncovered by the tides at their highest flood during the year constitute the shore of the sea has never

been applied to that portion of this country ceded to the United States by Mexico. The claim of the pueblo was for land above the ordinary high-water mark of the bay, not for any land covered and uncovered by the tides, either daily or when they reach their highest point during the year. As said in *San Francisco* v. *Le Roy*, 138 U. S. 656, 671, "The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide water flowed so continuously as to prevent their use and occupation. To render lands tide lands, which the State, by virtue of her sovereignty, could claim, there must have been such continuity of the flow of tide water over them, or such regularity of the flow within every twenty-four hours as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied."

The reasons given by the court below on the second affirmance of the judgment of the referee are marked by the objections stated to its former opinion. The true doctrine as to the effect of patents in actions at law is stated in a decision of the court below in *De Guyer* v. *Banning* — rendered whilst this case has been pending here, in which that court, following a long line of previous adjudications, unbroken except by this case, declares that upon a confirmation of a Mexican grant the patent issued by the United States to the claimant is the only evidence of the extent of the grant, and that if there is a conflict as to its location and extent between it and the decree of confirmation, the patent must control. It is the only doctrine which will insure peace and tranquillity to parties holding under patents issued upon confirmed Mexican grants. Any other doctrine would introduce endless confusion and perplexity as to all such titles. If there be, in fact, any material conflict between the boundaries given in the decree of confirmation and those described in the official survey, the only remedy is to be sought by direct proceedings instituted by the government, or by its authority. Until the alleged conflict is thus determined and adjusted, the patent must control.

From the views expressed I am clearly of opinion that the Supreme Court of the State erred in affirming the judgment

of the Superior Court entered upon the report of the referee; it should have reversed that judgment and ordered judgment for the defendant. This conclusion is, I think, established beyond all controversy in the opinion of the court. But it is unnecessary to pursue this case further. I have treated it at much length because the title of the city has been a subject of consideration in one form or another for now over thirty-nine years, and the questions presented have been discussed by counsel with marked ability and learning. The claim was originally presented to the board of commissioners in 1852, and it was decided by that board in 1854. It was then appealed to the District Court of the United States, and there remained unacted upon for over eight years. An act of Congress then authorized it to be transferred to the Circuit Court of the United States, to which court it subsequently passed in September, 1864. In October following a decree of confirmation was entered, which was modified May 18, 1865, and then entered in its final form. An appeal from that decree was taken to the Supreme Court of the United States, and was dismissed by that court in December, 1866, on motion of the attorney general upon stipulation of parties. A survey was made of the confirmed claim in 1868, and that survey, being appealed from, remained unacted upon before the Commissioner of the General Land Office for over nine years. After it was acted upon by him an appeal was taken from his decision to the Secretary of the Interior, and it was before one secretary after another for five years, so that the patent was not issued until 1884.

Even then the opposition to the just claim of the city and of parties holding under the city did not cease, but has been continued in one form or other ever since. It is to be hoped that all annoyances and litigation from such opposition will now be ended.

The Chief Justice, Mr. Justice Bradley and Mr. Justice Gray did not hear the argument or participate in the decision of this case.

MAINE v. GRAND TRUNK RAILWAY COMPANY.

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

No. 29. Submitted April 14, 1891. — Decided December 14, 1891.

A state statute which requires every corporation, person or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of a line or system extending beyond the State, the tax shall be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, does not conflict with the Constitution of the United States; and the tax thereby imposed upon a foreign corporation, operating a line of railway, partly within and partly without the State, is one within the power of the State to levy.

THE court stated the case as follows:

The defendant is a corporation created under the laws of Canada, and has its principal place of business at Montreal, in that Province. Its railroad in Maine was constructed by the Atlantic and St. Lawrence Railroad Company, under a charter from that State, which authorized it to construct and operate a railroad from the city of Portland to the boundary line of the State; and, with the permission of New Hampshire and Vermont, it constructed a railroad from that city to Island Pond in Vermont, a distance of 149½ miles, of which 82½ miles are within the State of Maine. In March, 1853, that company leased its rights and privileges to the defendant, The Grand Trunk Railway Company, which had obtained legislative permission to take the same; and since then it has operated that road and used its franchises.

A statute of Maine,[1] passed in 1881, enacted that every

[1] AN ACT RELATING TO THE TAXATION OF RAILROADS.

Be it enacted by the Senate and House of Representatives in the Legislature, assembled, as follows:

SECT. 1. The buildings of every railroad corporation or association whether within or without the located right of way, and its lands and

corporation, person or association, operating a railroad in the State, should pay to the state treasurer, for the use of the

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fixtures outside of its located right of way, shall be subject to taxation by the several cities and towns in which such buildings, land and fixtures may be situated, as other property is taxed therein.

SECT. 2. Every corporation, person or association, operating any railroad in this State, shall pay to the state treasurer, for the use of the State, an annual excise tax, for the privilege of exercising its franchises in this State, which, with the tax provided for in section one, shall be in lieu of all taxes upon such railroad, its property and stock. There shall be apportioned and paid by the State from the taxes received under the provisions of this act, to the several cities and towns, in which, on the first day of April in each year, is held railroad stock hereby exempted from other taxation, an amount equal to one per centum on the value of such stock on that day, as determined by the governor and council; *provided, however*, that the total amount thus apportioned on account of any railroad shall not exceed the sum received by the State as tax on account of such railroad.

SECT. 3. The amount of such tax shall be ascertained as follows: The amount of the gross transportation receipts as returned to the railroad commissioners for the year ending on the thirtieth day of September next preceding the levying of such tax, shall be divided by the number of miles of railroad operated to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one-quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars and do not exceed three thousand dollars, the tax shall be equal to one-half of one per centum of the gross receipts; and so on increasing the rate of the tax one-quarter of one per centum for each additional seven hundred and fifty dollars of average gross receipts per mile or fractional part thereof, *provided*, the rate shall in no event exceed three and one-quarter per centum. When a railroad lies partly within and partly without this State, or is operated as a part of a line or system extending beyond this State, the tax shall be equal to the same proportion of the gross receipts in this State, as herein provided, and its amount determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this State.

SECT. 4. The governor and council, on or before the first day of April in each year, shall determine the amount of such tax, and report the same to the state treasurer, who shall forthwith give notice thereof to the corporation, person or association, upon which the tax is levied.

SECT. 5. Said tax shall be due and payable, one-half thereof on the first

State, "an annual excise tax for the privilege of exercising its franchises" in the State, and it provided that the amount of such tax should be ascertained as follows: "The amount of the gross transportation receipts, as returned to the railroad commissioners for the year ending on the thirtieth of September next preceding the levying of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax

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day of July next after the levy is made, and the other half on the first day of October following. If any party fails to pay the tax, as herein required, the state treasurer may proceed to collect the same, with interest, at the rate of the ten per cent per annum, by an action of debt, in the name of the State. Said tax shall be a lien on the railroad operated, and take precedence of all other liens and incumbrances.

SECT. 6. Any corporation, person or association aggrieved by the action of the governor and council in determining the tax, through error or mistake in calculating the same, may apply for an abatement of any such excessive tax within the year for which such tax is assessed, and if, upon rehearing and reëxamination, the tax appears to be excessive through such error or mistake, the governor and council may thereupon abate such excess, and the amount so abated shall be deducted from any tax due, and unpaid, upon the railroad upon which the excessive tax was assessed; or, if there is no such unpaid tax, the governor shall draw his warrant for the abatement, to be paid from any money in the treasury not otherwise appropriated.

SECT. 7. If the returns now required by law, in relation to railroads, shall be found insufficient to furnish the basis upon which the tax is to be levied, it shall be the duty of the railroad commissioners to require such additional facts in the returns as may be found necessary; and, until such returns shall be required, or, in default of such returns when required, the governor and council shall act upon the best information they may be able to obtain. The railroad commissioners shall have access to the books of railroad companies, to ascertain if the required returns are correctly made; and any railroad corporation, association or person operating any railroad in this State, which shall refuse or neglect to make the returns required by law, or to exhibit to the railroad commissioners their books for the purposes aforesaid, or shall make returns which the president, clerk, treasurer or other person certifying to such returns knows to be false, shall forfeit a sum not less than one thousand dollars, nor more than ten thousand dollars, to be recovered by indictment, or by an action of debt in any county into which the railroad operated may extend.

SECT. 8. All acts and parts of acts inconsistent with this act, are hereby repealed, except as to all taxes heretofore assessed, and this act takes effect when approved. Approved March 17, 1881. Laws Maine, 1881, c. 91.

shall be equal to one-quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars, and do not exceed three thousand dollars, the tax shall be equal to one-half of one per centum of the gross receipts; and so on, increasing the rate of the tax one-quarter of one per centum for each additional seven hundred and fifty dollars of average gross receipts per mile or fractional part thereof, *provided*, the rate shall in no event exceed three and one-quarter per centum. When a railroad lies partly within and partly without this State, or is operated as a part of a line or system extending beyond this State, the tax shall be equal to the same proportion of the gross receipts in this State, as herein provided, and its amount determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated, to obtain the average gross receipts per mile, and the gross receipts in this State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this State."

The act also provided that the governor and council, on or before the 1st of April in each year, should determine the amount of such tax and report the same to the state treasurer, who should forthwith give notice thereof to the corporation, person or association upon which the tax was levied; and that such tax should be due and payable, one-half on the 1st of July next after the levy and the other half on the 1st of October following; and it declared that if any party should fail to pay the tax as required, the state treasurer might proceed to collect the same, with interest at the rate of ten per centum per annum, by an action of debt in the name of the State.

The defendant, The Grand Trunk Railway Company, made no returns as a corporation, but it furnished the data and caused the Atlantic and St. Lawrence Railroad Company to make a return of the gross transportation receipts over its road, 149½ miles in length, including the 82½ miles in Maine, for the years 1881 and 1882, and upon this return the governor and council, pursuant to the statute, ascertained the proportion of the gross

receipts in the State, and assessed the tax in controversy accordingly. The tax thus assessed for 1881 was $9569.66, and for 1882, $12,095.56, and, to recover these amounts as debts to the State, the present action was brought in the Supreme Judicial Court of the State of Maine, and, on application of the defendant, it was transferred to the Circuit Court of the United States. The defendant pleaded *nil debet*, accompanied with a statement of special matters of defence. By stipulation of the parties, the case was tried by the court, which held that the imposition of the taxes in question was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution of the United States, and was therefore invalid. It accordingly gave judgment for the defendant, that the plaintiff take nothing by its writ, and that the defendant recover its costs. From that judgment the case is brought to this court on writ of error.

Mr. Charles E. Littlefield, Attorney General of the State of Maine, for plaintiff in error.

The question may be succinctly stated thus: Is a tax upon the gross transportation receipts in the State of Maine of a railroad lying partly within and partly without the State, ascertained by multiplying its average gross receipts per mile for the whole length by the number of miles within this State, in conflict with Art. I, Sec. 8, Part 3, of the Constitution of the United States? Is such a tax a regulation of or an interference with interstate and foreign commerce? We contend that it is not.

We do not deem it profitable to examine all the cases where this question has been before the court in its various phases. We refer only to those upon which we rely as being closely in point, sustaining our contention, and to their present status in this court as authority. The cases of *State Tax on Railway Gross Receipts*, 15 Wall. 284, and the *Delaware Railroad Tax*, 18 Wall. 206, are, we think, decisive in support of our proposition, if they are still binding authority upon this court. A chronological examination of these cases will give a clear idea of the law as it is held to-day.

Argument for Plaintiff in Error.

The case of the *State Tax on Railway Gross Receipts* was one where the State of Pennsylvania assessed a tax upon the Reading Railroad Company, a corporation created by the State of Pennsylvania, under a statute that required railroad companies incorporated under the laws of Pennsylvania to "pay to the Commonwealth a tax of three-fourths of one per-centum upon the gross receipts of said company," and as a basis for said tax the company was required to transmit to the auditor general "a statement, under oath or affirmation, of the amount of the gross receipts of the said company during the preceding six months." Here is to be noticed a very important distinction between the Pennsylvania statute and the Maine statute involved at bar. The Pennsylvania statute does not confine the "gross receipts" to those received within the State; the Maine statute does. The Pennsylvania statute in terms — no exception appearing in the act and in its practical application — applied to all receipts from transportation as well without the State as within it. It covered receipts from freight exported without the State. It could and did operate *extra territorially*. The Maine statute does not and cannot, and certainly the Maine statute is less open to the imputation that it is a regulation of interstate commerce than the Pennsylvania statute. In that case the court held that the Pennsylvania statute was valid, (1) because it was "a tax upon the fruits of such transportation after they had become intermingled with the general property of the carrier; and (2) upon the ground that it was a tax upon the value of the franchise.

We presume that the cases of *Fargo* v. *Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, will be relied upon as overruling the case of *State Tax upon Railway Gross Receipts*, but before discussing those cases it is important to call attention to the respect paid by this court to that case as authority up to the time of the decisions in those two cases. See *Osborne* v. *Mobile*, 16 Wall. 479; *Erie Railway Co.* v. *Pennsylvania*, 21 Wall. 492; *Murray* v. *Charleston*, 96 U. S. 432; *Brown* v. *Houston*, 114 U. S. 622; *Hall* v. *DeCuir*, 95 U. S. 485; *Moran* v. *New Orleans*, 112 U. S. 69.

Argument for Plaintiff in Error.

In a dissenting opinion in the case of *Pacific Railway Co.* v. *Illinois*, 118 U. S. 557, 593, Mr. Justice Bradley, with whom the Chief Justice and Mr. Justice Gray concurred, treats the case of *State Tax on Railway Gross Receipts*, as still authority and binding upon the court, and says upon that point: "We have omitted to cite a number of cases corroborating the views we have expressed. The case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, is weighted with arguments and considerations in this direction. We would also refer to the cases of *Osborne* v. *Mobile*, 16 Wall. 479; *Railroad Co.* v. *Fuller*, 17 Wall. 560; *Railroad Commission Cases*, 116 U. S. 307, 334, 335;" thus clearly assuming that the first case referred to was still binding as authority in the United States Supreme Court, and no intimation is made in the dissenting opinion that the doctrine asserted in that case had been in any way at that time questioned, disputed or denied.

Fargo v. *Michigan*, so far from overruling *State Tax on Railway Gross Receipts*, indirectly affirms it. It makes the following distinctions between the two cases: First, the corporation which was the subject of that taxation was a Pennsylvania corporation, having the situs of its business within the State which created it and endowed it with its franchises. Upon these franchises thus conferred by the State it was asserted the State had a right to levy a tax. Second, this tax was levied upon money in the treasury of the corporation, upon money within the limits of the State, which had passed beyond the stage of compensation for freight and had become like any other property or money liable to taxation by the State. The case before us has neither of these qualities. The corporation upon which this tax is levied is not a corporation of the State of Michigan, and has never been organized or acknowledged as a corporation of that State. The money which it received from freight carried within the State probably never was within the State, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it was neither money nor property of the corporation within the State of Michigan. Neither of these grounds of distinction obtain in the case at bar.

As to *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, inasmuch as the court took pains to distinguish the case then under consideration from the second ground relied upon in *State Tax on Railway Gross Receipts*, it is a fair presumption, at least, that the court were not then prepared to declare that ground unsound. We are not aware that the case of *State Tax on Railway Gross Receipts* is questioned or denied in any other decision in this court.

The case of the *Delaware Railroad Tax*, 18 Wall. 206, is, we think, strongly in point in our favor. That was a case where the tax, though not assessed upon the gross railway receipts, was assessed upon net earnings or income received from all sources during the preceding year, and with the exception of this distinction between the particular sum upon which the tax was assessed, which we submit is in no sense material to the question under discussion, the act of the legislature by virtue of which the tax was assessed was strikingly parallel to that at bar. On the hearing in this court the state officers of Delaware withdrew their appeal, and the inquiry of the court was thus limited to the validity of the act so far as it imposed the taxes specified in its first and fourth sections. The tax imposed by the first section is the tax that is parallel to the tax at bar. Among other objections it was contended that the act conflicted with the power of Congress to regulate commerce among the several States, and upon this point the court in the opinion say: "The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another, just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attending upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality." See also *Baltimore & Ohio Railroad Co.* v. *Maryland*, 21 Wall. 456.

For these reasons we must submit that when the cases of *Fargo* v. *Michigan* and the *Philadelphia Steamship Co.* v. *Pennsylvania* are confined to the precise facts before the court in each case, neither of them can be held to be in point

against our contention. While no one can examine the opinions of this court during the last fifteen years upon this question of interstate commerce without becoming impressed with the obvious tendencies to enlarge the doctrine, and limit the power of the State to regulate or affect in any way commerce or its instruments, we think that the fact that in the two most recent cases in the United States that have been announced by the court, that of *McCall* v. *California*, 136 U. S. 104, and *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114, where the court passes adversely, under this clause in the Constitution, upon statutes imposing license taxes, three of the justices dissented in each case, may indicate that the doctrine applicable to these cases has been extended as far as a fair construction of the Constitution will authorize the court to go. It seems to us that the limit has been reached in this case, and that, unless the court are prepared to still further extend it, the cases upon which we rely are unshaken.

Now that Congress, by its recent interstate commerce legislation, is regulating many of these matters, and giving a legislative definition of the proper limits of the Federal and state powers, there would not seem to be any occasion for any extension of these Federal powers by construction on the part of the court.

It is further submitted that the method provided in the statute of determining the value of the franchise upon which this tax should be assessed is one that is eminently fair and just to the corporation, though it may be argued that it is in fact, by its method of application, a mere tax upon the use of the franchise. In the language of the court in *State Tax on Railway Gross Receipts* the tax at bar "imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise."

Mr. A. A. Strout for defendant in error.

Cases recently decided by this court establish beyond question that the act of the legislature of Maine, and the taxes

imposed thereunder, are invalid, because they are in conflict with the exclusive powers of Congress, under the Constitution of the United States, for the regulation of commerce with foreign nations, and among the several States. Constitution, Art. 1, Sect. 8, Clause 3; *McCall* v. *California*, 136 U. S. 104, and cases cited; *Lyng* v. *State of Michigan*, 135 U. S. 161, 166; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Sherlock* v. *Alling*, 93 U. S. 99, 102; *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114.

The only business of the defendant in error is interstate and foreign commerce, and upon the privilege of carrying on this business the tax is levied.

It cannot be said that this is a tax upon the receipts, as property in the treasury, of a domestic corporation. The defendant in error is a foreign corporation, and the case finds that its principal place of business is at Montreal. The receipts went to the home office. The statute does not base the tax upon that ground.

The questions involved in the present contention are confined to the following inquiries: (1) Was the business of the defendant in error commerce between the States or with a foreign country? (2) Is this tax placed upon it "for the privilege of exercising its franchises within the State," a burden upon, or otherwise a regulation of such commerce?

The rule to be applied depends upon the facts presented by the record. Repeated and well-considered cases have left no doubt as to what the law is. If the record presents a case where the business in relation to which the tax is levied is interstate or foreign commerce, and the tax placed upon it, by the burden it imposes, or otherwise, operates as a regulation of such commerce, then the law which authorizes such tax is unconstitutional and void, however ingenious the phraseology which it employs in its illegal usurpation of powers conferred by the Constitution exclusively upon Congress.

In *Lyng* v. *Michigan*, 135 U. S. 161, 166, the court said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that com-

merce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

In this case there is no question of police regulation and no necessity to invoke the maxim of "*Salus populi suprema lex.*" *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *McCall* v. *California*, 136 U. S. 104; *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34.

Counsel for the plaintiff in error relies upon the case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, to sustain the validity of the law by virtue of which the taxes under consideration were imposed. It is unnecessary to spend time in replying to his elaborate argument, in which he attempts to show that the case has not been overruled. This record presents no state of facts such as would bring it within the scope and authority of that decision, even if it was unquestioned law; but whether it has been entirely overruled or not, it has been so questioned that it is no longer a conclusive authority, even in a similar case, and to-day would not, in its present form, find its way into the reports of this court.

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

The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privi-

lege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad

company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred.

This conclusion is sustained by the decision in *Home Insurance Co.* v. *New York*, 134 U. S. 594. The Home Insurance Company was a corporation created under the laws of New York, and a portion of its capital stock was invested in bonds of the United States. By an act of the legislature of that State, of 1881, it was declared that every corporation, joint stock company or association, then or thereafter incorporated under any law of the State, or of any other State or country, and doing business in the State, with certain designated exceptions not material to the question involved, should be subject to a tax upon its corporate franchise or business, to be computed as follows: if its dividend or dividends made or declared during the year ending the first day of November, amounted to six per centum or more upon the par value of its capital stock, then the tax was to be at the rate of one-quarter mill upon the capital stock for each one per cent of the dividends. A less rate was provided where there was no dividend or a dividend less than six per cent. The purpose of the act was to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there were no dividends, according to the actual value of the capital stock during the year. The tax payable by the company, estimated according to its dividends, under that law, aggregated seven thousand five hundred dollars. The company resisted its payment, asserting that the tax was, in fact, levied upon the capital stock of the company,

contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States bore to its capital stock, and that the law requiring a tax, without such reduction, was unconstitutional and void. It was held that the tax was not upon the capital stock of the company nor upon any bonds of the United States composing a part of that stock, but upon the corporate franchise or business of the company, and that reference was only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year. And the court said: "The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

The case of *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different States and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it.

It follows from what we have said, that the judgment of the court below must be

Reversed, and the cause remanded, with directions to enter judgment in favor of the State for the amount of the taxes demanded; and it is so ordered.

Mr. Justice Bradley, with whom concurred Mr. Justice Harlan, Mr. Justice Lamar and Mr. Justice Brown, dissenting.

Justices Harlan, Lamar, Brown and myself dissent from the judgment of the court in this case. We do so both on

principle and authority. On principle, because, whilst the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional. The mode adopted is the laying of a tax on the gross receipts of the company, and these receipts, of course, include receipts for interstate and international transportation between other States and Maine, and between Canada and the United States. Now, if after the previous legislation [1] which has been adopted

[1] The "previous legislation" referred to in the dissenting opinion is stated in the record as follows:

"The court found the facts as follows: By an act of the Legislature of this State approved Feb'y 10, 1845, the Atlantic and St. Lawrence Railroad Company was incorporated, with power to construct and maintain a railroad from some point in the city of Portland to the boundary line of the State of Maine 'at such place as will best connect with a railroad to be constructed from said boundary to Montreal, in Canada.'

"Section 14 of the act of incorporation further provided 'said corporation is vested with power and authority to continue and prolong said railroad beyond the line of this State to the boundary of Canada, and to purchase, take and hold lands or the right of way over lands for the purpose of constructing said railroad in continuation, without the limits of this State, on and over said lands to the said boundary of Canada:

"'Provided the same can be done consistently with the laws and regulations of the State or States in which said lands lie and through and over the territory of which such railroad in continuation would pass.'

"The necessary authority for such continuation of the railroad was obtained from the States of New Hampshire and Vermont, and the road was constructed from Portland to Island Pond, in Vermont. In the State of Maine are 82½ miles of this railroad; in New Hampshire 52 miles, and in Vermont 15 miles.

"By section 16 it was enacted:

"'All real estate purchased by said corporation for the use of the same, under the fifth section of this act, shall be taxable to said corporation by the several towns, cities and plantations in which said lands lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality in such town, city or plantation, and not otherwise, and the shares owned by the respective stockholders shall be deemed personal estate and be taxable as such to the owners thereof in the places where they reside and have their home; and whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses, the directors shall make a special report of the fact to the Legislature, from and after which time one moiety,

with regard to admitting the company to carry on business within the State, the legislature has still the right to tax it for

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or such other portion as the Legislature may from time to time determine, of the net income from said railroad accruing thereafter over and above ten per centum per annum, first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation, as a tax, into the treasury of the State for the use of the State, and the State may have and maintain an action against said corporation therefor to recover the same; but no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises."

"Section 18 gives to the Legislature the right to inquire into the doings of the corporation and its use and employment of the privileges and franchises granted to it, with power 'to correct and prevent abuses of the same, and to pass any laws imposing fines and penalties upon said corporation which may be necessary more effectually to compel a compliance with the provisions, liabilities and duties hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities or obligations; and this charter shall not be revoked, annulled, altered, limited or restrained without the consent of the corporation, except by due process of law.'

"The Grand Trunk Railway Company of Canada is a foreign corporation, incorporated under the laws of the Province of Canada, and has its principal place of business at Montreal, in the Dominion of Canada, and possessed in the year 1853, and from that time to the present has continually possessed, a railroad connecting with and in extension of the railroad of the Atlantic and St. Lawrence Railroad Company at Island Pond, in the State of Vermont, and extending to Montreal. It also, at and long before the date of the assessment of taxes demanded in this action, possessed a line of railroad connecting with the before-mentioned railroad at Montreal and extending through the Dominion of Canada to Detroit, in the State of Michigan.

"On the 29th day of March, 1853, by an act of the Legislature of the State of Maine, approved that day, the Atlantic and St. Lawrence Railroad Company was authorized to 'enter into and execute such a lease of the railroad of said company, or contract in the nature of a lease, as will enable the lessee thereof to maintain and operate, by means of said railroad and other roads in extension of the same, a connected line of railroads from the Atlantic Ocean at Portland to the city of Montreal, in the Province of Canada, and thence to the western part of said province.'

"Under the authority thus conferred the Atlantic and St. Lawrence Railroad Company and the Grand Trunk Railway Company entered into a preliminary agreement for a lease to the latter company; but inasmuch as the proposed lessee had not 'the legal competency to enter into and execute such lease for want of the requisite legislative authority therefor,' a lease was on the 5th day of August, A.D. 1853, entered into and executed by the Atlantic and St. Lawrence Railroad Company as lessors and certain individ-

the exercise of its franchises, it should do so in a constitutional manner, and not (as it has done) by a tax on the receipts derived from interstate and international transportation. The power to regulate commerce among the several States (except as to matters merely local) is just as exclusive a power in Con-

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uals as lessees and trustees for the Grand Trunk Railway Co., the lessees to hold until the Railway Co. should obtain requisite authority, and then to transfer to it the said lease and all right, title and interest under the same.

"The trustees and lessees, on the ninth day of February, A.D. 1855, formally assigned the above-mentioned lease to the defendants, who had, in the meantime, procured the requisite legislative authority, and thereupon the property was delivered to and taken possession of by the defendants, who have ever since possessed, managed, controlled and operated the railroad leased, with all its appurtenances, as a part of their line, from Portland through the States of Maine, New Hampshire and Vermont and the Dominion of Canada to Detroit, in the State of Michigan.

"Feb. 10, 1872, the Lewiston and Auburn Railroad Company was incorporated by the Legislature of Maine, with authority to locate and construct a railroad 'from some point in the city of Lewiston to some point on the Atlantic and St. Lawrence railroad, otherwise known as the Grand Trunk railway, within the limits of the city of Auburn.'

"Under this authority a line some five and one-half miles in length was constructed, and on the 25th of March, A.D. 1874, was leased to the defendants, who have since been constantly in the control, management and possession of the same.

"One clause in this lease is: 'All taxes which may lawfully be assessed upon the corporate property or franchise of the lessors during the period of their lease may be paid by the lessee, and if so paid shall be deducted from the rent herein covenanted to be paid by said lessee.'

"The charter of the Lewiston & Auburn R. R. Co. contains nothing in respect to taxation nor any exemption from or restriction of legislative control.

"The Norway Branch Railroad Company was incorporated by the Legislature of this State Feb. 22, 1872, to construct and maintain a railroad 'from some point in or near the village of Norway, thence to South Paris, connecting at that point with the Grand Trunk railroad.'

"This road is about one and one-half miles in length, and after its construction by permission of the Legislature was leased, prior to the time covered by these assessments, to the defendant company, in whose possession, management and control it has since been.

"Nothing is found in its charter about taxes, nor is the general control of the Legislature in anywise restricted or limited.

"The Atlantic & St. Lawrence Railroad Company was duly constituted a corporation in New Hampshire and Vermont by the legislatures of those States, and its lease to the Grand Trunk Company was by the same authority confirmed and approved."

gress as is the power to regulate commerce with foreign nations and with the Indian tribes. It is given in the same clause and couched in the same phraseology; but if it may be exercised by the States, it might as well be expunged from the Constitution. We think it a power not only granted to be exercised, but that it is of first importance, being one of the principal moving causes of the adoption of the Constitution. The disputes between the different States in reference to interstate facilities of intercourse, and the discriminations adopted to favor each its own maritime cities, produced a state of things almost intolerable to be borne. But, passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues derived therefrom, (which is the same thing,) is contrary to the Constitution. Going no further back than *Pickard* v. *Pullman's Southern Car Co.*, 117 U. S. 34, we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace Car Company, by general legislation it is true, but applied to the company, of $50 per annum on every sleeping car going through the State. It was well known, and appeared by the record, that every sleeping car going through the State carried passengers from Ohio and other northern States, to Alabama, and *vice versa*, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So also in the case of *Leloup* v. *The Port of Mobile*, 127 U. S. 640, we held that the receipts derived by the telegraph company from messages sent from one State to another could not be taxed. So in the case of the *Norfolk and Western Railroad* v. *Pennsylvania*, 136 U. S. 114, where the railroad was a link in a through line by which passengers and freight were carried into other States, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keeping an office in the State. And in the case of *Crutcher* v. *Kentucky*, 141 U. S. 47, we held that the taxation of an express company for doing an express business between different States was unconstitutional and void. And

in the case of *Philadelphia &c. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, we held that a tax upon the gross receipts of the company was void because they were derived from interstate and foreign commerce. A great many other cases might be referred to, showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void.

We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a tax on a franchise. It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation.

This court and some of the state courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter; for its franchises; for the privilege of carrying on its business; it may be taxed on its capital; and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further. This court held that the taxation of the capital stock of the Western Union Telegraph Company in Massachusetts, graduated according to the mileage of lines in that State compared with the lines in all the States, was nothing but a taxation upon the property of the company; yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. By the present decision it is held that taxation may be imposed upon the gross receipts of the company for the exercise of its franchise within the State, if graduated according to the number of miles that the road runs in the State. Then it comes to this: A State may tax a railroad company upon its gross receipts in proportion to the number of miles run within the State, as a tax on its property; and may also lay a tax upon these same gross receipts, in proportion to the same number of miles, for the privilege of exercising its franchise in the State! I do not know what else it may

not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct.

We dissent from the opinion of the court.

MARTIN *v.* GRAY.

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

No. 1065. Submitted December 7, 1891. — Decided December 21, 1891.

When a person, whose equity of redemption in mortgaged real estate is foreclosed, rests inactive for eleven years, with full knowledge of the foreclosure, and of the purchaser's rights claimed under it, and of his own rights, and with nothing to hinder the assertion of the latter, and then files a bill in equity to have the foreclosure proceedings declared void for want of proper service of process upon him, this court will at least construe the language of the returns so as to sustain the legality of the service, if that can reasonably be done, even if it should not regard it as too late to set up such a claim.

THE court stated the case as follows:

On September 29, 1890, appellant filed his bill in the Circuit Court of the United States for the District of Kentucky, the object of which was to set aside a commissioner's deed to defendant, executed years before, in pursuance of certain proceedings in the District Court of the United States for that district. The facts as alleged were these:

Prior to May 2, 1879, the plaintiff, his mother, sister and brother, were the owners, each, of an undivided one-fourth of a lot in the city of Louisville, which lot was subject to a lease from the four owners to Thomas Slevin, who, as tenant, had built thereon houses of great value. On January 9, 1865, plaintiff had given to Thomas Slevin his note for two thousand dollars, payable in two years, and had secured the same by a mortgage of his undivided one-fourth of said property. Interest thereon was paid regularly until January 9, 1869, by the

application of a part of the rents coming to plaintiff under the lease, but after that date Slevin failed and refused to so apply the rents, but claimed to set them off against goods sold to plaintiff. On February 21, 1877, Slevin was adjudged a bankrupt in proceedings in the United States District Court, and Stephen E. Jones was elected his assignee. On February 5, 1878, Jones, as assignee, commenced a suit in the same court to foreclose the mortgage, in which suit, besides plaintiff and his wife, the other joint owners were made parties defendant. In that suit a decree of foreclosure was entered on May 22, 1879, and on August 11, 1879, the property was sold by R. H. Crittenden as special commissioner, and the sale having been confirmed on September 30, 1879, a deed was made to the purchaser, the present defendant, who thereupon took possession and has ever since collected the rents and profits.

In respect to the service of process on plaintiff, the bill alleged as follows:

"Your orator further says that he never appeared or answered in said cause, and no one appeared for him, as by the orders and record therein, still remaining in the District Court aforesaid, fully appears, nor was there any service of the subpœna upon him otherwise than that the following return appears upon the subpœna issued in said cause and which is on file with the papers thereof:

"'J. C. Hays, S. H. C., is hereby appointed special bailiff to execute the within subpœna on J. S. Martin and Mary A. Martin, February 13, 1878.

"'R. H. Crittenden,

"'*U. S. Marshal.*

"'Executed the within spa. on J. S. Martin and Mary A. Martin by delivering a copy to each in person, February 14, 1878.

"'R. H. Crittenden,

"'*U. S. Marshal.*

"'J. C. Hays,

"'*S. H. C., Special Bailiff.*'

"And that there was no such service also appears from the record and papers in said cause still remaining therein; yet, although your orator never appeared or answered in the cause and was never subpœnaed to answer therein, the complainant in said cause," etc.

Upon these facts the bill prayed for a decree setting aside the commissioner's deed, and for an accounting as to the rents and profits received by the defendant. A demurrer thereto was sustained, and the plaintiff electing to stand by the bill, a final decree was entered dismissing it. From this decree plaintiff appealed to this court.

Mr. Lewis N. Dembitz for appellant.

Mr. B. F. Buckner and *Mr. James S. Pirtle* for appellee.

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

The contention of plaintiff is that the return on the subpœna is wholly worthless, and shows no service; and that the decree and decretal sale, based on such a return alone, are null and void. The following are the two rules in equity which regulate the manner of service:

"Rule XIII.

"The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

"Rule XV.

"The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof."

It is insisted that the service in this case was not made by the marshal, or his deputy, but by J. C. Hays, who was not a

person appointed by the court for the service of this process, and who made no affidavit of service.

Before considering the question of service, a preliminary matter is worthy of mention. This is an application to a court of equity, to set aside deliberate proceedings of a court of superior jurisdiction; and is made more than eleven years after the matters complained of took place. There is no allegation that the subpœna was not in fact delivered to the plaintiff, or that he was ignorant of the proceedings in court, or of the possession taken and held by the defendant. While the bill alleges that plaintiff was at the time of the filing a citizen of Kansas, it does not show how long he had been such. It is averred that the plaintiff's mother, sister and brother, joint owners with himself of the property, were made parties defendant to the foreclosure proceedings; and it is not averred that they were not duly served with process. It is shown that the defendant entered into possession immediately after the sale, and has continued in possession, receiving the rents and profits. From what is stated in the bill, as well as from what is omitted, it is a fair inference that this plaintiff received the subpœna at the time the original suit was commenced; that he was aware of all the proceedings in the court; that he knew of the change in possession; and that he remained in Louisville for years thereafter, with full knowledge that the defendant had the possession, claimed it under the decree, supposed he was owner, and received the rents and profits as owner, and yet during all those years made no complaint, and took no steps to assert any rights as against the decree and sale.

Now, it is a rule of equity, that an unreasonable delay in asserting rights is a bar to relief. A familiar quotation from Lord Camden, in *Smith* v. *Clay*, 3 Bro. Ch. 638, is that "nothing can call forth this court into activity but conscience, good faith and reasonable diligence." Is not the delay disclosed by this bill such laches as to defeat plaintiff's claim? For eleven years he was inactive, and, as may be fairly inferred from the bill, with the full knowledge of his rights, and nothing to hinder their assertion. No excuses for this are given — the bill is absolutely silent as to any reasons for delay.

But if this long delay will not of itself bar plaintiff's claim, it at least compels any reasonable construction of language which will sustain the decree. Now, it is not averred in the bill that service was not made by the marshal, nor that Hays was not a general deputy. What relations he sustained to the marshal, what position he held under him, are not disclosed otherwise than by the return on the subpœna. While from that it may be inferred that he was a special bailiff, with only such powers as were given by the designation written on the subpœna, yet it is consistent with all that appears that he was also a general deputy, who was by the marshal designated for this special service. More than that, it is a fair question from the return as to who in fact made the service. The return is signed —

"R. H. Crittenden,
"U. S. Marshal.

"J. C. Hays,
"S. H. C., Special Bailiff."

and not —

R. H. Crittenden,
U. S. Marshal.

By J. C. Hays,
S. H. C., Special Bailiff.

If it were not for the designation above the return, it would not be doubted that the latter was to be construed as showing service by the marshal, and the name of the special bailiff would be disregarded as surplusage. Giving to the designation all the force that fairly belongs to it, it is a reasonable construction of the return that the service was made by the marshal and the bailiff, either jointly or severally. And if severally, then on the two defendants, respectively, in the order in which they are named, which would make that on this plaintiff service by the marshal himself. Further, the District Court is one of superior jurisdiction, in favor of the validity of whose proceedings when collaterally attacked is every intendment. Its jurisdiction in any case will be presumed, unless it appears

affirmatively on the face of the record that it had not been acquired.

Putting, therefore, these things together, to wit, the unexplained delay, the reasonable inferences from what is stated and what is omitted, the presumptions in favor of jurisdiction and the different constructions of which the language of the return is susceptible, we are of the opinion that the ruling of the Circuit Court sustaining the demurrer to the bill was correct, and its decree is

Affirmed.

DESERET SALT COMPANY *v.* TARPEY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 96. Argued and submitted November 24, 1891. — Decided December 21, 1891.

The grant of public land to the Central Pacific Railroad Company by the acts of July 1, 1862, 12 Stat. 489, c. 120, and July 2, 1864, 13 Stat. 356, c. 216, was a grant *in præsenti;* and the legal title to the granted land, as distinguished from merely equitable or inchoate interests, passed when the identification of a granted section became so far complete as to authorize the grantee to take possession.

Rutherford v. *Greene*, 2 Wheat. 196 cited and followed.

Patents were issued, not for the purpose of transferring title, but as evidence that the grantee had complied with the conditions of the grant, and that the grant was, to that extent, relieved from the possibility of forfeiture for breach of its conditions.

Wisconsin Central Railroad Co. v. *Price County*, 133 U. S. 496, 510 approved.

The provision in the statute, requiring the cost of surveying, selecting and conveying the land to be paid into the treasury before a patent could issue, does not impair the force of the operative words of transfer in it.

The railroad company could maintain an action for the possession of land so granted before the issue of a patent, and could transfer its title thereto by lease, so as to enable its lessee to maintain such an action.

THE court stated the case as follows:

This is an action of ejectment by D. P. Tarpey, the plaintiff below, against the Deseret Salt Company, a corporation created under the laws of Utah, for certain parcels of land in that Territory, described in the complaint as the northwest quarter of fractional section nine (9), in township eleven (11)

north, range nine (9) west, Salt Lake base and meridian, and the northeast quarter and the southwest quarter of said section, in part covered with water; in all, three hundred and eighty acres, more or less. The greater part of these lands lie on the border of Great Salt Lake, a body of water in that Territory of nearly ninety miles in extent, and in breadth varying from twenty to thirty miles, which holds in solution a large quantity of common salt. The remaining lands in the section are covered by the lake.

In 1875 one Barnes took possession of a portion of these lands and began the construction of improvements and the erection of machinery to raise the water of the lake and conduct it into ponds or excavations, partly natural and partly made by him, for the purpose of evaporating the water by exposing it to the sun, and thus producing salt. He commenced manufacturing salt in this way in 1876 or 1877, and continued in the business until September, 1883, when he sold and transferred the lands and improvements to the defendant, The Deseret Salt Company, which at once went into possession and continued in the manufacture.

The plaintiff derives his title from the Central Pacific Railroad Company, a corporation of California, to which a grant of land was made by the act of Congress of July 1, 1862, embracing the premises in controversy. A greater part of its lands lying in Utah was leased by the company to the plaintiff, on the 7th of August, 1885, for five years, for the annual rent of five thousand dollars, and in consideration of certain covenants in relation to the property which he undertook to perform. By one of these covenants he stipulated to begin to reduce the premises to possession, and to continue in that effort until he should be in the actual possession of the whole, and for that purpose to commence and prosecute any necessary or proper actions at law, or other legal proceedings. This lease covered the premises in controversy.

On the 20th of October, 1868, the map of the definite location of the line of the railroad of the company, to be constructed under the above grant, was filed in the Interior Department and accepted, as required by the act of Congress.

Statement of the Case.

The premises in controversy constitute an alternate section of the land within ten miles of the road, and its east, west and north lines were surveyed by the United States in 1871. Its southern line, lying in the lake, had not been run. The selection list of lands for patent by the company, filed in the land office at Salt Lake City, which was produced in evidence, included the surveyed lands of the section, and showed that the costs of selecting, surveying and conveying them had been paid. There was no evidence of any application for any other lands in the section, and no costs were paid or tendered for their selection, survey and conveyance.

The plaintiff also proved the incorporation in June, 1861, of the Central Pacific Railroad Company of California; its amalgamation and consolidation in June, 1870, with the Western Pacific Railroad Company, and, in August, 1870, with the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company, and the San Joaquin Valley Railroad Company. In the different articles of amalgamation a conveyance was made by the parties of their several interests to the new amalgamated company, as follows: "And the said several parties, each for itself, hereby sells, assigns, transfers, grants, bargains, releases and conveys to the said new and consolidated company and corporation, its successors and assigns, forever, all its property, real, personal, and mixed, of every kind and description." These instruments were all properly recorded.

The court informed the jury of the general nature of the grant to the company by the act of Congress of July 1, 1862, and the amendatory act of July 2, 1864, and instructed them, substantially, that the line of the road, which the company was to construct under the grant, became definitely fixed upon its filing with the Department of the Interior its map of definite location, designating the general route of the road; and that thereupon the beneficial interest in the land vested in the company, by relation back to the date of the act of Congress; and that as it was agreed that the lands in controversy were a portion of an odd alternate section, within the twenty mile limit of the grant, they passed to and vested in the company,

at the time of the filing of that map, unless they had been previously sold, reserved or otherwise disposed of by the United States, or a preëmption, homestead, swamp-land or other lawful claim had attached to them, or they were known to be mineral lands or were returned as such; and further, that the lease, bearing date the seventh day of August, 1885, from that company to the plaintiff, for five years from the first day of January, 1886, gave to him the right of immediate possession of the lands, unless they were within some of the exceptions of the grant.

The defendant company denied that the title to the lands in controversy had passed to the Central Pacific Railroad Company, the lessor of the plaintiff, and requested the court to instruct the jury that the plaintiff had not shown any grant, or conveyance by deed or other written instrument, sufficient to invest him with title to the lands. This instruction was refused, and the defendant excepted. The jury returned a verdict in favor of the plaintiff for the possession of the lands described in the complaint and for five hundred dollars for their use and occupation. Judgment being entered thereon the case was carried to the Supreme Court of the Territory and there affirmed. From the judgment of the latter court the case is brought here on a writ of error.

Mr. Parley L. Williams for plaintiff in error.

There was no evidence whatever showing or tending to show that the government had issued patents for any of the lands in question, nor was there any proof that the company had made any application to select or have conveyed to it any lands in said fractional section except the northwest quarter, the northwest quarter of the northeast quarter, and the northwest quarter of the southwest quarter; being two hundred and forty acres only, and the whole of the land in said fractional section which had been surveyed; yet the recovery in this case was for the whole tract sued for, the unsurveyed as well as the surveyed portions of this fractional section.

As to so much of this land as was unsurveyed and for which

the costs of surveying have not been paid, it is submitted with great confidence that by the true construction of the act of Congress granting these lands, the title remains in the government, and the defendant in error has not therefore, in any view of the case, a title that will support ejectment. In this connection the court is cited to the following cases in this court. *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Northern Pacific Railroad Co.* v. *Traill County*, 115 U. S. 600.

This case presents a question regarding the nature of the rights secured to the Pacific Railroads by virtue of the grant of lands to them that has not hitherto been passed on by this court, and one of great moment to a large part of the public in the region affected by these grants.

Mr. Attorney General and *Mr. John B. Cotton* for defendant in error.

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

The only questions which appear in this case to have elicited much discussion in the court below, relate to the title of the Central Pacific Railroad Company to the lands granted by the acts of Congress of July 1, 1862, and July 2, 1864, upon the filing of a map of the definite location of its contemplated road with the Secretary of the Interior and its acceptance by him. Was it sufficient to enable the lessee of the company to maintain an action for the possession of the demanded premises? The lessee can, of course, as against a stranger, have no greater right of possession than his lessor. On the one hand it is contended, with much earnestness, that upon the filing of the map of definite location of the proposed road, and its acceptance by the Secretary of the Interior, a legal title vested in the grantee to the alternate odd sections, subject to various conditions, upon a breach of which the title may be forfeited, but that until then their possession may be enforced by the grantee. On the other hand, it is insisted, with equal energy,

that the grant gives only a promise of a title when the work contemplated is completed, and that until then possession of the lands cannot be claimed.

An examination of the granting act, and the ascertainment thereby of the intention of Congress, so far as practicable, will alone enable us to give a satisfactory solution to these positions.

The act of Congress of July 1, 1862, 12 Stat. 489, c. 120, provides for the incorporation of the Union Pacific Railroad Company, and makes a grant of land to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. Its provisions, grants and obligations, specially relate in terms to that company; but other railroad companies are embraced within the objects of the act, and the clauses mentioning and referring to the Union Pacific Railroad Company are made applicable to them. Thus by the ninth section the Central Pacific Railroad Company of California was authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, "upon the same terms and conditions in all respects" as were provided for the construction of the railroad and telegraph line of the Union Pacific. And by the tenth section of the act that company, after completing its road across California, was authorized to continue the construction of its road and telegraph line through the Territories of the United States to the Missouri River, on the terms and conditions provided in the act in relation to the Union Pacific Railroad Company, or until its road should meet and connect with the road of that company. An equal grant of land, and of like extent and upon like conditions, was made to the Central Pacific Railroad Company of California, as was in terms made to the Union Pacific Railroad Company. By the same law the rights and obligations of both must be determined.

By the third section the grant was made. Its language is "*that there be and is hereby granted, to the said company,* for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transporta-

tion of the mails, troops, munitions of war and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company." The act of July 2, 1864, 13 Stat. 356, 357, c. 216, enlarged the amount of the grant to ten alternate sections on each side of the road.

By the fourth section, as amended by section 6 of the act of 1864, it was enacted: "That whenever said company shall have completed not less than *twenty* consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that not less than *twenty* consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each *twenty* miles of said railroad and telegraph line are completed, upon certificate of said commissioners."

By the terms of the act making the grant the contention of the defendant is not supported. Those terms import the transfer of a present title, not one to be made in the future. They are that "there be and is hereby granted" to the

company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered.

In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that unless the terms are restricted by other clauses, they import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described. *Schulenburg* v. *Harriman*, 21 Wall. 44; *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733.

In *Wisconsin Central Railroad Co.* v. *Price County*, 133 U. S. 496, 507, referring to the different acts of Congress making grants to aid in the construction of railroads, we stated that they were similar in their general provisions, and had been before this court for consideration at different times, and of the title they passed we said: "The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant."

As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, therefore, in the nature of a "float;" but, when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title then attached as of the date of the grant, except as to such parcels as had been in the meantime under its provisions appropriated to other purposes.

That doctrine is very clearly stated in the Leavenworth Case cited above, where the language of the grant was identical with that of the one under consideration, and the court said:

"'There be and is hereby granted' are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has uniformly administered every previous similar grant. They vest a present title in the State of Kansas, (the grantee named,) though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and, by relation, has the same effect upon the selected parcels as if it had specifically described them."

The terms used in the granting clause of the act of Congress, and the interpretation thus given to them, exclude the idea that they are to be treated as words of contract or promise rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title, as distinguished from an equitable or inchoate interest.

The case of *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196, well illustrates the nature of the title. In 1782 the State of North Carolina passed an act providing "that twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene," within the bounds of a tract reserved for the use of the army, to be laid off by commissioners designated in the act, as a mark of the high sense the State entertained of the extraordinary services of that brave and gallant officer. The commissioners allotted the twenty-five thousand acres, and in 1783 caused a survey of them to be made and returned to the proper office. One Rutherford claimed under a subsequent entry five thousand acres of the tract, and instituted a suit to establish his claim. The case turned upon the validity of Greene's title, and the date at which it commenced. It was contended by Rutherford's counsel that the words of the act gave nothing; that they were in the future and not in the present tense; and indicated an intention to give in future, but created no present obligation on the State, nor present interest in General Greene. But the court, speaking by Chief Justice Marshall, answered,

that it thought differently ; that the words were words of absolute donation, not indeed of any specific land, but of twenty-five thousand acres in the territory reserved for the officers and soldiers; that as the act of setting apart that quantity to General Greene was to be performed in the future, the words directing it were necessarily in the future tense, but that nothing could be more apparent than the intention of the legislature to order the commissioners to make the allotment, and to give the land when allotted to General Greene. And the court held that the general gift of twenty-five thousand acres, lying in the reserved territory, became by the survey a particular gift of that quantity contained in the survey; and concluded an elaborate examination of the title by stating that it was clearly and unanimously of the opinion that the act of 1782 vested a title in General Greene to twenty-five thousand acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made and returned in pursuance of that act gave precision to that title and attached it to the land surveyed.

It would therefore seem clear, that the title which passed under the act of Congress by the grant of the odd sections became by their identification so far complete as to authorize the grantee to take possession and make use of the lands; and in the exercise of that authority the grantee took possession from time to time as the lands became identified by the location of the line of the road, and made sales of parcels of the lands, and executed mortgages on other parcels with sections of the road constructed, for the purpose of raising money to meet expenses already incurred and which might thereafter be required for the completion of the road; and such mortgages were authorized by Congress.

But it is contended that the natural import of the granting terms of the act is qualified and restricted by its fourth section, which, as amended by the act of 1864, provides that, upon the completion of not less than twenty consecutive miles of the road and telegraph line in the manner required, and their acceptance by the president, upon the report of commissioners appointed to examine the work, patents shall issue to the com-

pany conveying the right and title to said lands on each side of the road as far as the same is completed.

The question naturally arises as to the necessity for patents, if the title passed by the act itself upon the definite location of the road, when the alternate sections granted had become identified? We answer that objection by saying that there are many reasons why the issue of the patents would be of great service to the patentees, and by repeating substantially what we said on that subject in *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 510. While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would thus be in the grantee's hands deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in its possession.

There are many instances in the reports, as there stated, where patents have been required and issued, although the title of the patentee had been previously recognized and confirmed. *Langdeau* v. *Hanes*, 21 Wall. 521, 529, is an instance of that kind. In that case there had been a previous confirmation to the heirs of one Tongas of a claim to a tract of land in the French and Canadian settlement of St. Vincents in the Northwestern Territory, conveyed by Virginia to the United States in 1793. This claim was confirmed by commissioners appointed by Congress under the act of 1804, and their decision was confirmed by the act of Congress of March 3, 1807, but no patent, for which this last act provided upon a location and survey of the claim, was issued for the tract at that time. One was, however, issued for it in 1872, upon a survey made in 1820, and the question was whether a new title was acquired by that patent, or whether the old title was good from the confirmation. It was held that the old title was good from the con-

firmation, if the claim was to a tract of defined boundaries, or capable of identification; but if the claim was to quantity, and not to a specific tract, the title became perfect when the quantity was segregated by the survey of 1820; and to explain the subsequent issue of a patent in 1872, this court said: "In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

Whilst a legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed to the railroad company by the act of Congress, upon the definite line of the road being once established, by which the sections could be ascertained and identified, the lands could not be disposed of by the company without the consent of Congress, except as each twenty-mile section of the road was completed and accepted by the President, so as to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the railroad and telegraph line, and it is manifest, from different provisions of the act, that Congress intended to secure this application of them. Whatever disposition might be made by the company of the lands after they became, by the definite location of the road, capable of identification, they were subject to the control of Congress, either to compel their application for the construction of the road contemplated, or to enforce their forfeiture if the road was not completed as required by the act. The application of the lands to the construction would not, of itself, operate to transfer the title; it would only remove the restriction upon the use and disposition of the title already possessed.

Opinion of the Court.

But it is unnecessary to consider what power of disposition the company would possess in advance of the construction of the road, for that road was entirely completed years before the execution of the lease to the plaintiff in this case, in August, 1885.

It is also urged that the title of the government to the lands in controversy was retained until the cost of selecting, surveying and conveying the whole of them was paid. In support of this position the twenty-first section of the act of July 2, 1864, is referred to, which provides that before any land granted by the act shall be conveyed to any company or party entitled thereto, there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same. The object of this provision was to preserve to the government such control over the property granted as to enable it to enforce the payment of these costs, and, for that purpose, to withhold its patents from the parties entitled to them until such payment. The act of 1862, in its fourth section, as amended in 1864, speaks of patents issuing "conveying the right and title" to the lands upon the completion of every section of not less than twenty miles, to the satisfaction of the President; and the twenty-first section of the act of 1864 only directs the withholding of these evidences of the transfer of title until payment is made for the selection, survey and conveyance of the land. Neither the issue of the patents nor any sale for taxes by State authority is permitted until such payment, thereby preserving unimpaired the lien contemplated.

We do not think the provision was designed to impair the force of the operative words of transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company, with the express or implied assent of the government.

Besides, in this case, the exterior limits of the section containing the lands in controversy, which are above the waters of the lake, were surveyed in 1871, and the costs of selecting, surveying and conveying the legal subdivisions as described by that survey were paid at the time of selection by the com-

pany. The lines of the lands under the water have not been run, but are easily traceable by reference to the lines actually surveyed. The possession of the lands under the lake appears to have always accompanied the possession of the lands on its border. No contest was made against their recovery if a right of possession was shown to the border lands.

From the view of the interest conveyed by the grant which we have expressed, we are satisfied that the company could maintain an action for the possession of the premises in controversy, and that its lessee, the plaintiff herein, was possessed of the same right. The judgment must, therefore, be

Affirmed.

KAUKAUNA WATER POWER COMPANY *v.* GREEN BAY AND MISSISSIPPI CANAL COMPANY.

ERROR TO THE CIRCUIT COURT OF OUTAGAMIE COUNTY, WISCONSIN.

No. 65. Argued October 30, November 2, 1891. — Decided December 21, 1891.

If the adjudication of a Federal question is necessarily involved in the disposition of a case by a state court, it is not necessary that it should appear affirmatively in the record, or in the opinion of that court, that such a question was raised and decided.

Proceedings under a state statute enacted before the adoption of the Fourteenth Amendment which, if taken before its adoption, would not have violated the constitution, may, when taken after its adoption, violate it, if prohibited by that amendment.

In Wisconsin the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels; and the law, so settled by the highest court of the State, is controlling in this court as a rule of property.

A state legislature may authorize the taking of land upon or riparian rights in a navigable stream, for the purpose of improving its navigation, and if a surplus of water is created, incident to the improvement, it may be leased to private parties under authority of the State, or retained within control of the State; but so far as land is taken for the purpose of the improvement, either for the dam itself or the embankments, or for the overflow, or so far as water is diverted from its natural course, or from

Statement of the Case.

the uses to which the riparian owner would otherwise be entitled to devote it, such owner is entitled to compensation.

Where a statute for the condemnation of lands for a public use provides a definite and complete remedy for obtaining compensation, such remedy is exclusive.

The act of March 3, 1875, 18 Stat. 506, c. 166, "to aid in the improvement of the Fox and Wisconsin Rivers, in the State of Wisconsin," provided a mode for obtaining compensation to persons injured by the taking of their land or their riparian rights in making such improvements; and, as it remained in force for thirteen years, it gave to persons injured a reasonable opportunity for obtaining such compensation, and if they failed to avail themselves of it, they must be deemed to have waived their rights in this respect.

Such an owner, who fails to obtain compensation for the taking of his property for use in a public improvement, by reason of his own neglect in applying for it, cannot violently interfere with the public use, or divert the surplus waters for his own use.

It is not decided whether or not a bill in equity, framed upon the basis of a large amount of surplus water not used, will lie to compel an equitable division of the same upon the ground that it would otherwise run to waste.

Under the circumstances disclosed in this case, there was no taking of the property of the plaintiff in error without due process of law.

THE court stated the case as follows:

This was a complaint in the nature of a bill in equity filed in the Circuit Court of Outagamie County, Wisconsin, by the Green Bay and Mississippi Canal Company against the Kaukauna Water Power Company, and a number of other defendants, lessees and tenants of the Water Power Company, for the purpose of enjoining them from interfering with the plaintiff and its employés while engaged in maintaining, repairing and rebuilding a certain embankment and drain upon a certain lot of land upon the bank of the Fox River, in the State of Wisconsin, and from cutting, tearing away or removing such embankment or drain. The case made by the complaint, pleadings and evidence was substantially as follows:

By an act approved August 8, 1846, 9 Stat. 83, c. 170, Congress granted certain lands to the State of Wisconsin, upon its admission into the Union, for the purpose of improving the navigation of the Fox and Wisconsin Rivers, the former of which is one of the navigable rivers of the State, having an

average flow of 150,000 cubic feet per minute, and affording a water power of 300 horse power per foot fall. By an act approved June 29, 1848, Laws Wisconsin 1848, No. 2, p. 58, the legislature accepted the grant, and by a subsequent act entitled "An act to provide for the improvement of the Fox and Wisconsin Rivers, and connecting the same by a canal," approved August 8, 1848, created a board of public works to superintend the construction of the improvements contemplated by the act of Congress.[1] In this act (sec. 16) the legislature pro-

[1] One of the briefs for the plaintiffs in error cited the following sections of this statute.

"SEC. 15. In the construction of such improvements the said board shall have power to enter on, to take possession of and use all lands, waters and materials, the appropriation of which for the use of such works of improvement shall in their judgment be necessary.

"SEC. 16. When any land, waters or materials appropriated by the Board to the use of said improvements shall belong to the State, such lands, waters or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the State, and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the State, subject to future action of the legislature.

"SEC. 17. When any lands, waters or material appropriated by the board to the use of the public in the construction of said improvements shall not be freely given or granted to the State, or the said board cannot agree with the owner as to the terms on which the same shall be granted, the superintendent, under the directions of the board, shall select an appraiser, and the owner shall select another appraiser, who, together, if they are unable to agree, shall select a third neither of whom shall have any interest directly or indirectly in the subject matter, nor be of kin to such owner, and said appraisers, or a majority of them, shall proceed to hear testimony, and to assess the benefits or damages, as the case may be, to the said owner, from the appropriation of such land, water or materials, and their award shall be conclusive unless modified as herein provided. If the owner shall neglect or refuse to appoint an appraiser as herein directed, after ten days' notice of such appointment by the superintendent, then such superintendent shall make such appointment for him.

"SEC. 18. Either party may appeal from such award to the Circuit Court of the County in which the premises may be situated within thirty days after such award may be made and filed with the secretary of the board, and such appeal shall be tried by a jury as other cases commenced in said Circuit Court, and upon the finding of such jury judgment may be rendered in favor of either party, but no execution shall issue thereon against the State.

vided that, "Whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the State, subject to the future action of the legislature." The board was limited by the act, in their contracts and expenditures, to the proceeds of the sale of the lands granted by Congress. In 1851 the State made a contract with Morgan L. Martin for the improvement of the Fox River between Lake Winnebago and Green Bay. At Kaukauna in township 24 N., R. 18 E., were rapids in the Fox River, and the navigation at this point had to be improved by the construction of a dam across the river to secure slack water, and of a canal leading therefrom on the north side of the river to a point below the rapids.

In 1853, the State of Wisconsin, finding itself unable to complete the improvement from the grant made to it, incorporated the Fox and Wisconsin Improvement Company, for the purpose of carrying forward the improvements of these rivers, and relieving the State of its indebtedness on account of the work already done, and from its liability upon its contracts not then executed. The grant was made upon condition that the company should file with the Secretary of State a bond for the vigorous prosecution of the improvement to completion, and for the completion of the same within three years. The bond was further conditioned to pay all the State's in-

"SEC. 19. An entry of such award, signed by the appraisers, or a majority of them, or certified by the Clerk of the Court, in case the same shall have been appealed and containing a proper description of the premises appropriated, the names of the persons interested, and the sum estimated for benefits or damages, shall be made in a book, to be kept by the secretary of the board.

"SEC. 20. A transcript of such entry, signed in like manner, acknowledged or proved as a conveyance of land, shall be recorded in the office of the Register of Deeds of the County in which the premises are situated, and the fee simple of said premises shall thereupon vest in the State.

"SEC. 21. If the damages exceed the benefits it shall be the duty of the board to direct the same to be paid out of the fund appropriated to said improvements; proof of such payment or the offer thereof in case the party entitled shall decline to receive the same, shall discharge the State and every person under its employ from any claim for such land, waters and materials appropriated as aforesaid."

debtedness and to save the State harmless from all liability growing out of the improvement. Having complied with all of these conditions, all of the dams, locks, water powers and other appurtenances of said works, and all the said rights, powers and franchises were passed to and vested in the Fox and Wisconsin Improvement Company. Pursuant to the conditions of this grant, the improvement company went on to complete the works as then contemplated, and in its prosecution of the same, in order to secure slack-water navigation around the rapids, in 1853, 1854 and 1855 built a dam at the head of the rapids, so as to raise the water about eight feet above the natural level, reaching from lot 5, section 22, south of the river, to section 24 north of the river, and also built a canal and locks on the north side of the river, reaching from the pond created by the dam to the slack water of the river below the rapids and below the dam. The south end of the dam abutted upon lot 5, now owned by the Canal Company. This dam was built and maintained by virtue of the act of the State, approved August 8, 1848, providing for the completion of such improvement, and there was no other authority for building or maintaining the same. The dam so constructed was maintained by the improvement company and its successor, the Green Bay and Mississippi Canal Company, until 1876, when the United States, having taken title to the improvement, built the new dam now in question, forty feet below the old one, and extended the embankment down the river to meet it. In the belief that it also owned the hydraulic power mentioned in the 16th section of this act, the improvement company bought lands adjacent to the canal for the purpose of rendering such power available.

In order to raise funds for the completion of the work and the payment of the State indebtedness, it mortgaged the property to the amount of $500,000; and, also, under an act of the legislature of October, 1856, made a deed of trust to three trustees of all the unsold lands granted to the State in aid of the improvement, and of all the works of improvement constructed on the river, including the dams, locks, canals, water powers and other appurtenances. This trust deed was subsequently

foreclosed for the purpose of paying the State indebtedness and the bonds issued under the mortgage, as well as those secured by the trust deed; and the property upon such foreclosure was sold to a committee, which subsequently became incorporated under the name of the Green Bay and Mississippi Canal Company, plaintiff in this suit, which in this manner became seized in fee of all the improvements, and all the rights, powers and privileges connected with the improvement company, including the dam and canal and all the hydraulic power thereby furnished and the mill lots connected therewith. Plaintiff entered into possession of this property and spent considerable sums in improving, repairing and operating such works of improvement. Finding its expenses largely exceeded the revenue derived from it, an act of Congress was procured in 1870, authorizing the Secretary of War to ascertain the amount which ought to be paid to the plaintiff for its property and rights in the canal, which amount, being subsequently settled by a board of arbitration, a deed was made to the United States of the entire property, with a reservation of the water power created by the dam, and by the use of the surplus water not required for the purposes of navigation, with the rights of protection and reservation appurtenant thereto, and the land necessary to the enjoyment of the same, and acquired with reference to such use.[1]

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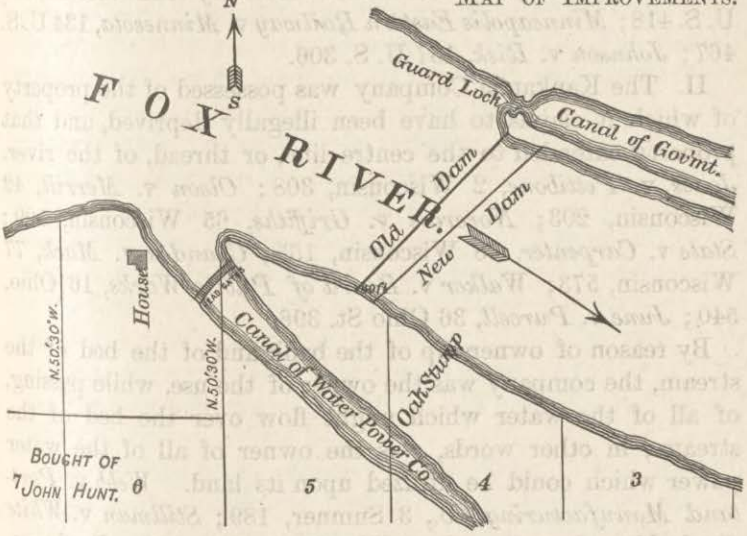
[1] On the 3d of March, 1875, Congress enacted: "That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox Rivers in the State of Wisconsin, it becomes necessary or proper in the judgment of the Secretary of War to take possession of any lands, or the right of way over any lands, for canals and cut-offs, or to use any earth-quarries or other material lying adjacent or near to the line of said improvement and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies. In case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner. 18 Stat. 506, c. 166, § 1.

The dam which furnishes such hydraulic power rests upon the south side of the river on lot 5 of the government survey, which lot in its natural condition was low and scarcely raised above the surface of the water in the river at its natural stage. In order to maintain a head of water in the pond for the purpose of navigation or hydraulic power, it was necessary to build an embankment about ten feet high, and of a thickness and strength sufficient to hold the water in the pond; such embankment was built and extended across the fronts of lots 5, 6 and 7, shortly before the construction of the dam. This lot number 5 was entered by one Denniston in 1835. He afterwards assigned his duplicate therefor to one Hathaway, who received a patent from the United States, August 10, 1837. His title, through several mesne conveyances, became vested in the Water Power Company, May 14, 1880, but no authority was ever obtained from the owner of this lot to erect or abut the dam upon it, or to build an embankment upon it, and no condemnation proceedings under the act of 1848 to obtain an appraisal of damages to such lot were proved at the trial. Lots 6 and 7, also originally entered by Denniston, lie immediately above lot 5, and in their natural state were also low and flat. In 1854, one John Hunt, then the owner in fee of these lots, granted to the improvement company, its successors and assigns, the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company, reserving the right to "myself to use said embankment when completed, but not so that the same shall be injured through lots 6 and 7; . . . also the privilege of excavating a ditch along the south or east side of said embankment, not exceeding three feet in width." Under and by virtue of such grant, the improvement company built the embankment, and dug the ditch, and the same have ever been maintained under and by virtue of such grant and the legislative act of 1848.

The defendant, the Kaukauna Water Power Company, claiming to own that part of lots 5, 6 and 7, adjacent to Fox River, by purchase of lot 5 from one Beardsley and of lots 6 and 7 from Hunt in 1880, began to excavate and build a canal upon these lands, in order to draw water from the pond on the south

side, and use the same for hydraulic purposes, when plaintiff gave notice in writing of its claim to such hydraulic power, stating that it would resist the breaking of such embankment and the drawing of water from the pond, thereby depriving plaintiff of the use thereof, and of the control of and dominion over the same. The other defendants claimed the right to use the water from the canal of the Water Power Company under, and as tenants of such company. The complaint was dismissed by the Circuit Court, and an appeal taken to the Supreme Court of the State, by which the decree of the Circuit Court was reversed, and the case remanded to that court with instructions to enter judgment for the plaintiff, and for an injunction against the defendants restraining them from drawing any water from the pond maintained by the dam for hydraulic purposes. From the decree so entered by the Circuit Court

MAP OF IMPROVEMENTS.



the Kaukauna Water Power Company and the other defendants sued out this writ of error, claiming that there was drawn in question the validity of a statute of the State, and of an authority exercised under the State, upon the ground of their

repugnance to the Constitution of the United States. A motion to dismiss the writ of error upon the ground that no Federal question was involved was postponed to a consideration of the case upon the merits.

Mr. David S. Ordway (with whom was *Mr. Alfred L. Cary*) for plaintiffs in error.

I. The question, as to whether the use was for a public or private purpose, is open here for discussion, notwithstanding the fact that this court usually adopts the construction put upon a state statute by the court of last resort of the State where enacted. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *McMillen* v. *Anderson*, 95 U. S. 37; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Crowley* v. *Christensen*, 137 U. S. 92; *Gormley* v. *Clark*, 134 U. S. 348; *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418; *Minneapolis Eastern Railway* v. *Minnesota*, 134 U. S. 467; *Johnson* v. *Risk*, 137 U. S. 306.

II. The Kaukauna Company was possessed of the property of which it claims to have been illegally deprived, and that property extended to the centre line, or thread, of the river. *Jones* v. *Pettibone*, 2 Wisconsin, 308; *Olson* v. *Merrill*, 42 Wisconsin, 203; *Norcross* v. *Griffiths*, 65 Wisconsin, 599; *State* v. *Carpenter*, 68 Wisconsin, 165; *Chandos* v. *Mack*, 77 Wisconsin, 573; *Walker* v. *Board of Public Works*, 16 Ohio, 540; *June* v. *Purcell*, 36 Ohio St. 396.

By reason of ownership of the bank and of the bed of the stream, the company was the owner of the use, while passing, of all of the water which might flow over the bed of the stream; in other words, was the owner of all of the water power which could be utilized upon its land. *Webb* v. *Portland Manufacturing Co.*, 3 Sumner, 189; *Stillman* v. *White Rock Manufacturing Co.*, 3 Woodb. & Min. 538; *Parker* v. *Griswold*, 17 Connecticut, 288; *S. C.* 42 Am. Dec. 739; *Cooper* v. *Williams*, 5 Ohio, 391; *S. C.* 24 Am. Dec. 299; *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 75 Wisconsin, 385.

It could erect and maintain a dam upon its own land across the stream, although navigable, unless the United States, the State of Wisconsin, or some party acting under them, for the protection of navigation, objected. *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 44; *Wetmore* v. *Brooklyn Gas Light Co.*, 42 N. Y. 384; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178; *Roe* v. *Strong*, 107 N. Y. 350; *Harvard College* v. *Stearns*, 15 Gray, 1; *Boom Co.* v. *Patterson*, 98 U. S. 403.

If the Water Power Company was so possessed of the south bank and the bed of the stream to its centre, with the right to construct such a wing-dam and canal, certainly the State, by the exercise of its undoubted power in the improvement of navigation, forestalled the Water Power Company, and by the erection of the dam in question deprived it of the opportunity of improving and utilizing its water power. The necessity for and object of the embankment was to prevent the overflow of the river and escape of the water; it was a mere continuation of the dam up stream upon the surface of the land of the Water Power Company. The right to place it there could only be acquired by purchase or condemnation. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.

In such case the riparian proprietors retain the ownership of the soil, subject to the public easement, unless the language of the statute shows an intention to take the fee for the purpose of the act; the rule being, that in the absence of express words, the courts do not infer that a statute of this kind gives to the public or to a board of conservators or navigation companies, acting in the public interest, a greater interest in the soil than is necessary for the purpose of navigation." See *Lee Conservancy Board* v. *Button*, 12 Ch. D. pp. 400, 401, James, L. J.

III. If taking the property of the Water Power Company was for a private purpose, there will be no dispute but that the law of 1848 was void, because in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States. *Osborn* v. *Hart*, 24 Wisconsin, 89; *Cole* v. *La Grange*, 113 U. S. 1; *Matter of Deansville Cemetery Assn.*, 66 N. Y. 569.

The right of the riparian owner to have the water of a *navigable* stream flow past his lands adjoining the same as they were accustomed to flow, is as perfect against everybody except the State, or some person or corporation standing in its stead, as it is in the case of *unnavigable* streams; and that right does not, as the state court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership. *Cohn* v. *Wausau Boom Co.*, 47 Wisconsin, 314, 322. And the right of the State to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the State, or in the riparian owner.

It is hardly to be conceived that the legislature of the State of Wisconsin, substantially copying its canal law from those of older States, knowing at the same time that under the constitution of the State there was no power or authority possessed by the State to engage in works of internal improvement, and knowing that the State was prohibited by its constitution from incurring any indebtedness for such purpose, could have intended to take the private property of individuals, for a mere private purpose, and it is only through the construction placed upon the act of 1848 that such a result is accomplished, which construction we bring here for review.

Upon this point, the Supreme Court of Wisconsin, by its judgment now under consideration, has decided that by the 16th and 17th sections of the act of 1848, it was the intention of the legislature to take all such surplus water, and furthermore that such taking was not a necessity — was only a convenience — and that it was a taking for a public purpose. As to both of these points so decided we respectfully submit that the decision of the Supreme Court of the State of Wisconsin is erroneous.

The court, in its opinion, substantially admits that, but for the fact of indivisibility, the taking of the surplus water would be a taking for a private purpose. The courts of New York, Ohio, Michigan and Maryland have had the same, or very similar questions before them, and, as I understand their decisions, have reached conclusions entirely different from those reached

by our Supreme Court in this case, and I respectfully submit more in consonance with justice and correct legal principles. *Buckingham* v. *Smith*, 10 Ohio, 288; *Cooper* v. *Williams*, 5 Ohio, 391; *S. C.* 24 Am. Dec. 299; *Varick* v. *Smith*, 5 Paige, 137; *S. C.* 28 Am. Dec. 417; *Smith* v. *Rochester*, 92 N. Y. 463; *Kane* v. *Baltimore*, 15 Maryland, 240. See also *In re Barre Water Co.*, 62 Vermont, 27.

We submit that this is the only logical disposition of such a question in a jurisdiction which affirms that the absolute ownership of the beds of navigable streams is, *prima facie*, in the owners of the banks; and I respectfully add that I can see, in this case, no reason for refusing to follow such holding to its logical results.

IV. The legislature is not the ultimate judge of how much water is necessary. *Silsby Manufacturing Co.* v. *State of New York*, 104 N. Y. 562.

V. The surplus water power was neither necessary nor convenient for the purposes of navigation.

The plaintiffs in error admit that it was of vital interest to the state, and to those entrusted with the preservation and maintenance of the improvement, that they should have the entire control of the dam, embankments, canals, and all appliances necessary for the purposes of navigation, as well as of the waters necessary for navigation in the pond created by the dam. But they deny that the absolute control of such water involves the ownership or the right to the use of the surplus over and above what is necessary for the purposes of navigation. They deny that the surplus water power is either necessary or convenient for the purposes of navigation.

The authorities are numerous upon the question of what is necessary, and what is merely convenient for public use, and the effect, in either case, upon the right of the public to take *in invitum*. Especially see *Stockton & Visalia Railroad* v. *Stockton*, 41 California, 147; *Varick* v. *Smith*, *supra*; *Waddell's Appeal*, 84 Penn. St. 90; *Loan Association* v. *Topeka*, 20 Wall. 655; *Chagrin Falls &c. Road* v. *Cane*, 2 Ohio St. 419.

As the interest of the public was acquired for defined ob-

jects and specified purposes, the land could not be diverted to other purposes or used in a manner substantially different from that for which it was appropriated, without relieving it from the incumbrance, and restoring the owner to the absolute dominion he had before it was taken. See *Nashville & Chattanooga Railroad* v. *Cowardin*, 11 Humph. 348; *Memphis Freight Co.* v. *Memphis*, 4 Coldwell, 419; *West River Bridge Co.* v. *Dick*, 6 How. 507.

Wherever the taking of private property for public use is provided for by a general law, which does not itself describe the property to be taken, the question whether the use is public is for the courts to determine in each individual case as it arises. *Hobart* v. *Milwaukee City Railroad*, 27 Wisconsin, 194.

All the facts bearing upon this question are set out in the record, and the court below does not seem to disagree with us as to the fact that the use, for hydraulic purposes, is *prima facie*, private. It could not well come to any other conclusion, in view of the declaration of the court in the *Eau Claire Case*, 40 Wisconsin, 533. It there declares that a statute which authorized the erection of a dam at public cost across a navigable river, either for the purpose of water works for the city, or for the purpose of leasing the water power for private purposes, was unconstitutional and void, because the power so granted was alternative and optional, either for public or private use, thus leaving it possible to be used for private purposes solely. But the court below distinguishes the case at bar upon its peculiar facts, and holds, contrary to the New York, Ohio and Maryland cases cited, and in direct opposition to all of the facts shown by the record that all of the surplus water power is a mere accidental excess, an unavoidable incident to the power to construct and maintain the dam, and that such surplus water is practically inseparable from the water necessary for the purposes of navigation. This conclusion is supported by two adjudicated cases only, that is to say, *The State* v. *Eau Claire*, 40 Wisconsin, 533, and *Spaulding* v. *Lowell*, 23 Pick. 71; in neither of which it is submitted, was involved the proposition in support of which they are cited.

Argument for Plaintiffs in Error.

Spaulding v. *Lowell* has been followed in many cases. See *George* v. *Mendon School District*, 6 Met. 497; *Hood* v. *Lynn*, 1 Allen, 103; *French* v. *Quincy*, 3 Allen, 9; *Minot* v. *West Roxbury*, 112 Mass. 1. In none of them, and in no other case which we have been able to find, has the accidental surplus or excess consisted of anything except a portion of that which had necessarily been taken for a public purpose. We therefore submit that, upon all the facts in the record, and all the authorities which have thus far been referred to by either of the parties to this case, the taking of the surplus water power, by the judgment of the court below, was for a private purpose and that, therefore, the judgment should be reversed.

VI. The act of Congress of 1875 failed to supply a just compensation.

The Wisconsin act of August 8, 1848, was void, for the reason that it allowed the "appraisers to assess the benefits or damages, as the case might be, to the owner from the appropriation of such land, water or materials," and only provided for the payment of damages to the owner if they exceeded the benefits.

It is the settled law of Wisconsin that the value of property taken must be paid, and that it cannot be reduced by offsetting against it benefits which may be assessed. *Robbins* v. *Milwaukee & Horicon Railroad*, 6 Wisconsin, 636; *Blesch* v. *Chicago & Northwestern Railway*, 48 Wisconsin, 168; *Bohlman* v. *Green Bay &c. Railway*, 40 Wisconsin, 157; *Powers* v. *Bears*, 12 Wisconsin, 213; *S. C.* 78 Am. Dec. 733.

The defects in the state statute of August 8, 1848, were not remedied, nor was just compensation for the property of the Water Power Company so taken supplied by the act of Congress of March 3, 1875, c. 166.

The Supreme Court, in its judgment below, held that that act was equivalent to the provisions of the state statute with reference to highways, when it only authorized an action to be brought against the United States in the courts of the State of Wisconsin, to obtain a judgment for its damages so claimed. In this it is respectfully submitted that the court below erred, and that the act of Congress relied upon, even if

Counsel for Defendant in Error.

it was intended to apply to cases of this kind, furnished no adequate mode for obtaining compensation, because, supposing the Water Power Company to be fortunate enough to obtain a judgment for its damages, it was then nearly as far from the possession of compensation as it was before the commencement of proceedings. Not one dollar could be had until an appropriation could be obtained through some act of Congress. It was left to trust to "the future justice of Congress."

It seems to us that this exact question was decided in the case of *Connecticut River* v. *Franklin County Commissioners*, 127 Mass. 50; the opinion was by Gray, C. J. The doctrine in that State is no more stringent and exacting as to prepayment, or the provision of a sure and adequate fund than in Wisconsin, but the case goes further and points out what is not such a sure and adequate provision.

In this respect there would seem to be an irreconcilable conflict between the decision of the Supreme Court of Massachusetts and that of the Supreme Court of Wisconsin brought here for review, and we respectfully submit that the Supreme Court of Wisconsin carried the doctrine of substituted payment far beyond any previously adjudged case, and that the doctrine of the Supreme Court of Massachusetts is more nearly in accord with all prior decisions of the Supreme Court of Wisconsin, than is its decision which is now brought here for review.

But suppose (for the purpose of this argument only) that the act of Congress of 1875 did furnish adequate provision for payment after that date of just compensation for water power taken, it could not possibly, by relation or otherwise, render the act of August 8, 1848, valid or effectual for the taking and passing title to the water power in question, at any time prior to the approval of the act, to wit, March 3, 1875.

The concurring opinion of Mr. Justice Bradley in *Davidson* v. *New Orleans*, 96 U. S. 97, stated clearly the doctrine for which we contend; and it was approved in *Hagar* v. *Reclamation District*, 111 U. S. 701.

Mr. Moses Hooper for defendant in error.

Opinion of the Court.

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

(1) The only question involved in this case proper for us to consider, is whether the act of the legislature of Wisconsin of August 8, 1848, reserving to the State the water power created by the erection of the dam over the Fox River, as construed by the Supreme Court of the State, and the proceedings thereunder, operated to deprive the plaintiffs in error of their property without due process of law. Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court. *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Armstrong* v. *Athens County*, 16 Pet. 281; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake Co.* v. *Yuba County*, 116 U. S. 410.

It is argued by the defendant in error that, inasmuch as the act of the legislature complained of was enacted in 1848, and the Fourteenth Amendment to the Constitution was not adopted until 1868, the provision of the latter against the "depriving" a person of property without due process of law has no application to this case. There are several answers made by the plaintiff in error to this contention: First. It was not the act itself which deprived the Water Power Company of its property, but the proceedings taken under the act, and so far as such proceedings were taken subsequent to the constitutional amendment, they fall within its inhibition. It may well be doubted whether the mere construction of the dam

and embankment operated of itself to deprive the owner of lot 5 of any right to the water power, as the water continued to flow past the lot as it had previously done, though at a higher level than before. Be this as it may, however, it is possible that the notice given by the Canal Company, in 1880, of its claim to the exclusive right to this water power may be considered as a deprivation within the meaning of the amendment. Until this time there had been no active interference with any claim or riparian rights belonging to the Water Power Company. Second. If the erection of the dam and embankment be treated as an assertion of an exclusive right to the water power in front of these lots, perhaps the maintenance of this dam and embankment may be regarded as a continuous deprivation of the rights of the riparian owner to such water power, within the meaning of the constitutional provision. The act of deprivation continues so long as the Canal Company maintains its paramount and exclusive right to the use of the water flowing in front of such lot. Third. While it is undoubtedly true that the first dam and embankment were constructed in the years 1853 to 1855, before the constitutional amendment was adopted, the new dam, the southerly end of which also abutted on lot 5, as well as the embankment connecting this with the old dam, was not built until 1876; and in the construction of these the Water Power Company claims that it was deprived of its property without due process of law. The allegation of the answer in this connection is "that the dam which now raises the water of said Fox River for the filling of said government canal, in the said complaint mentioned, is not the same dam which was built by the board of public works, and in said complaint referred to; that, after the United States became the owner of said canal and water-way, and in about the year 1874, the United States abandoned said old dam and built a new one, . . . the southerly half of which said new dam and which point of abuttal is upon land which, prior to, and at the time of, the commencement of this suit, belonged to, and was in the possession of, and still belongs to, and is in the possession of, the defendant, the Kaukauna Water Power Company; . . . that,

after the building of said new dam by the United States, as aforesaid, it, the said United States, constructed and extended the said embankment along the southerly shore of said Fox River, on said lot 5, from the said old dam down stream to, and joined and terminated the same upon, its said new dam, as the same is now in use; and these defendants state, upon information and belief, that neither the United States or any other party ever, by purchase, condemnation, dedication, or in any other way, acquired, of or from the owner of said lot 5, the right to so construct or abut said new dam upon said lot 5, or to so lengthen or construct said new part of said embankment thereupon," etc.

We think these facts and allegations are sufficient to raise the constitutional question whether the property of the Water Power Company has been taken without compensation, and that the motion to dismiss should, therefore, be denied.

(2) The act of the legislature of Wisconsin of August 8, 1848, in so far as it provided that the water power created by the dam erected, or other improvements made on the river, should belong to the State, is claimed to be invalid upon the ground, first, that it purported to take private property for a private purpose; and second, that if it were held to be the taking of private property for a public purpose, it was void under the constitution of the State, and not due process of law, because the act did not provide a method of ascertaining and making compensation for the property so taken. Practically the only question is, whether this act was valid in so far as it authorized the State to take and appropriate the water power in question.

It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. *Jones* v. *Pettibone*, 2 Wisconsin, 308; *Walker* v. *Shepardson*, 2 Wisconsin, 384; *S. C.* 4 Wisconsin, 486; *Norcross* v. *Griffiths*, 65 Wisconsin, 599. In *City of Janesville* v. *Carpenter*, 77 Wisconsin, 288, 300, it is said of the riparian owner: "He may construct

docks, landing places, piers and wharves out to navigable waters if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the constitution, and it cannot be taken, or its value lessened or impaired, even for public use, 'without compensation,' or 'without due process of law,' and it cannot be taken at all for any one's *private* use." With respect to such rights, we have held that the law of the State, as declared by its Supreme Court is controlling as a rule of property. *Barney* v. *Keokuk*, 94 U. S. 324; *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371. There is no doubt, under the facts of this case, that the owner of lot 5 was entitled to compensation for the land appropriated by the State in the construction of the dam and of the embankment in front of the lot. To what extent he was entitled to the use of the water power created by the dam, as against the public and the other riparian owners, may be difficult of ascertainment, depending as it does largely upon the number of proprietors, the width and depth of the river, the volume of the water, the amount of fall, and the character of the manufactures to which it was applicable. Nor is it necessary to answer the question in this case, since it appears that, whatever this property is, it has been appropriated and no provision made for the compensation of the owner.

The case of the plaintiff Canal Company depends primarily, as stated above, upon the legality of the legislative act of 1848, whereby the State assumed to reserve to itself any water power which should be created by the erection of the dam across the river at this point. No question is made of the power of the State to construct or authorize the construction of this improvement, and to devote to it the proceeds of the land grant of the United States. The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such

purpose, is doubtless a proper exercise of the authority of the State under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement.' Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw — controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.

The value of this water power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors who had not the means to make it available. These proprietors lost nothing that was useful to them except the technical right to have the water flow as it had been accustomed and the possibility of their being able some time to improve it. If the State could condemn this use of the water with the other property of the riparian owner it might raise a revenue from it sufficient to complete the work which might otherwise fail. There was

every reason why a water power thus created should belong to the public rather than to the riparian owners. Indeed, it seems to have been the practice, not only in New York but in Ohio, in Wisconsin, and perhaps in other States, in authorizing the erection of dams for the purpose of navigation or other public improvement, to reserve the surplus of water thereby created to be leased to private parties under authority of the State; and where the surplus thus created was a mere incident to securing an adequate amount of water for the public improvement, such legislation, it is believed, has been uniformly sustained. Thus, in *Cooper* v. *Williams*, 4 Ohio, 253, the law authorizing the construction of the Miami Canal, from Dayton to Cincinnati, empowered the canal commissioners to dispose of the surplus water power of the feeder for the benefit of the State, and their action in so disposing of the water was justified. The ruling was repeated in the same case, 5 Ohio, 391. In *Buckingham* v. *Smith*, 10 Ohio, 288, it was held that, if the water of private streams should be taken by the State for the mere purpose of creating hydraulic power, and rented to an individual, the transaction would be illegal, and no title would pass as against the owner; but it was intimated that in conducting water through a feeder, a discretionary power must necessarily rest in the agents of the State, and in making provision for a supply, it must frequently occur that a surplus will accumulate, and that such surplus might be subject to lease by the commissioners. In *Little Miami Elevator Co.* v. *Cincinnati*, 30 Ohio St. 629, 643, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation; but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the State, in the exercise of its discretion, abandoned or relinquished the public use. It was doubted whether the State could, after abandoning the canal as a public improvement, still reserve to itself the right to keep up a water power solely for private use and as a source of revenue. "By so doing," said the court, "the water power would cease to be an incident to the public use, and the State would be engaged in the private enterprise of

keeping up and renting water power after it ceased to act as a government in keeping up the public use." The same ruling was made by this court in *Fox* v. *Cincinnati*, 104 U. S. 783. See also *Hubbard* v. *City of Toledo*, 21 Ohio St. 379. In *Spaulding* v. *Lowell*, 23 Pick. 71, 80, it was held that, where a town built a market house two stories high, and appropriated the lower story for a market, it being *bona fide* their principal and leading object in erecting the building, the appropriation of the upper story to other subordinate purposes was not such an excess of authority as to render the erection of the building and the raising of money therefor illegal. Chief Justice Shaw, in delivering the opinion of the court, said: "If this had been a colorable act, under the pretence of exercising a legal power, looking to other and distinct objects beyond the scope of the principal one, it might be treated as an abuse of power, and a nullity. But we perceive no evidence to justify such a conclusion in the present case. The building of a market house was the principal and leading object, and everything else seems to have been incidental and subordinate. . . . If the accomplishment of the object was within the scope of the corporate powers of the town, the corporation itself was the proper judge of the fitness of the building for its objects, and it is not competent in this suit to inquire whether it was a larger and more expensive building, than the exigencies of the city required." See also *French* v. *Inhabitants of Quincy*, 3 Allen, 9. In *Attorney General* v. *Eau Claire*, 37 Wisconsin, 400, it was broadly held that where the State was authorized to erect and maintain a dam for a public municipal use, the legislature might also empower it to lease any surplus water power created by such dam. The ruling was repeated in *State* v. *Eau Claire*, 40 Wisconsin, 533.

The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such

improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the State are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement. Under the circumstances of this case, we think it within the power of the State to retain within its immediate control such surplus as might incidentally be created by the erection of the dam.

So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation. So far as concerns lots 6 and 7, no such compensation could be claimed, since the Supreme Court held, and we think correctly, that the release executed by Hunt to the Fox and Wisconsin Improvement Company in 1854, in which he granted to that company and its representatives "the right to erect and forever maintain an embankment of the dimensions as surveyed by the engineer of said company," operated as a surrender of all riparian rights appertaining to such lots not reserved in the instrument. No such grant, however, was proven to have been made with respect to lot 5, then owned by one Beardsley, to which the

Water Power Company now holds the title. Inasmuch as the dam abuts upon this lot, its owner was doubtless entitled to compensation for the land occupied by the dam and embankment, as well as for the value of the use of the water diverted from its natural course. The 17th section of the act of 1848 attempted to provide for such compensation by enacting that "when any lands, waters or materials, appropriated by the board to the use of the public in the construction of said improvements, shall not be freely given or granted to the State, or the said board cannot agree with the owner as to the terms on which the same shall be granted," the superintendent shall take measures to secure the appointment of appraisers to assess the benefits or damages to the owner from the appropriation of the land, etc., with a further provision that if the damages exceeded the benefits it should be the duty of the board to direct the same to be paid "out of the fund appropriated to said improvements." It was held, however, by the Supreme Court of Wisconsin in *Sweaney* v. *United States*, 62 Wisconsin, 396, as well as in the present case, that it failed to give the land owner the right to institute condemnation proceedings under it to have his compensation determined; and, that if the State should institute such proceedings, the condemnation when determined was, by section 21 of the act, made payable out of the fund appropriated for such improvements, and for these reasons the act did not make adequate provision for the compensation of the owners. The construction thus given to this act is obligatory upon this court.

In 1875, however, Congress passed an act, 18 Stat. 506, to aid in the improvement of the Fox and Wisconsin Rivers, the first section of which provided that "in case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation be ascertained," etc. It is claimed in this connection that there was nothing in the contract of purchase made between the government and the

Canal Company, by which the government was bound to pay anything for, or on account of, the property which it did not take and which was excepted in the deed; that the water power created by the Kaukauna dam, and by the use of the surplus water not required for the purposes of navigation, was a part of the excepted property which the government did not purchase; that whatever title the Canal Company had to such water power and such surplus water at the time of its conveyance, it kept, and nothing more; that if its title was defective, or it had none, the government was in nowise bound to make the same good or supply it; and that to compel the government now to pay for the water power, would require it to make a payment it never assumed to make, and for property it had no title to or interest in. If there were anything in this point, it is one which should more properly be made by the government, and if the government has seen fit, as it did, to reimburse the riparian owners for all their damages, it comes with ill grace from the mouth of the Water Power Company to set up the exemption.

This construction, however, in our opinion is too narrow and technical. The only authority by which private property could be taken or overflowed was one derived from the State or general government; whatever appropriation was made, or injury done to such lands, was done solely for the benefit of the public, and it was right the public should pay the compensation therefor. There is no sound reason for a distinction in regard to compensation between the property conveyed and the property excepted from the conveyance — the latter being a mere incident to the former. The Fox and Wisconsin Improvement Company, in receiving title from the State, did not undertake to reimburse the riparian proprietors for damages to their lands, and it was inequitable that it should be called upon to do so. It was said by this court in *United States* v. *Jones*, 109 U. S. 513, 514, speaking of the act of 1870 authorizing the purchase of the improvements: "Some of the dams constructed had caused the lands of several parties to be overflowed, and in the estimate of the amount to be paid by the United States no account was taken of the liability of the

company for such damages. The question, therefore, soon arose whether the payment of these damages devolved upon the United States; and this question was submitted by the Committee on Commerce of the House of Representatives to the Secretary of War, and was by him referred to the Assistant Judge Advocate General. That officer held that liability for the damages incurred from the flowage of water on the lands of others, caused by the works constructed, followed the property transferred and devolved on the United States." It is true that the defendant in error could not by its deed of 1870, or by any reservation of the water power therein contained, saddle the government with the burden, but it was a burden already existing, which could not be discharged until the proper compensation had been provided. The land was not taken for the purpose of creating a water power, but for improving the navigation of the river, and there was no reason for charging the defendant in error, which had reserved the water power only, with the payment of compensation. The question of compensation is one separate and apart from the transfers of which this property was the subject, but one which in honor as well as in law was chargeable upon the public. The act of 1875 in question seems to have originated from the report of the Assistant Judge Advocate General, upon whose opinion a bill was prepared for the assumption by the United States of the company's liability for such damages. The terms of this act are broad enough to cover not only lands taken for flowage purposes, but all injury done to lands or other property by means of any part of the works of said improvement, which would include damages caused by the diversion of the water. It is true that this act, after remaining in force about thirteen years, seems to have been repealed by the deficiency bill of 1888, 25 Stat. 4, 21, which, after making appropriation for the payment of flowage damages to about 125 different claimants, declared that the United States should not be "held liable for damages heretofore or now caused by the overflow of the lands or other property of any person . . . unless the action or proceeding to ascertain and determine the amount . . . shall have been or shall

be commenced . . . prior to the passage of this act; and all claims and causes of action now existing upon which no proceeding has been already or shall be taken within the time last specified to enforce the same shall be forever barred." Congress was not obliged to keep the act of 1875 in operation forever, and reasonable opportunity having been afforded to the plaintiffs in error to obtain compensation for the damages sustained by the construction of the improvement, we think they must be deemed to have waived their right to them.

Where a statute for the condemnation of lands provides a definite and complete remedy for obtaining compensation, this remedy is exclusive; the common law remedy or proceeding is superseded by the statute, and the owner must pursue the course pointed out by it. Mills on Eminent Domain, sections 87, 88. It is true that, if the statutory remedy be incomplete or imperfect, the owner is not thereby debarred from his common law remedy and may recover his damages in an action of trespass or ejectment. But it does not follow even from this that he has a right, especially after acquiescing in the appropriation of his land for a number of years, to take the law into his own hands, and *manu forti* repossess himself of his own. Thus, if a railway company, without condemnation proceedings, took possession of a lot of land for its track and ran its trains over it for the time which elapsed in this case between the building of the dam and the cutting of the embankment by the plaintiffs in error, it would scarcely be claimed that the owner could enter upon the land, tear up the rails, and throw his fences across the road-bed. Such a proceeding was attempted in *State* v. *Hessenkamp*, 17 Iowa, 25, and the result was an indictment for wilfully obstructing the track. The court declined to instruct the jury that if the defendant owned the land, and the railroad company had not obtained a right of way over it, defendant had a right to place what he pleased upon the land, and should be acquitted; and the Supreme Court said of this refusal that it was so obviously right that "we can scarcely believe it is expected of us to undertake a vindication of its correctness." So in *Dunlap* v. *Pulley*, 28 Iowa, 469, the defendant, during his term of office

as road supervisor, fenced up and obstructed a certain county road which had been laid out over a tract of land owned by him, claiming the right to do so upon the ground that he had never been paid a just compensation. The court held, however, that though entitled to compensation, he was entitled to it only in the manner provided by law. "If he failed to ask for compensation, or failed to apply in time, or applying, was unsuccessful in showing his right thereto, he could not, upon any principle, resist the right of the public to open the road, upon the ground that he has not been paid for injuries or losses which he claims to have sustained. If the board rejected his claim because not properly presented, because not preferred in time, or upon any ground, (having jurisdiction so to decide,) his remedy was by appeal."

Under the circumstances of this case we do not think it was within the power of the owner of lot 5, after acquiescing for over twenty-five years in the construction of the dam, and the exclusive appropriation of the water by the State, to treat their proceedings as a nullity, and take such action as could only be justified upon the theory that the State and the Canal Company had acquired no rights by its long silence. The claim of the Water Power Company is to cut the embankment erected by authority of the State, and to draw off one-half of the surplus water power of the pond, upon the ground that it is now the owner of the southern bank of the river, and this, too, without taking any legal proceedings in assertion of this right so to do. Its position necessarily assumes that, by virtue of its ownership of lot 5 (all damages connected with lots 6 and 7 having been released by their then owner, Hunt), it is entitled to one-half of the water created by this improvement, and that, too, without reference to the riparian rights properly appurtenant to lot 5 before the improvement was made, or to any particular fall from the upper to the lower corner of such lot. It is difficult to see how, under these circumstances, this claim can be sustained. The dam was built for a public purpose, and the act provided that if, in its construction, any water power was incidentally created, it should belong to the State, and might be sold or leased, in order that the proceeds of such sale

or lease might assist in defraying the expenses of the improvement. A ruling which would allow a single riparian owner upon the pond created by this dam to take to himself one-half of the surplus water without having contributed anything towards the creation of such surplus or to the public improvement, would savor strongly of an appropriation of public property for private use. If any such water power were incidentally created by the erection of a dam, it was obviously intended that it should belong to the public and be used for their benefit, and not for the emolument of a private riparian proprietor. The cutting of the embankment under the circumstances of this case and the appropriation of the surplus water which the Water Power Company had had no hand in creating, was a trespass which the court had a right to enjoin.

We do not undertake to say whether a bill in equity, framed upon the basis of a large amount of surplus water not used, might not lie to compel an equitable division of the same upon the ground that it would otherwise run to waste.

Our conclusion is that there was no taking of the property of the plaintiff in error without due process of law, and the decree of the Supreme Court of Wisconsin is

Affirmed.

Mr. Justice Harlan dissented.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY *v.* TODD COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 132. Argued and submitted December 18, 1891. — Decided January 4, 1892.

A decision of the Supreme Court of a State, sustaining as valid a statutory contract of the State exempting the property of a railway company from taxation, but deciding that a certain class of property did not come within the terms of the exemption, is not an impairment of the contract by a law of the State and is not subject to review in error here.

New Orleans Water Works Co. v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, affirmed and applied.

Statement of the Case.

THE court stated the case as follows:

This was a proceeding to enforce payment of taxes on real estate remaining delinquent on the first Monday of January, 1886, for the county of Todd, State of Minnesota, and was tried in the District Court of the Seventh Judicial District of that State, which made and filed findings of fact and conclusions of law and ordered judgment for the county against the railway company for the collection of the taxes in question and the interest and penalties thereon together with costs. The entry of judgment was then stayed by the District Court, which certified its findings of fact and its decision in the case to the Supreme Court of the State for its consideration. The matter having been duly argued and submitted, the Supreme Court affirmed the order of the court below, whereupon a remittitur having been sent down, judgment was given in favor of the county and against the railway company, adjudging the lands in question liable for taxes, penalties, costs and disbursements, and that the lands be sold unless the amounts were paid accordingly, and afterwards, an appeal having been taken to the Supreme Court, the judgment of the District Court was in all things affirmed. A writ of error from this court was then allowed by the Chief Justice of the State Supreme Court. The opinion of that court will be found reported in 38 Minnesota, 163, and states the case as follows:

"This railway corporation in 1882 purchased 35,000 acres of land in Todd County, which, excepting an inconsiderable portion, was timbered land. The question to be determined is as to whether these lands are exempt from ordinary taxation. The lands were purchased on account of their being valuable timber lands. Since 1885 the corporation has been engaged in cutting the timber, and converting it into boards, plank, ties and lumber of all kinds. The greater part of this has been used in constructing and repairing the railroad of this corporation in this State; the remainder (about one-third) has been used for a like purpose upon that part of the road which is in the Territory of Dakota. In some places, where the timber has been cut, grass has grown up, a small quantity of which

has been sold. Upon a part of one tract a town site had been platted before this land was purchased by the corporation, and a part of the lots are now owned by it.

"This corporation became the owner of a part of the line of the Minnesota and Pacific Railroad Company, and as to its line of road succeeded to the rights, franchises and immunities of that company, including its exemption from ordinary taxation. As to this no question is raised; nor that the charter of the Minnesota and Pacific Company is to be referred to as defining the exemption to which the St. Paul, Minneapolis and Manitoba Company is entitled. By section 1 of this charter (Laws 1857, Ex. Sess. c. 1) corporate powers were granted, including the right to acquire, by purchase or otherwise, and to hold, convey, sell and lease, property and estates, either real or personal or mixed. Section 2 empowered the corporation to locate, construct and operate a railroad. Section 3 authorized the appropriation, by virtue of the right of eminent domain, of a belt of land, not exceeding 200 feet in width, throughout the entire length of the road, and to take property even beyond that limit for certain necessary purposes. Section 16 regranted to the corporation the lands granted to the Territory by act of Congress. Section 18 provided for the annual payment to the State of three per cent of the gross earnings of the railroad, 'in lieu of all taxes and assessments whatever,' and that, 'in consideration of such annual payments, the said company shall be forever exempt from all assessments and taxes whatever . . . upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said company; and said land granted by said act of Congress . . . shall be exempt from all taxation till sold and conveyed by said company.' Section 20 declared that the company should be 'capable, in law, of taking and holding any lands granted by the government of the United States, or of this Territory, or of the future State, or by other parties, which shall be conveyed to it by this act, or by deed, gift or purchase, or by operation of law, and may mortgage, pledge, sell and convey the same. . . .'"

Opinion of the Court.

Mr. M. D. Grover for plaintiff in error.

Mr. Moses E. Clapp, Attorney General of the State of Minnesota, for defendant in error, submitted on his brief.

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

The lands in question were assessed in pursuance of sections 1 and 6, of chapter 11, of the General Statutes of the State of Minnesota, entitled "Taxes," which are as follows:

"§ 1. All real and personal property in this State, and all personal property of persons residing therein, the property of corporations now existing, or hereafter created, and the property of all banks or banking companies now existing or hereafter created, and of all bankers, except such as is hereinafter expressly excepted, is subject to taxation, and such property, or the value thereof, shall be entered in the list of taxable property for that purpose, in the manner prescribed by this act: *provided*, that railroad, insurance and telegraph companies shall be taxed in such manner as now is or may be hereafter fixed by law."

"§ 6. All real property in this State, subject to taxation, shall be listed and assessed every even-numbered year, with reference to its value on the first day of May preceding the assessment; and all real estate becoming taxable any intervening year shall be listed and assessed with reference to its value on the first day of May of that year." Stats. Minn. 1878, 4th ed. c. 11, §§ 1 and 6; Stats. Minn. 1891, §§ 1382, 1428 and references.

Sections 1 and 7, c. 12, of the Revised Statutes of the Territory of Minnesota for the year 1851 (p. 94) read:

"Sec. 1. All property, real and personal, within the Territory, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law."

"Sec. 7. The real estate of incorporated companies, liable to taxation, shall be assessed in the district in which the same shall lie, in the same manner as the real estate of individuals."

By section 2 of the schedule of the state constitution, adopted in 1857, it was provided: "All laws now in force in the Territory of Minnesota not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." Stats. Minn. 1878, p. 30.

We are met on the threshold of the case by the objection that the writ of error cannot be maintained.

It is conceded that the Supreme Court of Minnesota did not put its decision on the ground that there was not a valid contract between the State and the company exempting its property from taxation, but held that the exemption claimed did not attach to these lands, and it is argued that "if such lands are within the contract of exemption contained in the company's charter, then the obligation of that contract was impaired by the assessment, under chapter 11 of the general laws of the State, and the decision of the Supreme Court holding that the lands were subject to assessment under such laws." Our jurisdiction cannot be maintained upon that view. As stated by Mr. Justice Gray, speaking for the court, in *New Orleans Waterworks Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18, 30: "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." And the language of Mr. Justice Miller, in exposition of the rule, is quoted from two opinions of the court delivered by him: "It must be the constitution, or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or constitution of the State in the matter in which the conflict is supposed to exist; or the case for this court does not arise." *Railroad Company* v. *Rock*, 4

Wall. 177, 181. "We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contract. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox* v. *Exchange Bank*, 12 Wall. 379, 383.

The position of the State was not that the lands in question were rendered taxable by any law passed subsequent to the company's charter, but that under the terms of the contract itself the lands were taxable. No subsequent law is referred to upon which the opinion of the court proceeded; on the contrary, the law was the same, so far as any question arising here was concerned, as that above quoted from the territorial law of 1851. What the court held was that statutes imposing restrictions upon the taxing power of a State, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed, *Bank* v. *Tennessee*, 104 U. S. 493, and that tested by this rule the exemption in the company's charter "was not applicable to large tracts of timber land purchased by the corporation from which to take timber to be converted into ties and lumber for the use of the corporation," and that consequently these lands were subject to taxation. It is impossible therefore for this writ of error to be sustained, and it is accordingly

Dismissed.

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

TYLER *v.* CASS COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 1320. Submitted November 23, 1891. — Decided January 4, 1892.

The Northern Pacific Railroad Company sold to a purchaser a tract included in the original grant to it which had never been patented, and on which the costs of survey had never been paid. The tract was sold for non-payment of taxes while Dakota was a territory, and the purchaser paid therefor. The Supreme Court of North Dakota held that the land was not taxable when the tax was levied and assessed, and that nothing passed by the sale. The purchaser brought this action in the state court of North Dakota to recover back the purchase-money paid at the tax sale. A judgment in plaintiff's favor was reversed by the Supreme Court of the State, no question being made as to the regularity of the tax sale and proceedings. *Held*, that the exemption of the land from taxation having been recognized by the state court, no Federal question was involved, and the writ of error must be dismissed.

MOTION to dismiss. The court stated the case as follows:

Plaintiff presented a claim to the board of county commissioners of Cass County, Dakota Territory, to recover moneys paid by him as the purchase price of certain lands sold by the county treasurer for delinquent taxes at a tax sale in 1885. The claim was rejected and plaintiff appealed to the District Court of Cass County, where the cause was tried upon an agreed statement of facts without a jury, and resulted in a judgment in favor of the plaintiff. The defendant preserved proper exceptions to the rulings and action of the court, and carried the case by appeal to the Supreme Court of the Territory.

After the admission of North Dakota as a State, the appeal was heard and decided by the State Supreme Court, which had succeeded to the jurisdiction of the Territorial Supreme Court. The opinion will be found reported, in advance of the official series, in 48 N. W. Rep. 232. The judgment below was reversed with instructions to dismiss the case, and thereupon a writ of error was taken out from this court.

Argument against the Motion.

Counsel agree that the facts appearing of record are substantially as follows: That the lands in question were part of the original grant by the United States to the Northern Pacific Railroad Company; that the company had, prior to the levy and tax sale, disposed of said lands to private parties by deeds and contracts, and such parties were in possession; that no patents had been issued; that the company earned the lands after the passage of the act of Congress, approved July 15, 1870, in regard to payment of the cost of surveying; that they were surveyed at the expense of the United States government, after the date of the act, and no part of the cost and expense of the survey had been repaid by the company to the United States; that in 1884 and prior thereto, the taxing officers of Cass County assessed the lands and levied taxes thereon, which remained unpaid October 6, 1885, on which date the treasurer of the county proceeded to sell them for delinquent taxes, and plaintiff became the purchaser; and it was to recover the purchase money so paid that the action was brought. No question is made as to the regularity of the tax sale, or the proceedings leading thereto.

Mr. John F. Dillon and *Mr. Harry Hubbard* for the motion.

Mr. William H. Francis (with whom was *Mr. Seth Newman* on the brief) opposing.

The authority sought to be exercised by the assessor is contrary to the laws of the Territory, which provide that "the property of the United States" "shall be exempt from taxation." Nowhere is any authority given to the assessor to assess nontaxable lands, and his action was an exercise of authority in direct violation of its statutes. The Federal question is: Were the lands attempted to be assessed, when the assessor had no jurisdiction *by reason of their immunity from taxation under the Constitution and laws of the United States?* This question was raised below and was decided against such immunity. That is sufficient to give this court jurisdiction. *The Banks* v.

The Mayor, 7 Wall. 16. It was raised at the proper time and in the proper manner. *Detroit City Railway* v. *Guthard*, 114 U. S. 133.

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

This case comes before us on motion to dismiss the writ of error.

The question arising for determination in the state court was whether the money which had been paid by the purchaser of the lands at the tax sale could be recovered back either at common law or under the Dakota statute in that behalf. The ground upon which the tax title was held to have failed was that the United States had a lien upon the lands, and that, therefore, they could not, under the laws of the United States, be sold for taxes, but that fact did not impress with a Federal character the inquiry as to the right of recovery.

It is earnestly urged that the lands were "a part of the public domain of the United States," and, as no tax could therefore be imposed thereon, that they were not within the jurisdiction of the Territory of Dakota or its taxing officers for the purpose of assessment and taxation; that this was an immunity under the Constitution and laws of the United States, which was specially set up and claimed by appellant; and that the decision of the state court was against such immunity. But the Supreme Court of North Dakota held, that in view of the decision of this court in *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600, the lands were not taxable at the time the taxes were assessed and levied, and that nothing passed by the sale. The exemption of the lands from taxation was, in other words, fully recognized and allowed.

Plaintiff in error insists that although, in the absence of statute the purchaser of a defective title at a tax sale cannot recover back the money paid, yet there is an exception to this rule where there is no jurisdiction whatever to impose the tax, and that this case comes within that exception, because the assessor had no jurisdiction to decide whether the lands in

question were or were not taxable. And he contends that the Supreme Court of North Dakota decided against the right of recovery at common law, not upon the ground that such recovery could not be had even where there was an absolute want of jurisdiction, but upon the ground that if the assessor, in good faith and relying upon the record as it appeared to him, assessed the lands against private parties in possession, though they in fact belonged to the United States, such act would not be without jurisdiction, although the assessment could not be sustained. Hence it is argued that the court decided against the immunity from the jurisdiction of the assessor.

Since, however, it was because the exemption was sustained that the purchaser at the tax sale brought this action, the reasoning of the state court cannot be availed of by him as a denial of an immunity to which he was entitled. It was the assessor's duty under the Dakota statutes to return a tax list including all the lands that were taxable, and in doing so he passed upon the question whether they were or were not taxable, and if he put upon the list lands that were exempt, and those lands were sold for taxes, whether the purchase money could be recovered back was, irrespective of the statute, purely a common law question which was not changed by the fact that the exemption arose under the laws of the United States. As between the plaintiff and the county, it was for the state court to decide whether a recovery could be had, and that decision embraced no direct ruling upon a Federal question adverse to the plaintiff, even though it were based upon the ground that the assessor had jurisdiction to the extent stated.

In *Williams* v. *Weaver*, 100 U. S. 547, the plaintiff sought to hold the defendants individually liable for the sum which he was compelled to pay as taxes on his shares of national bank stock, by reason of the wrongful assessment thereof for the year 1874, made by them in their official character as the board of assessors of the city of Albany; and Mr. Justice Miller, delivering the opinion of the court, said: "The Court of Appeals, in its opinion, conceding the assessment to be in many respects erroneous and to the prejudice of plaintiff, holds that, in the absence of fraud or intentional wrong, the

defendants were not personally liable in damages for any error in the assessment. Whether that court decided that question correctly or not, it is not a Federal question, but one of general municipal law, to be governed either by the common law or the statute law of the State. In either case it presents no question on which this court is authorized to review the judgment of a state court. That decision is also conclusive of the whole case. If the defendants, in assessing property for taxation, incur no personal liability for any error they may commit, the fact that the error consisted in a misconstruction of an act of Congress can make no difference. An officer whose duty personally, as the Court of Appeals of New York holds, is mainly judicial, is no more liable for a mistaken construction of an act of Congress than he would be for mistaking the common law or a state statute."

In *The Banks* v. *The Mayor*, 7 Wall. 16, cited and relied on by plaintiff in error, an act of the New York legislature authorized the issue of bonds by way of refunding to banks such portions of a tax as had been assessed on Federal securities exempted by the Constitution and statutes of the United States from taxation, and the officers who were empowered to issue the obligations refused to sign them, because, as they alleged, a portion of the securities for the tax on which the banks claimed reimbursement was, in law, not exempt, and the highest court of the State sanctioned this refusal. There, the decision by the State court was against the exemption claimed, and it was held that this was a decision against a right, privilege or immunity claimed under the Constitution or a statute of the United States, and that, therefore, this court had jurisdiction.

In the case at bar, as we have said, the lands were held to be not taxable, and the question of the jurisdiction of the assessor, in the first instance, in making the assessment, was not so resolved as to deny the exemption. We do not understand it to be contended that, so far as the decision of the state court rested upon the construction of the statute, any Federal question was involved.

The writ of error is dismissed.

STUTSMAN COUNTY *v.* WALLACE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 89. Argued November 13, 1891. — Decided January 4, 1892.

Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of its highest court, unless they conflict with or impair the efficacy of some provision of the Constitution or of a law of the United States, or a rule of general commercial law.

In the case of an appeal from a judgment of the Supreme Court of a Territory, which was admitted as a State after the appeal was taken, a subsequent judgment of the highest court of the State upon the construction of a territorial law involved in the appeal is entitled to be followed by this court, in preference to its construction by the Supreme Court of the Territory.

Following the decision of the Supreme Court of North Dakota as to the tax-laws of Dakota Territory; *Held,*

(1) That an erroneous decision of an assessor of taxes under those laws in the matter of exemptions does not deprive the tax proceedings of jurisdiction, and that, until such erroneous decision is modified or set aside by the proper tribunal, all officers with subsequent functions may safely act thereon; and that the rule of *caveat emptor* applies to a purchaser at a tax sale thereunder;

(2) That under those laws a county treasurer, in making a sale for non-payment of taxes, acts ministerially, the law furnishing the authority for selling the property, and the warrant indicating the subjects upon which it is to be exercised; and he is protected so long as he acts within the statute;

(3) That in the case of lands granted to the Northern Pacific Railroad Company, on which the costs of survey had not been paid and for which no patents had been issued, it was his duty to proceed to sell, notwithstanding those facts; and that, when the title of the purchaser at the tax sale failed, by reason of the lands not being subject to taxation, the county was not liable for the purchase money under c. 28, § 78 of the Political Code of 1877.

The rule that the known and settled construction of a statute of one State will be regarded as accompanying its adoption by another is not applicable where that construction had not been announced when the statute was adopted; nor when the statute is changed in the adoption.

THE court stated the case as follows:

Appellees brought an action in the District Court for the Sixth Judicial District of the Territory of Dakota, September

28, 1886, to recover from Stutsman County certain moneys which they had paid that county for lands which the treasurer of the county had assumed to sell to them in satisfaction of taxes wrongfully assessed thereon, and which sale was therefore invalid. They also sought to recover the amount of taxes paid by them on the land after the sale; and prayed judgment for the amounts paid and interest at thirty per cent per annum thereon from the dates of the payments respectively.

The allegations of the complaint were denied by the defendant, and the action was tried upon a statement of facts agreed to by the parties, which statement was adopted by the District Court as its findings of fact. These findings were, in substance, that the lands in question were part of the original grant by the United States to the Northern Pacific Railroad Company; that no patents had been issued for them; that the company earned the lands after the passage of the act of Congress of date July 15, 1870, in regard to the payment of the costs of surveying; that they were surveyed at the expense of the United States government, and no part of the cost and expenses of the survey had at the time of the tax sale been repaid by the railroad company to the United States; that in the year 1880 the proper officers of the county assessed all the parcels of land mentioned in a schedule attached to the complaint, marked "A," and levied certain taxes thereon, to wit, the territorial, county, general school, and district school taxes, amounting in the aggregate to $5500, all of which remained unpaid October 1, 1882; that prior to that date the then county treasurer of that county offered the lands for sale for the non-payment of said taxes, and for the collection of the same, and sold them to Charles S. Wallace for sums amounting in the aggregate to $5221.75, and the treasurer then and there executed and delivered to Wallace the certificate of sale of the lands in the form provided by law to be issued upon the sale of land for non-payment of taxes, and Wallace paid the treasurer said amount; that in 1881 the officers of the county, duly authorized to assess property therein, assessed and levied taxes upon said parcels of land for the territorial, county and school taxes, and that Wallace, "in order to protect his tax lien thereon

and equitable title thereto, paid to the defendant's treasurer, as subsequent taxes upon said land, being the taxes so levied for the year 1881," the amount of $4699.25, none of which taxes so levied for the year 1881 had theretofore been paid; that in 1882 the officers of the county assessed and levied territorial, county, general school and district school taxes upon the parcels of land described in the schedule attached to the complaint and marked "B," all of which remained unpaid October 1, 1883, and the then treasurer of the county offered the lands for sale for the non-payment of the taxes, and for the collection of the same, and sold them to Wallace for the sum in the aggregate of $6033, and the treasurer delivered certificates of sale to Wallace, and he paid the said amount.

That in October, 1884, the Northern Pacific Railroad Company brought an action against the treasurer and Wallace, wherein a decree was entered adjudging the tax proceedings in question to be null and void, and enjoining the treasurer from making, and Wallace from receiving, any tax deed to the property named in schedule "A," and in September, 1885, a like action was brought which resulted in a similar decree as to the property named in schedule "B."

It was also found that James M. Martin had an interest in the tax receipts under an assignment from Wallace, and that prior to the commencement of this action plaintiffs tendered to the board of county commissioners of Stutsman County the tax certificates in question, "and offered to surrender said certificates to said county upon the payment of the amount so paid by said plaintiff, Charles S. Wallace, for the purchase of said lands at said sales, and for the payment of the subsequent taxes thereon as aforesaid, together with the interest thereon at the rate of thirty per cent per annum from the dates of such payment;" but defendant refused to pay that sum, or any part thereof, and the whole is still unpaid; and that no part of the land has ever been redeemed from the sales, nor from either of them, nor from the subsequent taxes paid as aforesaid.

The court found as conclusions of law that no taxes were due upon the lands at the time of their sale, and that they were sold "by the mistake and wrongful act of the defendant's

treasurer, the then county treasurer of Stutsman County, and that the plaintiffs are entitled to recover from the defendant the amount paid for said lands at said sales and the amount paid as subsequent taxes thereon, as hereinafter stated, together with thirty per cent interest thereon and on the whole amount so paid from and after the date of such payments, as hereinafter specified, to this date," and thereupon directed judgment in favor of plaintiffs and against Stutsman County for $9921, with interest from and after October 1, 1882, at the rate of 30 per cent per annum, and for the amount of $6033, with interest thereon from and after October 1, 1883, at the rate of 30 per cent per annum, amounting in the aggregate, both principal and interest, to the sum of $35,800, together with costs and disbursements, and judgment was entered accordingly.

Exceptions were duly taken and motion for new trial made and overruled. The county thereupon carried the case, on appeal, to the Supreme Court of the Territory, by which the judgment was affirmed, whereupon an appeal was prayed and allowed to this court.

The parts of the revenue laws of the Territory of Dakota, referred to by counsel, are given in the margin.[1]

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[1] Chapter 28 of the Political Code of the Territory of Dakota, as amended from time to time, and in force at the time of the levy and assessment of the taxes and sale of the lands referred to in the complaint, and at the date of the commencement of this action, contained a complete scheme for the assessment, levy and collection of taxes. (Revised Codes, Dakota, 1877, p. 111.) Chap. 15 of the Political Code in the Compiled Laws of 1887 has substantially the same provisions with a new numbering of the sections. (Comp. Laws, Dakota, 1887, p. 337.)

Sections 1, 2 and 3 name the classes of property liable to, and enumerate such as are exempt from, taxation. Subdivision one of section 2 states as exempt "the property of the United States, and of this Territory, including school lands."

Sections 4 to 26 provide for the assessment of "taxable property," and prescribe the manner of proceeding by the assessor in making up the assessment roll. He is required to list and assess "all taxable property, real and personal," each year, at its cash value at the place of listing on the day named, and can demand information of the owners, who are obliged to list all property subject to taxation, and must list property of which the owners are unknown, to "unknown owners."

The form of the assessment roll is prescribed in sections 26 and 27, and

Counsel for Appellant.

Mr. John F. Dillon for appellant. *Mr. Harry Hubbard* was with him on the brief.

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by sections 28, 29 and 30 the equalization of the assessment roll by the board of county commissioners is provided for; and the board is given power to correct errors made in the list by the assessor and to add thereto any property, real or personal, subject to taxation, omitted by the owner or the assessor. During the session of the board any person, or his agent or attorney, feeling aggrieved by anything in the assessment roll, may apply to the board for the correction of any alleged errors in the listing or valuation of his property, whether real or personal, and the board may correct the same as shall be just.

Under sections 31 and 32 abstracts of assessments must be forwarded to the Territorial auditor, and the assessments may be equalized by the Territorial board for Territorial purposes, and for Territorial taxes.

The rates and date and levy of taxes and the preparation of duplicate tax lists by the county clerk with their form, one of which lists is retained by the county clerk and the other delivered, with the warrant of the county commissioners attached to the county treasurer, are prescribed by sections 33 to 39.

Section 40 reads thus:

"An entry is required to be made upon the tax list and its duplicate, showing what it is, and for what county and what year it is, and the county commissioners shall attach to the lists their warrants under their hand and official seal, in general terms, requiring the treasurer to collect the taxes therein levied according to law; and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal. The county clerk shall take the receipt of the county treasurer on delivering to him the duplicate tax list with the warrant of the county commissioners attached, and such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained."

Sections 41 to 44 relate to the collection of taxes and form of receipts.

Section 45 provides:

"It shall be the duty of the county clerk, on receiving any duplicate tax receipt from the treasurer, forthwith to examine the same and compare it with the tax list in his possession, and see if the total amount of taxes and the several amounts of the different funds are correctly entered and set forth in such receipt; and in case it shall appear that the treasurer has not collected the full amount of taxes and interest which, according to the tax list and the terms of the receipt he should have collected, then the county clerk shall forthwith charge the treasurer with the amount such receipt falls short of the true amount, and the treasurer shall be liable on his official bond to account for and pay over the same."

Sections 46 to 51 relate to the treasurer's cash-book and the duplicate cash-book kept by the county clerk.

Section 52 is as follows:

"If on the assessment roll or tax list there be any error in the name of

Argument for Appellees.

Mr. W. E. Dodge (with whom were *Mr. J. H. Baldwin*, *Mr. D. B. Kurtz* and *Mr. John S. Watson* on the brief) for appellees.

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the person assessed or taxed, the name may be changed, and the tax collected, from the person intended, if he be taxable and can be identified by the assessor or treasurer; and when the treasurer, after the tax list is committed to him, shall ascertain that any land or other property is omitted, he shall report the fact to the county clerk, who upon being satisfied thereof, shall enter the same upon his assessment roll, and assess the value, and the treasurer shall enter it upon the tax list, and collect the tax as in other cases."

Delinquency, penalty for non-payment and lien of taxes are provided for by sections 53 to 56, section 56 reading: "Taxes upon real property are hereby made a perpetual lien thereupon against all persons and bodies corporate except the United States and the Territory, and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title."

Sections 57 to 59 treat of collection of taxes by distress and sale of personal property, and sections 60 to 69 of the sale of real property for taxes and the form of certificate of sale.

Section 62 reads:

"That on the first Monday of October in each year, between the hours of nine o'clock, A.M., and four o'clock P.M., the treasurer is directed to offer at public sale at the court house, or place of holding courts in his county, or at the treasurer's office, where, by law, the taxes are made payable, all lands, town lots or other real property, which shall be liable for taxes of any description for the preceding year or years, and which shall remain due and unpaid, and he may adjourn the sale from day to day until all the lands, lots or other real property have been offered, and no taxable property shall be exempt from levy or sale for taxes."

Section 67 is as follows:

"The purchaser of any tract of land sold by the county treasurer for taxes will be entitled to a certificate in writing describing the land so purchased, the sum paid and the time when the purchaser will be entitled to a deed, which certificate shall be assignable, and said assignment must be acknowledged before some officer having power to take acknowledgment of deeds. Such certificate shall be signed by the treasurer in his official capacity, and shall be presumptive evidence of the regularity of all prior proceedings. The purchaser acquires the lien of the tax on the land, and if he subsequently pay any taxes levied on the same, whether levied for any year or years previous or subsequent to such sale, he shall have the same lien for them, and may add them to the amount paid by him in the purchase, and the treasurer shall make out a tax receipt and duplicate for the taxes on the real estate mentioned in such certificate, the same as in other cases, and shall write thereon, 'sold for tax at public sale.'"

I. The lands sold by the defendant's treasurer to the respondent Wallace had not become part of the taxable prop-

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Then follows the form of certificate.

Section 69 concludes with the provision: "And the treasurer is further authorized and required to sell as aforesaid all real estate in his county on which taxes remain unpaid and delinquent for any previous year or years."

Section 70 provides for a redemption of lands sold for taxes upon the payment of "the sum mentioned in this certificate, and interest thereon at the rate of thirty (30) per cent per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale, and interest thereon at the same rate from the date of such payment."

Section 73 is as follows:

"If no person shall redeem such lands within two years, at any time after the expiration thereof, and on production of the certificate of purchase, the treasurer of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the Territory, a deed of the land remaining unredeemed, which shall vest in the grantee an absolute estate in fee simple, in such land, subject, however, to all the claims which the Territory may have thereon for taxes or other liens or incumbrances."

Section 78 reads thus:

"When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer."

Section 83 requires the county treasurer to pay over to the Territorial treasurer, on or before the first Monday of November, and at all other times on demand, all territorial funds collected by him, and prescribes his fees for such collection and receipt.

Section 84 reads:

"If the county treasurer shall wilfully and negligently fail to settle with the Territorial treasurer at the time and in the manner above prescribed by law, he shall forfeit to the use of the Territory the sum of five hundred dollars, which sum may be recovered of him, or his sureties, on suit brought by the Territorial treasurer in any court in this Territory having jurisdiction; or in case of failure of the Territorial treasurer to bring such suit, then any citizen of the Territory may bring the same."

Section 85 provides for the procuring by the territorial auditor of a list from the proper land office of all lands becoming taxable for the first time, in each county, and the forwarding of the list to the clerk of such county.

Sections 89, 95 and 96 are as follows:

"§ 89. In the case of dereliction of duty on the part of any officer or person required by law to perform any duty under the provisions of this

erty, within the Territory of Dakota at or prior to the date of such sale. Neither the Territory nor its officers could there-

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act in any county in this Territory, such person shall thereby forfeit all pay and allowance that would otherwise be due him, and the county commissioners in any such county, on receiving satisfactory evidence of such dereliction or failure to perform as required by law any duty enjoined by this act, shall refuse to pay such person or persons any sum whatever for such services."

"§ 95. If any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions for that purpose from the Territorial auditor or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties or any of them, in the District Court of his county.

"§ 96. Whenever suit shall have been commenced against any delinquent county treasurer, as aforesaid, the board of county commissioners of such county may, at their discretion, remove such treasurer from office, and appoint some suitable person to fill the vacancy thereby created, as hereinbefore provided."

Sections 94 and 95 of chapter 21 of the Political Code, (Codes, 1877, p. 56,) prescribing the duties of the county treasurer, provide:

"§ 94. He shall be the collector of taxes; shall keep his office at the county seat, and shall attend his office three days in each week. He shall be charged with the amount of all tax lists in his hands for collection, and credited with the amounts collected thereon, and the delinquent list, and shall keep a fair and accurate current account of the moneys by him received, showing the amount thereof, the time when, from whom, and on what account received, in cash, warrants, county or road orders; and if in warrants or orders, their kind, number or other designation, amounts for which they were drawn, interest due thereon and the amounts of the receipts thereon endorsed, if any; also of all disbursements by him made, showing the time when, to whom, on what account and the amount paid; and he shall so arrange his books that the amounts received and paid on account of each separate and distinct fund or appropriation, shall be exhibited in separate and distinct columns, or accounts, and so as to show whether the same was received or paid in cash, or warrants or orders, and if either of the latter, their designation and other particulars as above required; and the county treasurer shall at all times exhibit such accounts, when desired, to the Territorial, county or school officers, entitled to receive the same, and shall at any time pay over the balance in his hands to them, upon receiving proper vouchers.

"§ 95. The books, accounts and vouchers of the county treasurer, and all moneys, warrants or orders, remaining in the treasury, shall at all times be subject to the inspection and examination of the board of county com-

fore lawfully assume jurisdiction to tax or sell the same; and it must be conceded that the money received by the county

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missioners, and at the regular meetings of the board in January and July of each year, and at such other times as they may direct, he shall settle with them his accounts as treasurer, and for that purpose shall exhibit to them all his books, accounts and moneys, and all vouchers relating to the same, to be audited and allowed, which vouchers shall be retained by them for evidence of his settlement; and, if found correct, the account shall be so certified; if not, he shall be liable on his bond."

Section 84 of chapter 132 of the laws of North Dakota, enacted in 1890, (Laws North Dakota, 1890, 376, 408,) is as follows:

"When a sale of land as provided in this act is declared void by judgment of court, the judgment declaring it void shall state for what reason such sale is declared void. In all cases where any such sale has been or hereafter shall be so declared void, or any certificate or deed issued under such sale shall be set aside or cancelled for any reason, or in case of mistake, or wrongful act of the treasurer or auditor, land has been sold upon which no tax was due at the time, the money paid by the purchaser at the sale, or by the assignee of the State upon taking the assignment, and all subsequent taxes, penalties and costs paid by such purchaser or assignee, shall, with interest at the rate of ten per cent per annum from the date of such payment, be returned to the purchaser or assignee, or the party holding his right, out of the county treasury, on the order of the county auditor, and so much of said money as has been paid into the State treasury shall be charged to the State by the county auditor and deducted from the next money due the State on account of taxes. The county treasurer or auditor shall be liable on their bond for any loss occasioned by any such wrongful act. Whenever any sale of land, or certificate or deed, made or given under this act is declared void by judgment of court, unless the judgment declared the tax to be illegal, said tax and subsequent taxes, returned to the purchaser or assignee as provided in this section, shall remain a lien upon the land sold, and the county auditor shall advertise the same at the next succeeding annual sale, for the full amount of taxes, penalties and costs due on said piece or parcel of land."

The following are sections of chapter 69 of the Dakota General Laws of 1862 (Laws, 1862, p. 419):

"Sect. 36. On the first day of February, the unpaid taxes for the preceding year shall draw interest as hereinafter provided; and taxes upon real property are hereby made a perpetual lien thereon against all persons; and taxes due from any person on personal property shall be a lien on any real property owned by such person." "Sect. 39. On the first Monday in October, 1864, and in each year thereafter, the county treasurer is required to offer at public sale at the court house, or if there is no court house, at the office of the county treasurer, all lands on which taxes of any description for the preceding year or years shall have been delinquent and remain

treasurer for these lands, was received without authority of law; for the territorial statute, section 62, chapter 28, from which alone the treasurer derived any authority to sell lands for taxes, only authorized him to sell "lands, town lots or other real property, which shall be liable for taxes." The statute did not and could not lawfully authorize him to sell lands which were not liable for taxes, and which consequently could not be taxed, but which belonged to the public domain of the United States.

The acts of the treasurer in selling the lands to the respondents were wrongful, because committed without authority of law, in violation of express enactments, defining and restricting the treasurer's authority and resulting in civil injury, not only to the owner of the lands unlawfully sold, but to the purchaser thereof wrongfully deprived of his money without consideration. The statute, section 73 of chapter 28, guaranteed to the respondents that if these lands were not redeemed within two years they should, upon production of their certificates of purchase, receive deeds conveying to them in the name of the Territory, all of the lands remaining unredeemed, which deeds should vest in them an absolute estate in fee simple.

The breach of this guaranty did not arise through any defect in the tax proceedings, which the purchasers might have discovered upon an inspection of the record of such proceedings and which would bring them within the rule of *caveat emptor*, but by reason of the fact that the entire proceedings from their inception were absolutely void and without authority of law. The question in controversy, therefore, is not one of irregularity in the assessment of the taxes levied or of the sale by the county treasurer, but is one of entire

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due, and such sale shall be made for and in payment of the total amount of taxes, interest and cost, due and unpaid on such real property." "Sect. 54. Immediately after the expiration of the term of three years from the date of the sale of any land for taxes under the provisions of this act, the treasurer then in office shall make out a deed for each lot of land sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase."

absence of power or authority in the taxing officers to assess and the treasurer to collect or make sale of the lands for their payment.

The rule of *caveat emptor* as applied to tax sales purchases has never, to our knowledge, been held to apply to a case where there was no charge or tax due. In such case nothing passes by it to the purchaser. No right to receive or retain the money exists in the officer making the sale, and in such cases the courts have uniformly held that the purchaser, who thus paid his money and got nothing for it, should have the same returned to him. And so whenever the question has been raised, the courts have not hesitated to protect bidders at public sales, when there existed, from any cause, an entire absence of power to make the sale, refusing to enforce the payment of the bid or ordering restitution thereof. And in such a case it matters not that the officer making the sale mistakenly supposed he had full power to do so. *Todd* v. *Dowd*, 1 Met. (Ky.) 281; *Washington* v. *McCaughan*, 34 Mississippi, 304; *Riddle* v. *Hill*, 51 Alabama, 224; *Boykin* v. *Cook*, 61 Alabama, 472; *Burns* v. *Ledbetter*, 56 Texas, 282; *Laughman* v. *Thompson*, 6 Sm. & Marsh. 259; *Bartee* v. *Tompkins*, 4 Sneed, 623; *Norton* v. *Supervisors*, 13 Wisconsin, 611; *Chapman* v. *City of Brooklyn*, 40 N. Y. 372; *Commonwealth Bank* v. *Mayor of New York*, 43 N. Y. 184; *Newman* v. *Supervisors*, 45 N. Y. 676; *Schwinger* v. *Hikok*, 53 N. Y. 280; *Preston* v. *Boston*, 12 Pick. 7; *Corbin* v. *Davenport*, 9 Iowa, 239; *Phillips* v. *City of Hudson*, 31 N. J. Law (2 Vroom) 143; *Dodd* v. *Neilson*, 90 N. Y. 243; *Commissioners* v. *Young*, 18 Kansas, 440; *Clapp* v. *Pine Grove Township*, 138 Penn. St. 35.

Applying the same rule it has been repeatedly held that taxes illegally imposed and collected may be recovered back. *Slack* v. *Norwich*, 32 Vermont, 818; *Dorr* v. *Boston*, 6 Gray, 131; *Gillette* v. *Hartford*, 31 Connecticut, 351.

The rule that a purchaser cannot recover the money paid by him at a void tax sale, is based upon the principle that he is a volunteer in the payment of charges levied on lands subject to taxation, and has been applied only in cases where

jurisdiction existed and where the title of the purchaser failed by reason of non compliance with the statute causing irregularities in the assessment levy or sale as appeared by the records which were held to be constructive notice to the purchaser of such irregularities, and to this class of cases only has the rule of *caveat emptor* been applied. *Sullivan* v. *Davis*, 29 Kansas, 28; *Lynde* v. *Inhabitants of Melrose*, 10 Allen, 49; *Rice* v. *Auditor General*, 30 Michigan, 12; *Logansport* v. *Humphrey*, 84 Indiana, 467.

Assuming that the assessor had no jurisdiction of the subject matter, the treasurer was not protected by his warrant in the sale of the lands in question, and his acts were wrongful under the numerous decisions of this court pertinent to the subject.

When a court or other officer acts without jurisdiction of the subject matter, all is void and such acts are regarded in law as nullities, constituting no justification, but all persons concerned in executing such judgments or any process predicated thereon are trespassers and liable to an action thereon. *Griffith* v. *Frazier*, 8 Cranch, 9; *Dynes* v. *Hoover*, 20 How. 65; *Erskine* v. *Hohnbach*, 14 Wall. 613; *Hayes* v. *Pacific Mail Steamship Co.*, 17 How. 596.

The statute, section 78, chapter 28, political code (section 1629, Compiled Laws of Dakota) is cumulative and not exclusive. It is merely declarative of the common law rule "that an action lies for money paid by mistake or upon a consideration which happens to fail, or for money got through imposition." *Moses* v. *Macferlan*, 2 Burrow, 1005; *Louisiana* v. *Wood*, 102 U. S. 294.

The States of Iowa, Nebraska, Kansas and Wisconsin had previously enacted similar statutes to the one above quoted, and while no two of them were couched in exactly the same language, they were prompted by a common object, designed to subserve a common purpose and in each instance, when construed by the highest courts of those States so as to give effect to the object designed by the legislature, they have received a common construction.

The statute in question (section 78 of chapter 28) had its

origin in the statutes of Iowa and exists there to-day in the same form as originally enacted. It was taken by Nebraska from Iowa and by Dakota from Nebraska. It is true that in the latter State the statute was, prior to the decisions by the Supreme Court of that State, (*Coulter* v. *Mahaska Co.*, 17 Iowa, 92; *Scott* v. *Chickasaw Co.*, 46 Iowa, 253; *Morris* v. *County of Sioux*, 42 Iowa, 416,) amended so as to read "When by mistake of the treasurer *or other officer* lands are sold" etc.; but those decisions clearly show that no significance was given to the words contained in the amendment by the Supreme Court of Nebraska. The Supreme Court of Dakota, therefore, in the construction of this statute followed the familiar rule adopted by this court in numerous cases, by adopting the construction of the courts of those States by whose legislatures the statute was originally adopted. The statute having been taken from Iowa and Nebraska, the legislature in adopting it, adopted the construction put upon it by the courts of those States, which construction became part of the law itself. *McDonald* v. *Hovey*, 110 U. S. 619; *Metropolitan Railroad Co.* v. *Moore*, 121 U. S. 558.

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

Appellees recovered judgment for the amounts paid and thirty per cent per annum interest thereon. Interest at this rate was that which purchasers at tax sales received upon redemption, and section 78 of chapter 28 of the Political Code of the Territory of Dakota provided that the purchaser, who came within its terms, should be saved harmless, by being paid the principal and interest to which he would have been entitled if the land had been rightfully sold. Unless the recovery was justified under the statute, this judgment must be reversed.

Stutsman County is one of the counties of North Dakota, which was admitted into the Union after this cause was docketed in this court. In *Tyler* v. *Cass County*, 48 N. W. Rep. 232, not yet published in the official reports, where the state of facts was substantially such as is disclosed by this record, the Supreme Court of the State decided that no recov-

ery could be had by the purchaser at a tax sale whose title failed, either at common law or under the section in question, which in 1885 had been amended in a point not material here, and became § 1629 of the Compiled Laws of Dakota of 1887.

It is well settled that upon the construction of the constitution and laws of a State this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution or of a Federal statute or a rule of general commercial law. *Norton* v. *Shelby County*, 118 U. S. 425, 439; *Gormley* v. *Clark*, 134 U. S. 338, 348.

Our mandate in this case must be issued to the state Supreme Court, which will in its turn direct the state court succeeding to the District Court of the Territory to proceed in conformity to our judgment. 25 Stat. 683.

The parties are citizens of North Dakota. The litigation proceeded upon the recognition and allowance of the exemption of the lands from taxation under the laws of the United States, and no Federal questions were involved. *Tyler* v. *Cass County*, *ante*, 288. The case belongs to the class upon which the local decisions are ordinarily given controlling effect, and the adjudication of the highest tribunal of the State in the case cited should be considered in the light of this rule, though the appeal is from the Supreme Court of the Territory, which reached the opposite conclusion.

The Supreme Court of the State held that lands which were part of the original grant to the Northern Pacific Railroad Company and had been surveyed at the expense of the United States and earned by the company after the passage of the act of Congress of July 15, 1870, but no part of the survey fees had been repaid to the United States, although they had been disposed of by the company and conveyed to third parties, who were in possession, were not in fact taxable; yet that, since land was a subject of taxation in Dakota Territory, *prima facie* they were taxable; that the assessor being a judicial official, where property is exempt from taxation by class and not by specific description, has full jurisdiction, and it is

his duty to decide in each instance whether or not a particular piece of property falls within any of the exempted classes, and in this respect the source of the law that establishes the exemption is immaterial; that an erroneous decision of an assessor in the matter of exemptions does not deprive the tax proceedings of jurisdiction, but until such erroneous decision is modified or set aside by the proper tribunal all officers with subsequent functions may safely act thereon; that the rule of *caveat emptor* applied to the plaintiff; and that there was no right of recovery at common law. It was further held that under the law in force when the tax sale in question in the case was made, the treasurer, in the matter of the collection of the taxes, was purely a ministerial officer, and when he received the duplicate tax list with the warrant of the county commissioners attached, if such process was fair on its face and contained nothing that would apprise the treasurer of any defects or infirmities, and it did not appear that the treasurer had any knowledge of any defect or infirmities, such treasurer was fully protected from personal liability in collecting the taxes upon all property contained in his list, so long as he acted strictly within the statute; that the law furnished his authority for selling the property for delinquent taxes; that the warrant with the tax list attached gave him the subjects upon which to exercise such authority; that the statute which required the treasurer to "sell all lands liable for taxes of any description for the preceding year or years," meant all lands liable to taxation as shown by the process in his hands, and he could not refuse to sell lands on his list nor could he sell lands not on his list; that the sale of the lands in that case was neither the mistake nor the wrongful act of the treasurer within the meaning of section 1629, Compiled Statutes; and that the plaintiff had no right of action under that section. And further, that section 84 of chapter 132 of the laws of North Dakota for 1890 had no application to a sale of lands made before the enactment of said chapter.

Section 1629 of the Compiled Laws is identical with section 78, chapter 28, of the Dakota Political Code, except that in lieu of the words, "the amount of principal and interest to

which he would have been entitled had the land been rightfully sold," the words, "the amount of principal and interest at the rate of twelve per cent per annum from the date of sale," have been substituted. Compiled Laws, 1887, p. 362.

Section 78 is as follows: "When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer."

The county is thus made liable in the first instance, "when by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time," while a personal liability to the purchaser is directly imposed upon the treasurer, who with his sureties is also made liable for the amount to the county on his bond. This statutory provision is not the same as that of the act of North Dakota of 1890, and many similar State statutes, making counties generally liable to the purchaser at tax sales, when the sales are declared void. Nor is it the same as had previously existed. The law for the organization of the Territory of Dakota was passed March 2, 1861, and on the 15th of May, 1862, an act of its first legislative assembly was approved, which formed chapter 69 of its laws, entitled, "Revenue." (Laws Dakota, 1862, vol. 1, p. 419.)

Section 58 read thus: "When, by mistake or unlawful act of the treasurer, land has been sold on which no tax was due at the time, or whenever land is sold unlawfully in consequence of any other mistake or irregularity rendering the sale void, the county shall hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer and his sureties will be liable to the county for the amount of his official bond: *Provided*, That the treasurer or his sureties shall be liable only for his own or his deputy's acts."

The treasurer was the collector of taxes and directed to sell,

but he was not made liable if the sale were unlawful through mistakes or irregularities chargeable to others, but only for his own acts. When in section 78 of c. 28 of the Code of 1877, the words, "or whenever land is sold unlawfully, in consequence of any other mistake or irregularity rendering the sale void," were dropped out, the proviso was also exscinded as no longer necessary.

Under it as recast the county is not ultimately to respond. The liability falls upon the treasurer in either event, but does not arise save where the treasurer is himself in fault in selling the land. The wrong arising from selling land for taxes on which no tax is due, is not necessarily the result of the mistake or wrongful act of the treasurer; and upon the facts in this record, if he were protected by his warrant and acted strictly within the statute, he could not be held nor, of course, could the county, under that section.

We agree with the learned State Supreme Court that the treasurer acted in the sale as a ministerial officer, and that while the law furnished authority for selling property for delinqent taxes, the warrant furnished the subjects upon which to exercise the authority.

In *Erskine* v. *Hohnbach*, 14 Wall. 613, 616, Mr. Justice Field, speaking for the court, said: "Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possess jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have

been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

Things may be void as to all persons and for all purposes, or as to some persons and for some purposes, and although the assessor may have been without jurisdiction over the particular property, yet as he had general jurisdiction to list property for taxation, and there is no pretence that there was anything on the face of the warrant to apprise the treasurer of the lack of jurisdiction, he cannot be held, in executing the warrant, as guilty of a wrongful act within the intent and meaning of this statute.

The 40th section of chapter 28 shows that the warrant required the treasurer to collect the taxes therein levied according to law, and that the duplicate tax list with the warrant of the county commissioners attached was full and sufficient authority for the collection by the treasurer of all taxes therein contained. It was his duty to proceed, and he cannot be held to have been bound by the extrinsic fact that the costs of survey had not been paid, and that, therefore, these particular lands were not taxable.

We think the conclusion inadmissible that the legislature intended that the treasurer should be held responsible for the mistakes or wrongful acts of other officers, when acting in strict compliance with the exigency of the process committed to him.

It has been ruled that where an officer knows of facts *aliunde* his process, which render the proceedings void, he is not protected; but that question does not arise here, as no such knowledge on the part of the treasurer is found; nor is there any basis for the contention that the treasurer made any mistake of fact in the premises.

It was earnestly argued that, inasmuch as by section 62 the treasurer is directed to sell all lands "which shall be liable for taxes," there is just as much a question of law or fact presented for his decision as is presented to a sheriff when he is directed to sell the property of a defendant on execution, or required to determine the exemption of property from execution; but this ignores the fact that the warrant commanded him to col-

lect the taxes from the specific property against which they were levied, and that he had no discretion to use, no judgment to exercise, and no duty to perform except to sell the particular property for delinquency. *Buck* v. *Colbath*, 3 Wall. 334, 343.

Comparing sections 36, 39, and 54 of chap. 69 of the Laws of 1862 with sections 56, 62, and 73 of chap. 28 of the Code of 1877, (these will be found in the margin, *ante*, 298, 299,) it is contended that the legislature, in changing the language requiring the county treasurer to sell "all lands on which taxes of any description for the preceding year or years shall have been delinquent and remain due," so as to read: "all lands, town lots or other real property, which shall be liable for taxes of any description for the preceding year or years, and which shall remain due and unpaid," and adding the words: "And no taxable property shall be exempt from levy and sale for taxes," must be assumed to have intended to impose upon the treasurer the duty of determining in each instance whether or not the property was taxable, and that this view is confirmed by the amplification of the clause requiring the treasurer to execute a deed to the purchaser. We do not think so. If, as the state Supreme Court remarks, the treasurer must disregard his warrant and sell no property not liable for taxes, even though the same appeared on his list, it would be equally true that he must sell all lands that were liable for taxes, although the same did not appear on his list.

Under section 37 of chap. 28 of the Code of 1877, as under section 1593 of the Compiled Laws, the clerk was directed to prepare a list which should contain all the taxable lands in the county with the names of the persons or parties in whose name each subdivision was listed, and also a duplicate of the tax list when completed, and, retaining one, to deliver the other to the treasurer, and to these lists the warrants are attached. The clerk makes the list from the assessment roll after the taxes are levied, and can no more change it than the treasurer can; and the order is to sell lands shown to be liable by being upon the list.

By section 56 it was provided that taxes due from any

person upon personal property should be a lien upon any real property owned by such person or to which he may acquire a title; and hence the argument that the amendment of section 39 of chap. 69 of the Laws of 1862 by section 62 of chap. 28 of the Code of 1877, was objectless except upon the basis of appellee's contention, is completely answered by the Supreme Court in pointing out that in order to give effect to the provision relative to the lien on realty of taxes on personalty, it was necessary to direct all lands to be sold that were "liable for taxes of any description."

The language of section 73 of chapter 28 of the Code of 1877, that a tax deed shall run "in the name of the Territory," and "shall vest in the grantee an absolute title in fee simple, in such land," whatever weight may be attached to it in a different connection, contributes nothing to sustain the position that where such title fails, recovery can be justified under section 78.

It is said that section 78 had its origin in a statute of Iowa, was thence taken into the statutes of Nebraska and by the Territory of Dakota from Nebraska, and several decisions of the highest courts of Iowa and Nebraska are referred to as giving the provision a construction differing from that of which we approve. We do not find that any decision of that tenor had been announced prior to the adoption of the provision by the legislature of Dakota, and the rule that the known and settled construction of a statute of one State will be regarded as accompanying its adoption by another, is inapplicable. And the terms of the statutes of Iowa and Nebraska considered in the cases cited, were so different from that involved here, as to deprive the decisions of the weight which might justly be ascribed to them if they had argued and disposed of the precise question before us.

The judgment is reversed and the cause remanded to the Supreme Court of the State of North Dakota for further proceedings in conformity to law.

SUNFLOWER OIL COMPANY *v.* WILSON.

SAME *v.* SAME.

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

Nos. 122, 123. Argued and submitted December 15, 1891. — Decided January 4, 1892.

An oil company contracted with a railway company to purchase certain rolling stock and lease the same to the railway company at an agreed rental, the latter agreeing to purchase the same on or before a given day and pay for it in cash, or if it should be unable to do so to turn it over to the oil company, at the expiration of the contract, in good order and condition. It was further agreed that freights earned by the railway by transportation for the oil company might be applied to the payment of the rental and of the purchase money. The railway company was insolvent and, before the expiration of the contract, its mortgage bondholders had proceedings instituted in equity for the foreclosure of their mortgage, in which W. was appointed receiver. The receiver continued to use the rolling stock. The oil company intervened, claiming to recover from the receiver the balance of the purchase money, and to secure the carrying out of the contract by the receiver, and the retention by it of the amount of freights due from it, and their application to the payments of the rent and the purchase money. The receiver answered, declining to complete the contract, and averring that the rental had been paid in full and that there was a balance due him for freight. He also filed a cross-petition to recover the surplus. *Held*,

(1) That the contract provided that if the railway company became unable to pay its current debts in the ordinary course of business, it should be released from its obligation on returning the property;

(2) That the receiver had the right to return the property, upon complying with the terms of the contract in respect thereto;

(3) That, notwithstanding the absence of a provision in the contract forfeiting payments already made, in case of failure to complete the purchase, it was open to doubt whether an action at common law would lie to recover such payments;

(4) That the dismissal of the intervening petition did not necessarily involve the dismissal of the cross-petition, and that the court might do full justice between the parties;

(5) That the receiver was as much entitled to recover the money due upon the contract made with the railway company as with himself;

Statement of the Case.

(6) That as between the railway company and the receiver, the latter was entitled to the money, subject to any valid set-off of the oil company.

THE court stated the case as follows:

This was an intervening petition by the Sunflower Oil Company to enforce the specific performance of a contract by the railway company to purchase certain engines and cars until a balance of $6732.15 claimed to be due should have been paid and discharged; and a cross-petition by the receiver to recover freights earned, in the sum of $10,258.86, in excess of the rental of such engines and cars.

The case arises upon the following facts: In 1877 the Mobile and Northwestern Railway Company, for the purpose of raising money to build its road, executed a trust deed upon all its property in the amount of $250,000, to secure a series of bonds in that amount, to be negotiated. The railway company made early default in the payment of its interest upon these bonds, but, notwithstanding its default, the bondholders suffered the property to remain in its hands, and under the uninterrupted control and management of the company, until November 15, 1886, when the original bill in this case was filed. During the continuance of such default, and in January, 1883, the president of the railway company contracted with the Baldwin Locomotive Works for two locomotives at a cost of $7600 each, to be completed in the autumn of that year. Just preceding their completion, the only locomotive the railway then had became permanently disabled, and though the new locomotives ordered were nearing completion, the company had no money, nor means of raising money, to pay for them. In this strait, the bondholders being unwilling to extend their assistance, application was made to the Sunflower Oil Company, appellant, for the means necessary to purchase the rolling stock, and avert a total suspension of the company's business. Under these circumstances a contract was executed, October 6, 1883, between the oil company and the railway company to the following effect: The oil company agreed to purchase from the Baldwin Locomotive Works two

locomotives and tenders complete, named, respectively, La Flour and Yazoo, at the price of $7600 each, and to invest the further sum of $2400 in box and flat cars, and to lease the same to the railroad to January 1, 1886, for $1408 per annum, payable in monthly instalments. This was exactly 8 per cent upon the amount invested. The La Flour and the cars were to be paid for by the oil company in cash, and were at once to be and to continue its property until purchased by the railway company in the manner hereinafter provided. The Yazoo was to be purchased upon the obligation of the railway company, payable in six months from date, guaranteed by the mercantile firm of Fargason & Co. of Memphis, which guaranty the oil company agreed to procure; and until payment the title to the Yazoo was to remain in the Baldwin Locomotive Works. Should the railway company pay the obligation at maturity, the title to the engine was to vest in it, but should the same be paid by Fargason & Co. the title was to be and remain in the Sunflower Oil Company until the railway company should acquire title to it and the other property in the manner hereinafter set forth. Should the railway company promptly meet its obligation to the locomotive works for the Yazoo, then the rents payable to the oil company were to be reduced to $800 per annum, payable monthly. The railway company agreed to take all proper care of the rolling stock, and turn the same over in good order to the oil company at the end of the contract, "should said railroad company be then unable to purchase the same, at the price hereinafter mentioned," and agreed to use the same upon its line of road, and to turn the same over at the demand of the oil company, should it at any time violate its agreement.

The railway company further agreed that it would, on or before January 1, 1886, purchase all said property from the oil company, and pay for it in cash at the cost price, and should also have the right at any time before that date to purchase the whole by paying the cash price thereof, in which event the contract for rent should immediately cease and determine, but the other terms of the contract were to remain unimpaired. The railway company further agreed that it

would erect houses at several of its depots for the purpose of receiving cotton seed in bulk for the oil company, and would provide scales for weighing seed, and would haul seed in bulk from various points along the line of its road for the oil company; that the agents of the railway company would weigh the cotton seed and purchase the same, if desired, free of cost for any such services; that it would haul all sacks for the oil company free of charge; that it would receive and haul all freights for the oil company at the Mississippi River, opposite Helena, free of charge for storage or commission; and that the freight paid should be at reasonable rates to be fixed at various times by the presidents of the two companies, but the freight on seed in bulk was not to exceed $1.75 per ton, and that on seed in sacks was not to exceed $2.00 per ton. It was further agreed that the railway company would not haul cotton seed in bulk for any other corporation or person, nor permit its agents to purchase or pay for cotton seed for any other corporation or person, and that it would give all needed facilities and preferences to the oil company to enable it to control all the cotton seed along the line of its road, "as it now is, or as it may be while this contract is in force." All freights earned were to be credited on the rental of the property, and should there remain a surplus after paying the rent, it was to remain in the hands of the oil company and go as a credit upon the purchase-money of said property; interest was to be allowed said railway company on said surplus at the rate of 8 per cent per annum. The railway company was to furnish a monthly statement of freights at the end of each month, while the contract continued, to be credited in the manner above stated. The contract was to continue in force until January 1, 1886; and on this day, January 1, 1886, a further contract was made extending the time for one year from that date, for the purchase by the railway company of such engines and cars.

In November, 1886, Moses H. Katzenberger and others, holders of a majority of the bonds, filed a bill in the District Court of the United States for the Northern District of Mississippi to enforce a sale of the property and franchises covered by the trust deed, and praying for a receiver pending the pro-

ceedings. Subsequently the bill was amended, and on December 16, 1886, Benjamin Wilson, the defendant and appellee in this case, was appointed receiver of the company. Having duly qualified the receiver took charge of the road and began to operate the same under the orders of the court, using the rolling stock under an arrangement for that purpose. The same day the receiver was appointed an order was made that the receiver continue any existing contract for the purchase or use of the rolling stock then used on said road until, for sufficient cause shown, such contract should be annulled. A subsequent order permitted him to "make any change in the contract heretofore existing" in relation to the rolling stock.

On February 14, 1887, the Sunflower Oil Company, appellant, which was not a party to the original bill, interposed by petition, setting up its contract with the railway company, alleging a balance due it of $6732.15 on the purchase of said engines and cars, and praying that the receiver be required to carry out the terms of said contract, by continuing to carry freights for the appellant, and by allowing it to retain all moneys due or to become due the receiver for such services, as credits on such rental and purchase-money accounts, until the full indebtedness of the railway company was discharged. The receiver answered, denying that the railway company had ever made any binding contract to purchase such rolling stock, and that the contract was a contract of rental with a mere option to buy; that appellant had retained of the freights earned by said railway, the sum of $10,258.86, in excess of the agreed rental of the property, and for the recovery of the same, filed his answer in the nature of a cross-petition. The court was of the opinion that the relation between the parties was one of lessor and lessee, and decreed that the oil company pay to the receiver the amount above named, being the excess of the earnings of the road in the hands of the oil company over the amounts due for rents. From that decree the first appeal was taken. At the same time an account was taken of the amount due the receiver for the surplus of freights earned by the railroad while in his hands, over the rents due the oil company during the same period, which

resulted in a further decree against the oil company, in favor of the receiver, for $3729.82. From that decree the second appeal was taken to this court.

Mr. John W. Cutrer and *Mr. William D. Cutrer* for appellant.

The receiver, appointed at the suit of the bondholders, after the death of the trustee, and acting for their benefit, did not have conferred on him any power to sue for, nor to recover, property and assets *not covered by the terms of the trust deed;* and earnings of a railroad company, though named in the trust deed, are not covered by it, and do not accrue for the benefit of the creditors secured thereby, while the railroad property remains in the possession of the mortgagor. *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494.

Although the power to sue for this class of railroad property or assets may have been sought to be conferred on the receiver by the order making the appointment, we contend that the effort was vain, and that the receiver did not acquire thereby a legal right to sue, nor any authority to recover. The earnings of a railway company sufficient to provide for the operation of its road and the surplus belong to the company, subject to its sole control; *Gilman* v. *Ill. & Miss. Tel. Co.*, 91 U. S. 603; and those who receive any part of such earnings before the appointment of a receiver, are not bound to account for them, to any mortgage bondholder, nor to any person suing for him, or in his behalf. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459.

The decisions upon contracts of this character are numerous in England and America. Many recent cases hold that where it is apparent that the contract, though nominally a *hiring*, is, in reality, a conditional sale, the courts will so regard it, looking to the substance rather than the form. Benjamin on Sales, §§ 393, 425–433; *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664. The intention of the parties, and the practical construction placed by them upon their contracts, prevail in every instance over the mere language of the instrument. *Donahoe*

v. *Kettrell*, 1 Clifford, 141; *Irwin* v. *United States*, 16 How. 523; *United States* v. *Gibbons*, 109 U. S. 200; *Mobile &c. Ry. Co.* v. *Jurey*, 111 U. S. 592; *Harkness* v. *Russell*, 118 U. S. 663; *Topliff* v. *Topliff*, 122 U. S. 122; *District of Columbia* v. *Gallagher*, 124 U. S. 505.

This being true, the contract stands before the court, as stated, as, in effect, a *conditional sale*, with a right of rescission on the part of the *vendor*, in case the purchaser shall fail in payment of the purchase money. The vendor, however, has never sought rescission, but by its suit insists that the purchaser shall comply with and complete its obligation to purchase, by the continued making of payments which it is entirely able to make and to meet.

There is a manifest distinction, well stated by the authorities, between a hiring or lease, with the *privilege* or *option* to the lessee to purchase, and possession, as in the present instance, under a contract of *conditional sale, or unconditional undertaking to purchase.* The language of the contract is plain and unaccompanied by any limitation of the obligation or liability assumed. "The said railroad company further *agrees that it will, on or before the said 1st day of January*, 1886, *purchase all of said property from said oil company, and pay for it in cash the cost price thereof.*" This clause immediately succeeds the clause from which counsel have evolved their conception of the option contended for, as though it were, thereby, purposely intended to exclude from the contract and wholly preclude any such doubt or hypothesis as that they assert.

Proceeding upon the hypothesis that the contract cannot be construed as an option, without force as against the railway company, but is, instead, an obligation enforcible on the demand of the oil company, we submit that the means adopted by the parties to effect the discharge of such obligation, is exactly in the line of what the law itself would have provided if no contract had been made. The railway company had ample authority to pledge its earnings, and to execute a contract, hypothecating a particular portion of them for the discharge of appellant's claim. Mississippi Rev. Code (1880) c.

38, § 1033; Jones on Railway Securities, §§ 114–120; *Teal* v. *Walker*, 111 U. S. 242; *Sage* v. *Memphis & Little Rock Railway Co.*, 125 U. S. 361; *Freedman's Savings Co.* v. *Shepherd*, 127 U. S. 501. The pledge was intended to cover only enough to meet the actual cash cost price of the rolling stock. And when the receiver was appointed he took the road, its property, including under the express order of the court this rolling stock and its income, subject to that pledge, and he was bound to respect it.

As to the cross-petition, there are no authorities which will warrant retaining it for the rendition of a personal money judgment, or that will sustain such a judgment when rendered, where the court, on final hearing on the merits, dismisses the original bill, refusing to grant any relief upon it. The rule in Mississippi is the same as that established by this court; and there can be no exception in principle or practice, engrafted on it, that can be made to embrace and save the judgment in this cause. *Cross* v. *Valle*, 1 Wall. 1; *Dows* v. *Chicago*, 11 Wall. 108; *Gilmer* v. *Felhour*, 45 Mississippi, 627; *Jacks* v. *Bridewell*, 51 Mississippi, 881; *Belcher* v. *Wilkerson*, 54 Mississippi, 677; *Wright* v. *Frank*, 61 Mississippi, 32.

Mr. Holmes Cummins and *Mr. Edward Mayes*, for appellee submitted on their brief.

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

(1) This case turns upon the construction of the contract of October 6, 1883, between the Sunflower Oil Company and the Mobile and Northwestern Railway Company, the substantial provisions of which were that the oil company should purchase of a manufacturer certain rolling stock, which it should lease to the railway company at a rent equal to 8 per cent upon the cost price, the latter agreeing to purchase the same of the oil company on or before January 1, 1886, and pay for it in cash, with a proviso that, in case it should be unable to purchase the same, it should turn it over to the oil company in good order and condition, at the expiration of the contract.

Opinion of the Court.

There is no doubt of the general proposition that mere inability to pay is no defence to the performance of a contract, or to a promise to pay. A person making purchase of an article is conclusively presumed to intend to pay for it, and to have had his ability to pay in contemplation when he made the purchase; and, if this proviso had not been inserted, no doubt could have arisen regarding the proper interpretation of this contract. But here was a contingency carefully introduced into this contract, upon the happening of which the railway company was to be discharged of its obligation to the oil company by returning to it the rolling stock in good order and condition. We are bound to assume that this provision was inserted for some purpose, and are bound to give it its proper effect. At the time the contract was entered into, the railway company was financially embarrassed; its only locomotive had been crippled beyond repair; and it had neither money nor credit with which to purchase another. In this extremity it entered into negotiations with the oil company, which was itself desirous of increasing its facilities for obtaining cotton seed, and a monopoly of that article along the line of said road. But in making the advance necessary to secure the requisite amount of rolling stock, the oil company naturally sought to protect itself in every possible way against loss. This it did, (1) By retaining to itself the title and ownership of such rolling stock until the same should be fully paid for: (2) By leasing it to the road at a rental equal to 8 per cent upon the value of the property: (3) By retaining the freights due the road for carriage of cotton seed, and crediting them, first, upon the rent, and, second, upon the purchase price of the property: (4) By providing for the return of the property in good order and condition, in case the road was *unable to purchase* the same for cash by January 1, 1886, subsequently extended to January 1, 1887. The last was a proviso doubtless inserted out of abundant caution, in order to put beyond question the return of the property in case the road should fail to pay for it in full before the expiration of the contract. Under these circumstances, we find it difficult to give these words any other than their ordinary meaning, viz., that if the

railway company became so deeply involved as to be unable to pay its current debts in the ordinary course of business, it should be released from its obligation upon returning the property. In ordinary speech, a person is said to be unable to make a purchase when he has neither money nor credit sufficient for that purpose, though the entire value of his assets may be greater than the purchase price of the property. It is unnecessary to decide, however, whether the proviso in question created a mere option, or whether anything less than the total insolvency of the company constituted an inability to purchase within the meaning of the contract, since the appointment of a receiver at the suit of bondholders seems to be most conclusive evidence of inability to carry out its contracts, and, indeed, to have been the very contingency contemplated in the proviso. It is unnecessary even to decide whether this inability to purchase could be asserted at all by the railway company, since the defence in this case is set up by the receiver acting in the interest of all the creditors, and claiming that, in view of the insolvency of the company, the oppressive character of the contract and the greatly reduced price at which he could secure similar property, payment ought not to be compelled from the funds in his hands.

The receiver did not simply by virtue of his appointment become liable upon the covenants and agreements of the railway company. High on Receivers, § 273; *Hoyt* v. *Stoddard*, 2 Allen, 442. Upon taking possession of the property, he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, paying, of course, the stipulated rental for it so long as he used it. *Turner* v. *Richardson*, 7 East, 335; *Commonwealth* v. *Franklin Insurance Co.*, 115 Mass. 278; *Sparhawk* v. *Yerkes*, *ante*, 1. Of course, if he elects to take property subject to a condition, he is bound to perform the condition before he can obtain title to the property. He may, however, decline to assume this obligation, and return the property to the purchaser, upon complying with the terms of the contract with respect to such return. The case is not

unlike that of *Express Company* v. *Railroad Company*, 99 U. S. 191. In that case the express company agreed to loan the railroad company $20,000 upon its notes, to be expended in repairs and equipments. In consideration of this the railroad company agreed to provide the necessary privileges and facilities for the transaction of all the business of the express company over its road; and to charge a certain sum for transportation, which was to be credited monthly toward the payment of the loan, with a proviso that if the loan were not paid within a year, the contract should continue in force for a further period, or until the whole had been repaid. A mortgage upon the road having been foreclosed, the receiver repudiated the contract, forbade the express company from further using the cars of the railroad company, unless upon conditions whereby the contract was virtually surrendered or ignored, and the express company was compelled to abandon the road, although the money loaned, with a portion of the interest thereon, was still due and unpaid. It filed a bill for specific performance, alleging that the railroad company having conveyed away its property, and being in part insolvent, the violation of the contract could not be compensated by any damages that might be recovered at law. This court dismissed the bill, holding that, as the plaintiff had no lien, and the contract was simply for the transportation of persons and property, the court could not require either a specific performance by the receiver, or the satisfaction of the plaintiff's demand by money; and that the express company had, therefore, no standing in a court of equity.

The case of *Coe* v. *New Jersey Midland Railway*, 27 N. J. Eq., (12 C. E. Green,) 37, is also instructive in this connection. In that case, the Rhode Island Locomotive Works Company entered into an agreement with the railway company to furnish the latter certain locomotives and tenders, as upon lease, but with the agreement that, upon payment in full of the rent reserved, they should become the property of the railway. The rent was payable in instalments, for which the company gave its notes; at the time of the appointment of the receiver there was due for rent about $120,000; and the locomotives

were then in possession of the receiver and in use upon the road. Petitioners based their claim to relief upon the ground that the receiver requested them to leave the locomotives in his possession, for use on the road, he guaranteeing to keep them in good order, and promising to apply for authority to pay the claim. In defence, the receiver alleged a notice by bondholders not to pay the rent or deliver the certificates therefor, which had been issued upon his application, because the property was not worth the amount agreed to be paid, and it was not for the interest of the trust that the rent should be paid. It was held that petitioners had no equity arising from the conduct of the receiver to have the contract specifically performed, without regard to the advantage or disadvantage of the trust fund; that although they appeared to be willing up to the time they were warned not to do so, to pay for the property according to the agreement, it might have been an improvident act on their part; that the fact that the receiver had applied for leave to issue the certificates to pay the rent did not bind them; and that the court would not grant the prayer of the petitioners until satisfied that it was for the interest of the trust that it should be done; but that the petitioners would be allowed just compensation for the use of the property while held by the receiver.

(2) Notwithstanding the absence of a provision in the contract forfeiting payments already made, in case of failure to complete the purchase, it is open to doubt whether an action at common law would lie to recover such payments. The courts of Massachusetts, Maine and Illinois hold that partial payments are forfeited; while those of Connecticut, Michigan, Minnesota and Georgia hold that, upon equitable grounds, the buyer is entitled to a return of the money. There seems to be no doubt, however, that a court of equity may require the return of the money paid, less the amount of any damage sustained to the property, and a reasonable compensation for the use of the same, particularly if there be a clause in the contract providing that upon a certain contingency the property shall be returned to the seller.

(3) Under the circumstances of this case, and in view of the

fact that a court of equity takes jurisdiction of all questions with respect to this property as ancillary to its jurisdiction over the main case, the dismissal of the intervening petition does not necessarily involve a dismissal of the cross-petition, and the court, having jurisdiction of the entire proceeding, may proceed to do complete justice between the parties.

(4) In the view we have taken of this case, it is unnecessary to consider whether the manifestly illegal stipulations in this contract had the effect of vitiating the entire agreement. It bears evidence upon its face of having been extorted from the necessities of the railway company, and contains many provisions which fail to commend it to the consideration of a court of equity.

There is no practical distinction between these two appeals. By his order of appointment, the receiver was authorized to take possession of the money and assets and all other rights and property of the railway company, wherever the same might be found, including its equitable interests, things in action, and other effects; and he is as much entitled to recover moneys due upon contracts made with the railway company as with himself. No question arises with regard to the rights of other creditors, as was the case in *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798; and *Gilman* v. *Telegraph Co.*, 91 U. S. 603; and as between the railway company and the receiver the latter was entitled to the money, subject to any valid set-off of the oil company.

There was no error in the disposition of either of these two cases by the court below, and both decrees are, therefore,

Affirmed.

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

GISBORN *v.* CHARTER OAK LIFE INSURANCE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 115. Submitted December 2, 1891. — Decided January 4, 1892.

G. conveyed to S. a "mining claim and lode" in Utah, and S. executed a declaration of trust that the conveyance had been made to him "upon trust to receive the issues, rents and profits of the said premises, and to apply the same as received": (1) to the payment of operating expenses; (2) to the repayment to S. of $400,000 advanced by him, as trustee, to G. for the purchase of the interest of his co-tenants; together with (3) other trusts. After taking out about $20,000, the vein was lost, and fruitless attempts were made to recover it, which resulted in an indebtedness of about $52,000. The holder of these claims filed a bill against S., G. and others to charge the mining property itself with their payment, and to have it sold to satisfy them, no personal decree being asked against any defendant. *Held*,

(1) That as a result of these transactions, a debt was created and the mining property itself was pledged for the payment of that debt, and of the reasonable expenses incurred in the operation of the mine, and not simply its rents and profits;

(2) That the instruments did not create a mortgage, but an active and express trust, which was not subject to the rule that when an action on the debt is barred, action on the mortgage given to secure it is also barred.

Where the manifest purpose of a transaction is security for a debt created, and title is conveyed, the mere direction to appropriate the rents and profits to its payment will not relieve the realty from the burden of the lien or limit the latter solely to the rents and profits: the test is, the manifest purpose.

In California, (from which the Territory of Utah took its statute of limitations,) the statute does not begin to run, in the case of an express trust, until the trustee, with the knowledge of the *cestui que trust*, has disavowed and repudiated the trust.

THE court stated the case as follows:

On and prior to February 24, 1874, Obadiah Embody, Warren D. Heaton, William E. Miller and Matthew T. Gisborn were the owners of the Mono Mine, situated in Ophir Mining District, Tooele County, in Utah Territory, Gisborn owning an undivided one-third, and the others the remaining undi-

vided two-thirds. On that day, Embody, Heaton and Miller executed a deed of their undivided two-thirds to Gisborn. The consideration named and to be paid was $400,000. With the deed in his possession, he went to the city of New York to raise the money. Negotiations were there had with the firm of Allen, Stephens & Co., through William A. Stephens, a partner, and by them on April 30, $100,000 was advanced, for which Gisborn and Warren Hussey, who was assisting in the negotiations, executed four notes of $25,000 each to William A. Stephens, trustee, and as security Gisborn made a deed of the undivided $\frac{10}{18}$ of the Mono mining property, also to William A. Stephens, trustee. Subsequently the negotiations were completed, the balance of the money advanced, and on May 6, 1874, Gisborn made a second deed conveying the remaining undivided $\frac{8}{18}$ of the property to William A. Stephens, trustee. Each of these was a warranty deed.

On May 30, 1874, Stephens executed the following declaration of trust:

"Know all men by these presents, that whereas Matthew T. Gisborn, of the city of Salt Lake and Territory of Utah, has by two certain deeds of conveyance, bearing date, respectively, April 30, 1874, and May 6, 1874, conveyed to me, William A. Stephens, of the city and county of New York, trustee, all of the 'Mono' mining claim and lode, with the tenements, hereditaments and appurtenances thereunto appertaining, situate in Dry Canyon, Ophir Mining District, Tooele County and Territory aforesaid, and more particularly described in the survey and application for a patent therefor, now pending in the United States Land Office:

"Now, as a part of the same transaction, I, the said William A. Stephens, trustee as aforesaid, do declare that such conveyance was made and received upon the trusts, nevertheless, and to and for the uses, interests, securities and purposes hereinafter limited, specified, described and declared, that is to say, upon trust to receive the issues, rents and profits of the said premises, and to apply the same as received as follows, viz.,

"First. To the payment of all expenses of operating said

mine, keeping the same with the appurtenances in good condition and repair, transportation of ores, etc., from and after the 30th day of April, 1874, including expenses for the hoisting works on said premises, and current public taxes.

"Second. To the payment to me, as trustee, of the sum of four hundred thousand dollars ($400,000) advanced by me, as trustee, to said Gisborn, for the purchase of two-thirds, undivided, of said premises from his late cotenants, together with interest at the rate of seven (7) per cent per annum, as follows: On $100,000 thereof, from and after the said 30th day of April, 1874, and on the remaining $300,000 from and after the 30th [6th] day of May, 1874.

"Third. To the payment to said Matthew T. Gisborn, of a sum equal to seven per cent per annum, upon one-third of the net proceeds of said mine, so applied to the payment of said sum of $400,000, and interest, as aforesaid, from and after the same shall be so applied, or a like percentage per annum on such portion of one-third of the net proceeds of said property as said Gisborn shall not have received in the meantime with my consent.

"Fourth. And finally to deliver and pay over to said Gisborn, his heirs or assigns, the sum of two hundred and seventy-five thousand (275,000) dollars, less the amount of net proceeds he may have received as last aforesaid, but exclusive of the interest mentioned last above in subdivision third.

"And I, the said William A. Stephens, trustee, as aforesaid, do covenant and agree to and with the said Matthew T. Gisborn, his heirs and assigns, that I shall and will duly apply all the rents, issues and profits of said property to the uses aforesaid, in the order aforesaid, and as soon as the same shall be received by me, and further, that as soon as said uses shall be fulfilled and discharged, I will cause said conveyance of said premises to me to be cancelled of record, by doing such acts and executing such instrument as may be necessary to recover or revert the title of said premises, with the tenements, hereditaments and appurtenances thereto appertaining to and in the said Matthew T. Gisborn, his heirs and assigns, to the same extent and estate as now held by me, as aforesaid, as trustee.

Statement of the Case.

"And it is further declared as one of the terms of said trust, that during the continuance thereof the said premises and property, and all the operations and business pertaining thereto, shall be placed in the management and control of two persons, one of whom to be selected by the said Matthew T. Gisborn, and the other by myself, and in case of any disagreement between them in respect to the operation of said mine, and the management of the business pertaining thereto, the two agents so selected shall each select one person, and the matter of difference shall be submitted for decision to the persons so selected as last aforesaid, and in the event that the two alternates so selected, as last aforesaid, cannot agree upon a decision of the matter so referred to them, they shall select a third party as an umpire, whose decision shall determine the matter in dispute; the compensation of such agents, and their respective alternates, shall be paid by the party on whose behalf they are selected respectively, and that of the umpire, if incurred, shall be paid as a current expense of said mine, and it is understood and approved, that said Matthew T. Gisborn, both select and appoint Alexander W. Adams as such managing agent on his behalf, and that I select and appoint Samuel K. Holman as such managing agent on my behalf, and that any vacancy which may occur in either appointment, shall be filled by the same right of selection on either side, but in no case shall any person, directly or indirectly or contingently interested in said property, be selected for this purpose, but nevertheless, it is provided and specified, as a further term of said trust, that in the meantime, on request of said Matthew T. Gisborn, his assigns or legal representatives, I shall and will reconvey to such person or persons as he may designate that portion of said mining claim and premises which is situate east of the centre of the ravine crossing said premises, nearest the eastern boundary thereof, which said ravine is further designated and identified as one in which a living spring rises, a short distance above the north boundary of said premises, the more exact metes, bounds and extent of such portion to be hereafter described by exact measurement, according to said tokens.

"In testimony whereof, I hereunto set my hand and affix my seal this 30th day of May, 1874.

"[SEAL.] W. A. STEPHENS, Trustee.

"J. B. Rosborough.

"John T. Caine."

The two deeds to Stephens were recorded May 12, 1874, and this declaration of trust June 12, 1874.

The trustee entered upon his duties and mined some $20,000, when the vein which had theretofore produced abundantly suddenly ran out. Thereafter, in fruitless endeavors to find the lost vein, about $52,000 of indebtedness was created. By assignment the present appellee became the owner and holder of the claims for the original advances and the moneys thus fruitlessly expended, and on August 20, 1883, filed its bill in the District Court of the Third Judicial District of the Territory of Utah, the object of which was to charge the mining property itself with both these sums and to have it sold to satisfy such liability. No personal judgment was asked against any party. Stephens, the trustee, Gisborn, the firm of Allen, Stephens & Co., and Hoyt Sherman, the assignee in bankruptcy of Allen, one of the firm, and Warren Hussey were made parties defendant to the bill. On May 20, 1886, a decree was entered in favor of the plaintiff for both sums, and directing that the property be sold to satisfy such amount. Gisborn appealed to the Supreme Court of the Territory, which affirmed the decree, and thereafter he appealed to this court.

Mr. Arthur Brown and *Mr. Lyttleton Price* for appellant.

I. In California, from which State Utah takes its entire jurisprudence, and from which it has copied literally its statute of limitations, it is expressly provided by statute, and held by the courts, that a mortgage is barred in four years under the provisions of that statute. Under this enactment the courts have held, without dissent, that mortgages and other instruments creating liens by way of contracts are barred in four years. They are "instruments of writing," and the statute is

applicable to them. Deering's Code of Civil Procedure, section 337 and note, and discussion in the note; *McCarthy* v. *White*, 21 California, 495; *S. C.* 82 Am. Dec. 754; *Lord* v. *Morris*, 18 California, 482. In *McCarthy* v. *White*, the court say: "Where an action upon a promissory note secured by a mortgage of the same date upon real property is barred by way of the statute of limitations, the remedy upon the mortgage is barred." See also *Read* v. *Edwards*, 2 Nevada, 262; *Henry* v. *Mining Co.*, 1 Nevada, 619; *Mackie* v. *Lansing*, 2 Nevada, 302; *Cooks* v. *Culbertson*, 9 Nevada, 199; *Hayward* v. *Gunn*, 82 Illinois, 385, 389; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *S. C.* 11 Am. Dec. 417; *Governor* v. *Woodworth*, 63 Illinois, 254.

II. A lien upon real estate must either be created by law, that is, by some statute, or by the contract of the parties. The contract of these parties did not make the $400,000 a lien upon anything but "*the rents, issues and profits*," and the expenses incurred in hunting for the lost vein were not thought of or dreamed of by the parties, and are in no way included within the contract. *New* v. *Nicoll*, 73 N. Y. 127, 130; *Perkins* v. *Perkins*, 16 Michigan, 162; *Bennett* v. *Nichols*, 12 Michigan, 22.

Mr. Alvan P. Hyde for appellee.

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

There are three principal questions in this case: First, was the mine chargeable with the payment of the consideration money? Second, was it also chargeable with the payment of the moneys expended in the fruitless search for the lost vein? And, third, is the cause of action barred under the statute of limitations?

With respect to the first, the contention of appellant is that Stephens, as trustee, was a purchaser of the undivided two-thirds acquired by Gisborn by his deed of 24th February, 1874; that, as such purchaser, he took all the chances of the mine's productiveness; and that now, on its failure, he must

pocket the loss. And, secondly, that the trust was only in reference to the rents, issues and profits; that Stephens, having taken title for the purpose of executing such trust, has failed, and relinquished all attempts at so doing; and, therefore, that the title to the one-third of the mine, of which Gisborn was all the while the owner in equity, has now reverted, and a decree should have been entered directing a conveyance thereof by Stephens to him.

These matters must be settled not by parol testimony as to the prior conversations and negotiations between the parties, but by the terms of the written instruments, which express the result of all such negotiations, and constitute the contract between the parties. If the meaning of these instruments be in any respect doubtful, reference may be had to the surrounding circumstances for the purpose of interpretation; but, when interpreted, the writings which constitute the contract determine the relative rights. Fortunately the language is not obscure, and the real transaction is fully disclosed. There was no purchase by Stephens, or the firm for which he was trustee. On that side of the transaction there was only a loan of money. By the deed of February 24, 1874, from his coowners, Gisborn became the owner of the entire mine. True, the delivery at first may have been conditional, and to be completed only on the payment of the consideration; but, when that was paid, as it was, then the delivery was complete, and Gisborn became the absolute and full owner. Gisborn, as owner, by two deeds conveyed the entire mine to Stephens as trustee, and not individually. The terms of that trust were disclosed by the declaration of May 30, which, as stated in it, was "a part of the same transaction." The two deeds and the declaration may, therefore, be considered as one instrument making a conveyance of lands upon certain specified trusts and conditions. They are that the grantee shall take the title and possession; out of the rents, issues and profits pay certain moneys; and then reconvey the entire property to the grantor. If the firm had been a purchaser, then, on performance of the trust, the trustee should have conveyed to it the portion of which it was a purchaser. As was well said

by the Supreme Court of the Territory, "The idea of a sale and that the purchaser was not to get the title are not consistent."

Nor is this conclusion affected by the surrounding circumstances, or the subsequent conveyances disclosed by the testimony. It appears that Warren Hussey, who had no interest in the property, was helping Gisborn to negotiate the loan, on a promise of receiving, if successful, an interest in the mine. In order to induce Allen, Stephens & Co. to make the loan, he promised to share with them his compensation; and on April 13, and prior to any advances, this agreement was executed:

"NEW YORK, April 13, 1874.

"It is understood that Warren Hussey gets four-eighteenths of all the 'Mono' mine in his own right. With us he agrees to make the matter satisfactory to us from the said four-eighteenths, even if he gives us all of it.

"ALLEN, STEPHENS & Co.,
"WARREN HUSSEY."

After the declaration of trust, but on the same day, Gisborn gave to Hussey a contract, which recited that "for and in consideration of certain moneys advanced and services rendered to me in effecting the purchase of two-thirds of the 'Mono' mining claim and lode from my late cotenants, . . . as soon as the uses and purposes of said trust shall be fulfilled and accomplished according to the terms of said declaration of trust, (reference thereto here made for particulars,) I shall and will convey to the said Warren Hussey, his heirs and assigns, by good and sufficient deed, the following described part, portion and interest in said mining claim, lode and premises, viz., the one-half, undivided, of all that portion of said 'Mono' mining claim, lode and premises," etc. And on August 10, 1874, Hussey executed to William A. Stephens a bond to convey to him all the interest acquired under such contract from Gisborn.

But the transaction evidenced by these instruments was independent of the loan. It was an arrangement of the agent

with respect to his compensation for services, and does not change the contract made by the two deeds and the declaration. Indeed, the recital in the bond from Gisborn is equivalent to an assertion by him, that he, rather than Allen, Stephens & Co., was the purchaser of the two-thirds, and is inconsistent with his present claim in respect thereto. No disposition which Hussey, his agent, might make of the interest which he proposed to convey to him for his services in effecting a purchase from the cotenants, would reach backward and modify the terms of the contract between him and the lenders to him, or alter their established relations.

Further, these contracts throw light upon the third and fourth clauses of the declaration, which otherwise would appear strange and unnecessary provisions. Were it not for them, it might seem singular that if the trust was simply to pay the $400,000 borrowed from Allen, Stephens & Co., the reconveyance should not be made immediately upon such payment, and that the trust should continue further, and until the payment of $275,000 to Gisborn. They show that the final arrangement was not that Gisborn should give Hussey an undivided one-half of the mine after the payment out of the profits of the money borrowed, but only after the payment of the loan, and also the receipt by himself of the further sum named. In other words, the transaction practically amounted to this: The mine was placed as security to Allen, Stephens & Co. for the $400,000 borrowed, then to Gisborn for $275,000, and, thereafter, Hussey was to receive one-half for his services. But whatever arrangements may have been made between Gisborn and Hussey, and whatever disposition Hussey may have seen fit to make of the remote interest he was to acquire from Gisborn, the transaction between Gisborn and Allen, Stephens & Co. was fully contained in and determined by the two deeds and the declaration. That transaction was a loan by Allen, Stephens & Co. of $400,000, on the security of the mine.

Neither is there force in the contention that the mine itself was not the security, but only the rents, issues and profits. It is true that the language of the trust is "to receive the issues,

rents and profits of the said premises, and to apply the same as received as follows." Undoubtedly the thought of the parties was that the mine would continue so productive that the issues and profits would pay these amounts, but the mine itself was conveyed, and the further stipulation was that upon the discharge of this trust the mine should be reconveyed. The trust contemplated the payment of the sums named, and until they were paid the trust was not discharged. The language used may not have been the most apt, but the intent is clear. What was meant is, that the mine was not placed in the hands of the trustee simply for the purposes of sale, but in order that he might work it and apply the proceeds to the payment of these sums. There was not a mere conveyance of the title in the nature of a mortgage to secure the debt, but an express and active trust.

Undoubtedly the owner of real estate can specifically appropriate rents and profits to a named purpose, or create a trust in them separate and apart from the title to the real estate; but where the manifest object is security, and the title is conveyed, the mere direction to appropriate the rents and profits to the payment of the debt will not relieve the realty from the burden of the lien or limit the latter solely to the rents and profits. The test is — the manifest purpose. Is that merely to dispose of the rents and profits or is it to grant security for an indebtedness? This question is not a new one. It has arisen frequently in the consideration of powers given by will to dispose of rents and profits. In the case of *Allan* v. *Backhouse*, 2 Ves. & Beam. 65, the Vice Chancellor held that where the term was created for the purpose of raising money out of the rents and profits, if the trust of a will required that a gross sum should be raised, the expression "rents and profits" would not confine the term to the mere annual rents, but would authorize the sale or mortgage of the estate itself. In 2 Story's Equity Jurisprudence, (11 ed.,) sec. 1064*a*, the rule is thus stated: "When a testator directs a gross sum to be raised out of the rents and profits of an estate at a fixed time, or for a definite purpose or object, which must be accomplished within a short period of time, or

which cannot be delayed beyond a reasonable time, it is but fair to presume that he intends that the gross sum shall at all events be raised, so that the end may be punctually accomplished; and that he acts under the impression that it may be so obtained by a due application of the rents and profits within the intermediate period. But the rents and profits are but the means; and the question therefore, may properly be put, whether the means, if totally inadequate to accomplish the end, are to control the end or are to yield to it. Now if the gross sum cannot be raised out of the rents and profits at all, or not so soon as to meet the exigency contemplated by the testator, it would seem but a reasonable interpretation of his intention, to presume that he meant to dispense with the means, and, at all events, to require the sum to be raised." See also Hawkins on Wills, 120; 1 Powell on Mortgages, 61. The same ruling has been applied to mortgages. In 3 Pomeroy's Equity Jurisprudence, § 1237, the author says that "an assignment of the rents and profits of land as security for a debt is another mode of creating an equitable lien on the land in the favor of the assignee." And in *Ex parte Willis*, 1 Ves. Jr. 162, it is said of such an assignment that "it is an odd way of conveying; but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage." *Legard* v. *Hodges*, 1 Ves. Jr. 477; *Smith* v. *Patton*, 12 West Va. 551.

The evident purpose of these instruments was not the mere appropriation of the rents and profits; the parties contemplated security for the debt. The owner conveyed the title to the trustee; and the provision as to rents and profits, while imposing a primary duty on the trustee, does not, if the rents and profits fail to accomplish the object of the conveyance, to wit, the payment of the debt, prevent the application of the realty itself thereto.

Passing now to the second question: The trust, as disclosed by the first clause, contemplated the continued operation of the mine, keeping it and its appurtenances in good repair, and the payment of taxes. Whatever expenses were legitimately incurred in the discharge of this part of the trust were charge-

able upon the property. These were not debts created on the personal obligation of the trustee, and afterwards sought to be thrown upon the estate, but in an honest and reasonable execution of the trust. In 2 Pomeroy's Equity Jurisprudence, sec. 1085, it is said that "the trustee is entitled to be allowed, as against the estate and the beneficiary, for all his proper expenses out of pocket, which include all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in the absence of any such directions all expenses, reasonably necessary for the security, protection and preservation of the trust property, or for the prevention of a failure of the trust." Gisborn is certainly not in a position to complain of these expenditures, for most of them, at least, were incurred while he was acting as manager for the trustee, and were approved by him in writing. It will not do to say that it was the duty of the trustee to stop work the moment the vein was lost. It was a reasonable exercise of the power vested in him to make some limited exploration to see if the lost vein could not be recovered. No one could tell in advance how great had been the displacement; perhaps a few feet of mining might have brought it to light; and as Gisborn was consulted on these efforts, and approved of them, and the expenditures were largely made under his direction, it must be adjudged, as against him, that they were reasonable, and therefore also chargeable upon the trust estate.

With reference to the last question, the contention of the appellant is, that if the title was conveyed as security, then the instruments created simply a mortgage; and that the rule in California, from which State Utah took its statutes, is that when action on the debt is barred, action on the mortgage given to secure the debt is also barred. *Lord* v. *Morris*, 18 California, 482; *McCarthy* v. *White*, 21 California, 495.

The obvious answer is that these instruments did not create a mortgage, but an active and express trust, and the rule invoked as to mortgages does not apply, either in California or elsewhere. In *Miles* v. *Thorne*, 38 California, 335, it was held that the statute of limitations does not begin to run in

the case of an express trust, until the trustee, with the knowledge of the *cestui que trust*, has disavowed and repudiated the trust. In *Hearst* v. *Pujol*, 44 California, 230, the proposition is laid down that "if A. conveys to B. a tract of land, to be by B. afterwards reconveyed to himself, he thereby creates an express trust, which B. may accept by accepting the deed;" and also that, "the statute of limitations does not commence running on A.'s right to a reconveyance until B. repudiates the trust, and such repudiation is brought to the knowledge of A." And *Grant* v. *Burr*, 54 California, 298, draws the distinction between a deed of trust and a mortgage, as to the running of the statute of limitations. In that case, the trustee under a deed of trust, long after the notes secured thereby had become barred by the statute of limitations, was proceeding to sell the land under the power conferred. The grantor in the deed sought to enjoin such sale, but the injunction was denied, and this ruling was affirmed by the Supreme Court. See also *Henry* v. *Mining Company*, 1 Nevada, 619; *Bacon* v. *Rives*, 106 U. S. 99; *Seymour* v. *Freer*, 8 Wall. 202, in which the general proposition is laid down that the statute of limitations has no application to an express trust where there is no disclaimer. In the case at bar there was no disclaimer on the part of the trustee, no repudiation of the trust. He never asserted title in himself as against any beneficiary. On the contrary, he continued to work the mine, and in the active discharge of the trust, so long as money therefor was available, and then, with the consent and approval of Gisborn, leased the mining property for two successive years, and until January, 1880, to parties who stipulated to do certain work therein. That nothing was done by him after this was not because of any repudiation of the trust, but simply from a lack of means. His inaction under the circumstances amounts to nothing further than this, that the continued failure to realize rents, issues and profits justified an appeal to the courts to subject the realty itself to the satisfaction of the claims.

These are the principal and decisive questions in the case, and in respect to them, or otherwise, we see no error in the rulings. The decree will, therefore, be

Affirmed.

PACIFIC EXPRESS COMPANY *v.* SEIBERT.

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

No. 983. Submitted November 9, 1891. — Decided January 4, 1892.

A bill in equity which alleges (1) that a statute of a State imposes a tax upon interstate commerce, and is therefore void as forbidden by the Constitution of the United States, and which sets out the provision complained of from which it appears that the tax was imposed only on business done within the State, (2) that the act denies to the complainant the equal protection of the laws of the State, and is therefore void by reason of violating the Fourteenth Amendment; and (3) that the act is not uniform and equal in its operation, and is void by reason of repugnance to the constitution of the State; and which seeks on these grounds an injunction against the collection of the tax, presents no ground justifying the interposition of a court of equity to enjoin the collection of the tax.

The act of the legislature of Missouri of May 16, 1889, "to define express companies, and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon," imposes a tax only on business done within the State, and does not violate the requirements of uniformity and equality of taxation prescribed by the constitution of the State of Missouri.

Diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality in taxation, and of a just adaptation of property to its burdens.

A system of taxation which imposes the same tax upon every species of property, irrespective of its nature, or condition, or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens.

A state statute which defines an express company to be persons and corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies, does not invidiously discriminate against the express companies defined by it, and in favor of other companies or persons carrying express matter on other conditions, or under different circumstances.

THE court stated the case as follows:

This was a suit in equity by the Pacific Express Company, a Nebraska corporation, against John M. Seibert, state auditor,

and John M. Wood, attorney general, of the State of Missouri, to restrain and enjoin the collection of certain alleged illegal taxes assessed against the company under the provisions of an act of the Missouri legislature, which was claimed to be in conflict with the constitution of Missouri and the Constitution of the United States.

The act in question, approved May 16, 1889, is as follows:

"SECTION 1. Any person, persons, joint-stock association, company or corporation incorporated under the laws of any State, Territory or country conveying to, from or through this State or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise or effects of any kind by express on contract with any railroad or steamboat company or the managers, lessees, agents or receivers thereof (not including railroad companies or steamboats engaged in the ordinary transportation of merchandise and property in this State) shall be deemed to be an express company.

"SEC. 2. Every such express company shall annually, between the first day of April and the first day of May, make and deliver to the state auditor a statement, verified by the oath of the officer or agent making such report, showing the entire receipts for business done within this State of each agent of such company doing business in this State for the year then next preceding the first day of April for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies: Provided, that the amount which any express company actually pays to the railroads or steamboats within this State for the transportation of their freight within this State may be deducted from the gross receipts of such company as above ascertained; and provided further, that said amount paid to the various railroad or steamboat companies for transportation shall be itemized, showing the amount paid to each railroad or steamboat company; and provided further, that nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such

all sums earned or charged for the business done within this State for such preceding year, whether actually received or not. Such statement shall contain an abstract of the amount received in each county and the total amount received for all the counties. In case of the failure or refusal of such express company to make such statement before the first day of May it shall then be the duty of each local agent of such express company within this State annually, between the first day of May and the first day of June, to make out and forward to the state auditor a similar verified statement of the gross receipts of his agency for the year then next preceding the first day of April. When such statement is made such express company shall at the time of making the same pay into the treasury of the State the sum of two dollars on each one hundred dollars of such receipts; and any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided and to pay the required tax thereon shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered in an action in the name of the State of Missouri on the relation of the state auditor in any court of competent jurisdiction, and the attorney general shall conduct such prosecution; and such company, corporation or association so failing or refusing shall be prohibited from carrying on said business in this State until such payment is made." Stats. Missouri, 1889, p. 52.

The bill, filed on the 17th of June, 1890, contained substantially the following material averments: At the date of the passage of the aforesaid act of the legislature, the complainant was, and ever since that date has been, engaged in the business of conveying valuable articles to, from and through the State of Missouri and various parts of that State, by express, at the same time providing its own transportation, under contracts with the Missouri Pacific and other railroad companies operating lines in that State, to convey the property bailed to it. In the prosecution of such business, complainant, under contracts of hire, receives and has received, property at various points in other States and conveys it to various places in Mis-

souri, and also property in Missouri which it conveys to points in other States. At the time and during the period mentioned there were other persons and corporations engaged in a like business in the State of Missouri, who either owned their own transportation facilities or procured the same by hire from persons not a railroad or steamboat company, or any one connected with such corporations.

The bill then averred that if the act of the legislature aforesaid was a valid law, complainant would be required to pay taxes to the State for the year ending April 1, 1890, in the estimated sum of over $12,000, and if the act was a valid law only in respect to the gross receipts upon such business as complainant had done between points wholly in the State of Missouri, and void as to gross receipts upon its business done between points within the State and points in other States, then complainant would be required to pay taxes for such period in the sum of over $3000; that complainant was willing to pay any taxes which might be found to have been legally assessed against it, but it declared that the aforesaid act of the Missouri legislature was not a valid law, because it sought to impose a tax upon the business of interstate commerce in which complainant was engaged, and was, therefore, violative of the Constitution of the United States.

The bill then averred that neither the tax of two per cent mentioned in section 2 of the act of the legislature, nor any other equivalent tax was imposed by that act or any other law of the State, upon other common carriers engaged in similar business as complainant, who do not hire transportation by "contract with any railroad or steamboat company," etc.; that there was no provision in that act in respect to the equalization of the taxes required to be levied under it, by state and county boards of equalization, as in the case of other state taxes, and the tax assessed under said act was not uniform; and it was claimed, therefore, that the act was violative of the Fourteenth Amendment of the Constitution of the United States because it denied to the complainant the equal protection of the laws, and was also violative of § 3, art. 10, of the constitution of Missouri, because the taxes levied were not "uniform upon the

same class of subjects within the territorial limits of the authority levying the tax."

The bill also averred that the act under consideration was violative of certain other mentioned provisions of the constitution of Missouri; and that the defendants, being the officials charged with the duty of enforcing the provisions thereof, would proceed to enforce the same, unless restrained by the order or process of the court, by instituting legal proceedings to collect said taxes and the penalties prescribed, and would thereby prohibit complainant from carrying on its business in Missouri, whereby complainant would be subjected to and harassed by a multiplicity of suits, and would suffer great and irreparable loss and damage, for which it had no adequate remedy at law.

Wherefore an injunction was prayed to restrain the collection of said taxes, and a decree was asked adjudging the aforesaid act of the legislature of Missouri invalid and unconstitutional, together with a prayer for such other and further relief as might appear equitable and just.

Upon the filing of the bill and upon hearing argument of counsel for both sides of the controversy, the court, on the 23d of June, 1890, granted a temporary injunction, as prayed.

The defendants then demurred to the bill, upon three grounds: (1) that it did not state facts sufficient to entitle complainant to the relief prayed; (2) that there was no equity in it; and, (3) that it appeared from the bill that complainant had an adequate remedy at law. The demurrer was sustained, and a decree was entered dissolving the temporary injunction and dismissing the bill for want of equity. 44 Fed. Rep. 310. From that decree the complainant appealed, and the case is now here for consideration.

Mr. Westel W. Morsman for appellant.

I. The State does not permit itself to be sued, and the act requires the tax to be paid to the state treasurer, under penalties for failure to do so, grossly disproportioned to the injuries the State would suffer by delay. It is evident that

the State intended to coerce submission. Under these circumstances the only complete remedy is in equity. It is not necessary, in order to sustain the remedy in equity, to show there is *no* remedy at law. It is sufficient if the remedy at law be substantially *less adequate* than in equity. *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806; *Wylie* v. *Coxe*, 14 How. 1; *Boyce* v. *Grundy*, 3 Pet. 210; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 839; *Allen* v. *Balt. & Ohio Railroad*, 114 U. S. 311; *Cummings* v. *National Bank*, 101 U. S. 153; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Evansville Bank* v. *Britton*, 105 U. S. 322; *Hills* v. *Exchange Bank*, 105 U. S. 319; *Boyer* v. *Boyer*, 113 U. S. 689; *Pennoyer* v. *McConnaughy*, 140 U. S. 1.

II. By the terms of the act it applies to gross receipts from transportation "to, from or through this State, or any part thereof;" to the "entire receipts from business done within this State;" and to the "proportion of gross receipts for *business* done by such company in connection with other companies." Whether these words embrace interstate traffic is the decisive question. *State Freight Tax Case*, 15 Wall. 232.

"Business" is a broad, generic term. It embraces, in this connection, every transaction, every service performed within the State, from which receipts are derived. It is as easily and as rationally applied to that portion of interstate transportation which is within the State, as to transportation which originates and terminates within it. Each is, equally, "business" done within the State. Interstate commerce may not, correctly speaking, be "business done within the State." But the latter is always included in the former. "Business" done within the State may be, and often is, interstate commerce, because of its being an essential part of transportation which originates or terminates beyond the lines of the State. Reading the words "business done within the State," in connection with the words "to, from or through the State, or any part thereof," as used in the first section, there seems to be no reason to doubt that it was the intention of the legisla-

ture to include that portion of transportation which should be performed within the State, notwithstanding it may have originated or terminated beyond the lines of the State. In embracing carriers engaged in carrying "to" the State, the legislature had in mind those carriers who take goods at points in other States and deliver them within the State. It used the word "to" in the sense of "into," which is not very uncommon.

Articles taken up in another State to be delivered within the State of Missouri, or to be carried through and across the State, or taken up within the State to be carried out and delivered at points in other States, would, so far as the carriage within the State of Missouri is concerned, be "business done within the State," by any rule of interpretation that does not ignore the plain and obvious meaning of the words of the act. A court should, if it consistently can, so interpret an act of a legislature as to save it from objection on constitutional grounds. But it cannot ignore the words of the act, or their clear and ordinary meaning, upon an assumption that the legislature understood the situation, and would not knowingly exceed its powers.

In *Philadelphia &c. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, this court would hardly have gone into the constitutional question, if the case could have been correctly decided by simply holding that the words "doing business within the State," "*ex vi termini*, import business begun and ended within the State, and include only intra-state and not inter-state commerce;" and in *Fargo* v. *Michigan*, 121 U. S. 230, the State sought to impose a tax upon gross receipts "for freight earned within the State." These words are not materially different in meaning or scope from the words of the act in question in the case at bar. But this court decided the case upon constitutional grounds, not intimating that the act did not apply to interstate commerce.

III. This statute violates that provision in the Fourteenth Amendment which prohibits any State from denying to any person within its jurisdiction, the equal protection of its laws; and is in violation of that provision of the constitution of the

State, which requires all taxation to be uniform in respect to the subjects upon which it is levied, within the district levying the tax. The provision of the Fourteenth Amendment to the Constitution of the United States, and the provision referred to in the constitution of the State, are equally provisions requiring equal and uniform laws, so far as they relate to the subject in controversy in this suit. There is no difference in principle, between these provisions; but the object of the provision of the Constitution of the United States, was to take the subject of equal legislation under the protection of the national constitution. As applied to the subject of taxation, it requires that all taxation shall be equal and uniform, in respect to all persons and corporations within the jurisdiction of the State, under like circumstances and conditions. *Barbier* v. *Connolly*, 113 U. S. 27; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512; *Dent* v. *West Virginia*, 129 U. S. 114; *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The provision of the constitution in question has received legislative interpretation. By Rev. Stat. § 1977, it is enacted, for the purpose of enforcing the provisions of the constitutional amendment, that all persons within the jurisdiction of the United States shall have the same right in every State and Territory, and be "subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." In order to determine whether or not the act of the legislature is uniform and equal, as required by the constitutional provisions referred to, it is necessary to ascertain the sphere of operation of the act. If, within this sphere of operation, it affects all persons equally and uniformly under like circumstances and conditions, it is not obnoxious to the provision of either constitution. But, on the other hand, if it create a burden upon some persons and not upon others, under the same circumstances and conditions, it is then an obvious violation of these constitutional provisions.

The legislature, in defining what should constitute an express company for the purposes of the act, evidently intended to

exclude all express companies or persons doing the business described in the act, who own their own lines of transportation or procure transportation facilities by contract with some other person or corporation than a railroad or steamboat company. Yet it is obvious that a railroad company doing the character of business specified in the section defining an express company, over its own line of railroad, would still be an express company with respect to that particular business, notwithstanding any effort of the legislature to exclude it by definition. The legislature can no more say that a railroad company, prosecuting the business referred to in this act, is not, in fact, an express company, than it can say that a black man carrying on the dry goods business is not a dry goods merchant equally with a white man prosecuting the same business. The mere fact that one corporation or person denominates itself an express company, while the other denominates itself a railroad company, affords no distinction that will justify the legislature in saying that one is an express company and the other is not, when it proposes to levy a tax upon the pursuit or occupation in which each are alike engaged. The "business" is precisely the same in both cases. Both parties are engaged in the same occupation, and no definition can change it. It is the occupation or business which the legislature proposes to tax. It cannot make a discrimination not based upon any intrinsic difference in the occupation, but resting solely upon the mere difference of name in the parties pursuing it, without raising a discrimination prohibited by each of the constitutional provisions referred to.

I do not deny that the legislature may classify subjects for the purposes of taxation, but it cannot do so, arbitrarily, by legislation having no reference to an intrinsic difference of circumstances and conditions. It cannot, arbitrarily, divide those engaged, or who may engage, in the same business, into different classes, imposing burdens upon one and exempting another. This is not classification at all, but a mere division of the same class, or subject of taxation. It is discrimination, pure and simple. See *Kentucky Railroad Tax Cases*, 115 U. S. 321; *State* v. *Readington Township*, 36 N. J. Law (7 Vroom)

66; *Lexington* v. *McQuinlan*, 9 Dana, 513; *S. C.* 35 Am. Dec. 159; *Field* v. *Highland County*, 36 Ohio St. 476; *St. Louis* v. *Bowler*, 94 Missouri, 630; *St. Louis* v. *Spiegels*, 75 Missouri, 145; *People* v. *Weaver*, 100 U. S. 539; *Evansville Bank* v. *Britton*, 105 U. S. 322; *San Mateo County* v. *Southern Pacific Railroad*, 8 Sawyer, 238; *Santa Clara County* v. *Southern Pacific Railroad*, 9 Sawyer, 165; *Pullman Palace Car Co.* v. *Texas*, 64 Texas, 274; *People* v. *Central Pacific Railroad*, 83 California, 393.

Mr. John M. Wood, Attorney General of the State of Missouri, for appellees.

Mr. Justice Lamar delivered the opinion of the court.

According to the view we take of the case, it is not necessary to inquire into the special equities set forth in the bill and relied upon in the argument for complainant to show that this record presents a case for the interposition of a federal court, for the purpose of restraining the assessment or collection of a state tax. The primary and fundamental ground on which the maintenance of such a suit rests is the unlawfulness of the tax against which relief is sought, or, in other words, the invalidity or unconstitutionality of the legislative act under the authority of which the tax is imposed. It is true that this ground is not in itself sufficient. But when the illegality of the tax or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further, and make out a case that can be brought under some recognized head of equity jurisdiction: such as, that the collection of the tax sought to be restrained may entail a multiplicity of suits; or cause some other irreparable injury, as, for instance, the ruin of complainant's business; or, where the property is real estate, throw a cloud upon the title of the complainant. *Shelton* v. *Platt*, 139 U. S. 591, 594; *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658, 661.

It is contended in behalf of the complainant (1) that the statute of Missouri, under the provisions of which the tax sought to be restrained is levied, imposes a tax upon interstate

commerce, and to that extent is forbidden by the Constitution of the United States, and is, therefore, void; (2) that the act denies to the complainant the equal protection of the laws of the State of Missouri, and is, therefore, void by reason of its being violative of the fourteenth amendment of the Constitution of the United States; and, (3) that the act is not uniform and equal in its operation, and is void by reason of its repugnance to section three of article ten of the constitution of the State of Missouri.

We do not think that these propositions, taken in connection with the averments of the bill, present any ground justifying the interposition of a court of equity to enjoin the collection of the tax imposed by the statute in question. The first proposition, that the statute imposes a tax upon interstate commerce, and is, therefore, violative of what is known as the commercial clause of the constitution, is unsound. It is well settled that a State cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on; for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs to Congress. *Lyng* v. *Michigan*, 135 U. S. 161; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114. The question on this branch of the case, therefore, is, — Was the business of this express company in the State of Missouri, on the receipts from which the tax in question was assessed under this act, interstate commerce? The allegation of the bill is very positive that in the prosecution of its business as an express company the complainant is engaged, in part, in the transportation of goods and other property between the States of Nebraska, Kansas, Texas and other States of the Union and the State of Missouri; and also in the business of carrying goods between different points within the limits of the State of Missouri. The question on this point, therefore, is narrowed down to the single inquiry, whether the tax com-

plained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its *intra*-state business. We think a proper construction of the statute confines the tax which it creates to the *intra*-state business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report "showing the entire receipts for business done *within this State* of each agent of such company doing business *in this State*," etc., and further provides that the amount which any express company pays "to the railroads or steamboats *within this State* for the transportation of their freight *within this State*" may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged "for the business done *within this State*," etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the *business done within the State*. This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. "Business done within this State" cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce.

The second and third propositions stated above are reducible to the single contention, that the act in question violates the requirements of uniformity and equality of taxation prescribed

by the constitution of Missouri, and thereby denies to the complainant the equal protection of the laws of the State which the Fourteenth Amendment to the constitution guarantees shall not be abridged by state action.

This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.

The rules of taxation, in this respect, were well stated in the opinion of the court, delivered by Mr. Justice Bradley, in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237, as follows: "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money: it may allow deductions for indebtedness, or not allow them. . . . It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation,

and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

In *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606, 607, the court, speaking through Mr. Justice Field, said: "But the Amendment [the Fourteenth] does not prevent the classification of property for taxation — subjecting one kind of property to one rate of taxation, and another kind of property to a different rate — distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all, under the same conditions, in determining the rate of taxation. There is no discrimination in favor of one against another of the same class;" citing a long list of authorities.

The contention of the complainant, however, in this connection is, that the rule of uniformity and equality of taxation is destroyed by the arbitrary discrimination involved in the definition of what shall be taxed under the act, imposing upon certain persons or associations taxes from which other persons or companies of precisely the same kind, doing exactly the same kind of business, under exactly the same conditions, are exempt. In other words, the contention is, that the act of the legislature arbitrarily defines what shall constitute an express company, and then lays a tax upon its business, while at the same

time it permits the same kind of business to be done by any person or company not embraced within the class thus defined, without being subject to any tax at all. It is said that the act, by the very terms of its definition, restricts the tax to persons or corporations who carry on the business of transportation *on contracts for hire with railroad or steamboat companies* doing business within the State; and that it permits any person or company that may be so fortunate as to own its own means of transportation to go free from any such tax. That is to say, an express company that engages for hire a railroad or steamboat company to transport its merchandise must pay a tax for the privilege of doing business, while the railroad or steamboat company owning its own means of transportation might, in connection with the business for which it was primarily chartered, engage in the express business without paying any tax whatever on the privilege of carrying on such express business. It is strenuously argued, therefore, that this is an unjust discrimination against the express companies defined by the act, and in favor of other companies or persons that may, in connection with their primary or original business, engage in the express business, or that may carry on a separate express business, owning their own means of transportation.

The fallacy of this argument lies in the assumption that the definition of what shall constitute an express company excludes from the classification companies which are as much engaged in the business, or as much under the same conditions, as are those which, under the definition, are subject to the tax.

The legislation in question cannot be considered as invidiously discriminating against the express companies defined by it and in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. There is an essential difference between express companies defined by this act and railroad or steamboat companies or other companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their road-beds, rolling stock and other

tangible property as well as, generally, upon their franchise; and steamboat companies likewise pay a tax upon their tangible property. This tax is not necessarily an *ad valorem* tax at the same rate as is paid on other private property in the State belonging to individuals. Generally, indeed, it is not, but is often determined by other means and at different rates, according to the will of the state legislature. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337. On the other hand, express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions, or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes. There can be no objection, therefore, to the discrimination made as between express companies defined by this act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed. Their different nature, character and means of doing business justify the discrimination in this respect which the legislature has seen fit to impose. The legislation in question does not discriminate between companies brought within the class defined in the first section; and such companies being so entirely dissimilar, in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like owning a large amount of tangible and other property subject to taxation under other and different laws, and upon other and different principles, we do not see how, under the principles of the many decisions of this court upon the subject, it can be held violative either of the Fourteenth Amendment of the Constitution of the United States, or of the provision in the constitution of Missouri, relating to equality and uniformity of taxation. See *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Dent* v. *West Virginia*, 129 U. S.

Citations for Plaintiffs in Error.

114; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512; *St. Louis* v. *Weber*, 44 Missouri, 547; *Germania Life Ins. Co.* v. *Commonwealth*, 85 Penn. St. 513; *Missouri* v. *Welton*, 55 Missouri, 288.

The opinion of the court below on this branch of the case is elaborately argued, and is conclusive. We concur in the reasoning of it as well as in the language employed, and refer to it as a correct expression of the law upon the subject.

Decree affirmed.

CHAFFEE COUNTY *v.* POTTER.

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

No. 103. Submitted November 24, 1891. — Decided January 4, 1892.

A statement, in the bond of a municipal corporation, that it is issued under the provisions of the act of the general assembly of Colorado of February 21, 1881, and in conformity with its provisions; that all the requirements of law have been fully complied with; that the total amount of the issue does not exceed the limits prescribed by the constitution of that State; and that the issue of the bonds had been authorized by a vote of a majority of the duly qualified electors of the county, voting on the question at a general election duly held, estops the county, in an action by an innocent holder for value, to recover on coupons of such bonds, from denying the truth of these recitals.

When there is an express recital upon the face of a municipal bond that the limit of issue prescribed by the state constitution has not been passed, and the bonds themselves do not show that it had, the holder is not bound to look further.

Lake County v. *Graham*, 130 U. S. 674, and *Dixon County* v. *Field*, 111 U. S. 83, affirmed and distinguished from this case.

THE case is stated in the opinion.

Mr. Thomas Macon, for plaintiffs in error, cited: *McClure* v. *Township of Oxford*, 94 U. S. 429; *Town of Coloma* v.

Eaves, 92 U. S. 484; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Dixon County* v. *Field*, 111 U. S. 83; *Lake County* v. *Graham*, 130 U. S. 674.

Mr. Willard Teller, for defendant in error, cited: *Knox County* v. *Aspinwall*, 21 How. 539; *Bissell* v. *Jeffersonville*, 24 How. 287; *Mercer County* v. *Hacket*, 1 Wall. 83; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Meyer* v. *Muscatine*, 1 Wall. 384; *Van Hostrup* v. *Madison City*, 1 Wall. 291; *Supervisors* v. *Schenck*, 5 Wall. 772; *Grand Chute* v. *Winegar*, 15 Wall. 355; *St. Joseph Township* v. *Rogers*, 16 Wall. 644; *Coloma* v. *Eaves*, 92 U. S. 484; *Venice* v. *Murdock*, 92 U. S. 494; *Moultrie County* v. *Rockingham Bank*, 92 U. S. 631; *Marcy* v. *Oswego*, 92 U. S. 637; *County of Henry* v. *Nicolay*, 95 U. S. 619; *Township of Rock Creek* v. *Strong*, 96 U. S. 271; *San Antonio* v. *Mehaffy*, 96 U. S. 312; *Cromwell* v. *County of Sac*, 96 U. S. 51; *Wilson* v. *Salamanca*, 99 U. S. 499; *County of Macon* v. *Shores*, 97 U. S. 272; *County of Daviess* v. *Huidekoper*, 98 U. S. 98; *Hackett* v. *Ottawa*, 99 U. S. 86; *Orleans* v. *Platt*, 99 U. S. 676; *Lyons* v. *Munson*, 99 U. S. 684; *Block* v. *Commissioners*, 99 U. S. 687; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Walnut* v. *Wade*, 103 U. S. 683; *Harter* v. *Kernochan*, 103 U. S. 562; *Pana* v. *Bowler*, 107 U. S. 529; *Kirkbride* v. *La Fayette*, 108 U. S. 208; *Dallas County* v. *McKenzie*, 110 U. S. 686; *Dixon* v. *Field*, 111 U. S. 83; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Oregon* v. *Jennings*, 119 U. S. 74; *Comanche County* v. *Lewis*, 133 U. S. 198; *Lake County* v. *Graham*, 130 U. S. 674.

Mr. Justice Lamar delivered the opinion of the court.

This was an action by Andrew Potter, a citizen of Massachusetts, against the board of county commissioners of Chaffee County, Colorado, on a large number of interest-bearing coupons attached to certain bonds issued by that county, in 1882, for the purpose of funding its floating indebtedness.

The following is a copy of one of the bonds and coupons:

"No. —. $1000.

"United States of America, County of Chaffee, State of Colorado.

"Funding Bond.

"(Series A.)

"The County of Chaffee, in the State of Colorado, acknowledges itself indebted, and promises to pay to —— —— or bearer, one thousand dollars, lawful money of the United States, for value received, redeemable at the pleasure of said county after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of said county, in the town of Buena Vista, with interest thereon at the rate of eight per cent per annum, payable semi-annually on the first day of March, and the first day of September in each year, at the office of the county treasurer aforesaid, or at the banking-house of Kountze Brothers, in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due.

"This bond is issued by the board of county commissioners of said Chaffee county, in exchange at par for valid floating indebtedness of the said county, outstanding prior to August 31, 1882, under and by virtue of, and in full conformity with, the provisions of an act of the general assembly of the State of Colorado, entitled 'An act to enable the several counties of the state to fund their floating indebtedness,' approved February 21, 1881, and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Chaffee, voting on the question at a general election duly held in said county, on the seventh day of November, A.D. 1882.

"The bonds of this issue are comprised in three series designated 'A,' 'B,' and 'C,' respectively; the bonds of series 'A'

being for the sum of one thousand dollars each, those of series 'B' for the sum of five hundred dollars each, and those of series 'C' for the sum of one hundred dollars each. This bond is one of series 'A.'

"The faith and credit of the county of Chaffee are hereby pledged for the punctual payment of the principal and interest of this bond.

"In testimony whereof, the board of county commissioners of the said county of Chaffee have caused this bond to be signed by their chairman, countersigned by the county treasurer and attested by the county clerk under the seal of the county, this first day of December, A.D. 1882.

——— ———,

"*Chairman Board of County Commissioners.*

"Attest: —— ——, *County Clerk.*

"[COUNTY SEAL.]

"Countersigned: —— ——, *County Treasurer.*"

"$—. (Coupon.) $—.

"The County of Chaffee, in the State of Colorado, will pay the bearer — dollars at the office of the county treasurer, in the town of Buena Vista, or at the banking-house of Kountz Brothers, in the city of New York, on the first day of ——, being six months' interest on funding bond

"No. —, Series —. E. B. JONES, *County Treasurer.*"

The plaintiff, as the holder of a large number of the coupons of each series, alleged in his declaration that all the proceedings required by the statutes of the State to be taken in the matter of the issue and registration of the bonds had been taken before the bonds were put on the market, that the bonds were therefore legal in all respects as valid obligations of the county, and that, as the *bona fide* holder for value of the interest coupons, he had presented them for payment at the place required and payment had been refused. Wherefore he prayed judgment for the amount of said coupons, with interest, in all, $9648.

Opinion of the Court.

The defences set up in the answer were: That the bonds had not been authorized by a vote of the qualified voters of the county, and no bonds had been authorized to be exchanged for the warrants of the county, and the board, therefore, never had any jurisdiction to issue them; that the bonds, and each of them, were issued in violation of § 6, art. 11, of the constitution of the State, and the debt which they assumed to fund was contracted in violation of said provision of the constitution; and that the bonds were issued by the board of county commissioners without any consideration valid in law, as plaintiff well knew when he received the coupons sued on.

A demurrer to the answer on the ground that it was not a sufficient defence to the action, was sustained by the Circuit Court, and, the defendants electing to stand by their pleading, judgment was entered in favor of the plaintiff for the full amount of his claim, with interest. 33 Fed. Rep. 614. This writ of error is prosecuted to review that judgment.

The ground upon which the Circuit Court based its decision and judgment was that the county should be estopped, by the recitals in the bonds, from pleading the defences set up in the answer.

The act of the legislature, under the authority of which the bonds were issued, is set out in the margin.[1] It is the same

[1] SECTION 1. It shall be the duty of the county commissioners of any county having a floating indebtedness exceeding ten thousand dollars, upon the petition of fifty of the electors of said counties [county,] who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish, for the period of thirty days, in a newspaper published within said county, a notice requesting the holders of the warrants of such county to submit, in writing, to the board of county commissioners, within thirty days from date of the first publication of such notice, a statement of the amount of the warrants of such county, which they will exchange at par, and accrued interest for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such board of county commissioners, at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforementioned, upon the petition of fifty of the electors of such county who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county who shall have paid taxes on prop-

act under which certain bonds were issued by Lake County, Colorado, which bonds were under consideration in *Lake*

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erty assessed to them in said county in the preceding year, the question whether the board of county commissioners shall issue bonds of such county, under the provisions of this act, in exchange, at par, for the warrants of such county issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a special election, which they are hereby empowered to call for that purpose, at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish, for the period of at least thirty days immediately preceding such general or special election, in some newspaper published within such county, a notice that such question will be submitted to the duly qualified electors as aforesaid, at such election. The county treasurer of such county shall make out and cause to be delivered to the judges of election, in each election precinct in the county, prior to the said election, a certified list of the taxpayers in such county who shall have paid taxes upon property assessed to them in such county in the preceding year; and no person shall vote upon the question of the funding of the county indebtedness unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the floating county indebtedness shall be for the funding of such indebtedness, the board of county commissioners may issue to any person or corporation holding any county warrant or warrants issued prior to the date of the first publication of the aforementioned notice coupon bonds of such county in exchange therefor, at par. No bonds shall be issued of less denomination than one hundred dollars, and if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent per annum. The interest to be paid semi-annually, at the office of the county treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the county, after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same, and made a part of the records of the county; and any bond issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond.

SEC. 2. All bonds which may be issued under the provisions of this act shall be signed by the chairman of the board of county commissioners, countersigned by the county treasurer of the county, and attested by the clerk of said county, and bear the seal of the county upon each bond, and

County v. *Graham*, 130 U. S. 674. The bonds in that case were quite similar to those now under consideration, differing

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shall be numbered and registered in a book kept for that purpose by the county treasurer, in the order in which they are issued; each bond shall state upon its face the amount for which the same is issued, to whom issued and the date of its issuance.

SEC. 3. The county commissioners shall be authorized to prescribe the form of such bonds and the coupons thereto, and to provide for the half-yearly interest accruing on such bonds actually issued and delivered; they shall levy annually a sufficient tax to fully discharge such interest, and for the ultimate redemption of such bonds they shall levy annually, after nine years from the date of such issuance, such tax upon all the taxable property in their county as shall create a yearly fund equal to ten (10) per cent of the whole amount of such bonds issued, which fund shall be called the redemption fund. And all taxes for interest on and for the redemption of such bonds shall be paid in cash only, and shall be kept by the county treasurer as a special fund, to be used in payment of interest on and for the redemption of such bonds only; and such taxes shall be levied and collected as other taxes.

SEC. 4. It shall be the duty of the county treasurer, when there are sufficient funds in his hands to the credit of the redemption fund, to pay in full the principal and interest of any such bonds, immediately to call in and pay as many of such bonds, and accrued interest thereon, as the funds on hand will liquidate, as hereinbefore provided. Such bond or bonds shall be paid in the order of their number; and when any bonds or coupons issued under this act are taken up, it shall be the duty of such treasurer to certify his action to the board of county commissioners, who shall cancel the same, so that they can be plainly identified, and cause a record to be made of the same; and when it is desired to redeem any of such bonds, the county treasurer shall cause to be published for thirty days, in some newspaper at or nearest the county seat of the county, and in a newspaper published in the city of Denver, a notice that certain county bonds by numbers and amounts will be paid upon presentation, and at the expiration of thirty days such bonds shall cease to bear interest.

SEC. 5. All persons voting on the question as hereinbefore provided shall vote by separate ballot, which shall be deposited in a box to be used for that purpose only, and on which ballot shall be printed the words, "For funding county debt," or "Against funding county debt;" and if, upon canvassing to [the] vote (which shall be canvassed in the same manner as the vote for county officers), it shall appear that a majority of all votes cast upon the question so submitted are for funding the county debt, then the county commissioners shall be authorized to carry out the provisions of this act, and the canvassing board shall certify the vote, and it shall be made part of the county records. The judges of election shall make and certify to the clerk of the county a separate list of the names of the electors voting upon the

only, as regards their recitals, in this, that the bonds here contain the additional recital that "the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," and do not show upon their face, as did those in that case, how many bonds were issued, or how large each series was.

The provision of the constitution of 1876, referred to, both in this case and in that, (art. 11, sec. 6,) is as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years; and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; *Provided*, That this section shall not apply to counties having a valuation of less than one million of dollars."

We held in that case that the county was not estopped from

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question of the funding of the county indebtedness in the order in which the ballot of the elector so voting is received, and each ballot shall be numbered in the order in which it is received, and the number recorded and [on] the said list of voters opposite the name of the voter who presents the ballot. — Laws 1881, p. 85, §§ 1, 2, 3, 4 and 5.

pleading the constitutional limitation, because there was no recital in the bonds in regard to it, and because, also, the bonds showing upon their face that they were issued to the amount of $500,000, the purchaser, having that data before him, was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds, having been issued in violation of that provision of the constitution, were not valid obligations of the county. Our decision was based largely upon the ruling of this court in *Dixon County* v. *Field*, 111 U. S. 83. To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: Do the additional recital in these bonds, above set out, and the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation?

In our opinion these two features are of vital importance in distinguishing this case from *Lake County* v. *Graham* and *Dixon County* v. *Field*, and are sufficient to operate as an estoppel against the county. Of course, the purchaser of bonds in open market was bound to take notice of the constitutional limitation on the county with respect to indebtedness which it might incur. But when, upon the face of the bonds, there was an express recital that that limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the *Lake County Case*, and in *Dixon County* v. *Field*, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and

then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is — What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in *Lake County* v. *Graham* and *Dixon County* v. *Field*. But that is not this case. Here, by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the State and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue. *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Town of Venice* v. *Murdock*, 92 U. S. 494; *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Wilson* v. *Salamanca*, 99 U. S. 499; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608.

The rule respecting the binding force of recitals in bonds is well stated in *Town of Coloma* v. *Eaves*, as follows: "Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and

to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." 92 U. S. 491.

In *Buchanan* v. *Litchfield*, while holding that the bonds were in excess of the amount that could be legally issued, and that the recitals in the bonds were not sufficient to estop the municipality from pleading a want of authority to issue them, the court say: "As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation on the part of the constituted authorities of the city that the requirements of the constitution were met — that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit — then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Town of Coloma* v. *Eaves*." And again: "Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement, as to the extent of its existing indebtedness." 102 U. S. 290, 292.

We think this case comes fairly within the principles of those just cited; and that it is not governed by *Dixon County* v. *Field* and *Lake County* v. *Graham*, but is distinguishable from them, in the essential particulars above noted.

Judgment affirmed.

Mr. Justice Gray dissented.

DOON TOWNSHIP *v.* CUMMINS.

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

No. 883. Submitted January 6, 1891. — Decided January 4, 1892.

By virtue of Art. 11, sec. 3 of the constitution of Iowa of 1857, which ordains that "no county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation — to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness," negotiable bonds, in excess of the constitutional limit, issued by a school district, and sold by its treasurer, for the purpose of applying the proceeds of the sale to the payment of the outstanding bonded indebtedness of the district, pursuant to the statute of Iowa of 1880, c. 132, are void as against one who purchases them from the district with knowledge that the constitutional limit is thereby exceeded.

The original action was brought by Theron Cummins, a citizen of Illinois, on coupons attached to negotiable bonds issued by the defendant, a district township of Iowa, under the statute of Iowa of 1880, c. 132, the material provisions of which are copied in the margin.[1]

[1] Sec. 1. Any independent school district or district township now or hereafter having a bonded indebtedness outstanding is hereby authorized to issue negotiable bonds at any rate of interest not exceeding seven per cent per annum, payable semi-annually, for the purpose of funding said indebtedness, said bonds to be issued upon a resolution of the board of directors of said district: provided, that said resolution shall not be valid unless adopted by a two-thirds vote of said directors.

Statement of the Case.

The defendant denied the validity of the bonds, on the ground that they were issued in violation of the constitution of Iowa of 1857, art. 11, sec. 3, likewise copied in the margin.[1]

A jury was duly waived, and the case was submitted to the Circuit Court, which found the following facts:

The defendant is a school district in Lyon County, Iowa, having power to contract in its corporate name, and to issue negotiable bonds. From the date of its organization its affairs have been badly managed, and, through fraud and incompetency on the part of the officers of the district, indebtedness to a very large extent has been created against the district, part of which was evidenced by bonds of the district, part by judgments against it, and part by warrants or orders drawn on its different funds.

On July 9, 1881, the board of directors of the district unanimously adopted a resolution to issue "for the purpose of funding the outstanding bonded indebtedness of the district" bonds to an amount not exceeding $25,000, in accordance with the statute aforesaid, to run for ten years, and payable after five years at the pleasure of the district, and bearing interest at the annual rate of seven per cent, with interest coupons attached; and appointing one Richards "refunding agent to negotiate said bonds," to take up the aforesaid indebtedness, and to report his doings to the district.

In pursuance of this resolution, twenty-five bonds were prepared and signed by the proper officers of the district, dated July 11, 1881, for the sum of $1000 each, having the statute

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Sec. 2. The treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par, but the bonds hereby authorized shall be issued for no other purpose than the funding of outstanding bonded indebtedness. Laws of Eighteenth General Assembly of Iowa, 127.

[1] No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation — to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness. 1 Charters and Constitutions, 565.

aforesaid printed upon them, and containing the following recital: "This bond is executed and issued by the board of directors of said school district in pursuance of and in accordance with chapter 132, laws of the eighteenth general assembly of Iowa, is in accordance with the laws and constitution of the State of Iowa, and in conformity with a resolution of said board of directors passed in accordance with said chapter 132 at a meeting thereof held 9th day of July, 1881."

Ten of these bonds were sold on July 25, 1881, and ten others on August 11, 1881, for their par value in cash, by Richards to the plaintiff, who, at the time of his first purchase, knew that it was the defendant's purpose to issue bonds to the amount of $20,000 at least, or $25,000 if necessary. The remaining five bonds were sold by Richards on December 20, 1881, to another party.

At the time of issuing the bonds in question, the total valuation of the taxable property within the district, as shown by the next preceding state and county tax lists, was $131,038. The evidence failed to show the exact amount of bonds of the defendant outstanding on July 11, 1881; but the amount of such bonds, with interest, exceeded $20,000. Large amounts of warrants had been issued by the district from time to time for various purposes, a portion, at least, of which was fraudulent; and there were outstanding unsatisfied judgments against it for $11,700. Many frauds had been perpetrated by the officers of the district, and thereby the amount of indebtedness evidenced by its bonds and by judgments against it had been fraudulently increased. But the evidence failed to show that any of those bonds had been issued in violation of the above provision of the constitution of Iowa, or that a successful defence could have been interposed by the defendant against the holders of any of them.

Of the proceeds of the sale of the new bonds, the sum of $19,174 was paid out by Richards at various times from July 30, 1881, to March 4, 1882, in discharging bonds, coupons, judgments, warrants and orders drawn on the teachers', contingent and schoolhouse funds, and the balance of $6485.79 was paid to the defendant's treasurer. His report, which was made

Citations for Defendant in Error.

part of the findings of fact, showed that of the sum of $19,174, less than $6000 was applied to the payment of outstanding bonds and coupons, $875 in paying interest on the new bonds, and the rest to the other purposes above mentioned.

The defendant regularly paid interest on the new bonds until and including July, 1885; and this action was brought on the coupons falling due in 1886, 1887, 1888 and 1889.

On these facts the court gave judgment for the plaintiff for $6462.40, being the amount of the coupons sued on, with interest. 42 Fed. Rep. 644. The defendant sued out this writ of error.

Mr. B. F. Kauffman, *Mr. A. Van Wagenen*, *Mr. H. T. McMillan* and *Mr. N. T. Guernsey* for plaintiff in error, cited: *Dixon County* v. *Field*, 111 U. S. 83; *School District* v. *Stone*, 106 U. S. 183; *Lake County* v. *Rollins*, 130 U. S. 662; *Lake County* v. *Graham*, 130 U. S. 674; *McPherson* v. *Foster*, 43 Iowa, 48; *Mosher* v. *Ackley School District*, 44 Iowa, 122; *King* v. *Mahaska County*, 75 Iowa, 329; *Scott* v. *City of Davenport*, 34 Iowa, 208; *Council Bluffs* v. *Stewart*, 51 Iowa, 385; *Austin* v. *District Township of Colony*, 51 Iowa, 102; *Railroad Co.* v. *Osceola County*, 45 Iowa, 168; *Wisconsin Central Railroad* v. *Taylor County*, 52 Wisconsin, 37.

Mr. J. H. Swann, *Mr. M. B. Davis* and *Mr. W. E. Gantt* for defendant in error, cited, among others: *Miller* v. *Nelson*, 64 Iowa, 458; *Railroad Co.* v. *Osceola County*, 45 Iowa, 168, 52 Iowa, 26; *School District* v. *Stone*, 106 U. S. 183; *Bates* v. *School District of Riverside*, 25 Fed. Rep. 192; *Griffith* v. *Burden*, 35 Iowa, 138; *Morris Canal & Banking Co.* v. *Fisher*, 9 N. J. Eq. (1 Stockton) 667; *S. C.* 64 Am. Dec. 423; *Bluff Creek* v. *Hardinbrook*, 40 Iowa, 130; *Taylor Township* v. *Morton*, 37 Iowa, 550; *Union Township* v. *Smith*, 39 Iowa, 9; *Wilson* v. *Salamanca*, 99 U. S. 499; *Coloma* v. *Eaves*, 92 U. S. 484; *Marcy* v. *Oswego*, 92 U. S. 637; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Sherman County* v. *Simons*, 109 U. S. 735; *Humboldt*

Township v. *Long*, 92 U. S. 642; *Lynde* v. *The County of Winnebago*, 16 Wall. 6; *Commissioners* v. *January*, 94 U. S. 202; *County of Warren* v. *Marcy*, 97 U. S. 96; *Commissioners of Douglas County* v. *Bolles*, 94 U. S. 104; *Pana* v. *Bowler*, 107 U. S. 529; *Supervisors* v. *Schenck*, 5 Wall. 772; *Portsmouth Savings Bank* v. *Springfield*, 4 Fed. Rep. 276; *Moran* v. *Miami County*, 2 Black, 722; *Bissell* v. *Jeffersonville*, 24 How. 287; *Mercer County* v. *Hacket*, 1 Wall. 83; *Meyer* v. *Muscatine*, 1 Wall. 384; *Van Hostrup* v. *Madison City*, 1 Wall. 291; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Rogers* v. *Burlington*, 3 Wall. 654; *Lexington* v. *Butler*, 14 Wall. 282; *Grand Chute* v. *Winegar*, 15 Wall. 355, 372; *St. Joseph Township* v. *Rogers*, 16 Wall. 644; *Coloma* v. *Eaves*, 92 U. S. 484; *Town of Venice* v. *Murdock*, 92 U. S. 494; *Moultrie* v. *Savings Bank*, 92 U. S. 631; *Randolph County* v. *Post*, 93 U. S. 502; *Leavenworth* v. *Barnes*, 94 U. S. 70; *Johnson County* v. *Thayer*, 94 U. S. 631; *Cass County* v. *Johnston*, 95 U. S. 360; *San Antonio* v. *Mehaffey*, 96 U. S. 312; *Warren County* v. *Marcy*, 97 U. S. 96; *Hackett* v. *Ottawa*, 99 U. S. 86; *Schuyler County* v. *Thomas*, 98 U. S. 169; *Anthony* v. *Jasper County*, 101 U. S. 693; *Pompton Township* v. *Cooper Union*, 101 U. S. 196; *Harter* v. *Kernochan*, 103 U. S. 562; *Bonham* v. *Needles*, 103 U. S. 648; *Walnut* v. *Wade*, 103 U. S. 683; *Clay County* v. *Savings Society*, 104 U. S. 579; *Moultrie County* v. *Fairfield*, 105 U. S. 370; *Insurance Co.* v. *Bruce*, 105 U. S. 328; *Knox County* v. *Aspinwall*, 21 Howard, 539.

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

The constitution of Iowa, art. 11, sec. 3, ordains as follows: "No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation — to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness."

Opinion of the Court.

The scope and meaning of this provision of the fundamental and paramount law of the State are clear and unmistakable. No municipal corporation "shall be allowed" to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted "in any manner, or for any purpose." The limit of the aggregate debt of the municipality is fixed at five per cent of the value of the taxable property within it; and that value is to be ascertained "by the last state and county tax lists," which are public records, open to all, and of the contents of which all are bound to take notice. The prohibition is addressed to the legislature, as well as to all municipal boards and officers, and to the people, and forbids any and all of them to create, or to give binding force to, any debts of the corporation in excess of the limit prescribed. The prohibition extending to debts contracted "in any manner, or for any purpose," it matters not whether they are in every sense new debts, or are debts contracted for the purpose of paying old ones, so long as the aggregate of all debts, old and new, outstanding at one time, and on which the corporation is liable to be sued, exceeds the constitutional limit. The power of the legislature in this respect being restricted and controlled by the constitution, any statute which purports to authorize a municipal corporation to contract debts in any manner or for any purpose whatever in excess of that limit is to that extent unconstitutional and void.

By the terms of the statute of Iowa of 1880, c. 132, under which the bonds in question were issued, any independent school district or district township, having a bonded indebtedness outstanding, is authorized to issue negotiable bonds for the purpose of funding that indebtedness; and "the treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par."

There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative, of

exchanging bonds issued under the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the constitution. But under the first alternative, by which the treasurer is authorized to sell the new bonds and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if new bonds equal in amount to the old ones are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged.

It is true that if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit. But it is none the less true, that it has been increased in the interval; and that unless those officers do their duty, the increase will be permanent. It would be inconsistent alike with the words, and with the object, of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers.

There could be no better illustration of the reasonableness, if not the necessity, of this construction, in order to secure to municipal corporations the protection intended and declared by the constitution of the State, than is afforded by the facts of the present case. The total valuation of the property of the district, as shown by the last state and county tax list before it issued the bonds in question, was $131,038, five per cent of which, or $6551.90, was the limit beyond which it was prohibited by the constitution to contract debts. Its outstand-

ing bonded debt was already not less than $20,000, which upon the facts found must be assumed to be valid. For the purpose of funding that debt it executed and sold bonds to the amount of $25,000, and it actually applied less than $6000 of the proceeds of the sale to the payment of outstanding bonds. The result of holding the new bonds good would be to double the whole bonded debt of the district, and to bring it up to about thirty per cent of the valuation.

This construction of the constitution of Iowa appears to us to be warranted, and indeed required, by previous decisions of this court.

In construing a prohibition of the constitution of Illinois of 1870, art. 9, sec. 12, expressed in substantially the same words, this court, speaking by Mr. Justice Harlan, said: "The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount." "No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur." *Buchanan* v. *Litchfield*, 102 U. S. 278, 287, 288. It is proper to add that the bonds there held invalid recited that they had been issued in accordance with a certain legislative act and municipal ordinance, but neither the bonds, the statute, nor the ordinance, mentioned the constitutional restriction; and that it was intimated in the opinion that if the bonds had contained further recitals which, fairly construed, amounted to a representation that the proposed indebtedness was within the constitutional limit, the city might have been estopped to dispute the truth of the representation as against a *bona fide* holder of the bonds. 102 U. S. 290, 292. This court afterwards held that the original purchaser of the bonds thus held invalid could not maintain a suit in equity against the city to recover back the money paid for them; and, speaking by Mr. Justice Miller, after quoting the constitutional provision, and emphasizing the words "*indebted*

in any manner or for any purpose," said: "It shall not *become indebted*. Shall not incur any pecuniary liability. It shall not do this in *any manner*. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose*. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." *Litchfield* v. *Ballou*, 114 U. S. 190, 192, 193.

In *Dixon County* v. *Field*, 111 U. S. 83, there was brought in question the effect of the constitution of Nebraska of 1875, art. 12, sec. 2, prohibiting any county or other subdivision of the State from ever making donations to any railroad, without a vote of the qualified electors thereof at an election held by authority of law, and providing that its donations "in the aggregate shall not exceed ten per cent of the assessed valuation of county," (with a proviso immaterial to that case,) and that "no bonds or other evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of the State, showing that the same is issued pursuant to law." Bonds issued by a county beyond ten per cent of its assessed valuation were held to be void, even in the hands of a *bona fide* holder, although each bond, after stating the whole amount issued, stated that they were issued pursuant to an order of the county commissioners, and authorized by an election held on a certain day, and under and by virtue of certain statutes, and the constitution of the State; and bore a certificate of the secretary and auditor that "it was issued pursuant to law." In delivering the opinion of the court, Mr. Justice Matthews said: "We regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing the public debts, by express and positive limitations upon the legislative power itself." 111 U. S. 89. "No recital involving the amount of the assessed taxable valuation of the

property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power." 111 U. S. 95.

The constitution of Colorado of 1876, art. 11, sec. 6, provides that the indebtedness contracted in any one year, by any county having a valuation of not less than one million of dollars, shall not exceed a certain per cent on its assessed valuation, and that "the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited." This court held, in *Lake County* v. *Rollins*, 130 U. S. 662, that this provision limited the power of the county to contract debts for any purpose whatever; and in *Lake County* v. *Graham*, 130 U. S. 674, that the county was not estopped, as against a *bona fide* holder for value, to show that the constitution had been violated by issuing bonds which recited the whole amount issued, and that they were issued "under and by virtue of and in full compliance with" a certain statute, and that "all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." In the latter case, Mr. Justice Lamar, delivering judgment, said: "In this case the constitution charges each purchaser with knowledge of the fact that, as to all counties whose assessed valuation equals one million of dollars, there is a maximum limit, beyond which those counties can incur no further indebtedness under any possible conditions, provided that, in calculating that limit, debts contracted before the adoption of the constitution are not to be counted." 130 U. S. 680. And again: "In this case the standard of validity is created by the constitution. In that standard two factors are to be considered; one the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of a legislature to dispense with them, either directly, or indirectly, by the creation of a ministerial commission whose

finding shall be taken in lieu of the facts. In the case of *Sherman County* v. *Simons*, 109 U. S. 735, and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was that the legislature, being the source of exaction, had created a board authorized to determine whether its exaction had been complied with, and that its finding was conclusive to a *bona fide* purchaser." 130 U. S. 683, 684.

It is hardly necessary to add that the payment of some instalments of interest cannot have the effect of ratifying bonds issued beyond the constitutional limit; for a ratification can have no greater effect than a previous authority; and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest, or otherwise. *Marsh* v. *Fulton County*, 10 Wall. 676; *Loan Association* v. *Topeka*, 20 Wall. 655; *Daviess County* v. *Dickinson*, 117 U. S. 657; *Norton* v. *Shelby County*, 118 U. S. 425, 451.

In the Supreme Court of Iowa, it is settled law that the constitutional restriction includes not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of the current revenues. *Scott* v. *Davenport*, 34 Iowa, 208; *McPherson* v. *Foster*, 43 Iowa, 48; *Mosher* v. *Ackley District*, 44 Iowa, 122; *Council Bluffs* v. *Stewart*, 51 Iowa, 385; *Kane* v. *Rock Rapids District*, 47 Northwestern Reporter, 1076. And a school district has been adjudged to be a political or municipal corporation within the meaning of the constitution. *Winspear* v. *Holman District*, 37 Iowa, 542; *Mosher* v. *Ackley District* and *Kane* v. *Rock Rapids District*, above cited.

In *Scott* v. *Davenport*, it was held that after the constitutional limit had been reached, by debts contracted either before or after the constitution took effect, no new debts could be contracted, even for the purpose of erecting public works from which it was expected that the city would derive a revenue. In *McPherson* v. *Foster*, it was held that bonds issued in excess of the constitutional limit were void, even in the hands

of a *bona fide* purchaser for value, and could not be ratified by the municipality, by payment of interest or otherwise. In *Mosher* v. *Ackley District*, it was again held that such bonds were void against a *bona fide* holder, and that a statute giving a lien on a schoolhouse for materials for which such bonds had been given was unconstitutional. In *Council Bluffs* v. *Stewart*, it was held that uncollected taxes and the levy for the current year could not be deducted from the outstanding debt for the purpose of ascertaining the real indebtedness, and that the contrary view "confounds the distinction between an indebtedness and insolvency." 51 Iowa, 396.

The Iowa cases cited by the defendant in error fail to support his position. In *Austin* v. *Colony District*, 51 Iowa, 102, the limit in question was not fixed by the constitution, but by a vote of the district. In *Sioux City* v. *Weare*, 59 Iowa, 95, the bond held valid was issued and received in payment and satisfaction of a judgment for a tort, and that judgment was not shown to have been in excess of the constitutional restriction. There the bond took the place of the judgment, and therefore, as observed by the court, did not increase the city's indebtedness.

The case of *Sioux City & St. Paul Railway* v. *Osceola County*, 45 Iowa, 168, arose under the statute of Iowa of 1872, c. 174, which provided that a judgment creditor of a municipal corporation, in lieu of an execution against its property, might demand and receive the amount of his judgment and costs in bonds of the corporation; and the decision was that a bond given by a county under that statute, in payment of a judgment recovered upon a warrant of the corporation, could not be defeated in the hands of a *bona fide* holder by evidence that the warrant was issued in excess of the constitutional restriction, and that the supervisors of the county fraudulently omitted to interpose the defence in the action upon the warrant. That decision went upon the ground that, there having been no defence by the supervisors nor interposition by the taxpayers in the action on the warrant, the purchaser of the bond had the right to presume that there was no defect in the judgment. 45 Iowa, 175, 176. In a subsequent

case between the same parties, the county, having given bonds partly in exchange for county warrants and partly in exchange for judgments upon such warrants, all the warrants having been issued in excess of the constitutional limit, and all the bonds having passed out of the hands of their original holders, was restrained by injunction from paying the bonds exchanged for warrants on which no judgment had been recovered, and was permitted to pay those bonds only given in exchange for judgments. Appeal was taken from the latter part of the decree only, and the judgment of the Supreme Court of the State, following its former decision between the parties, was confined, in express terms, as well as in legal effect, to "the validity of negotiable bonds of a county, issued in satisfaction of a judgment, in the hands of innocent holders for value." 52 Iowa, 26, 28. The rule there acted on is restricted to such a case in the opinion in *Miller* v. *Nelson*, 64 Iowa, 458, 461, and by the adjudication of the same court in a very recent case not yet published in the official reports. *Kane* v. *Rock Rapids District*, 47 Northwestern Reporter, 1076.

In the case at bar, the new debts did not arise on warrants for money actually in the treasury of the district, or on contracts for ordinary expenses payable out of its current revenues; and none of the bonds in question were given in payment and satisfaction of judgments. Nor did the plaintiff buy the bonds for value, in good faith, and without notice of any defect, from one to whom they had been issued by the district. He was himself the person to whom they were originally issued by the district, and knew, when he took the first ten bonds, that the district, in issuing them, exceeded the constitutional limit, as appearing by public records of which he was bound to take notice, and that it intended still further to exceed that limit. Under such circumstances he had no right to rely on the recitals in the bonds, even if these could otherwise have any effect as against the plain provision of the constitution of the State. By the uniform course of the decisions of the Supreme Court of Iowa, therefore, as well as of this court, he cannot maintain this action.

Judgment reversed, and case remanded to the Circuit Court with directions to enter judgment for the defendant.

Dissenting Opinion: Brown, Harlan, Brewer, JJ.

MR. JUSTICE BROWN, (with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE BREWER,) dissenting.

These bonds were issued under an act of the legislature authorizing district townships having a bonded indebtedness outstanding to issue negotiable bonds for the purpose of funding such indebtedness, and subject to a constitutional provision that no municipal corporation shall become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent on the value of the taxable property within such corporation. The bonds were certified by the proper officers of the district to have been executed and issued in pursuance of and in accordance with the statute authorizing such bonds, (a copy of which was printed upon the bonds,) and in accordance with the laws and constitution of the State of Iowa, and in conformity with the resolution of the board of directors, etc. Plaintiff purchased these bonds, for their par value in cash, of one Richards, who had been appointed "refunding agent to negotiate the bonds." Under the provision of the constitution, the township had no power to create an indebtedness in excess of $6551.90, that being five per cent of the taxable property of the township, as shown by the last tax list previous to the issuance of said bonds.

But, granting that the indebtedness already existing exceeded the constitutional limit, these bonds were issued, not for the purpose of increasing this indebtedness, but merely to change its form and reduce its rate of interest. The object of the constitutional provision was to prevent the incurrence of a new debt or the increase of an existing debt beyond a limited amount. The object of the statute was to enable district townships to fund their indebtedness by issuing and selling bonds at not less than their par value, and applying the proceeds to the payment of such outstanding indebtedness, or by exchanging such bonds for outstanding bonds. If the construction placed upon this statute by the court be correct, it is difficult to see how any township can avail itself of it, if such township has an existing indebtedness up to the amount of the constitutional limitation, since the new bonds, whether

issued to be sold for cash or to be exchanged for other bonds, must, while the process of sale or exchange is going on, nominally increase the indebtedness of the corporation. I regard this as too technical an interpretation of the constitutional provision.

In giving a construction to this clause, the Supreme Court of Iowa held in *S. C. & St. P. R. R. Co.* v. *The County of Osceola*, 45 Iowa, 168, that the validity of negotiable bonds of a county, issued in satisfaction of a judgment, in the hands of innocent holders for value, without notice of any claim that they are illegal for any cause, could not be questioned, by showing that the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent, and that the board of supervisors fraudulently omitted to interpose the defence when the warrants were sued upon. "When a bond," says the court, "issued in discharge of a judgment is placed upon the market, a purchaser who has no intimation of anything affecting its validity, has a right to presume that the board of supervisors have been mindful of their interest and their duty, and that all available defences have been presented and passed upon." This case was recognized and cited with approval in *Miller* v. *Nelson*, 64 Iowa, 468, and *S. C. & St. P. R. R. Co.* v. *Osceola County*, 52 Iowa, 26. See also *Chaffee Co.* v. *Potter*, *ante*, 355, and cases there cited; *Powell* v. *Madison*, 107 Indiana, 106.

Had the proceeds of these bonds been properly applied, no question could have arisen as to the indebtedness of the township having been increased by their issue. If the district township had the right to issue the bonds, which it certainly had, if the statute under which they were issued be constitutional, the purchaser of such bonds was under no obligation to see that the money he paid for them was applied to extinguishing the existing indebtedness. He was entitled to act upon the presumption that the officers charged with the execution of the law would not betray their trust, and would deal fairly with the people who had put them forward to represent them. In my view this is simply an attempt to saddle the holders of these bonds with the derelictions of the officials chosen by the electors of this township to act for them in this transaction, and who were alone entitled to receive the money.

SCOTT *v.* ELLERY.

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

No. 117. Submitted November 25, 1891. — Decided January 4, 1892.

Sections 5105 and 5106 of the Revised Statutes relate to different classes of debts against a bankrupt; the former to debts that are proved, the latter to debts that are provable but not proved.

A mortgage creditor of a bankrupt obtained a decree for the foreclosure of the mortgage, under which the property was sold for less than the mortgage debt. He proved the remainder, deducting the amount received from the sale, in the bankruptcy proceedings. After the discharge of the bankrupt he obtained a decree in the foreclosure proceedings against the debtor for the balance due on the mortgage debt. *Held*, that by proving his debt in bankruptcy he waived his right, pending the question of discharge, to take a deficiency decree against the bankrupt; that after the discharge the right to such a decree was lost altogether; that the debtor was not bound, after his discharge, to give any attention to the foreclosure suit; and that, under the circumstances, the obtaining a deficiency decree amounted to a fraud in law.

The case is stated in the opinion.

Mr. H. Scott Howell and *Mr. William C. Howell* for appellant.

Mr. E. S. Huston for appellee.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff, Ellery, and the defendant, Scott, were, on and after the 17th day of August, 1877, residents and citizens, continuously, of the respective States of New Jersey and Iowa.

On that day, Scott instituted a suit in the District Court of Des Moines County, Iowa, to obtain a decree for the sale of certain lands in that county covered by a mortgage given by Ellery, and for a judgment against the latter for the mortgage debt. Ellery appeared in the suit and caused it to be removed

into the Circuit Court of the United States for what was then the Southern District of Iowa. By a decree, rendered June 10, 1878, the mortgage was foreclosed, the court adjudging the sum of $19,480.50 and costs to be due Scott from Ellery, and directing a sale of the premises by the master to pay that sum. The decree concluded: "It is further ordered that the said master shall, as soon as the said sale is made, report the same to this court for its action thereon, and that this cause do stand continued until the execution of this decree, and the further order of this court." The mortgaged property was sold under the decree, and brought the sum of $10,000. The sale was duly confirmed November 4, 1878, that sum being credited on the decree.

Prior to the confirmation of the sale — whether before the sale occurred is not stated — a petition of involuntary bankruptcy was filed against Ellery in the District Court of the United States for the District of New Jersey, and he was duly adjudged by that court a bankrupt. His estate was conveyed by the register in bankruptcy, in the usual form, to an assignee. Subsequently, January 27, 1879, Scott filed with the register in bankruptcy proof of his debt against the estate of Ellery, based upon the above decree of foreclosure, and giving a credit for the $10,000 realized by the sale.

On the 25th day of February, 1879, Ellery was granted a discharge in bankruptcy, but no dividend was ever made or paid by his assignee.

At the regular term of the Circuit Court of the United States for the District of Iowa, held at Des Moines, May 15, 1879, Scott appeared by counsel, and such proceedings were had that a decree was rendered, at his instance, against Ellery for $10,436.42, being the balance due on the mortgage debt. No new notice was served upon Ellery or his counsel, by or for Scott, nor was any notice published, stating that an application would be made for a deficiency decree against Ellery.

Scott did not have knowledge of Ellery's discharge in bankruptcy until long after the date of the deficiency decree; and Ellery had no actual knowledge of that decree until about the last of May, 1883. The only notice either had was such as

might be implied or inferred from the facts and proceedings to which reference has been made.

By the final decree in the present suit, which was a bill in equity brought by Ellery, the court, in accordance with Ellery's prayer for relief, vacated the deficiency decree of May 15, 1879, and Scott was enjoined from enforcing it.

Section 5105 of the Revised Statutes provided (as did the bankruptcy act of 1841, c. 9, § 5, 5 Stat. 445) that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby." This section was amended by the act of June 22, 1874, by adding thereto the following words: "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge." 18 Stat. 179, c. 390, § 7.

Section 5106 provided that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

It is clear that sections 5105 and 5106 related to different classes of cases. Section 5106 applied only to creditors whose debts were "provable," but not proved, in bankruptcy. In respect to such debts, when sued for, the right was given to the bankrupt, upon his application, to have the suit and pro-

ceedings, in whatever court pending, stayed until the question of his discharge was settled, subject to the condition that there was no unreasonable delay in endeavoring to obtain the discharge, and to the further condition that the court in which the action was pending, with leave of the bankruptcy court, could proceed for the purpose simply of ascertaining the amount of the debt, so that it could be proved in bankruptcy. If the bankrupt failed, in a case of that kind, to make his application for a stay of proceedings, the jurisdiction to proceed to final judgment against him, whether the action was pending in a state or in a federal court, was not impaired by section 5106. *Eyster* v. *Gaff*, 91 U. S. 521; *Davis* v. *Friedlander*, 104 U. S. 570, 575; *Hill* v. *Harding*, 107 U. S. 631, 634; *Dimock* v. *Revere Copper Co.*, 117 U. S. 559, 564; *Boynton* v. *Ball*, 121 U. S. 457, 466; *In the matter of Schepeler & Co.*, 4 Ben. 68.

The present case falls distinctly under section 5105 as amended by the act of June 22, 1874. When Scott proved his debt in the bankruptcy court, he waived his right, pending the question of Ellery's discharge in the bankruptcy court, to take a deficiency decree against him in the court in Iowa; and the discharge having been granted, the right to such a decree was lost altogether. The statute is susceptible of no other construction. It is of no consequence that Scott was without knowledge at the time the deficiency decree was rendered that Ellery had been discharged. By proving his debt in the bankruptcy court he became a party to the proceedings in bankruptcy, and surrendered the right to proceed in the Iowa suit until the question of Ellery's discharge was determined, and he was bound to know, when he took the deficiency decree, whether or not the bankrupt had in fact been discharged. After proving his debt in the bankruptcy court, he could not proceed in the Iowa suit unless Ellery was refused a discharge, or unless the proceedings in bankruptcy were determined without a discharge. And such would have been, no doubt, the view of the learned judge who rendered the deficiency decree, if he had been informed at the time that Scott had proved his debt or claim in the bank-

ruptcy court, and that a discharge had been granted to the bankrupt.

The appellant lays some stress upon the fact that when the decree of foreclosure and sale was entered the cause was continued until the execution of that decree, and until the further order of the court. If by this is meant that Ellery was to be deemed as in court when the deficiency decree was rendered, and made no objection thereto, it is sufficient to say that the statute protected him against any personal decree in the court of Iowa, after Scott proved his debt in the bankruptcy court, and pending the question of his discharge, and that, after he was discharged, the right of Scott to a deficiency decree against him was gone. He was not bound, after Scott proved his debt in bankruptcy, to give attention to the suit in Iowa, or to assume that any steps would be taken in the Iowa court that were inconsistent with the statute. If Scott intended, by what he did, to assert his right to a deficiency decree, whether Ellery was discharged or not in bankruptcy, he should have instituted a new suit, or given due personal notice of his purpose to apply for such a decree in the foreclosure suit; in either of which cases Ellery could have pleaded his discharge in bankruptcy. Neither of these courses was pursued, but a deficiency decree was obtained in violation of the statute, and without notice to Ellery. It was obtained under circumstances that amounted to a fraud in law, and the decree below, vacating it and enjoining the appellant from enforcing it, was clearly right.

Decree affirmed.

CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY *v.* GIBBES.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 41. Argued October 20, 1891. — Decided January 4, 1892.

The provisions in c. 40 of the General Statutes of South Carolina of 1882, requiring the salaries and expenses of the state railroad commission to be borne by the several corporations owning or operating railroads within the State, are not in conflict with the provision in the Fourteenth Amendment to the Constitution that a State shall not "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is again decided that private corporations are persons within the meaning of that Amendment.

Requiring the burden of a public service by a corporation, in consequence of its existence and of the exercise of privileges obtained at its request, to be borne by it, is neither denying to it the equal protection of the laws, nor making any unjust discrimination against it.

The legislative and constitutional provision of the State of South Carolina that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income of the several railroads, in proportion to the number of miles of railroad operated within the State, in order to meet the special service required of the state railroad commission.

THE court stated the case as follows:

The plaintiff below, and in error, The Charlotte, Columbia and Augusta Railroad Company, is a corporation existing under the laws of the States of North Carolina, South Carolina and Georgia. Its road and other property are situated in the county of Richmond, Georgia, and in the counties of Aiken, Edgefield, Lexington, Richland, Fairfield, Chester and York, South Carolina, and in the county of Mecklenberg, North Carolina.

By the legislature of South Carolina a general railroad law was passed in 1878, prescribing numerous provisions for the regulation and government of railroads in that State. That law, as amended in some particulars, was incorporated as

chapter 40 in the General Statutes of the State, in 1882. It provides for the appointment by the governor of three railroad commissioners, charged to see to the enforcement of its various provisions, each of whom is to receive a salary of two thousand dollars a year, to be paid out of the treasury of the State in the manner provided by law for the salaries of other state officers; and also that, "the entire expenses of the railroad commission, including all salaries and expenses of every kind, shall be borne by the several corporations owning or operating railroads within this State according to their gross income proportioned to the number of miles in the State, to be proportioned by the comptroller general of the State, who on or before the first day of October in each and every year shall assess upon each and every corporation its just proportion of such expenses in proportion to its said gross income for the current year ending on the 30th day of June next preceding that on which the said assessment is made; and the said assessment shall be charged up against the said corporations, respectively, under the order and direction of the comptroller general, and shall be collected by the several county treasurers in the manner provided by law for the collection of taxes from such corporations, and shall be paid by the said county treasurers, as collected, into the treasury of the State in like manner as other taxes collected by them for the State."

For the fiscal year of 1883 the plaintiff was charged on the books of the county treasurer of Richland County, in South Carolina, with the sum of $987.75, being the amount assessed as a tax against that company as its entire proportion of the salaries and expenses of the railroad commissioners of the State, and being its proportion for all the counties.

The plaintiff, deeming the same to be unjust and illegal, paid the same under protest, and instituted the present suit, under a law of the State, to obtain a judicial determination that it was wrongfully and illegally collected, and the certificate of the court that it should be refunded.

In its complaint it alleges that the tax is illegal because assessed in proportion to the gross income of the plaintiff instead of being in proportion to the value of its property;

and because its imposition is in conflict with the constitution of the State in several particulars mentioned; and also in violation of the Fourteenth Amendment of the Constitution of the United States, by which each State is forbidden to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, in this, that the act and amendments authorizing it require railroad companies of the State, exclusively, to pay the salaries and expenses of three state officers, no other persons in the State being required to contribute any portion of the same, and require them to pay a tax of a nature, character and amount not required of other corporations and persons within the jurisdiction of the State.

The attorney general of the State appeared for the treasurer of Richland County, and admitted that that officer, under the order and direction of the comptroller general of the State, had collected of the plaintiff the sum claimed, $987.75, as the just proportion of the entire expenses of the railroad commissioners of the State, assessed upon that corporation by him, and also the sum of $24.70, being the amount of costs and penalties charged against it by his direction, and that the same were paid under protest, denying, however, that the laws under which the amount was assessed against the plaintiff and collected were unconstitutional and void, or that the same was illegally and wrongfully collected.

The constitution of South Carolina declares that "all property subject to taxation shall be taxed in proportion to its value," and that its legislature "shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property," with certain specified exceptions not affecting the questions presented.

The case was heard by the Court of Common Pleas for Richland County, and, by its decree, the validity of the assessment and tax was sustained and the complaint dismissed. On appeal to the Supreme Court of the State the judgment was affirmed, and, to review that judgment, the case is brought here on writ of error.

Argument for Plaintiff in Error.

Mr. Linden Kent for plaintiff in error.

I. Corporations are persons within the meaning of the Fourteenth Amendment of the Constitution of the United States, and can invoke the benefits of the provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection or prohibit legislation injuriously affecting it. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26. I give prominence to this point because it is at once a full answer to the argument of the Chief Justice of the Supreme Court of South Carolina delivering the opinion in this case.

II. A tax which is in effect or substance a property tax imposed exclusively upon railroad companies in a State, in addition to the general tax upon all of their property ascertained by the Board of Equalization, which it bears alike with all other taxable property in the State, for the specific purpose of contributing to the support of certain state officers, whose functions may be connected with the railroads, is a double tax, and in contravention of the first section of the Fourteenth Amendment of the United States Constitution, that no State shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Barbier* v. *Connolly*, 113 U. S. 27; *Memphis Gas Light Co.* v. *Shelby County*, 109 U. S. 398.

III. The additional tax imposed upon the railroads of South Carolina for the support of the Railroad Commission of that State was not in the exercise of its police power, but was in the exercise of its power of taxation, pure and simple, and being such, it must conform to principles of equality and uniformity. I concede that, however arbitrarily a police power may be exercised, the Constitution would not be violated. As to what is a police power, see *Barbier* v. *Connolly*, 113 U. S. 27; *License Cases*, 5 How. 504; *License Tax Cases*, 5 Wall. 562; *Munn* v. *Illinois*, 94 U. S. 113. This case is not the

exercise of such a power. The charge upon a railroad company, in the form of a tax, of a sum sufficient to pay the costs and expenses of the enforced control and regulation over its properties and operations, which sum is paid into the treasury of the State and out in the same manner as other public moneys, is an exercise of the power of taxation pure and simple, and not of the police power.

Mr. William E. Earle for defendant in error. *Mr. Y. J. Pope*, Attorney General of the State of South Carolina, and *Mr. N. L. Jeffries* were with him on his brief.

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

Notwithstanding the several objections taken in the complaint to the assessment and tax upon the railroad companies to meet the expenses and salaries of the railroad commissioners, the argument of counsel on the hearing was confined to the supposed conflict of the laws authorizing the tax with the inhibition of the Fourteenth Amendment of the Constitution of the United States. All other objections were deemed to be disposed of by the decision of the Supreme Court of the State, that the laws complained of are not in conflict with its constitution.

The property of railroad companies in South Carolina is subjected by the general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality in its assessment are imposed. The further tax laid upon them to meet the expenses and salaries of the railroad commissioners is not in proportion to the value of their property, but according to their gross income, proportioned to the number of miles of their roads in the State. This tax is stated to be beyond any which is levied upon other corporations to meet an expenditure for state officers, and, therefore, it is contended, constitutes an unlawful discrimination against railroad corporations, imposing an unequal burden upon them, in conflict with the constitutional

amendment which ordains that no State shall deny to any person the equal protection of the laws. Private corporations are persons within the meaning of the amendment; it has been so held in several cases by this court. *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *Minneapolis & St. Louis Railroad Co.* v. *Beckwith*, 129 U. S. 26.

If the tax were levied to pay for services in no way connected with the railroads, as, for instance, to pay the salary of the executive or judicial officers of the State, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations, and of their not receiving the equal protection of the laws. But there is nothing of this nature in the tax in question. The railroad commissioners are charged with a variety of duties in connection with railroads, the performance of which is of great importance in the regulation of those instruments of transportation. They are invested with the general supervision of all railroads in the State, and are obliged to examine the same and keep themselves informed as to their condition, and the manner in which they are operated with reference to the security and comfort of the public, and compliance with the provisions of their charters, and the laws of the State. Whenever it appears to them that a railroad corporation has violated any law, or neglected in any respect or particular to comply with the terms of its charter, especially in regard to connections with other railroads, the rates of toll and the time schedules, they are obliged to give notice thereof to such corporation; and, if the violation or neglect is continued after such notice, to apply to the courts for an injunction to restrain the company complained of from further continuing to violate the law or the terms of its charter. And, whenever it appears that repairs are necessary to any such road, or that any addition to the rolling-stock, or any enlargement or improvement

in the stations or station-houses, or any modification of the rates of fare for transporting freight or passengers, or any change in the mode of operating the road and conducting its business is reasonable and expedient, in order to promote the security, convenience and comfort of the public, they are required to give information to the corporation of the improvements and changes adjudged to be proper, and, if the company fail, within sixty days, to adopt the suggestions made, to take such legal proceedings as may be deemed expedient to compel them. It is their duty to listen to complaints against a railroad company made by the authorities of any city, town or county, and to give its officers due opportunity of explanation, and, if the complaint is sustained, to require the corporation to remove the cause of complaint. They are required to investigate the cause of any accident on the railroad resulting in the loss of life, and of any accident not so resulting, which shall require investigation, and to make annual reports to the legislature of their official acts, including such statements and explanations as will disclose the actual working of the system of railroad transportation in its bearing upon the business and prosperity of the State, with such suggestions as to the general railroad policy of the State, or as to any part thereof, or as to the condition, affairs or conduct of any of the railroad corporations, as may seem to them appropriate, with a special report of all accidents, and the causes thereof, for the preceding year. All contracts, agreements or arrangements of any and every nature, made by any railroad company, doing business in the State, for the pooling of earnings of any kind with any other railroad company or companies, are to be submitted to the commissioners for their inspection and approval, so far as they may be affected by any of the provisions of the act for securing to all persons just, equal and reasonable facilities for transportation of freight and passengers; and if the contracts, agreements or arrangements shall, in the opinion of the commissioners, in any way be in violation of the provisions of the act, the commissioners are to notify the railroad companies, in writing, of their objections thereto, specifying them, and if the railroad companies, after such notice, fail or neglect

to amend and alter such contract, agreement or arrangement in a manner satisfactory to the commissioners, they shall call upon the attorney general to institute such legal proceedings as may be necessary to enforce the penalties prescribed for such violations.

It is evident, from these and many other provisions that might be stated, that the duties of the railroad commissioners, when properly discharged, must be in the highest degree beneficial to the public, securing faithful service on the part of the railroad companies, and safety, convenience and comfort in the operation of their roads. That the State has the power to prescribe the regulations mentioned there can be no question. Though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested for that purpose with special privileges. They are allowed to exercise the State's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 179. That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties,

the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the Fourteenth Amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making any unjust discrimination against them. All railroad corporations in the State are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and therefore no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered. The legislative and constitutional provision of the State, that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the State to meet the special service required. *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512.

There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the

public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan* v. *Louisiana*, 118 U. S. 455, 466. So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, Chattanooga & St. Louis Railway* v. *Alabama*, 128 U. S. 96, 101. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole State. Thus, in *County of Mobile* v. *Kimball*, 102 U. S. 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole State was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the State or be apportioned between them, is matter of legislative direction.

We see no error in the ruling of the court below upon the Federal question presented, and the conclusion we have reached renders it unnecessary to consider how far the obligation of the corporation was affected by the alleged amendment made to its charter.

Judgment affirmed.

Justices Bradley and Gray did not sit in this case nor take part in its decision.

Syllabus.

WIGGINS FERRY COMPANY *v.* OHIO AND MISSISSIPPI RAILWAY COMPANY.

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

No. 27. Argued December 3, 1891. — Decided January 4, 1892.

A ferry company operating a ferry across a navigable river and, owning the land at the landing and about the approaches to it, contracted with a railroad company for the use of the land for the purposes of its business so long as they should be used and employed for such uses and purposes. The railroad company in consideration thereof agreed to pay the taxes on the land, and not to interfere with the ferry company in respect of its ferry, and to always employ the ferry company in its transportation across the river. The railroad company entered upon the land, and laid down tracks and performed its part of the contract until it became insolvent, and a mortgage upon its property was foreclosed. The property was purchased by a new railway company, which continued to carry on the business as it had been carried on before, but without making any new contract, or any special agreement for rent. After continuing to carry on the business in this way for some time, the railway company diverted a portion of its transportation across the river to other carriers. Subsequently a further diversion was made, and then the company became insolvent, and a receiver was appointed. This officer also continued to carry on the business, and without making any special agreement: but eventually he wholly diverted the business and removed all the rails and tracks from the premises. The ferry company then intervened in the suit against the railway company in which a receiver had been appointed, claiming to recover compensation for the use of its property by the railway company and by the receiver, and for the value of the materials removed from the premises when possession was surrendered. The court below dismissed this petition and allowed an appeal. *Held*,

(1) That the contract did not create the relation of landlord and tenant; that no rent having been reserved, or claimed, or paid during the whole occupation, the conduct of the parties was inconsistent with such a relation; and that under such circumstances such a relation would not be implied;

(2) That the railway company, under the circumstances, acquired an equitable estate in the premises of like character with the legal estate previously held by the railroad company; and that both parties were equitably estopped from denying that such was the case;

(3) That the ferry company having, up to the argument in this court, conducted the litigation solely on the theory that it was entitled

Statement of the Case.

as landlord to recover the rental value of the premises in question, this presented a serious obstacle in the way of doing substantial justice between the parties; but,

(4) That a mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion, even of the appellate court, to permit such amendment to be made;

(5) That the ferry company was not entitled to recover the value of the rails removed by the receiver.

It is not necessary that a party should formally agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract.

Where the judgment in a former action is upon demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings or decided, and does not operate as a bar to a second suit for other breaches of the same covenants; although if the judgment be upon pleadings and proofs, the estoppel extends not only to what was decided, but to all that was necessarily involved in the issue.

As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession.

This case was argued before six justices on the 14th of October, of the present term. On the 19th of the same month it was ordered to be reargued before a full bench. This was done on the 3d of December. The court, in delivering its opinion, stated the case as follows:

This was an appeal from a final decree dismissing an intervening petition, filed December 21, 1878, by the Wiggins Ferry Company in a suit for the foreclosure of a mortgage upon the property of the Ohio and Mississippi Railway Company. The petitioner was a corporation created in 1853 for the purpose of operating a ferry across the Mississippi River at St. Louis, Missouri. The object of this intervening petition was to obtain compensation for the use and occupation by the railway company, from July 1, 1862, to November 18, 1876,

and by John King, Jr., receiver of the said company, from that date to February 20, 1880, of certain lands, the property of the petitioner, upon Bloody Island, opposite the city of St. Louis, in the county of St. Clair, in the State of Illinois. The Ohio and Mississippi Rail*road* Company (hereinafter called the railroad company) was a railroad corporation, and in 1851, was authorized by law to construct its road to Illinoistown, now East St. Louis, on the Mississippi River opposite St. Louis; and in 1854, was further authorized to extend its road from Illinoistown across Bloody Island to the main channel of the river. Bloody Island, as well as the land over which it could be conveniently reached, then belonged in fee to the petitioner. On April 1, 1858, the petitioner and the railroad company entered into a written contract, whereby the ferry company granted and conveyed to the railroad company the right to construct, maintain and use upon and over a certain parcel of land on Bloody Island, therein described, such tracks, depots, warehouses and other buildings as the railroad company should find necessary and convenient to be constructed and used for the purpose of its business, together with a right of way over an adjoining piece of land, with the right to have and to hold the same so long as they should be used and employed for the uses and purposes of the railroad, as therein specified, and for no other purpose, even forever.

In consideration thereof, the railroad company covenanted and agreed:

1. To pay all taxes on said parcels of land.

2. That the ferry company should never be hindered or interfered with in respect to its ferry by the railroad company, or by any other person claiming under said contract.

3. That the railroad company should always employ the ferry company to transport for it across the Mississippi River all persons and property that might be taken across said river either way by the railroad company, "to or from Bloody Island," either for the purpose of being transported on the railroad, or having been brought to said river upon said railroad, so that the ferry company, its legal representatives and assigns, should have the profit of the transportation of all

passengers, persons and property taken across the river, either way, by said railroad company, either to or from St. Louis, the ferry company charging for said ferriage as low rates as charged by it to any other party between St. Louis and Bloody Island, which ferriage should be paid by the said railroad company to the ferry company, its legal representatives and assigns, owners of said ferry.

4 and 5. That the railroad company should grade and pave a certain piece of ground across the front of the property, and keep the same open and in repair for a wharf or street for the free passage of all persons, vehicles and property, and that the ferry company should be entitled to wharfage upon the same.

6 and 7. That the railroad company should keep certain streets open for the free passage of all persons.

8. That the lots conveyed should be used for the purpose of right of way, depots and other buildings for the use of the railroad company, and for no other purpose.

Upon the execution of this contract, the railroad company took possession of the premises, and thereafter used and occupied the same in accordance therewith, filled a portion of the grounds, and placed thereon their tracks, buildings and other improvements, and fulfilled the covenants of said contract upon its part until July 1, 1862. At that date the Ohio and Mississippi Rail*way* Company, (hereinafter called the railway company,) a distinct corporation, which had been chartered for the purpose of taking a conveyance of all the property and franchises of the railroad company, which it had purchased at a judicial sale under a decree of foreclosure, took possession of all the property of the said railroad company as said purchaser, and also took possession of the premises described in the said contract. The railroad company then ceased to perform its corporate functions. The railway company was not a reorganization of the railroad company, but a new and totally independent corporation.

Such possession was taken by the railway company with the tacit consent of the petitioner, but without any special agreement for rent; and the premises were held, used and occupied by the railway company with the sufferance and permission of

the petitioner, until November, 1876, when, under proceedings to foreclose a mortgage upon the property of the railway company, a receiver was appointed who took possession of the premises and improvements, also with the tacit consent of the petitioner, but without any special agreement for rent. In respect to this, the answer of the receiver alleged the fact to be that "from the time of the entry into possession of the purchaser up to the present time, the petitioner, the Ohio and Mississippi Railway Company, and this respondent, as its receiver, have treated the contract as in full force and binding upon them, and the said Ohio and Mississippi Railway Company and respondent have always and at all times done and performed all that the terms of the said contract required the said Ohio and Mississippi Railroad Company to do and perform." Immediately upon taking possession of this property, the railway company began filling up, paving and otherwise improving the same at considerable expense, and also filled in its right of way across the adjoining tract described in said contract, and, until about 1871 or 1872, exercised exclusive control over the premises, paid the taxes thereon, and complied with the conditions of the contract of April 1, 1858, giving to the ferry company the transportation of all its passengers and freight across the river at St. Louis. In the summer of 1871, the railway company changed its track from broad to standard gauge, which enabled it, by using the connecting tracks of the Chicago and Alton Railroad Company, on Bloody Island, to transfer freight across the river by the Madison Ferry, at Venice, Illinois, about two and one-half miles north of the Wiggins Ferry; and also by using the East St. Louis and Carondolet Railway, to transfer freight to South St. Louis by the Pacific Ferry, which was about six miles south of the Wiggins Ferry; the Ohio and Mississippi having no tracks of its own connecting either with the Madison or the Pacific Ferry. About 1872, the railway company began to divert their freight from the Wiggins Ferry to the Madison Ferry at Venice, and also to the Pacific Ferry. The officers of the Wiggins Ferry, learning of these diversions, protested against them as breaches of the contract of April 1, 1858, and in 1874 brought an action at law

Statement of the Case.

in the state court of Illinois against the railway company for damages for violating its contract, by transporting freight by means of the Madison Ferry at Venice. A demurrer interposed by the defendant to the declaration was sustained, and final judgment rendered for the defendant, which was affirmed by the Supreme Court of the State at the June term, 1874. 72 Illinois, 360.

In anticipation of the completion of the St. Louis bridge, in 1871 the railway company entered into an agreement with the bridge company, by which it bound itself, so soon as the bridge should be completed, to connect its own tracks with those on the bridge, and to transport over and across said bridge all freight and passengers of the railway company under its control, destined across the river at St. Louis, and to continue this arrangement for ten years. The bridge was completed about June 15, 1874, after which date the railway company ceased to transfer any of its passengers across the river on the boats of the Wiggins Ferry, sending them in omnibuses over the bridge instead and from that time onwards none of the passenger traffic of the said railway company was ever done by the Wiggins Ferry Company, except during a few days in 1877, when the eastern approach to the bridge was burned.

Subsequently, and about 1875, the railway company began to divert its freight from the ferry company to the St. Louis Transfer Company. In 1876, the ferry company brought a second suit in the state court against the railway company, to the declaration in which the defendant demurred. The demurrer was sustained by the Circuit Court, and final judgment entered for the defendant, from which an appeal was taken to the Supreme Court, which affirmed the judgment of the court below. 94 Illinois, 83.

On October 18, 1878, the receiver of said railway company obtained an order authorizing him to erect a new engine-house upon other ground owned by the railway company, and also to remove to such ground the rails and materials from the land owned by the Wiggins Ferry Company. This order appears to have been obtained without notice to the petitioner. Under this order, the receiver at intervals removed

all railway tracks from the ground in question, against the objections of the ferry company, which claimed that all the tracks, ties, switches and buildings on the property belonged to it, as appurtenant to the freehold. The grounds in question, being those described in the contract of April 1, 1858, remained in possession of the receiver until February, 1880, when their use was finally discontinued by him, and possession surrendered to the ferry company.

On December 21, 1878, the ferry company filed an intervening petition, and on April 27, 1880, an amended petition, claiming compensation for the use and occupation by the railway company and its receiver of the premises in question, from July 1, 1862, to February 20, 1880, and for the value of the materials removed from the premises when possession was surrendered. The defendant, answering, denied all liability, and also pleaded the statute of limitations. The case having been referred to a special master to hear and try the same upon the evidence, he filed his report on April 15, 1886, giving his conclusions of fact and law upon the evidence taken. His conclusions were summarized as follows:

"1. The deed of April 1, 1858, conveyed to the railroad company an estate of limitation in consideration of the covenants to be performed by it, and when that company ceased to use the premises for the purpose of transacting its business the contingency happened which, by the words of the deed, was to limit the estate, and the estate then *ipso facto* determined.

"2. Upon the determination of the estate of the railroad company the railway company entered into possession of the premises with the tacit consent of the ferry company; and, by the mutual acts and acquiescence of these two parties, an equitable estate, of like character as the legal estate which had existed by virtue of the deed, with the same reciprocal rights, privileges and obligations, was created, or at least neither party will be permitted in equity to deny, to the prejudice of the other party, that such was the case.

"3. The railway company was under equitable obligation, so long as it held the premises, to perform the covenants form-

ing the consideration of the grant, including the covenant pertaining to ferriage, the same as if it had been one of the original contracting parties.

"4. In case of default as to such performance, this court has jurisdiction to award equitable compensation in money to the petitioner under the circumstances in this case.

"5. The defendants have partially failed to perform their equitable obligation as to ferriage.

"6. Equitable compensation will be such sum of money as will, as nearly as may be, place the petitioner in as good condition as that in which it would have been if the obligation as to ferriage had been fully performed.

"7. The extent of such partial failure or the loss sustained by reason thereof do not clearly appear in evidence, and a re-reference to take further testimony on this point is recommended.

"8. The iron rails and other like materials necessary for the purposes of the grant, laid by the defendants and their grantor in the track on the premises, did not become part of the realty, and the defendants had lawful right to remove the same before surrendering the premises."

Exceptions were filed by both parties to his report, upon consideration whereof, the court dismissed the intervening petition at the cost of the ferry company, with the allowance of an appeal.

Mr. Henry Hitchcock (with whom were *Mr. George A. Madill* and *Mr. G. A. Finkelnburg* on the brief) for appellant, made the following point as to the iron rails, carried away by the receiver.

The ferry company is entitled to compensation for the railway tracks taken away, against its objection, by the receiver. These were permanently attached to and part of the soil, to which, neither at law nor in equity, did the Ohio and Mississippi Railway Company ever acquire any title. They were not placed there with any view to ultimate removal, and the doctrine of trade fixtures cannot be applied to them. *Galves-*

ton Railroad v. *Cowdrey*, 11 Wall. 459, 482; *United States* v. *New Orleans Railroad*, 12 Wall. 362, 365; *Palmer* v. *Forbes*, 23 Illinois, 249; *Lehigh Coal &c. Co.* v. *Central Railroad*, 35 N. J. Eq. (8 Stewart) 379; *Salem Bank* v. *Anderson*, 75 Virginia, 250; *Weetjen* v. *St. Paul & Pacific Railroad*, 4 Hun, 529.

Mr. Lawrence Maxwell, Jr., (with whom were *Mr. Garland Pollard* and *Mr. William M. Ramsey* on the brief,) for appellee.

The suit below being for rent for use and occupation, I contented myself in the former argument with an attempt to show that such an action would not lie. This I did by pointing out that the premises were held under an express contract to furnish ferriage, as one of the considerations for their use, and that, therefore, no implied contract to pay money rent could be inferred. The correctness of this position is now conceded by counsel for the appellant. They admit that an action for use and occupation does not lie, but that their remedy, if any, is for breach of the contract of 1858. They rest their case on this appeal, upon an effort to now convert it from an action for use and occupation into a suit for damages for breach of the contract of 1858. This, we submit, cannot be done.

I. Upon the pleadings and proofs the case is simply one for rent for use and occupation. The sole defence set up by the answer was that the premises since 1862 had been, and then were, held under the contract of 1858, and that thereunder no money rent was due for use and occupation. The amended petition, filed February 27, 1880, repeats the allegation of the original petition, that the railway company in 1862, and the receiver upon his appointment in 1876, severally "with the tacit consent of the petitioner, and without any special agreement for rent therefor, entered upon and took possession of said premises"; it repeats the prayer of the original petition as already quoted, to recover the amounts alleged to be due for use and occupation. There is no allegation that the rail-

way company or the receiver ever assumed or became otherwise bound by the contract of 1858.

The case was also treated through the entire hearing as one simply for use and occupation. The plaintiff offered no evidence except to establish the rental value of the premises, and to show that they had not been held by the defendant under the contract of 1858. There was some proof in a general way as to the defendant's failure to furnish ferriage, but that was only for the purpose of establishing the plaintiff's contention that the contract of 1858 had not been recognized by the parties as being in force. There was no attempt to offer evidence as to the amount of ferriage supplied, or as to loss of profits, such as would have been absolutely necessary if the suit had been dealt with as one for breach of the contract of 1858.

The master suggested that leave might be given the plaintiff to amend the petition so as to convert the suit from one for use and occupation into one for damages for breach of the the covenant of ferriage, but the suggestion was declined, and the plaintiff went to final hearing on the case made by its intervening petition for use and occupation, and for nothing else. The master, assuming that leave to amend might be asked and obtained, suggested a second reference to supply the evidence necessary to support the new case, but the plaintiff declined that suggestion also, adhered to its case for use and occupation, as made by the pleadings, and excepted to the report on the sole ground that the master had decided against its right to maintain that action. There can be no doubt but that the case made by the pleadings and adhered to by the plaintiff at every stage of the proceedings below, was one for use and occupation and for nothing else. The right to recover under the contract of 1858 was distinctly repudiated. Such a right is now asserted in this court for the first time.

II. In equity the decree must conform to the pleadings. It is not permitted to sue on one contract and recover on another. No recovery is therefore possible in this case for breach of the contract of ferriage. The claim is not only wholly different from that sued for in the petition, but utterly inconsistent with it. The existence of the one depends upon the denial of the

other. *Morris* v. *Tillson*, 81 Illinois, 607, 615; *Crocket* v. *Lee*, 7 Wheat. 522, 527; *Legal* v. *Miller*, 2 Ves. Sen. 299; *Shields* v. *Barrow*, 17 How. 130, 144.

III. A prayer for general relief cannot be used to convert a suit for use and occupation into one for breach of a contract of ferriage. It is a fundamental proposition that under a general prayer no relief can be granted which is inconsistent with the special prayer or with the case made by the bill. *English* v. *Foxall*, 2 Pet. 595, 612; *Hobson* v. *McArthur*, 16 Pet. 182, 195; *Hayward* v. *National Bank*, 96 U. S. 611. While a plaintiff who is doubtful of the relief to which he is entitled, may so frame his prayer, that if one species of relief is denied another may be granted, he is never permitted to rely on inconsistent claims. He is not permitted for instance to assert a will to be invalid, and at the same time to ask to take under it if it shall be held to be valid, *Wright* v. *Wilkin*, 4 De G. & J. 141; nor to ask the cancellation of a mortgage, or to redeem it, *Micon* v. *Ashurst*, 55 Alabama, 607; nor to pray to set aside a contract for fraud, or if that be denied to have it specially enforced, *Shields* v. *Barrow*, 17 How. 130.

If the case could have been treated in the Circuit Court as one for breach of the contract of ferriage, the court would nevertheless have been bound to dismiss the bill, for the reason that the plaintiff offered no evidence to support an award of damage.

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

When the railway company became the purchaser at judicial sale of the property, assets and franchises of the railroad company, it found the latter in possession of a tract of land upon Bloody Island in the Mississippi River, making use of the same for its tracks, depots, warehouses and other terminal facilities, and also sending to and receiving from St. Louis at this point its passengers and freight by steamers not its own. It knew, or was bound to know, that this property did not belong to the railroad company. As the record shows that it remained

in possession of these premises for the next fourteen years, using the same for some nine years of this time as they had before been used, sending its passengers and freight to and from St. Louis in the boats of the ferry company, and, in the language of the answer, "treated the contract as in full force and binding upon them," it must be assumed that it was fully informed of the ownership of such property, and the terms of the contract under which it was held and employed by the railroad company.

(1) Under these circumstances what was the legal relation of the railway company to this contract? In a case between these same parties, (94 Illinois, 83,) the Supreme Court of Illinois held that the covenants contained in the contract of April, 1858, were not such as ran with the land, and that the relationship of landlord and tenant was not created by such contract between the ferry company and the railroad company. Indeed, the fact that the railway company and its receiver continued in the occupation of this property for over seventeen years, with the tacit consent of the ferry company, and without any suggestion of a tenancy or a demand for rent, is sufficient of itself to show that the relations between them were not those of landlord and tenant. Such relationship will never be implied when the acts and conduct of the parties are inconsistent with its existence. In *Carpenter* v. *United States*, 17 Wall. 489, 493, it was held by this court that no reason for the implication of a tenancy existed, "when an express contract or an arrangement between the parties shows that it was not intended by them to constitute the relation of landlord and tenant, but that the occupation was taken and held for another purpose." In that case, it was shown that the entry had been made in pursuance of an agreement to purchase, and it was held that the tenant was not liable for use and occupation if the purchase were actually concluded.

The railway company was not the formal assignee of the interest of the railroad company in such a contract, nor could it become so under the eighth clause of the contract, without the consent of the ferry company. It is a well-established principle that the mere purchase of a railway under a fore-

closure sale by a new corporation does not of itself make such new corporation liable for the obligations of the old one. *Stewart's Appeal*, 72 Penn. St. 291; *Vilas* v. *Milwaukee &c. Railway*, 17 Wisconsin, 497; *Smith* v. *Chicago & Northwestern Railway*, 18 Wisconsin, 17. The railway company, then, upon taking possession of the property of the railroad company, was at liberty to renounce the benefit of such contract, if it chose to do so, or to make such further arrangement with the ferry company as they might be able to agree upon. It did neither, but still maintained possession of the land. In view of the fact that the railway company used this property precisely as it had been used; improved it at great expense, by filling up low places and securing it from the overflow of the river; graded and paved the river front, erected buildings, paid the annual taxes, and, until 1871, employed the ferry company to transport its passengers and freight to and from the city — in short, in the language of the answer, doing and performing "all that the terms of the said contract required the said Ohio and Mississippi Railroad Company to do and perform," we think it must be held in a court of equity to have adopted such contract, and made it its own. This construction certainly consorts with the acts and conduct of both parties, between whom different modifications of the contract were proposed and discussed at different times from 1872 to 1875. Under the circumstances of this case, we agree with the conclusion of the special master, that the railway company acquired an equitable estate in the premises, of like character as the legal estate previously held by the railroad company, which estate was in equity unimpeachable, and that the railway company and the ferry company sustained the same relation as had previously existed under the deed between the railroad company and the ferry company; or, at least, that both parties are equitably estopped from denying that such was the case. It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a

person conduct himself in such manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations. 2 Pom. Eq. Juris. sec. 965; *Chicago & Alton Railroad* v. *Chicago &c. Coal Co.*, 79 Illinois, 121. This principle is applicable here, and it results from this that, if the railway company or its receiver has been guilty of a breach of this contract, the petitioner is entitled to recover its damages, by reason of such breach, in this proceeding, unless it has in some way become estopped by the judgments of the state courts of Illinois, or by its own conduct and disclaimers in this suit.

The first action between these parties was brought in 1874, in the St. Clair Circuit Court, and was determined upon a demurrer to the declaration, which alleged a breach of the third covenant of the contract in this, that in November and December, 1873, the defendant wrongfully and without plaintiff's assent, brought to its railroad in East St. Louis and its said depot across the Mississippi River, from the city of St. Louis, in its cars, certain loads of grain to be transported eastwardly on its railroad, and caused said grain in said cars to be transferred across said river, from St. Louis to its depot at East St. Louis, by way of Venice, a village two miles above East St. Louis, on a rival ferry, and also caused certain carloads of coal to be taken in its cars, from East St. Louis, by way of Venice, and thence across the Mississippi River to the city of St. Louis, on said rival ferry. As the contract, which was set out *in hæc verba* in the declaration, provided that the railroad company should employ the ferry company to transport across the river all persons and property which might be taken either way by the railroad company "to or from Bloody Island," there was an apparent variance between the contract and the breach alleged in the declaration, in bringing to its depot in *East St. Louis* the property in question. A demurrer was interposed to this declaration and sustained, and final judgment entered in favor of defendant, an appeal taken to the Supreme Court, and the case affirmed. 72 Illinois, 360. In delivering its opinion, the Supreme Court held that the contract was con-

fined in its operation to the territorial limits of Bloody Island, and that there was nothing in such contract, unless it arose by implication, that prevented the railway company from extending its tracks to Venice, or any other point, however distant, and crossing passengers and freight there for St. Louis or points beyond. The court in that case seems to have assumed that the railway diverted its passengers and freight from Bloody Island altogether, by sending them across the river from points above and below the island. But there is nothing in this decision which estops the ferry company from showing that the railway company did in fact send them to its depot upon Bloody Island, and from there diverted them by tracks of other roads to ferries above and below said island, as was actually the case, and thereby defrauded petitioner of its rights under the contract. If, as a matter of fact, the diversion complained of began after the arrival of the freight at the grounds of the ferry company upon Bloody Island, a different case is presented from that passed upon in this opinion. All that was actually decided was that the ferry company had no right to complain, if the railroad company sent its freight across the river from other points than Bloody Island; and the estoppel extends no farther than this. Where the judgment in the former action is upon demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings or decided, and does not operate as a bar to a second suit for other breaches of the same covenants, although if the judgment be upon pleadings and proofs, the estoppel extends not only to what was decided, but to all that was necessarily involved in the issue. *Wash. & Alexandria Packet Co.* v. *Sickles*, 24 How. 333; *S. C.* 5 Wall. 580; *Gould* v. *Evansville &c. Railway*, 91 U. S. 526; *Boyd* v. *Alabama*, 94 U. S. 645; *Russell* v. *Place*, 94 U. S. 606, 608; *Morrell* v. *Morgan*, 65 California, 575.

The second action was brought in 1876, in the same court, against the railway company as assignee of the railroad company, also upon the covenants contained in the third clause of the contract, and, like the former, was disposed of upon demurrer to the declaration, which sought to charge the defendant as

the legal representative and assignee of the railroad company in said contract. The Supreme Court (94 Illinois, 83) affirmed the judgment of the court below sustaining the demurrer to said declaration, upon the ground that the covenant that the railroad company would always employ the ferry company to transport for it all persons and property across the Mississippi River, was not a covenant running with the land. The opinion states that "the suit is against one corporation averred to be the assignee of another, upon a covenant made by the alleged assignor. There is no express undertaking, averred in the declaration, by the assignee to perform the covenant of the assignor, nor is there any averment therein from which such an undertaking can be held to be legally implied. The only ground upon which there can be any reasonable pretence to base an argument in favor of the right to recover is, that the covenant is one which in legal contemplation runs with the land, and it will, therefore, only be important to inquire whether this is such a covenant." The opinion then discusses the requisites of such a covenant, the nature of the grant to the railroad company, and holds that such covenants did not create the relation of landlord and tenant, but only an easement, which was not for life, for years or at will, but was a freehold of inheritance, answering to the accepted description of a base or qualified fee. It also held that the covenant sued on was not one the performance or non-performance of which affected the nature, quality or value of the property demised; the easement granted being in the two parcels of land, not in the ferry, while the covenant was purely a collateral covenant affecting the ferry only, and, therefore, not one running with the land. The decision was carefully guarded, the court observing that it was not pertinent to inquire whether the appellants had a remedy in equity, or in some other action at law, and that the decision went no further than the matters specially noticed. The case, which was determined solely upon common law principles, is no estoppel to an equitable proceeding like this to obtain compensation for the use and enjoyment of the petitioner's property.

The most serious obstacle in the way of doing substantial

justice in this case arises from the attitude assumed by the petitioner throughout the entire proceedings in the Circuit Court, that it was entitled to recover the rental value of the premises in question. Up to the time of the appeal to this court, the litigation was conducted solely upon this theory. The original petition contained no reference to the contract of 1858, nor any claim on the part of the ferry company that performance of the covenants for ferriage was the consideration for the use of the land in question. It averred simply that the railway company, with the consent of the petitioner, took possession of the lands owned by it, and, by the sufferance and permission of the petitioner, used and occupied the same without any special agreement for rent, and sought to charge the company for the value of such use and occupation, and to enjoin the receiver from removing the tracks and other property belonging to or attached to the freehold, upon which petitioner claimed a lien. While the amended petition set forth the contract of 1858, the possession of the premises by the railroad company, and the purchase and entry into possession by the defendant under the covenants of the contract, it assumed that the judgment of the Supreme Court in the first case above mentioned, estopped the receiver from setting up or claiming that either he or the railway company ever held said premises under or by virtue of said contract; averred that neither he nor the railway company had paid petitioner anything for the occupation of said premises; claimed that it was entitled to receive a reasonable and just compensation for such use and occupation during the time the premises were held by the railway company or the receiver; and prayed for such just and reasonable compensation for the use and occupation, as well as an account of all property and material removed from the premises, and for general relief. Even after the master had reported his opinion that the estate conveyed by the deed of 1858 was determined, and that an equitable estate of like character as the legal estate which had existed by virtue of the deed was created, and that the railway company was under equitable obligation, so long as it held the premises, to perform the covenants forming the consideration of the grant, and had

recommended a reference to ascertain the equitable compensation to which the petitioner was entitled, the ferry company refused to act upon such recommendation, and excepted to the report upon the ground that the master failed to find that the relation of landlord and tenant existed between the petitioner and the railway company. In view of these facts and of the persistency with which it has pressed its claim for rent, and repudiated its right to recover under the contract, it would have no just cause of complaint if this court refused to permit a change of front, and affirmed the decree of the court below. Did this disposition of the case involve anything less than a total and final denial of any right whatever to compensation for the use of this property, it might be proper to do this. There is much to be said, however, in favor of the equity of petitioner's claim to an equivalent for the benefit the defendants have received from the use of this property, and we do not consider it beyond the power of this court, upon broad principles of justice, to refer this cause back for such further proceedings as are permitted by the rules and practice of courts of equity.

When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made by the bill, has in several instances asserted its power to remand the case to the court below for an amendment of the pleadings and such further proceedings as may be consonant with justice. In *Crocket* v. *Lee*, 7 Wheat. 522, plaintiff filed a bill to obtain a conveyance of land covered by a certificate of settlement right, the legal title to which was in the defendant, and he was decreed by the court below, in conformity with another bill filed by the defendant, to convey to the defendant the land covered by his patent. It was contended in the Supreme Court that the defendant ought not to be allowed to recover on his cross-bill by reason of his failure to make the proper averments with respect to the invalidity of the plaintiff's title. The court adopted the view of the appellant in this particular, but remanded the case with directions to permit the parties to amend their pleadings. In *Watts* v. *Waddle*, 6 Pet. 389, this court affirmed the decree

of the Circuit Court refusing the specific execution of a contract, but, after reviewing the evidence in detail, it further ordered that to give relief for the rents and profits of the land in controversy, the decree of the Circuit Court, dismissing the bill, should be opened, and the case remanded for further proceedings in conformity with law and justice. In delivering the opinion of the court, Mr. Justice McLean observed that "a new ground of relief has been assumed in the argument here that was not made in the Circuit Court, which is, that although this court should be of the opinion that a specific execution of the contract ought not to be decreed, still the complainants are entitled to a decree for the rents and profits of the land, while it was in the possession of the defendants. . . . There is no rule of court or principle of law, which prevents the complainants from assuming a ground in this court, which was not suggested in the court below; but such a course may be productive of much inconvenience and of some expense." So in *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 273, where possession had been taken of land, and improvements made, under an imperfect agreement for purchase, though the court would not grant relief upon the ground of part performance, yet the bill was maintained for the purpose of affording the party reasonable compensation for beneficial and lasting improvements. See also *Walden* v. *Bodley*, 14 Pet. 156; *Neale* v. *Neales*, 9 Wall. 1; *Hardin* v. *Boyd*, 113 U. S. 756.

In the case under consideration, while the prayer of the petition is for compensation for use and occupation, its present claim for an assessment of damages under the contract is not inconsistent with the allegations of the petition, which are, that "the railway company, defendant, after taking possession of said premises, as aforesaid, observed and kept, until the summer of 1871, some of the covenants of said contract, which were to have been kept and performed by its said predecessor in the ownership of said line of railroad, . . . and thereby induced your petitioner to believe, and it did believe, that said railway company had adopted said contract as its own, and that it would continue to observe and keep the covenants thereof which were to have been kept and performed by the said railroad

company, and that by reason of its having taken possession of said premises, and held, used and occupied the same as aforesaid, it thereby became and was legally bound, as the successor of said railroad company in the ownership of said line of railroad, to keep and perform the covenants of said contract," etc. It then alleged the failure and neglect to employ petitioner to do its ferriage, and that it "totally ignored and repudiated said contract, and denied any and all obligations to carry out any of the covenants," etc., and averred a loss of profits thereby in the sum of $150,000. We have shown that the inference it draws from all this, namely, that it is entitled to have a just and reasonable compensation for the use and occupation of said premises, is untenable, but it does not necessarily follow that it is wholly remediless. Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made. *Schooner Anne* v. *United States*, 7 Cranch, 570.

(2) We agree with the court below that the petitioner is not entitled to recover the value of the rails removed by the receiver from the premises upon Bloody Island. They were laid there under a mere easement granted by the petitioner, and obviously with no intention that they should become part of the realty. As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession. It is incredible that it could have been the intention of the parties that the rails and switches laid upon this ground by the railroad company should become the property of the landlord, when, by the terms of the contract, the ferry company had the right to put an end to it at

any time upon six months' notice. In *Van Ness* v. *Pacard*, 2 Pet. 137, it was held that a house built by a tenant upon land, primarily for the purpose of a dairy, and incidentally for a dwelling house for the family, did not pass with the land. The earlier authorities are reviewed in that case by Mr. Justice Story, and the conclusion reached, that whatever is affixed to the land by the lessee for the purpose of trade, whether it be made of brick or wood, is removable at the end of the term. Indeed, it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term. In the case of *Wagner* v. *Cleveland & Toledo Railroad*, 22 Ohio St. 563, it was held that stone piers built by a railroad company as part of its road on lands over which it had acquired the right of way, did not, though firmly imbedded in the earth, become the property of the owner of the land, as part of the realty; and that, upon the abandonment of the road, the company might remove such structures as personal property. So in *Northern Central Railroad* v. *Canton Co.*, 30 Maryland, 347, it was held that the rails fastened to the road-bed of a railroad, as well as the depots and other buildings, might, under certain circumstances, be treated as trade fixtures, and removable by the company, if the surrounding circumstances showed that at the time the rails were laid upon the land it was not intended that they should be merged in the freehold. In that case the road was built upon land under a license and permission of the owner. It is entirely clear that the rails in the case under consideration did not become part of the realty, and that the receiver was not guilty of waste in removing them from the land.

But for the reasons above stated, and under the peculiar and exceptional circumstances of this case, we think the decree of the court below should be

Reversed, but without costs, and the case remanded for such further proceedings as may be consonant with justice and in conformity to this opinion.

SIMMONS CREEK COAL COMPANY *v.* DORAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 84. Argued November 5, 6, 1891. — Decided January 4, 1892.

This being a suit to establish a deed alleged to have been executed, and not recorded, but lost, the court holds the evidence to be entirely sufficient to establish the existence and loss of that deed.

It being also a suit to correct an alleged mistake in boundaries, the court holds, on the authority of *Ayers* v. *Watson*, 137 U. S. 584, that it is well settled that, in running the line of a survey of public lands in one direction, if a difficulty is met with, and all the known calls of the survey are met by running them in the reverse direction, this may be properly done; and it applies this principle to the lines established by the court below, and holds that the evidence is clear and convincing in establishing the facts which sustain its action in that respect.

The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court.

When each and all of the individuals who organize a corporation under a state law had knowledge, or actual notice, of a defect in the title to lands acquired by the corporation through them, their knowledge or actual notice was knowledge or notice to the company, and if constructive notice bound them, it bound the company.

None of the original deeds in appellant's chain of title having been produced, (though certified copies were attached to the pleadings,) and no independent evidence having been offered of payments of purchase money by defendants, *Held*, that, as against complainant, the recitals in the deeds could not be relied on as proof of such payment.

The rule of *caveat emptor* applies exclusively to a purchaser, who must take care, and make due inquiries, and is bound by constructive as well as by actual notice — the latter being equivalent in effect to the former: but, in applying the rule, each case must be governed, in these respects, by its own peculiar circumstances.

Actual and unequivocal adverse possession of land is notice to a purchaser: it is incumbent upon him to ascertain by whom and in what right it is held, and the unexplained neglect of this duty is equivalent to notice.

In this case the defendants had such notice as to put them on inquiry, and to charge them with knowledge of the facts.

The commission of a trespass on real estate, and the commission of acts of waste upon it do not constitute a possession which in itself would drive

the owner to an action of ejectment, and prevent him from filing a bill *quia timet*.

The jurisdiction of a court of equity is maintained in a suit to determine title, when a part of the remedy sought is, to supply what was by mistake omitted from one of the title deeds; or to establish a lost deed, even though in the latter case proof of the fact might have been allowed to be made in an action at law.

THE court stated the case as follows:

This was a bill in equity filed by Joseph I. Doran, August 1, 1885, in the District Court of the United States for the district of West Virginia, against the Simmons Creek Coal Company, Robert D. Belcher, George W. Belcher, Chrispianos Belcher, P. H. Rorer, N. L. Reynolds, and R. B. McNutt, commissioner of school lands for Mercer County, to establish a deed alleged to have been executed by Chrispianos Belcher to Robert D. Belcher, and not recorded but lost, for two hundred acres of land, more or less, with its proper metes and bounds; to obtain the construction of a deed of the same land from Robert D. Belcher to William H. Witten, and the correction of an alleged mistake as to its boundaries; to set aside certain deeds executed by George W. Belcher and others, so far as embracing the land in controversy, as clouds upon complainant's title thereto, and to restore complainant to and quiet him in the possession thereof; to enjoin and restrain the commission of waste by the defendants; and for general relief.

The bill prayed that the defendant coal company and the defendant Robert D. Belcher answer under oath all and singular the allegations of the bill as if specially thereunto interrogated. Chrispianos Belcher was not served, and the defendants Robert D. Belcher and McNutt, commissioner, did not answer.

The coal company answered by counsel and under its corporate seal, but the answer was not verified by affidavit. The answers of George W. Belcher, N. L. Reynolds, and P. H. Rorer were sworn to, though they had not been required to answer under oath. Evidence was adduced on behalf of complainant and a final hearing had, which resulted in the following decree:

Statement of the Case.

"This cause came on this 17th day of February, 1888, for a final hearing, and was argued by counsel, and, upon mature consideration, the court is of opinion that the plaintiff is entitled to the relief prayed for in his bill; and it appearing to the court that at and before the date of the deed from the defendant Robert D. Belcher, to William H. Witten, bearing date the 23d day of December, 1852, for two hundred acres of land, more or less, the said Robert D. Belcher was the owner, by purchase from Chrispianos Belcher, of 800 acres of land, of which the said 200 acres, more or less, was and is a part, which said 800 acres was bounded east by Simmons Creek, commencing at the 2 birches mentioned in the said deed, and running thence up said creek, with its meanders, to the mouth of the middle fork thereof, and thence up the left-hand fork of said creek, with its meanders, to two spruce pines and a white oak, corner to William Miller's survey of 100 acres, and also a tract of 150 acres conveyed by Chrispianos Belcher and wife to William Payne, and which tract of 800 acres is shown on the map filed with the deposition of the said William Miller in this cause;

"And it further appearing to the court that by reason of a dispute in reference to the true west line of the said 800 acres of land the said Chrispianos Belcher conveyed to the said Robert D. Belcher by deed the said two hundred acres of land, more or less, the same being part of said 800 acres bounded or intended to be bounded east by Simmons Creek, as above stated, which deed was never recorded and is lost and cannot be found; and it further appearing to the court that by the contract and agreement between the said Robert D. Belcher and the said William H. Witten, under which said deed of the 23d of December, 1852, was executed, the boundary line of the said deed from the two birches to the six chestnuts was to be inserted in said deed as follows: 'Beginning at the two birches on Simmons Creek, corner to Chrispianos Belcher's land, thence up and with said creek and with William Miller's line to the mouth of the middle fork of said creek, as is now shown on the map of Surveyor Sinnett, made and filed in this cause, marked "Decree Map, Feb. 17th, 1888,"

and made part of this decree; thence up and with the left-hand fork of said creek, as is shown on said map, to the point shown on said map by the letter "E," which is a corner of a survey of 100 acres then owned by the said William Miller, and also of the tract of 150 acres adjoining said Miller's survey, then owned by the said William H. Witten and R. C. Graham, both of which said tracts are laid down on said map; and thence, with the line of the said Miller survey of 100 acres, to six chestnuts at the point shown on said map by the words "six chestnuts" and the letter "D";'

"And it further appearing to the court that by the mistake and inadvertence of the drawer of said deed the calls thereof from the said two birches to the six chestnuts do not conform to and carry out the contract and intentions of the parties to said deed, or to the boundary lines thereof from the two birches to the six chestnuts, it is therefore adjudged, ordered and decreed that the said lost deed of the said Chrispianos Belcher to the said Robert D. Belcher for the said 200 acres of land, more or less, be, and the same is hereby, set up as a muniment of the title of the plaintiff in this cause to the said 200 acres of land, more or less, a part of which said tract is in controversy in this suit, and it is to have the same force and effect as such muniment of title as if said deed were now in existence and of record, with the boundary lines of said tract of land from the two birches to the six chestnuts as hereinabove stated; and it is further adjudged, ordered and decreed that the said mistake in the calls of the said deed of the said Robert D. Belcher to the said William H. Witten, bearing date the 23d day of December, 1852, from the said two birches to the said six chestnuts, be, and the same is hereby, corrected and the said calls made to correspond with the contract and intent of the parties to said deed as follows:

"'Beginning at two birches on Simmons Creek, corner to Chrispianos Belcher's land, and running thence up and with said creek with William Miller's line to the mouth of the middle fork of said creek; thence up and with the left-hand fork of said creek to two spruce pines and a white oak, corner to said William Miller's survey of 100 acres; and thence with the

Statement of the Case.

line of said survey to six chestnuts, also a corner thereof;' and that the said plaintiff be, and he is hereby, forever quieted in his title, possession, control and enjoyment of the said two hundred acres of land, more or less, within the boundary lines of the said deed of Robert D. Belcher to said William H. Witten therefor as it is hereby corrected.

"And it further appearing to the court that the said William H. Witten and those claiming under him took and held the possession of the said 200 acres of land, more or less, under his said deed from R. D. Belcher from the date thereof to the year 1884, claiming the same up to the line of Simmons Creek, as herein stated, without question or objections by the said Chrispianos Belcher, R. D. Belcher or any other person;

"And it further appearing to the court that the defendant, 'Simmons Creek Coal Company,' was at the commencement of this suit and still is claiming a portion of the said tract of land of 200 acres, more or less, in defiance of the rights of the plaintiff, who is the true owner thereof, under the following named deeds of record in the county of Mercer, in this district, where said land is situate, to wit: A deed from George W. Belcher & wife to Newton L. Reynolds, dated the 4th day of December, 1884; also a deed from George W. Belcher & wife to P. H. Rorer, dated February 25th, 1885; also a deed from N. L. Reynolds to I. A. Welch, dated January 13th, 1885; also a deed from I. A. Welch & wife to A. W. Reynolds, dated January 13th, 1885; also a deed from I. A. Welch & wife to Simmons Creek Coal Company, dated February 28th, 1885; also a deed from A. W. Reynolds to Simmons Creek Coal Company, dated February 28th, 1885; also a deed from P. H. Rorer & wife to Simmons Creek Coal Company, dated February 28th, 1885; also a deed from N. L. Reynolds to Simmons Creek Coal Company, dated February 28th, 1885; and that the said claim of said defendant and the said deeds and each of them constitute a serious and damaging cloud upon the title of the said plaintiff to so much of his said land as is covered by the said claim of the said defendant 'Simmons Creek Coal Company' under said deeds and each of them, it is therefore further adjudged, ordered and decreed,

that the said deeds and each of them be, and they are hereby, set aside, vacated, and annulled, and the claim of the said defendant to the said lands so set up as aforesaid under said deeds be held for naught; and it is further adjudged, ordered and decreed that the said defendant, 'Simmons Creek Coal Company,' do pay to the plaintiff his costs by him expended and incurred in the prosecution of this suit, to be taxed, and that if necessary he may have execution therefor."

The map made part of the decree is given opposite. The coal company prosecuted an appeal to this court.

Mr. A. W. Reynolds for appellant.

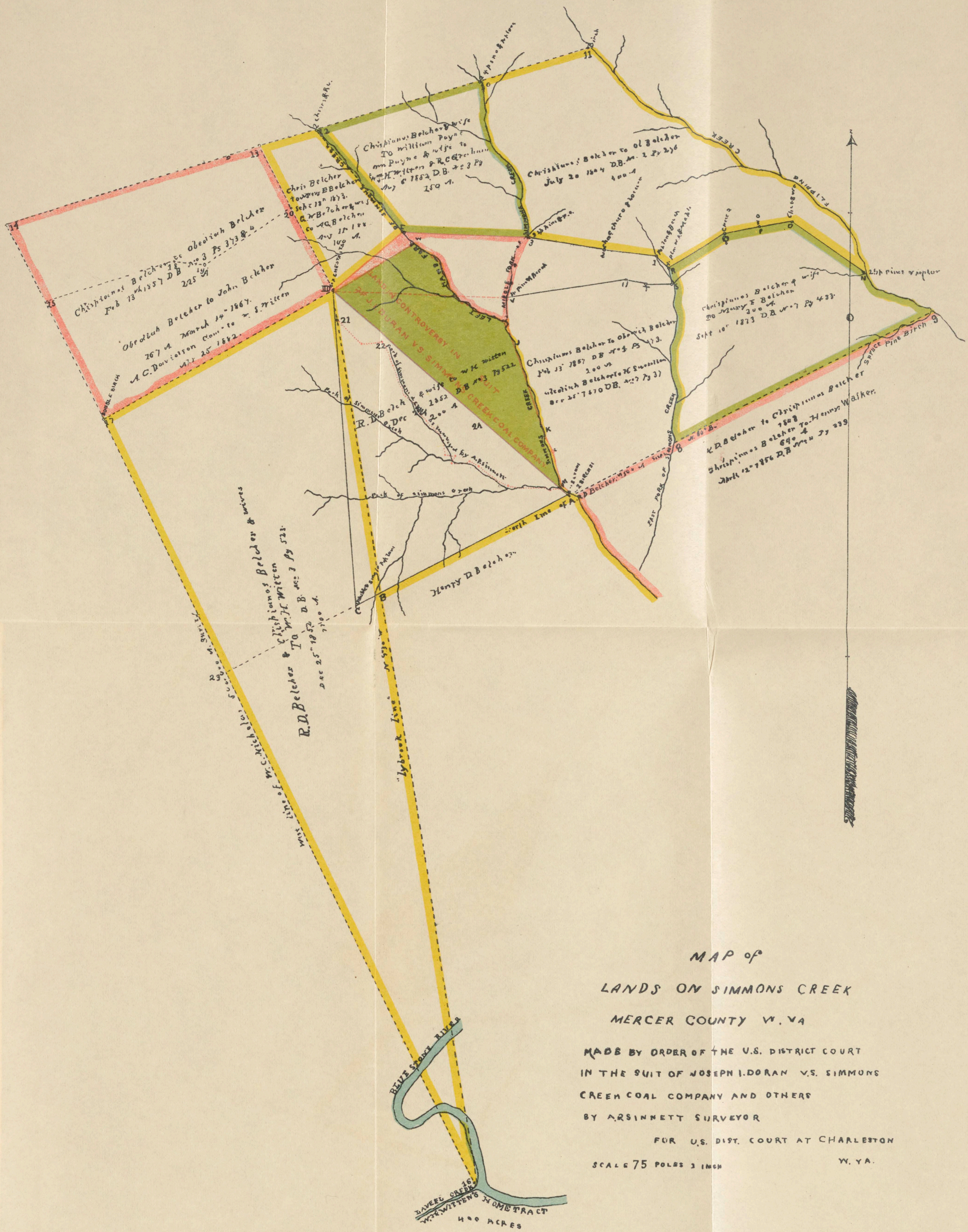
I. A court of equity has no jurisdiction in this case. The bill alleges that the defendant is in possession. Complainant's remedy was at law. He cannot maintain a bill to remove a cloud from his title when he is out of possession. *United States* v. *Wilson*, 118 U. S. 86; *Orton* v. *Smith*, 18 How. 263; *Hipp* v. *Babin*, 19 How. 271; *Ellis* v. *Davis*, 109 U. S. 485; *Killian* v. *Ebbinghaus*, 110 U. S. 568.

The deed from Robert D. Belcher to Wm. H. Witten, of December 23, 1852, cannot be corrected as between complainant and appellant, because appellant is not privy thereto, and jurisdiction must fail on that ground. Story's Eq. Jur. § 165; *Baskins* v. *Calhoun*, 45 Alabama, 582; *Adams* v. *Stevens*, 49 Maine, 362; *Rhodes* v. *Outcalt*, 48 Missouri, 367.

II. The land in controversy is not part of the complainant's 200 acres, more or less, and complainant's prayer for the correction of deeds cannot be granted.

The boundary line of the 200 acres running from the two birches, the beginning corner, to the six chestnuts, is the one in dispute. A straight line from the two birches, the beginning corner, to the next corner, the six chestnuts, does not embrace the land in controversy as part of complainant's tract. I submit that the call is for one line, and the legal construction of the deed will sustain but one line, a straight line from the two birches to the six chestnuts.

The two corners being established beyond controversy, they



MAP of

LANDS ON SIMMONS CREEK

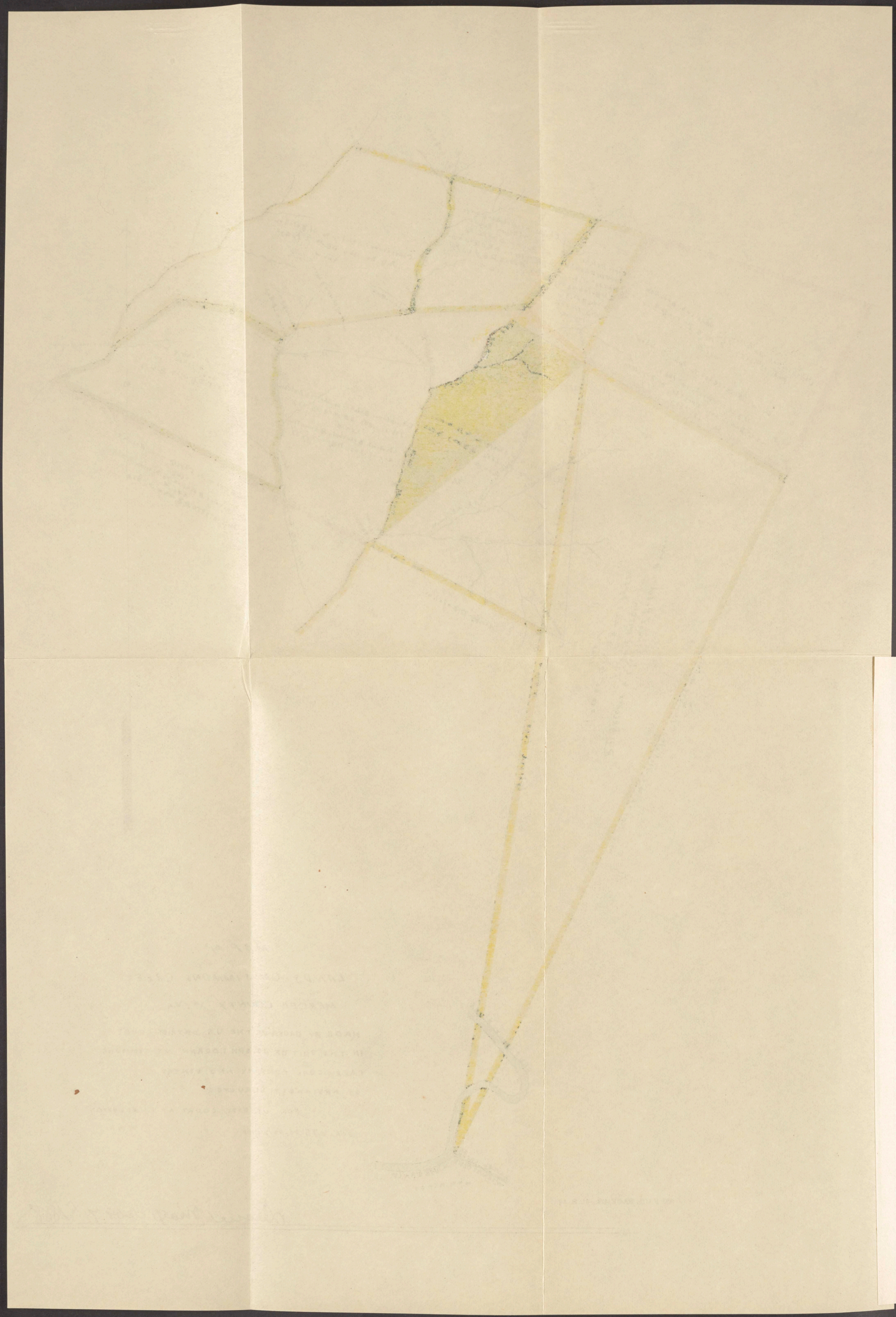
MERCER COUNTY W. VA

MADE BY ORDER OF THE U.S. DISTRICT COURT
IN THE SUIT OF JOSEPH I. DORAN V.S. SIMMONS
CREEK COAL COMPANY AND OTHERS
BY A.R. SINNETT SURVEYOR
FOR U.S. DIST. COURT AT CHARLESTON
W. VA.

SCALE 75 POLES 1 INCH

TO FACE PAGE 422.—U. S. 142.

Deeds Map Feb 7 F 1888



control course and distance, and less material calls, and the line must be run straight from one to the other. *White* v. *Luning*, 93 U. S. 514.

There is no controversy about the beginning point of the West and Shreve survey. The difficulty is as to the true location of its second line. The question in the cause therefore is as to the true construction of the description of that second line. This is a question of law.

There are only three corners called for in the deed, all of which are well known and undisputed, and are clearly represented on the map of the surveyor; and a line run straight from each of the corners to the next corner called for in the description, encloses 246 acres, 46 acres more than complainant's said deed calls for. I submit that a careful examination of the cases and a correct application of the precedents established by them to the points involved in the construction of the deed, in the light of the evidence produced by the complainant himself, will be conclusive in favor of the straight line. All the objects mentioned in the call in the deed, when identified by complainant's own testimony, are inconsistent with any other than a straight line from the two birches to the six chestnuts.

Imperative calls control those that are only directory. The six chestnuts is the imperative call in this case; Simmons Creek and Miller's line are only directory, and intended only as a guide by which the location of the corner is to be found. This principle is ably discussed by the Supreme Court of Maryland in the very recent case of *Friend* v. *Friend*, 64 Maryland, 321, which is very similar to this case. See also *Parks* v. *Loomis*, 6 Gray, 467; *Bosworth* v. *Sturtevant*, 2 Cush. 392; *Allen* v. *Kingsbury*, 16 Pick. 235; *Henshaw* v. *Mullens*, 121 Mass. 143; *Jenks* v. *Morgan*, 6 Gray, 448; *Martin* v. *Carlin*, 19 Wisconsin, 454; *S. C.* 88 Am. Dec. 696; *Stafford* v. *King*, 30 Texas, 257; *S. C.* 94 Am. Dec. 304, 309.

A mistake in a written instrument, and the true intention of the parties must be proved to the exclusion of every reasonable doubt, before a court of equity will correct it. *Jarrell* v. *Jarrell*, 27 West Va. 743; *Tucker* v. *Madden*, 44 Maine, 206,

215; *Hinkle* v. *Royal Exchg. Ins. Co.*, 1 Ves. Sen. 319; *Marquis of Townshend* v. *Stangroom*, 6 Ves. 328; *Harter* v. *Christoph*, 32 Wisconsin, 245; *Hileman* v. *Wright*, 9 Indiana, 126; *Shattuck* v. *Gay*, 45 Vermont, 87; *Minor* v. *Hess*, 47 Illinois, 70; *Weidebusch* v. *Hartenstein*, 12 West Va. 760; *Western Mining Co.* v. *Peytona Coal Co.*, 8 West Va. 406; *Howland* v. *Blake*, 97 U. S. 624; *Jones* v. *Johnston*, 18 How. 150.

III. The alleged lost deed never existed; and the complainant did not have title to the 200 acres, more or less, at the time appellant acquired title to the land in controversy. There is no presumption in favor of its existence, because the 200 acres, more or less, were wild lands, in an original state of nature, and no one ever had actual possession of them under the alleged lost deed. On the other hand it is a presumption of law that if complainant had taken the testimony of Chrispianos Belcher, the alleged grantor, Wm. H. Witten, the scrivener, and the officer before whom the deed is alleged to have been acknowledged, they would all have been against him. When a party has in his possession or under his control evidence by the introduction of which at the trial he would be able to render certain a fact material to his success, which is otherwise left in doubt, and he withholds such evidence, the court will, upon a demurrer to the evidence introduced by his adversary, presume that the fact was against him. *Hefflebower* v. *Detrick*, 27 West Va. 16.

IV. As a correction of the lost deed and the deed of Dec. 23, 1852, from Robert D. Belcher to Wm. H. Witten, involves the enforcement of an alleged oral agreement, within the statute of frauds, it cannot be corrected.

V. Complainant cannot obtain a reformation of the deed from Robert D. Belcher to Wm. H. Witten as between him and appellant, because appellant is neither a party nor privy thereto. A deed can only be reformed between the parties. *Baskins* v. *Calhoun*, 45 Alabama, 582; *Adams* v. *Stevens*, 49 Maine, 362; *Rhodes* v. *Outcalt*, 48 Missouri, 367; *Simpson* v. *Montgomery*, 25 Arkansas, 365; *S. C.* 99 Am. Dec. 228; *Warwick* v. *Warwick*, 3 Atk. 295.

VI. The mistakes sought to be corrected in the deeds are unilateral mistakes and cannot be corrected.

VII. The complainant's claims are stale. A court of equity will entertain no such demand. *Justice* v. *English*, 30 Gratt. 576; *Snell* v. *Atlantic Ins. Co.*, 98 U. S. 85.

VIII. The appellant is a purchaser of the land in controversy for a valuable consideration, and without notice of the alleged lost deed. There is no evidence in the case tending in the slightest degree to show that appellant or its vendors had notice of such a deed. There was nothing to even suggest its existence.

Mr. James H. Ferguson for appellee.

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

Appellant assigns as errors that the court erred in establishing the alleged lost deed from Chrispianos Belcher to Robert D. Belcher, and in correcting the alleged mistake therein; in setting aside the deeds under which appellant claims as clouds on complainant's title; and in correcting the alleged mistake in the deed from Robert D. Belcher to William H. Witten, dated December 23, 1852.

Complainant Doran deraigns title through the lost deed from Chrispianos Belcher to Robert D. Belcher; and deeds of Robert D. Belcher to W. H. Witten, December 23, 1852; of W. H. Witten, W. Scott Witten and Graham to Doran, November 5, 1881; of Doran to the Southwest Virginia Improvement Company, January 1, 1883; and of said company to Doran, December 13, 1883; and it also appears that Chrispianos Belcher gave a deed to Doran, dated April 2, 1885, of the 200 acres, describing the boundaries of the tract in accordance with Doran's contention.

The defendant claims title through a deed of Chrispianos to George W. Belcher, dated October 18, 1884, and various mesne conveyances set forth in the decree and hereinafter referred to. Both parties claim, therefore, under Chrispianos Belcher.

The description of the tract of land in the deed from Robert D. Belcher to William H. Witten is as follows: "All that

tract of land, containing by estimation two hundred acres, be the same more or less, lying in Mercer County, on Simmons Creek, waters of Bluestone, and [bounded] as follows, to wit: Beginning at two birches on Simmons Creek, corner to Chrispianos Belcher's land, thence up said creek with Miller's line, S. 55° W. 120 poles to six chestnuts, corner to Miller's survey, and with the same S. 35° E. 310 poles to a double and single poplar, corner to said Belcher, and with the same N. 40° E. 250 poles to the beginning."

By the decree the boundary line from the two birches to the six chestnuts was made to read: "Beginning at two birches on Simmons Creek, corner to Chrispianos Belcher's land, and running thence up and with said creek with William Miller's line to the mouth of the middle fork of said creek; thence up and with the left-hand fork of said creek to two spruce pines and a white oak, corner to said William Miller's survey of 100 acres; and thence with the line of said survey, to six chestnuts, also a corner thereof."

Upon the hearing, the testimony of Robert D. Belcher, to whom, as alleged, Chrispianos conveyed, and who conveyed to W. H. Witten; of William Miller referred to in the deed of Robert D. to Witten; of W. S. Witten, son of W. H. Witten; of Henry Sadler and others; was introduced on behalf of complainant, together with divers deeds and maps. The deposition of Chrispianos Belcher, who was living in the State of Missouri, was not taken, nor was that of W. H. Witten, in respect of whom it was shown that his mind and memory had been declining for some years, and that his mental and physical condition was such as to render him unable to recall business transactions with certainty and accuracy.

It appeared from the evidence that in 1842, Robert D. Belcher and his brother Obediah purchased of James Hector 4000 acres of land situated on the waters of the Bluestone in the county of Mercer, Virginia, now West Virginia; that they agreed upon a division line, Obediah taking about twenty-five hundred and Robert D. about fifteen hundred acres, and the land was surveyed and conveyed according to the agreed division; that the land was a part of a five hundred thousand-acre

survey granted by the Commonwealth to Wilson Cary Nicholas, from whom Hector had purchased it; that Obediah sold fifteen hundred acres, part of his twenty-five hundred acres, to Chrispianos Belcher, and in the year 1844, Robert D. purchased of Chrispianos about eight hundred acres of this fifteen hundred acres, in consideration of one horse; that said eight hundred acres were bounded on the east by Simmons Creek, a tributary of the Bluestone, on the north by the lands of Obediah Belcher and others, on the west by the Wilson Cary Nicholas survey, and on the south by the fifteen hundred-acre tract conveyed to Robert D. by Hector.

It further appeared that after Robert D. purchased the eight hundred acres, Chrispianos and he were informed that there was a controversy or dispute about the west line of the Nicholas survey, as not running as far west as Hector claimed; that one Lybrook, a surveyor of Giles County, had some time before run said line and so located it as to leave out about six hundred of the eight hundred acres, and about five hundred acres of Robert D.'s fifteen hundred-acre tract; and that when Chrispianos heard of this dispute he declined to make Robert D. a general warranty deed to that part of the eight hundred acres so brought into question, and not having his title bond for the land, Robert agreed to accept such deed for the portion not in dispute, and as to the balance, both were to await the final establishment of said line. That thereupon Chrispianos made and delivered to Robert a deed with covenants of general warranty for the undisputed part, which was supposed to contain two hundred acres, more or less, the metes and bounds of which were, Robert testified, as follows: "Beginning at two birches on Simmons Creek, thence up said creek with the same and leaving said creek upon the course south 55 west 120 poles to six chestnuts mentioned, and thence with the said Lybrook line to a single and double poplar on the said division line between Obediah Belcher & myself, and thence with same to the beginning."

In 1852 Robert sold the two hundred acres, and also the land the title to which had been called in question, supposed to be about eleven hundred acres, to W. H. Witten, and as

Chrispianos had not conveyed the six hundred acres (part of the eleven hundred) to Robert, he joined Robert in the conveyance of the eleven hundred to Witten.

This deed from Robert and Chrispianos was put in evidence and bears date December 23, 1852, and thereby, in consideration of $35, the grantors conveyed eleven hundred acres, more or less, "lying in Mercer County, Virginia, on the waters of Bluestone and Elkhorn, and bounded as follows, to wit, viz.: Beginning at the north of Laurel, a branch of Bluestone, thence north 27 W. in the line of the Wilson Cary Nicholas 500,000-acres survey, and with the same about E. 640 poles to two birches; thence continue on the said line 280 poles to a double birch on said line; thence leaving said line north 55 E. 294 poles to six chestnuts; thence south 35 east 940 poles to the beginning," making the triangular tract lying between the west line of the Nicholas survey and the Lybrook line, as delineated on the decree map.

On the same day Robert made the deed to Witten, the description in which is in controversy, intending, as he says, to convey the two hundred acres which Chrispianos had conveyed to him; and Robert testified further that some time after this conveyance, he and Witten were looking over some old land papers at Obediah's house and came across the deed from Chrispianos to Robert for the said two hundred acres of land, and Robert then gave the deed, and money to have the same recorded, to Witten, and had not since seen it. It was stipulated that if Chrispianos conveyed the two hundred-acre tract to Robert the deed was never recorded, and that diligent search had been made and no such deed could be found.

It also appeared that at the time of Robert's conveyance Miller owned or claimed to be the owner of a tract of six hundred acres lying east of and adjoining the two hundred acres; that the line of this Miller tract ran up Simmons Creek from the two birches called for in the deed of Robert to Witten; that Miller got this land from Obediah Belcher, and the west three hundred acres of it was subsequently purchased by Henry Sadler. Miller was a brother-in-law of Chrispianos and George W. Belcher, Obediah Belcher being his wife's

father and Robert D. her uncle, and according to his testimony he not only purchased from Obediah this six hundred acres, which lay between Flipping Creek and the main Simmons Creek, and included what afterwards became the Henry Sadler land, but also owned one hundred acres, which he purchased from Obediah and Chrispianos, lying at the head of the west fork of Simmons Creek and north of the Witten land, which was afterwards conveyed by Chrispianos to George W.'s wife, Mary E., and by George W. and Mary E. to A. G. Belcher. The west line of this six hundred acres purchased by Miller from Obediah commenced at the two birches on the main Simmons Creek, and ran up to the latter's home place of four hundred acres on the middle fork of the creek, the north line being the marked line between the six hundred-acre tract and Obediah's home tract; and the south line of Miller's one hundred-acre survey ran from the six chestnuts to Payne's line or Payne's corner, on the left-hand fork of the creek.

By the testimony of W. Scott Witten, it was shown that in 1852 his father, William H. Witten, was living on a tract of four hundred acres of land, the title to which was in the latter, and on which he had resided, as he claimed, for fifty years, and witness had resided there with him ever since he was born, in 1848; that the tract of eleven hundred acres conveyed by Robert D. Belcher and Chrispianos Belcher to William H. Witten, December 23, 1852, touched at its southern point the tract on which William H. Witten then lived; that the two hundred acres joined and were bounded in part by the eleven hundred acres; that William H. Witten took actual possession of the eleven hundred-acre tract by placing tenants on it, and paid taxes on that and on the two hundred acres, and used the latter as a range for his cattle; that in February, 1877, W. Scott purchased the two hundred acres at a judicial sale, which was confirmed, but he took no deed to the land, and he and his father thereafter claimed and exercised ownership over it together; that witness paid the taxes on the two hundred acres for the last fifteen years, during which it was owned by his father and himself; that he offered the land for sale to Powell and Sadler before he sold it to Doran, and sold it to

the latter by the line from the two birches of Simmons Creek, up said creek to its forks, and thence up the west or left-hand fork to a white oak and pine on the southwest corner to a tract owned by his father and Payne, and thence either S. 50 or S. 55 west to the six chestnuts; that shortly after he purchased the two hundred acres he bought an adjoining tract and put a tenant on it, who ranged cattle for him on both places; that the two hundred acres were in the woods as late as March, 1886, when his deposition was taken, "except what improvement has been put on by defendant and not enclosed;" and that he never knew that Chrispianos Belcher or anybody else ever disputed the title of Witten to the two hundred acres as claimed by him up to the line of Simmons Creek, until the 25th of December, 1884.

And Robert Belcher testified that from 1844 to 1852, when he conveyed the tract to Witten, he claimed that the east line ran from the two birches up Simmons Creek, with the meanders thereof, and that the north line left said creek with the course south 55 west 120 poles to the six chestnuts, the chestnuts being a noted corner as well as the two birches; and that he had never heard the line called in question until quite recently, when the railroad ran there and the land became valuable.

The evidence is entirely sufficient to establish the existence and loss of the deed of the two hundred acres from Chrispianos to Robert D. Belcher, and the inference is a natural one that, because of this deed, the two hundred acres were not included in the conveyance by Chrispianos and Robert to Witten of the eleven hundred acres. The reason for Chrispianos joining in that deed was that the eleven hundred acres included six hundred of the eight hundred sold by him to Robert, and as Robert had sold not only the eleven hundred, but the two hundred acres to Witten, it seems reasonable to suppose that Witten would have required a conveyance from Chrispianos to Robert if none such then existed.

The deeds to Witten of the eleven hundred and the two hundred acres bore the same date, December 23, 1852, and were both drawn up by Witten in the presence of Chrispianos; the one was acknowledged by Chrispianos and his wife and

Robert and his wife, and the other by Robert and his wife, before the same justices, on the same day, May 7, 1853, and both were ordered to be recorded at the June term, 1853, of the county court. All this is irreconcilable with the view that the title to the two hundred acres was left outstanding in Chrispianos, and confirms complainant's contention to the contrary. In connection with the description in Robert's deed to Witten of the two hundred acres, the description in the deed of the eleven hundred acres must be considered. It will be remembered that the north line of the latter tract ran from the double birch in the line of the Nicholas survey, "north 55 E. 294 poles to six chestnuts," and that line if projected east of the six chestnuts would strike the left-hand fork of Simmons Creek, at a corner of Miller's one hundred-acre survey. In the description of the two hundred-acre tract conveyed by Robert to Witten, the line beginning at the two birches on Simmons Creek ran up said creek with Miller's line. Miller's line ran up that creek to its forks, and thence up what is styled the middle fork to the line of Obediah Belcher's home place, and thence east to Flipping Creek, but the calls in the Witten deed are also for the line S. 55 W. and the six chestnuts; and these must be considered in determining how far Miller's line should be pursued. If it be followed to Obediah's line, and the six chestnuts are reached by a straight line west, this would disregard the S. 55 W., and embrace the land between the two forks, never claimed by Witten, or in his possession. This parcel contains, according to the proofs, thirty-six acres, and passed by Chrispianos' deed to George W., and was presumably the tract he intended to convey when he gave that deed. Inasmuch, however, as the course of the north line in the deed from Chrispianos and Robert to Witten of the eleven hundred acres, given simultaneously with the deed by Robert to Witten, is from the double birch in the west line of the Nicholas survey to the six chestnuts N. 55 E. 294 poles, and that is the same as the course reversed given in the deed from Belcher to Witten, if we reverse the calls in the latter deed, and run from the two birches to the double and single poplar, thence to the six chestnuts, and thence N. 55 E. 120 poles to Simmons Creek, and down

said creek to the beginning, all ambiguity disappears and all the calls are satisfied.

It is well settled that in running the line of a survey of public lands in one direction, if a difficulty is met with, and all the known calls of the survey are met by running them in the reverse direction, this may be properly done. *Ayers* v. *Watson*, 137 U. S. 584.

We conclude, therefore, that the court was justified in passing up the left-hand fork to Miller's survey.

The description of the tract in the deed of Chrispianos Belcher to George W. Belcher, October 18, 1884, is as follows: "A certain tract or boundary of land, supposed to contain seventy-five acres, be the same more or less, lying and being in the county of Mercer, State of W. Va., on the waters of Simmons Creek, a branch of Bluestone River, and being a part of a survey purchased by Obediah Belcher of Jas. Hector in the year 1842 and a portion of the tract deeded by Obediah Belcher to Chrispianos Belcher and bounded as follows, to wit: Beginning at two birches on the west bank of Simmons Creek, corner to William H. Witten, thence with said Witten's line to six chestnuts, corner to A. G. Belcher, on a ridge; thence north 50 E. 112 poles to a white oak and two pines on a branch of Simmons Creek, corner to Witten and Graham-Payne tract; north 85 E. 134 poles with the Payne line to two pines and a white oak on another branch of Simmons Creek, corner to four hundred acres deeded by said Chrispianos Belcher to Obediah Belcher; thence down Simmons Creek with the meanders thereof to the beginning."

As we have seen, Witten's line was the same as Miller's line, at least to the forks of the creek, but it is contended on appellant's behalf that the true line was a straight line from the two birches to the six chestnuts. The difficulty with this contention is, that it entirely ignores Simmons Creek, Miller's line, and the course S. 55 W., and the distance of 120 poles, called for in the deed to Witten. Nor is it consistent with the evidence and the reason of the thing to assume that Chrispianos, in selling the 800 acres to Robert, undertook to make such a line its eastern boundary, rather than Simmons Creek, a nat-

ural boundary in itself. The land was worth so little in 1844 that precision of that sort is hardly supposable, and there is nothing to indicate that Chrispianos, Robert or Witten ever entertained the idea that the tract stopped short of Simmons Creek. In fact, Robert and Witten, and those claiming under them, always claimed up to the creek, down to and after October, 1884. The Circuit Court was not compelled to adopt the straight line, and to have done so would have violated the rule, which prefers natural and ascertained objects, and disregarded the other calls.

The argument is made in the answer of the coal company that because in the deed of Robert to Witten, the 200 acres is described as beginning at two birches on Simmons Creek, "corner to Chrispianos Belcher's land," this recognized "that Chrispianos Belcher owned at that time the land down to the two birches, and which is now the land of this respondent." But the proofs show that in 1848, Robert D. Belcher conveyed to Chrispianos 640 acres, parcel of the 1500 acres conveyed to him by Hector, and this 640 acres cornered on the two birches in question, and was subsequently, in 1856, conveyed by Chrispianos to Henry Walker. The two birches were at the southeast corner of the 200 acres and the northwest corner of the 640 acre tract, and this disposes of the inference suggested.

It is also urged that the description in the deed of W. H. and W. S. Witten and Graham to Doran of November 5, 1881, treated the 200 acres as if it were part of the 1100 acres, and that Doran's title is thus shown not to be under the lost deed, and in fact not to extend to the 200 acres at all. We do not so understand that description. By that conveyance, a moiety of the Payne tract was conveyed as well as the 200 acres, and the description ran: "All that certain tract, piece or parcel of land situate on the south side of the dividing ridge and on Simmons Creek, in Mercer County aforesaid, and containing two hundred acres, more or less, bounded on the north by the tract of land next hereinafter described, on the east by the lands of Henry Sadler and lands of the heirs of Henry Walker, on the south by lands of G. W. Perdue, and on the west by other lands of the said W. H. and W. S. Witten, the balance of a

larger tract of eleven hundred acres, hereinafter more particularly described, being the eastern part of the said large tract of eleven hundred acres which Robert D. Belcher et ux. et al., by deed dated December 23, 1852, and recorded in Mercer County, in deed book No. 3, page 523, etc., granted and conveyed unto the said W. H. Witten in fee; and a portion of the lands of the said W. H. Witten having been seized, taken in execution, and sold under a certain proceeding instituted against him in the Circuit Court of Mercer County aforesaid at the suit of the Bank of Princeton, the said W. H. Witten purchased the same and is about to receive a deed therefor." And then follows the description of the Payne tract as bounded on the south by lands of Sadler and the tract of land above described. The land lying on the west belonged to the Wittens as stated, and might well enough be described as the eastern part of the eleven hundred acre tract, but it would be an inadmissible construction, to make the 200 part of the 1100 acres, particularly in view of the fact, as elsewhere shown, that the 200 acres had been sold by proceedings against W. H. Witten and are thus identified.

Allusion is also made to the fact that the 200 acre tract as described in the deed to Witten turned out on actual survey to contain 357 acres, but the conveyance was of 200 acres, "by estimation," and, moreover, the western boundary in that deed was the line from the six chestnuts S. 35 E. 310 poles to a double and single poplar, corner to Robert Belcher, instead of the Lybrook line, thus throwing into this conveyance the land between these two lines as shown upon the map. This was not material as between the parties, as, although Chrispianos had not up to December 23, 1852, conveyed the 600 acres to Robert, yet he did then, with Robert, convey them to Witten so that the latter by the two deeds got the whole 800 acres, though that part in the 1100 acre tract may have fallen short of 600, while the 200 acre tract ran over. If the 1100 acre tract contained, as testified, 778 or 825 acres, and the 200 acre tract 357 acres, that would be between 1100 and 1200 in all, instead of the 1300 more or less which the Wittens undertook to convey.

Opinion of the Court.

The differences in quantity resulting from taking the areas as estimated and supposed, rather than accurately platted and calculated, could hardly excite remark, while the growth of the 75 acres in the deed of Chrispianos to George W. into 176 acres might perhaps, as the record stands, invite some explanation.

We regard the evidence as clear and convincing in establishing the lost deed, and the facts which sustain the action of the District Court in correcting the line.

The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court. *Fishack* v. *Ball*, 34 West Va. 644; *Shenandoah Valley Railroad* v. *Dunlop*, 86 Virginia, 346.

The general doctrine is not denied, but it is contended that the effect of the correction of the deeds (if the lost conveyance contained an identical description) is to enlarge them so as to include more land than they originally embraced, and that this renders the action of the court obnoxious to the statute of frauds.

Glass v. *Hulbert*, 102 Mass. 24, is cited to the proposition that although the principle maintained by Chancellor Kent in *Gillespie* v. *Moon*, 2 Johns. Ch. 585, that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract as well as to a defendant resisting its enforcement, is well settled, it cannot be extended to enlarge the subject matter of a contract or to add a new term to a writing, by parol.

We need not enter upon a discussion in this regard here, as the deeds themselves furnished the means of making the correction, and the statute of frauds was not pleaded.

The coal company insists, however, that it occupies the position of a *bona fide* purchaser for value without notice, and as such is entitled to the protection of the court. No evidence whatever was adduced on behalf of the defendants, and al-

though George W. Belcher, N. L. Reynolds and P. H. Rorer answered under oath, they were not required to do so, and their answers were not evidence in their favor, under the amendment to the 41st rule in equity.

Reference to the appendix to the acts of the legislature of West Virginia of 1885, (pp. 446, 447,) shows the certificate of incorporation of the company, from which it appears that the agreement required under the statute in order to form a corporation was delivered to the secretary of state of West Virginia on the 16th of January, 1885, on which day the company, as the secretary certifies, became a corporation. The subscribers to the agreement were P. H. Rorer, I. A. Welch, N. L. Reynolds, A. W. Reynolds and George W. Belcher; and the agreement states that these five corporators had subscribed the sum of $250, being one $50 share each, and had paid on the subscriptions the sum of $25. It is through these corporators that the company claims title and the record discloses that Welch was its president. Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators and the president was the knowledge or notice of the company, and if constructive notice bound them it bound the company.

The conveyances were as follows: December 4, 1884, George W. Belcher conveyed to Newton L. Reynolds the undivided five-eighths of the tract of land claimed by the company, and on the 23d of February, 1885, George W. Belcher conveyed to Rorer the undivided three-eighths of the tract. January 13, 1885, N. L. Reynolds conveyed two-eighths of his five-eighths to I. A. Welch, and on February 28, 1885, he conveyed the remaining three-eighths to the company. January 13, 1885, Welch conveyed to A. W. Reynolds an undivided one-eighteenth of the tract, and the remaining portion of the two-eighths conveyed by N. L. Reynolds to Welch, the latter conveyed to the company on February 28, while, on the same day, A. W. Reynolds conveyed the one-eighteenth aforesaid and Rorer and wife the three-eighths.

The deeds of N. L. Reynolds to Welch; Welch to A. W. Reynolds; Rorer, N. L., and A. W. Reynolds and Welch to

the company; all name the nominal consideration of one dollar. The deed of George W. Belcher to N. L. Reynolds purports to have been executed in consideration of $66.10, and of George W. Belcher to Rorer in consideration of $6393.75, $500 in cash and $5893.75 in deferred payments.

The deed from Chrispianos to George W. recites a consideration of $75 "and other valuable considerations." This was a general warranty deed, and so was that to Rorer. The others were special warranties only.

None of the original deeds in appellant's chain appear to have been produced on the hearing, though certified copies were attached to the pleadings, but no independent evidence was adduced of the payment by any of the defendants of any money whatever. As against complainant the recitals in these deeds cannot be relied on as proof of the payment of the purchase money. *Boone* v. *Chiles*, 10 Pet. 177; *Flagg* v. *Mann*, 2 Sumner, 486; *Kyles* v. *Tait*, 6 Gratt. 44; *Warren* v. *Syme*, 7 West Va. 474; *Brown* v. *Welch*, 18 Illinois, 343; *Lloyd* v. *Lynch*, 28 Penn. St. 419.

Apart from this we hold appellant chargeable with notice. The rule is thus stated by the Virginia Court of Appeals, in *Burwell's Adm'rs* v. *Fauber*, 21 Gratt. 446, 463: "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual*, but also by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice." *Jones* v. *Smith*, 1 Hare, 43, 55; *Le Neve* v. *Le Neve*, 3 Atk. 646; *S. C.* 1 Ves. Sen. 64; *S. C.* 2 Leading Cas. Eq. 109, 4th Am. ed.; and *Brush* v. *Ware*, 15 Pet. 93, 114, are cited.

In *Mundy* v. *Vawter*, 3 Gratt. 518, relied on by appellant, the registry of a deed of "all the estate both real and personal, to which the said James was in any manner entitled in law or in equity," was held not to be notice in point of law to a subsequent purchaser of the existence of the deed, nor would notice in point of fact of such existence and contents affect such purchaser, unless he had further notice that the land purchased by him was embraced by the provision of the deed; "and the proof of such notice, whether direct or positive, or circumstantial and presumptive, must be such as to affect the conscience of the purchaser, and is not sufficient if it merely puts him upon inquiry, but must be so strong and clear as to fix on him the imputation of *mala fides*." But the latter branch of this ruling was disapproved of in *Warren* v. *Syme*, 7 West Va. 474; and in *Fidelity Company* v. *Railroad Company*, 32 West Va. 244, 259, it is said that "whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice."

Lord Hardwicke observed in *Le Neve* v. *Le Neve*, Amb. 436; 3 Atk. 646; 1 Ves. Sen. 140: "That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser;" and the notes to that case in 2 Leading Cases in Eq. 109, discuss at length the doctrine of knowledge, actual notice, express or implied, and constructive notice, with abundant citation of authority. The conclusion of the American editor is that actual notice embraces all degrees and grades of evidence, from the most direct and positive proof, to the slightest circumstances from which a jury would be warranted in inferring notice, while constructive notice is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute.

Mr. Justice Story in his work on Equity Jurisprudence, § 399, adopts the language of Chief Baron Eyre, in *Plumb* v. *Fluitt*, 2 Anstr. 432, 438, that constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the court will not allow even of its being controverted.

In later editions of that work, Judge Redfield, (11th ed. § 410 *a*,) says that the term constructive notice "is applied, indiscriminately, to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by the registry, and notice by *lis pendens*. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry, and some other similar matters, although often called constructive notice, is rather implied notice, or presumptive notice, subject to be rebutted or explained. Constructive notice is thus a conclusive presumption or a presumption of law, while implied notice is a mere presumption of fact."

Vice-Chancellor Wigram in *Jones* v. *Smith*, *supra*, laid it down that cases in which constructive notice had been established, resolved themselves into two classes; first, those in which the party charged had actual notice that the property in dispute was in some way affected, and the court has thereupon bound him with constructive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that the property is in some way affected so that the case does not fall within the first class, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not apply.

Each case must be governed by its own peculiar circumstances, and in that in hand we think appellant either had

actual knowledge, or actual notice of such facts and circumstances, as by the exercise of due diligence would have led it to knowledge of complainant's rights, and that if this were not so, then its ignorance was the result of such gross and culpable negligence that it would be equally bound.

The deed of George W. Belcher to N. L. Reynolds conveyed the undivided five-eighths of seventy-five acres by a description reading as follows: "Beginning at two birches on the bank of Simmons Creek in a line of a survey of twenty-five hundred acres conveyed by James Hector to Obediah Belcher, and a corner to the William H. Witten land, and with a line of the said Witten land N. 50° 40′ W. 85.40 chains up Simmons Creek, topping a ridge at 23 chains and crossing hollows and points of said ridge, to six dead chestnuts on said ridge, a corner to A. G. Belcher's land." The deed of George W. Belcher to P. H. Rorer purported to convey "three-eighths ($\frac{3}{8}$), undivided, of a certain tract or parcel of land lying on Simmons Creek, a branch of Bluestone River, in the county of Mercer, and State of West Virginia, it being the same tract, five-eighths ($\frac{5}{8}$), undivided, of which has heretofore been conveyed by the said parties of the first part to N. L. Reynolds, and containing, by recent survey, by horizontal measurement, one hundred and seventy and $\frac{5}{10}$ acres, and bounded as follows: Beginning at two birches on the bank of Simmons Creek, N. 50° 26′ W. 80.33 chains up Simmons Creek, crossing ridges and spurs, to six dead chestnuts on ridge, corner to A. G. Belcher." The other conveyances refer to these descriptions.

When Obediah and Robert D. Belcher bought the four thousand acres of James Hector, they agreed to a division whereby Robert D. Belcher took fifteen hundred and Obediah twenty-five hundred acres. The deed of Hector to Robert D. Belcher for the fifteen hundred acres is in the record. The north line of this tract ran from the Wilson Cary Nicholas line N. 60 E. to the mouth of the Spruce Pine Branch on Flipping Creek, and Obediah Belcher's twenty-five hundred acres lay immediately north of that line and extended across from the Nicholas line to Flipping Creek. The two birches spoken of in George W. Belcher's deed to Reynolds as being

in a line of a survey of twenty-five hundred acres conveyed by Hector to Belcher were not corner trees in that line, but were corner trees to the Witten tract of two hundred acres. As the description in the deed to Reynolds puts the two birches as a corner to the William H. Witten land, it is plain that resort must have been actually had to R. D. Belcher's deed to Witten of the two hundred acres, and that deed described Witten's line as running from the two birches up Simmons Creek "with Miller's line." That deed could not be read without discovering that something had been omitted therefrom. And this is the more apparent, since it is shown by the evidence that the distance by a straight line from the two birches to the six chestnuts was 328 poles, while it is also clear that a line running S. 55 W. from the two birches would not reach the six chestnuts, but would run away from them, so that both by distance and by course it was evident that an error had been committed, and what that error was seems to us to be obvious to any candid mind. Having actual notice to this extent, appellant was put upon inquiry, and inquiry would have conducted at once to the unrecorded deed.

So far as the defendant George W. Belcher is concerned, the evidence is quite convincing of knowledge on his part. Belcher had resided near the land apparently all his life. In October, 1882, when the Barcroft tract of land, which we understand to be the same as Obediah Belcher's home place, was surveyed for the Southwest Virginia Improvement Company, one Crockett was assisting in the survey and George W. Belcher and others were present; and Crockett testified, without objection, that at that time, when they got down to the corner on the creek, he asked Belcher whose land that was adjoining, and he said Mr. Witten's; and the witness further said that since George W. Belcher set up a claim to the land in controversy, Belcher told him "that he never knew he had any land there until Mr. Welch and Mr. Reynolds found it out, as I remember he said, by running the lines and plotting." He also stated upon cross-examination: "He told me, I think, that Capt. Welch got him to write what he would take for his claim in there, *i.e.*, to Chrispianos Belcher, his brother."

Henry Sadler testified that in 1866, when a part of his purchase from Obediah Belcher was surveyed, George W. Belcher was along and marked the lines, and "there was something said that if we got too far from the creek we would get on Witten's land." The witness added that Simmons Creek was recognized by himself as the line between his land and that of William H. Witten.

W. S. Witten testified that on December 25, 1884, he met George W. Belcher, and "asked him what land it was he had sold (as Mr. Burkholder told me there was trouble about the matter). He told me it was the land I sold Joseph I. Doran. I told Mr. Belcher he ought to be careful about trading on that land, and he remarked to me that when I sold it, that I did not get much for it, and that if I would not kick in the thing that they would make me whole." George W. Belcher was present during the taking of these depositions, but he was not called as a witness.

Again, actual and unequivocal possession is notice, because it is incumbent on one who is about to purchase real estate to ascertain by whom and in what right it is held or occupied; and the neglect of this duty is one of the defaults which, unexplained, is equivalent to notice. 2 Lead. Cas. Eq. 180; *Landes* v. *Brant*, 10 How. 348; *McLean* v. *Clapp*, 141 U. S. 429, 436; *French* v. *Loyal Company*, 5 Leigh, 627, 641; *Western Mining Company* v. *Peytona Coal Company*, 8 West Va. 406, 441; *Core* v. *Faupel*, 24 West Va. 238; *Morrison* v. *Kelley*, 22 Illinois, 610. "Possession," said Walker, J., in the case last cited, "may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaptation to use; constructive, as when a person has the paramount title, which, in contemplation of law, draws to and connects it with the possession. But to be adverse it must be a *pedis possessio*, or an actual possession." In *Ewing* v. *Burnett*, 11 Pet. 41, 53, it was held that neither actual occupancy nor cultivation nor residence was necessary to constitute actual possession; that where the property is so situated as not to admit of any permanent useful improvements, and the continued claim of the party has been evidenced by public

acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim, such possession will create a bar under the statute of limitations; that what acts may or may not constitute a possession are necessarily varied, and depend to some extent upon the nature, locality and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question. And so possession of an improved portion of a tract of land, under a conveyance in fee of the whole, is construed to be co-extensive with the grant. And where a party purchases land adjoining a tract of which he is already in the occupancy, he will be considered as at once, in point of law, in the possession of the newly-acquired tract, when the latter is vacant, or at least not held under an adverse possession.

Now, W. H. Witten resided on 400 acres of land, which adjoined the 1100 acre tract, while the 200 acres bounded on the 1100 acres, and neither of the latter tracts was in adverse possession when purchased by Witten, and the evidence of W. Scott Witten shows that W. H. Witten used the 200 acre tract as a range for his cattle and paid the taxes on it, and that after W. Scott Witten purchased it at the judicial sale, he also used it in the same way. In other words, such possession as the land was susceptible of was taken and maintained, and in addition to that it connected with the home tract on which W. H. Witten had lived for fifty years. The possession, such as it was, was notorious, and contributes its weight to the other proofs of notice.

We repeat, that we regard it as satisfactorily established that the defendants had such notice as put them on inquiry and charged them with knowledge of the facts, and under the circumstances their silence is most significant.

Certain proceedings resulting in an alleged deed of the land in controversy from the commissioner of school lands for Mercer County to George W. Belcher, under date of December 3, 1884, are attacked by the bill as fraudulent and void, and part of a scheme to deprive complainant of his property.

These proceedings are attached to the bill, and show the filing of a petition by George W. Belcher against the school land commissioner in the Circuit Court of Mercer County, and its reference to a master in chancery, November 21, 1884, the report of the master on November 27, and a decree on November 29. The only party defendant was the commissioner, who appeared and waived process.

The decree describes the land in accordance with the description in the deed from Chrispianos to George W., and directs the school commissioner to convey the same to Belcher, which was done accordingly. The petition stated that George W. Belcher was the owner of a tract of land lying on Simmons Creek in the county of Mercer, adjoining the lands of Witten, Sadler and others, and containing about seventy-five acres, and that said tract was conveyed to him by Chrispianos Belcher by deed bearing date October 18, 1884; and that "a short time prior to the formation of the State of West Virginia, his vendor, Chrispianos Belcher, removed from the State of Virginia and county of Mercer to the State of Missouri, and that by mistake and accident the said land was omitted from the land books, and he is advised that said land is forfeited and the title thereto vested in the State of West Virginia for non-entry thereof on the land books of Mercer County." The petitioner further averred, "that at the time the title vested in the State, his said vendor, Chrispianos Belcher, had good, valid title thereto, superior to any other claimant thereof, and that your petitioner now has good, valid title thereto, superior to any other claimant thereof, and he is advised and now avers that he is entitled to redeem the same by paying all taxes and interest due on said land by reason of the forfeiture thereof from the year 1863 to the present time and all costs."

The decree recites the conveyance of Chrispianos to George W. Belcher, and that at the time of the forfeiture Chrispianos had a good and valid fee-simple title thereto, superior to that of any other claimant, and that George W. Belcher having appeared in open court and offered to pay the sum of $30.71, being the amount of all taxes, interest, damages and costs due

against said tract of land by reason of the forfeiture, (the taxes in question covering the years from 1863 to 1884 inclusive,) is entitled to be treated in the nature of a purchaser thereof, it appearing to the court that the said George W. Belcher would be entitled to the surplus of purchase money over and above the said sum of $30.71, had said tract of land been subjected to sale as school lands, etc.

We cannot resist the impression that, taking all the facts and circumstances of the case together, these proceedings in the Circuit Court of Mercer County were, as charged by complainant, a mere device to bolster up the alleged claim of George W. Belcher, under the deed from Chrispianos, to property belonging to the complainant. So far from strengthening appellant's position, the inferences to be drawn from the transaction are inconsistent with good faith in dealing with the land. The proofs in this record show the charge of a 200 acre tract of land on Simmons Creek Fork, or Upper Simmons Fork, or Simmons Fork, on the land books of Mercer County, in the name of William H. Witten, for the years 1854, '56, '57, '58, '60, '61, '62, '63, '65, '66, '67, '68, '69, '70, '71, '72, '73, '74, '75, '76, '77, '78, '79, '80, and its transfer for 1882–'83 to Joseph I. Doran, and for 1884–'85 to the Southwest Virginia Improvement Company. The location is stated to be for the last four years on the "dividing ridge and Simmons Creek." It also appears that the land books for the years 1855 and 1859 were destroyed, and for 1864 that the land book was "gone," and that the land does not appear on the book for 1881. The same books also show Chrispianos Belcher charged in 1854 and 1856 with 650 acres and 200 acres, located on "Bluestone and Flipping ridge and Crane Creek;" that in 1855 the books were destroyed; and that for the year 1857, 10 acres, part of the 650 acres, on Bluestone, were charged to Chrispianos, and for many years thereafter, exclusive of the two years when the minute is that the books were destroyed. As has heretofore been stated, Chrispianos had a tract of 640 acres south of the dividing line between Obediah's 2500 and Robert D.'s 1500 acres derived from Hector, and part of the 1500 acres, which had been conveyed to him by Robert in

1848, and which Chrispianos conveyed to Henry Walker in 1856. And both as to that and the 200 acres mentioned, their location was on Flipping Creek and Crane Creek, waters of Bluestone, and they have no connection whatever with the 200 acres in controversy. The latter 200 acres appear in the tax receipts of W. H. Witten for 1854, '55, '59, '66, '67, '69, '70, '71, '72, '74, '75, '76, '77, '78, '79, '80, and evidence is given explanatory of the loss of the tax receipts for the missing years, the payment of the taxes for all the years being otherwise proven. The land in controversy here was evidently not forfeited to the State in 1863, for the reason given in the petition or any other.

Under the constitution of West Virginia, Art. 13, (Code, 1884, p. 36,) it is provided that all lands in the State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State until such sale as is hereinafter mentioned be made, shall by proceedings in the Circuit Court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder; and that the former owner of any such land shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per cent per annum, and the costs of the proceedings, if his claim be filed in the Circuit Court that decrees the sale, within two years thereafter. No such sale had ever taken place in this instance.

By chapter 105 of the code of West Virginia, (Warth's ed. of 1884, p. 639,) provision was made for the certifying to the clerk of the Circuit Court by the auditor of a list of all waste and unappropriated lands theretofore vested in the State of West Virginia by forfeiture or purchase at the sheriff's or collector's sale for delinquent taxes, and not released, etc., and of lands theretofore or thereafter purchased at a

sale for taxes and not redeemed; and all lands forfeited to the State for failure to have the same entered upon the land books, etc., in order that they might be sold for the benefit of the school fund; and it was made the duty of the surveyor of each county to report to the Circuit Court all waste and unappropriated lands in his county subject to sale under the provisions of the chapter. Further, the appointment and qualification of a commissioner of school lands by the Circuit Court of each county was provided for, whose duty it should be once in each year to ascertain from the reports and such other information as he might be able to obtain, what lands were liable to sale under the provisions of the chapter, as to which no proceedings had been commenced for the sale thereof, and to file his petition praying that the same might be sold, and stating the claimant or claimants, and their residence, if known, against whom process should be issued that they might show cause why the lands should not be sold. Publication of notice to unknown parties was also required. And it was further provided that the former owner of any such land should be entitled to recover the excess of the sum for which the lands might be sold over what was due to the State, if he filed his claim within two years thereafter, and, further, that any owner might within the time aforesaid file his petition in the Circuit Court, stating his title to the land, etc., whereupon said court should order the excess mentioned to be paid to him, and at any time during the pendency of the proceedings in the sale of such land, such former owner, or any creditor of such former owner, might file his petition in the Circuit Court and ask to be allowed to redeem such part or parts of any tract of land so forfeited, or the whole thereof, as he might desire. The privilege of redemption given by the statute was a privilege personal to the former owner or his creditors having liens on the land, and the way, time, mode and manner in which the privilege should be exercised was prescribed by the statute.

At the time George W. Belcher filed his petition to redeem the land from the alleged forfeiture, there were no proceedings pending in the Mercer County Circuit Court for its sale for

the benefit of the school fund. The petitioner did not pretend that he was the former owner, or a creditor of the former owner, but said that the land was forfeited, and the title vested in the State of West Virginia for the failure of Chrispianos to have it entered on the land books of Mercer County, a short time prior to the admission of the State; and the report upon the reference is to the effect that the tract was forfeited about 1863 by reason of such omission, and that at the time of the forfeiture the legal title was in Chrispianos. But the legal title to the land in dispute was not in Chrispianos from before 1852, and the land was entered on the land books in 1863 and prior years, and taxes paid thereon. Moreover, the proceeding was an independent proceeding to which the owners were not made parties and by which they were not bound. As to the suggestion of forfeiture prior to 1848, no question thereon was raised on the petition or in this case.

We are of opinion that the Circuit Court was right in ignoring the claim of title under this deed, and in setting aside the other deeds as clouds upon complainant's title, without regard to these proceedings in the Circuit Court of Mercer County.

But it is said that complainant's claim is stale, and that he and those under whom he claims have slept upon their rights for forty years. There is no doubt that William H. Witten believed himself to be the owner of all the land up to Simmons Creek and Miller's line on the east side of that creek, from the two birches to the corner of Payne and Graham's tract and to Miller's survey, and thence to the six chestnuts. It is true the deed to Robert Belcher had not been recorded and was lost, but as Witten was in possession, mere delay, unless by reason thereof an equitable estoppel was created in favor of appellant, would not operate to defeat relief; but appellant, and none of the parties under whom it claims, can assert upon this record, that complainant stood by while they were undertaking to possess themselves of his land, and allowed them to do so to their injury, when they would have abstained from it if he had proceeded earlier to the restoration of the lost deed and the rectification of the boundary in the Witten deed.

The deed of Chrispianos to George W. was dated October 18,

1884, and apparently at some time between that date and February, 1885, these defendants, or some of them, entered upon the tract, prospected for coal, and put on improvements amounting to the value of some $200. On February 24, Doran served notice on the persons then on the land of his ownership, etc., and on the 15th of May, 1885, served another notice, and demanded possession. He also, February 14, put his own tenant in a frame house on the premises, which was part of the improvements above mentioned, who appears to have been subsequently forcibly ejected.

The bill was filed August 1, 1885. There was no delay, therefore, in the assertion of his rights after they were invaded.

It is argued at length that a court of equity had no jurisdiction in this case. The bill alleged that complainant was "seized in fee of the said tract of two hundred acres, more or less;" and that this is a sufficient allegation of possession of the land, has been determined by this court. *Gage* v. *Kaufman*, 133 U. S. 471.

As heretofore stated, such possession as the land was susceptible of had been taken by Witten and maintained by himself and his grantees down to the time, after October, 1884, when appellant entered upon a part of complainant's land in the commission of a trespass, and commenced committing acts of waste upon the property. It cannot be held that this trespass on appellant's part constituted a possession which in itself would drive complainant to an action of ejectment.

The jurisdiction of courts of equity to remove clouds from title is well settled, the relief being granted on the principle *quia timet*, and in the case at bar, appellant's own contention makes it clear that the remedy of complainant at law would have been inadequate, since the aid of a court of equity was required to supply what was by mistake omitted from the deed of Robert to Witten, so that the line could be made to run up the left-hand fork of Simmons Creek to the corner of Miller's survey on that creek, and thence to the six chestnuts.

We think also that the court had jurisdiction to establish the lost deed, and that this is so even though in an action at law

proof of the fact might have been allowed to be made. *Hickman* v. *Painter*, 11 West Va. 386; 1 Story Eq. Jur. § 81.

Upon the whole, we see no reason for a reversal of the decree, and it is therefore

Affirmed.

BOYD *v.* UNITED STATES.

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

No. 1048. Argued December 16, 1891. — Decided January 4, 1892.

The full and unconditional pardon of a person convicted of larceny and sentenced to imprisonment therefor completely restores his competency as a witness, although it may be stated in the pardon that it was given for that purpose.

On the trial of a person indicted for murder, it appeared in evidence that the killing followed an attempt to rob. The court admitted, under objections, evidence tending to show that the prisoner had committed other robberies in that neighborhood, on different days, shortly before the time when the killing took place, and exceptions were taken. *Held*, that the evidence was inadmissible for any purpose.

THE case is stated in the opinion.

Mr. H. J. May for plaintiffs in error. *Mr. A. H. Garland* filed a brief for same.

Mr. Assistant Attorney General Maury for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiffs in error were jointly indicted in the court below for the crime of murder, alleged to have been committed on the 6th day of April, 1890, at the Choctaw Nation, in the Indian country, within the Western District of Arkansas; the first count alleging that the person murdered, John Dansby, was a negro, and not an Indian; the second, that the defendants were white men, and not Indians. The court, in its charge

to the jury, said that the second count differed from the first "by alleging that Eugene Standley, alias Eugene Stanton (he is charged in that way in both counts) and John Boyd were white men and not Indians. The proof, without any controversy, shows that Standley is an Indian; therefore you will confine your finding, if it should be a verdict of guilty, to the first count in the indictment, if the proof shows that fact with reference to Standley and you should find him guilty. If it shows such other facts as are necessary to give the court jurisdiction, as are alleged in the first count of the indictment, then your finding will be on that count, provided you should find a verdict of guilty. If you should find a verdict of not guilty it may be general in its character, and it would be responsive to both charges."

The defendants were found guilty of murder as charged in the first count. A motion for a new trial having been overruled, the defendants were condemned to suffer the punishment of death.

The proof was conflicting upon many points, but there was evidence tending to show the following facts: In the night of April 6, 1890, the defendants, Boyd and Standley, with John Davis *alias* Myers, came to a ferry, on Cache Creek, in the Indian country, a short distance from Martin Byrd's at whose house, at the time, were John Dansby, the deceased, Joseph Byrd, a brother of Martin Byrd, and Richard Butler. The defendants and Davis, or one of them, called to the ferryman, Martin Byrd, to come and set them over the creek. Byrd protested that he did not like to do work of that kind after dark, but finally consented to get the key of the boat, and take them across the creek. He went to his house, avowedly to obtain the key; and, after remaining away some time, returned, accompanied by Dansby, Joseph Byrd and Richard Butler, each with weapons. When Martin Byrd reached the ferry boat, and was about to unlock the chain by which it was held fast — Boyd being at the time in the rear end of the boat, while Davis and Standley were sitting upon the bank of the creek — Davis said to him, "Lay down that chain, and throw out your rusty change." Upon Byrd saying, "Don't you want

to cross?" Davis, holding his pistol upon Byrd, replied, with an oath, "No, it's your money we're after." Dansby started towards Byrd, and was shot in the back by Boyd. When Davis presented his pistol at Martin Byrd, the latter, dropping upon his knees, drew a pistol. The ball from Davis' pistol passed over Byrd's head, but Davis was shot by Byrd, and died instantly. The firing immediately became general. Butler shot Boyd in the back, Standley shot at Joseph Byrd, but was himself slightly wounded by a shot from the latter's pistol. Boyd, although badly wounded, went up the creek some little distance, but, being followed, was secured and carried to Martin Byrd's house, as a prisoner. He remained there until he was arrested by an officer upon the charge of having murdered Dansby. Standley escaped, and it was some time before he was arrested. Dansby lived a few days only, and died at Martin Byrd's house, from the wounds inflicted upon him on the above occasion.

Upon the part of the defendants there was evidence tending to show a case, in some respects, materially different. They contended — to use the words of their counsel — "that while Boyd was sitting in the boat and Standley and Davis on the bank, the ferryman and his party came around with Winchester rifles and revolvers, and before they suspected anything had levelled their guns on him and Davis, and told them to give up their pistols; that they had the description of some men that had robbed Judge Taylor; that he handed up his pistol, which they took, and Davis drew his out, but whether to comply or to resist he does not know; that they fired on Davis and killed him; that he turned, and, as he did so, was shot in the shoulder and fell, the ball remaining under the point of the shoulder blade; that they ran after Boyd, and while they were gone he picked up Davis' pistol and ran off and hid."

The principal witness for the prosecution, at the trial, was Martin Byrd. When presented as a witness, the defendants objected to him as incompetent, by reason of the fact that he had been convicted of the crime of larceny and sentenced to the penitentiary, the record of such conviction being offered

in support of the objection. The government thereupon produced a pardon from the President of the United States, as follows:

"Benjamin Harrison, President of the United States of America, to all to whom these presents may come, greeting:

"Whereas, Martin Byrd, in the United States District Court for the Western District of Arkansas, was indicted, charged with larceny, convicted May 10th, 1884, and on the 19th day of May, 1884, was sentenced to one year's imprisonment in the Detroit House of Correction, Detroit, Michigan; and whereas the said Martin Byrd has been discharged from said prison, he having served out the term for which sentenced, and was accredited for good behavior while in prison; and whereas the district attorney for the Western District of Arkansas requests the pardon of said Martin Byrd, in order to restore him to competency as a witness in a murder trial to be had July 1st, next, in said District Court at Little Rock, in which request the judge of said District Court unites: Now, therefore, be it known that I, Benjamin Harrison, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant to the said Martin Byrd a full and unconditional pardon.

"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 27th day of June, A.D. 1890, and of the Independence of the United States the one hundred and fourteenth.

"(The place of the seal.) BENJAMIN HARRISON.

"By the President: JAMES G. BLAINE, *Sec. of State.*"

This pardon removed all objections to the competency of Martin Byrd as a witness. The recital in it that the district attorney requested the pardon in order to restore Byrd's competency as a witness in a murder trial to be had in the District Court at Little Rock, did not alter the fact that the pardon was, by its terms, "full and unconditional." The dis-

ability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect. The competency as a witness of the person so pardoned was, therefore, completely restored. *United States* v. *Wilson*, 7 Pet. 150; *Ex parte Wells*, 18 How. 307, 315; *Ex parte Garland*, 4 Wall. 333, 380; 4 Bl. Com. 402.

The principal assignments of error relate to the admission, against the objection of the defendants, of evidence as to several robberies committed prior to the day when Dansby was shot, and which, or some of which at least, had no necessary connection with, and did not, in the slightest degree, elucidate the issue before the jury, namely, whether the defendants murdered John Dansby on the occasion of the conflict at the ferry. This evidence tended to show, and, for the purposes of the present discussion, it may be admitted that it did show, that, in the night of March 15, 1890, Standley, under the name of Henry Eckles, robbed Richard C. Brinson and Samuel R. Mode; that in the afternoon of March 17, 1890, he and Boyd robbed Robert Hall; that in the night of March 20, 1890, Standley, under the name of John Haynes, together with Davis, robbed John Taylor; and that, in the evening of April 5, 1890, Davis, Boyd and Standley robbed Rigsby's store. In relation to these matters, the witnesses went into details as fully as if the defendants had been upon trial for the robberies they were, respectively, charged by the evidence with having committed. The admissibility of this evidence was attempted to be sustained, in part, upon the ground that Martin Byrd and his crowd, having the right to arrest the parties guilty of the robberies, were entitled to show that the robberies had been, in fact, committed by the defendants. While the evidence tended to show that Martin Byrd had information, prior to April 6, 1890, of the Taylor robbery, and of Taylor having offered a reward for the arrest and conviction of the guilty parties, there is nothing to show that he or his associates had ever heard, before the meeting at the ferry, of the robberies of Brinson, Mode, Hall and Rigsby. It is said that the evidence in chief as to what occurred at the

time of the shooting, left the identity of the defendants, or at least of Standley, in some doubt, and that the facts, connected with the robbery of Rigsby, showing that the defendants and Davis were all engaged in it, and were together only the night before Dansby was shot, tended not only to identify Standley and Boyd, but to show that they came to the ferry for the same purpose with which they went to Rigsby's house, namely, to rob and plunder for their joint benefit; and, consequently, that each defendant was responsible for Dansby's death if it resulted from the prosecution of their felonious purpose to rob.

The rule upon this subject was thus expressed by the court in its charge to the jury: "If a number of men agree to do an act which, from its nature or the way it is to be done, is an act that will put human life in jeopardy, then the putting of human life in jeopardy, or the destruction of human life, is a necessary and a natural and a probable consequence of the act agreed to be done by the party, and upon the principle of the law I have already announced to you, it is but equal and exact justice that all who enter upon an enterprise of that kind should be responsible for the death of an innocent person that transpires because of the execution of the enterprise then entered upon, and because that enterprise is one that would naturally and reasonably produce that result." Again: "Now the law defines the character of crimes that, if a number of persons enter upon the commission of them they may be affected by a result of this kind. It says robbery is one of them. Why? Robbery has the very element that enters into it, to distinguish it, to make it a crime, as that of violence upon the person, and it is but a probable and natural and reasonable consequence of an attempt to commit that crime that a human life will be destroyed. The very demand of a man who robs — 'Your money or your life!' — implies that human life is in jeopardy; so that when a number of persons agree to and enter upon the commission of the crime of robbery, and a person is killed, who is an innocent person, in the execution of that purpose to rob, all the parties who have so entered into the agreement and enter

upon the execution of the purpose to rob are equally responsible. The pistol or gun fired is the pistol or gun of each and every one of them. There are other crimes of a like character, and the law, I say, draws this distinction, and bases it upon a just ground. It says that any crime which, from its nature and the way it is usually committed, will necessarily or probably or reasonably endanger a human life, is a crime that, if a number of persons agree to commit, and enter upon the commission of, will involve them all in the consequences that ensue. The commission of robbery is a crime that may cause the death of an innocent person."

These principles, of the soundness of which we entertain no doubt, were enforced by the court in its charge by numerous illustrations drawn from adjudged cases and text-writers of high authority. This being done, it proceeded: "Now it becomes necessary for the court to remind you of what figure these other crimes that have been proven cut in the case. This crime of the robbery of Rigsby may be taken into consideration by you in passing upon the question of the identity of the defendants. It is a competent fact for that purpose. You will remember that the evidence shows that goods were found upon the person of one of these parties who was present at this ferry when the killing of Dansby took place, that were sworn to by Rigsby as having been taken by the three parties, the man Davis or Myers and these two defendants, from his store. That would be evidence that might be taken into consideration with the statements of these colored witnesses who were present at the time, and undertook to point out and identify these defendants; that may be taken into consideration for that purpose. If you believe in the theory that there was an attempt made to arrest upon the part of these parties, and that the attempt wasn't made by these defendants, together with Davis, to commit a robbery upon them, then the fact that the robbery of Rigsby had transpired, and the robbery of Taylor and these other robberies that have been proven before, may be taken into consideration to show that crime had been committed, that would give the citizen the right to make an arrest provided there was reasonable ground to believe, in your

judgment, at the time, that the parties they were seeking to arrest were the ones that had committed those crimes. They may be taken into consideration for that purpose. You are not to consider these other crimes as make-weight against the defendants alone. That is to say, you are not to convict the defendants because of the commission of these other crimes. They were admitted for the specific purposes that I have named. They are not to influence your minds so as to induce you to more readily convict them than you would convict them if the crimes had not been proven against him. That is the figure they cut. That is the reason they were admitted as testimony before you."

The charge made no reference to the robberies committed upon Brinson, Mode and Hall, except as they may have been in the mind of the court, when it referred to "these other crimes." Whatever effect, prejudicial to the defendants, the proof of the robberies upon Brinson, Mode and Hall produced upon the minds of jurors, remained with them, except as it may have been modified by the general statement that the defendants were not to be convicted "because of the commission of these other crimes." The only other crimes referred to in the charge (other than the alleged murder of Dansby) were the Rigsby and Taylor robberies. The jurors were particularly informed as to the purposes for which the court admitted testimony in respect to those two robberies; but they were left uninstructed, in direct terms, as to the use to which the proof of the Brinson, Mode and Hall robberies could be put in passing upon the guilt or innocence of the particular crime for which the defendants were indicted. It is true, as suggested by counsel for the government, that no exception was taken to the charge. But objection was made by the defendants to the evidence as to the Brinson, Mode and Hall robberies, and exception was duly taken to the action of the court in admitting it. That exception was not waived by a failure to except to the charge.

If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the

peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court. But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

FISK v. HENARIE.

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

No. 118. Argued December 3, 4, 1891. — Decided January 4, 1892.

The act of March 3, 1887, 24 Stat. 552, c. 373, with regard to the removal of causes from state courts, (corrected by the act of August 13, 1888, 25 Stat. 433, c. 866,) repealed subdivision 3 of Rev. Stat. § 639.

The words in that act "at any time before the trial thereof," used in regard to removals "from prejudice or local influence" were used by Congress with reference to the construction put on similar language in the act of March 3, 1875, 18 Stat. 470, c. 137, by this court, and are to receive the same construction, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof.

THE court stated the case as follows:

This action was commenced in the Circuit Court of the State of Oregon for the county of Wasco, on November 13, 1883, by James H. Fisk against Daniel V. B. Henarie, Eleanor Martin, Peter Donahue, Thomas S. Martin, Edward Martin and John D. Wilcox, to recover a commission of ten per cent, amounting to $60,000, on an alleged sale of a tract of land, known as the Dalles Military Road Grant, containing about 600,000 acres, situated in the counties of Wasco, Grant and Baker. The first three of the defendants were residents and citizens of California, and the latter three of Oregon. Service of summons was had on the citizens of Oregon, and they appeared and answered. On February 2, 1884, publication of the summons was ordered as to the California defendants, who appeared and answered August 21, 1884.

The answers of the defendants controverted the allegations on which the plaintiff based his demand, and contested his right to recover anything from them, or either of them, on any sale of the lands.

On September 1, 1884, plaintiff replied to the answers, and on the 16th of the same month, on motion of the defendants,

the venue was changed to Multnomah County, where the plaintiff and the Oregon defendants resided when the action was commenced, none of the parties residing in Wasco County. The case was afterwards tried before a jury in the Circuit Court for Multnomah County, who, on April 15, 1885, found a verdict under the direction of the court for the defendants, on which there was a judgment for costs in their favor; which judgment was on January 11, 1886, reversed by the Supreme Court, (13 Oregon, 156,) and a new trial ordered, which, being had, resulted, May 21, 1886, in a verdict for the plaintiff for the sum of $60,000.

On the 18th of May, before the jury was empanelled, the death of Peter Donahue was suggested, and his executors, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, citizens of California, were substituted as defendants.

The case was afterwards heard on the motion of plaintiff for judgment and two motions of the defendants for a new trial, and for a judgment notwithstanding the verdict. On June 30, 1886, plaintiff's motion was denied, and defendants' for judgment *non obstante* allowed, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and thereupon judgment was entered for costs in favor of the defendants, which judgment was on October 20, 1886, on writ of error, reversed by the Supreme Court, (14 Oregon, 29,) and the cause remanded for further proceedings according to law.

On December 18, 1886, the Circuit Court allowed the motion for a new trial and set aside the verdict, from which order the plaintiff appealed to the Supreme Court, and the appeal was on April 18, 1887, dismissed. 15 Oregon, 89. Thereafterwards the cause was again tried, and the jury, being unable to agree, were discharged without finding a verdict. July 30, 1887, the defendants Henarie, Eleanor Martin and the executors of Peter Donahue, deceased, applied to the state court for the removal of the cause to the Circuit Court of the United States for the District of Oregon, and on the first day of August, 1887, an order removing it was entered by the judge of the state court.

Statement of the Case.

The petition for removal was filed on behalf of those defendants who were citizens of California in the state circuit court, and addressed to the judge thereof, and set up the citizenship of the petitioners; that at the time the action was commenced and the petition was filed there was a controversy therein between the plaintiff and the petitioners; the amount involved; the alleged cause of action; the issue thereon; and proceeded thus: "That said action has not been tried and is now pending in the above entitled court. That from prejudice and local influence your petitioners will not be able to obtain justice in this court or in any other state court to which the said defendants may under the laws of this State remove said cause. That the other defendants in said action, Thos. S. Martin, Edward Martin and John D. Wilcox, now and at all times since the commencement of said action have been citizens and residents of the State of Oregon, residing in Portland, therein; that your petitioners desire to remove said cause to the Circuit Court of the United States for the District of Oregon under the provisions of the act of Congress approved March 3, 1887. Your petitioners further say that they have filed the affidavit required by the statute in such cases, and they herewith offer their bond, with surety, in the penal sum of one thousand dollars, conditioned as by the statutes of the United States required. Your petitioners therefore pray that said bond may be accepted and approved, and that said cause may be removed into the next Circuit Court of the United States for the District of Oregon, and that no further proceedings may be had therein in this court."

Henarie, one of the petitioners, verified the petition upon belief; and it was accompanied by the affidavit of Henarie and Eleanor Martin to the effect that they had reason to believe and did believe, and so stated, that from prejudice and local influence, the defendants, to wit, the affiants and the executors of Peter Donahue, would not be able to obtain justice in said state court or in any other state court to which said defendants under the laws of the State of Oregon had the right to remove the same, on account of such prejudice and local influence. The state court ordered the removal under the act of Congress of March 3, 1887.

Statement of the Case.

The transcript was filed in the Circuit Court of the United States, September 30, 1887, and on October 8 following, a motion was made to remand upon the grounds: that the application for the removal of the cause was not made in time, or before trial of the cause in the state court; that the petition and affidavit were insufficient, in that they did not set forth the facts and reasons showing the alleged prejudice or local influence; that the removal papers were not served on the plaintiff in accordance with the rules of practice in the state courts; and that the petition and accompanying papers did not show a cause for removal; and the motion concluded with a denial of the existence of any prejudice or local influence which would prevent the defendants or any of them from obtaining justice in the state courts or at all, and asked the court to examine into the truth of the affidavits alleging prejudice and local influence, and the grounds thereof, and thereupon to direct the action to be remanded to the court from whence it was removed. This motion referred to the record and certain affidavits filed in its support. The motion was denied by the Circuit Court, October 26, 1887, (the opinion will be found reported in 32 Fed. Rep. 417,) and on December 17 the cause was tried by a jury and a verdict rendered for the defendants. Judgment was thereupon entered against the plaintiff and in favor of the defendants for costs. A motion for a new trial was filed, assigning, among other grounds, that the court had no jurisdiction of the parties or of the subject matter of the action, and erred in denying the motion to remand. This motion was overruled, (35 Fed. Rep. 230,) and a writ of error sued out from this court.

Section 2 of the act of Congress of March 3, 1887, entitled "An act to amend the act of Congress approved March 3, 1875, entitled 'An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts, and for other purposes;' and to further regulate the jurisdiction of Circuit Courts of the United States, and for other purposes;" 24 Stat. c. 373, pp. 552, 553, is as follows:

"SEC. 2. That any suit of a civil nature, at law or in

equity arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district any [. *Any*] other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being non-residents of that State; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be

proceeded with therein. 'At any time before the trial of any suit which is now pending in any Circuit Court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice, or local influence, he was unable to obtain justice in said state court, the Circuit Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto.' Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

Mr. John H. Mitchell, (with whom were *Mr. George H. Williams* and *Mr. George H. Durham* on the brief,) for plaintiff in error, cited from the decisions of this court in support of the proposition that the removal was too late: *Insurance Co.* v. *Dunn*, 19 Wall. 214; *Hess* v. *Reynolds*, 113 U. S. 73; *Alley* v. *Nott*, 111 U. S. 472; *Scharff* v. *Levy*, 112 U. S. 711; *Gregory* v. *Hartley*, 113 U. S. 742; *Laidly* v. *Huntington*, 121 U. S. 179; *Holland* v. *Chambers*, 110 U. S. 59; *Core* v. *Vinal*, 117 U. S. 347; *Baltimore & Ohio Railroad* v. *Bates*, 119 U. S. 464; *Hancock* v. *Holbrook*, 119 U. S. 586.

Mr. J. N. Dolph, for defendants in error, cited in reply to that point from the decisions of this court: *Hyde* v. *Ruble*, 104 U. S. 407; *King* v. *Cornell*, 106 U. S. 395; *Holland* v. *Chambers*, 110 U. S. 59; *Ayers* v. *Watson*, 113 U. S. 594; *Bible Society* v. *Grove*, 101 U. S. 610; *Hess* v. *Reynolds*, 113 U. S. 73; *Baltimore & Ohio Railroad* v. *Bates*, 119 U. S. 464; *Insurance Co.* v. *Dunn*, 19 Wall. 214; *Vannevar* v. *Bryant*, 19 Wall. 41; *Yulee* v. *Vose*, 99 U. S. 539; *Railroad Co.* v. *Mc-*

Kinley, 99 U. S. 147; *Schræder Manufacturing Co.* v. *Parker*, 129 U. S. 688; *Hancock* v. *Holbrook*, 119 U. S. 586; *Babbitt* v. *Clark*, 103 U. S. 606; *Alley* v. *Nott*, 111 U. S. 472; *Scharff* v. *Levy*, 112 U. S. 711.

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

After this case had been pending in the state courts from November 13, 1883, to August 1, 1887; had been tried three times before a jury in the Circuit Court, there being one verdict for defendants, one for plaintiff and one disagreement; and been heard in various phases three times in the Supreme Court of the State, the application was made for removal. Was this application in time? This question is to be determined upon a proper construction of section 2 of the act of Congress of March 3, 1887, for it is not, and could not be, contended that the right of removal could then have been invoked on the ground of diverse citizenship. The application was filed July 30, 1887, and by its terms purported to be made under the act of 1887, to which act the order of the state court referred. Indeed, if subdivision 3 of section 639 of the Revised Statutes were repealed by the act of 1887, or, since some of the defendants were then and at the commencement of the suit citizens of the same State as the plaintiff, if a removal could be had at all, it could only be under the act of 1887.

The Judiciary Act of 1789, 1 Stat. c. 20, § 12, pp. 73, 79, provided that a party entitled to remove a cause should file his petition for such removal "at the time of entering his appearance in such state court." 1 Stat. 79.

The act of July 27, 1866, relating to separable controversies, provided that "the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause," etc. 14 Stat. 306, c. 288.

The act of March 2, 1867, relating to removal on the ground of prejudice or local influence, provided that the plaintiff or defendant "may, at any time before the final hearing or trial

of the suit, file a petition in such state court for the removal of the suit," etc. 14 Stat. 558, c. 196.

The first subdivision of section 639 of the Revised Statutes was a reënactment of the 12th section of the Judiciary Act; the second subdivision, of the act of July 27, 1866; and the third subdivision, of the act of March 2, 1867; and this subdivision adopted the phraseology of the act of July 27, 1866, namely: "At any time before the trial or final hearing" of the suit.

The act of March 3, 1875, said nothing about prejudice or local influence, but provided in the case of diverse citizenship that the party desiring to remove a cause should make and file his petition in the state court "before or at the term at which said cause could be first tried and before the trial thereof." 18 Stat. 470, 471, c. 137.

This act repealed the first and second subdivisions of section 639 of the Revised Statutes, but left subdivision 3 unrepealed. *Baltimore & Ohio Railroad* v. *Bates*, 119 U. S. 464, 467.

In *Insurance Company* v. *Dunn*, 19 Wall. 214, it was held that the word "final" as used in the phrase "at any time before the final hearing or trial of the suit" applied to the word "trial" as well as to the word "hearing." And it has been often ruled that if the trial court had set aside a verdict and granted a new trial, or if the appellate court had reversed the judgment and remanded the case for trial *de novo*, it was not too late to apply to remove the cause under the act of 1867 and subdivision 3. *Vannevar* v. *Bryant*, 21 Wall. 41; *Jifkins* v. *Sweetzer*, 102 U. S. 177; *Baltimore & Ohio Railroad* v. *Bates*, 119 U. S. 464, 467, and cases cited. But these and like decisions were inapplicable to proceedings under the act of 1875, as the petition was thereby required to be filed "before or at the term at which said cause could be first tried and before the trial thereof." This has been construed to mean the first term at which the cause is in law triable — the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations; and it has also been decided that there cannot be a removal after the hearing on a demurrer to a complaint be-

cause it does not state facts sufficient to constitute a cause of action. *Gregory* v. *Hartley*, 113 U. S. 742, 746; *Alley* v. *Nott*, 111 U. S. 472; *Laidly* v. *Huntington*, 121 U. S. 179.

The act of March 3, 1887, 24 Stat. 552, c. 373, and also as corrected by the act of August 13, 1888, 25 Stat. 433, 435, c. 866, provided that "any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

In view of the repeated decisions of this court in exposition of the acts of 1866, 1867 and 1875, it is not to be doubted that Congress, recognizing the interpretation placed on the word "final," in the connection in which it was used in the prior acts, and the settled construction of the act of 1875, deliberately changed the language, "at any time before the final hearing or trial of the suit," or "at any time before the trial or final hearing of the cause," to read: "at any time before the trial thereof," as in the act of 1875, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof.

The attempt was manifestly to restrain the volume of litigation pouring into the Federal courts, and to return to the standard of the judiciary act, and to effect this in part by resorting to the language used in the act of 1875, as its meaning had been determined by judicial interpretation. This is the more obvious in view of the fact that the act of March 3, 1887, was evidently intended to restrict the jurisdiction of the Circuit Courts, as we have heretofore held. *Smith* v. *Lyon*, 133 U. S. 315; *In re Pennsylvania Company*, 137 U. S. 451.

We deem it proper to add that we are of opinion that the act of 1867, or subdivision third of section 639, was repealed by the act of 1887.

The subject matter of the former acts is substantially cov-

ered by the latter, and the differences are such as to render the intention of Congress in this regard entirely clear.

Under the previous acts the right of removal might be exercised by plaintiff as well as defendant; the application was addressed to the state court; there was no provision for the separation of the suit; the ground of removal was based upon what the affiant asserted he had reason to believe and believed; and action on the motion to remand could be reviewed on appeal or writ of error or by mandamus; while under the latter act, the right is confined to the defendant; the application is made to the Circuit Court; the suit may be divided and remanded in part; the prejudice or local influence must be made to appear to the Circuit Court, that is, the Circuit Court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that, by reason of those causes, the defendant will not be able to obtain justice in the state courts; and review on writ of error or appeal, or by mandamus is taken away. *In re Pennsylvania Company*, 137 U. S. 451; *Malone* v. *Richmond & Danville Railroad Co.*, 35 Fed. Rep. 625.

The repealing clause in the act of 1887 does not specifically refer to these prior acts, but declares that "all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed." The provisions relating to the subject matter under consideration are, however, so comprehensive, as well as so variant from those of the former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail.

In *King* v. *Cornell*, 106 U. S. 395, 396, it was held that subdivision second of section 639 was repealed by the act of 1875, the repealing clause in which was the same as here, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." The rule thus expressed is applicable, and is decisive.

Many other questions of interest and importance arise upon this record and have been argued by counsel, but the conclusion at which we have arrived renders their determination unnecessary.

We are of opinion that the application for removal came too late. The judgment must therefore be

Reversed, and the cause remanded to the Circuit Court, with a direction to remand it to the state court.

Mr. Justice Harlan, with whom concurred Mr. Justice Field, dissenting.

Mr. Justice Field and myself do not concur in the construction which the court places upon the act of 1887.

Section three of that act, requiring the petition for removal to be filed in the state court, "at the time, or at any time before the defendant is required by the laws of the State or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," excepts from its operation the cases mentioned in the last clause of section two, namely, those in which a removal is asked *upon the ground of prejudice or local influence.* As to the latter cases, the statute provides that the removal may be had, upon a proper showing, "at any time before the trial." This means, at any time before a trial in which, by a final judgment, the rights of the parties are determined. Under the act of 1887, there can be no removal, upon the ground of prejudice or local influence, unless it be made to appear to the Circuit Court of the United States that, on account of such prejudice or local influence, the defendant citizen of another State cannot obtain justice in the state courts. The existence of such prejudice or local influence is often disclosed by a trial in the state court in which the verdict or judgment is set aside. The fact of prejudice or local influence may be established by overwhelming evidence; still, under the decision of the court, there can be no removal if the application for removal be not made before the first trial. We do not mean to say that when

a trial is in progress the cause may be removed before its termination, even upon the ground of prejudice or local influence. But, if at the time the application is made the cause is not on trial and is undetermined, that is, has not been effectively tried, the act of 1887, in our judgment, authorizes a removal, on proper showing, upon the ground of prejudice or local influence, although there may have been a trial, resulting in a verdict which has been set aside.

The error, we think, in the opinion of the court, is in applying to the act of 1887 the decisions under the act of 1875. The words in the latter act limiting the time within which the application for a removal must be made — "before or at the term at which said cause could be *first* tried, and before the trial thereof" — necessarily meant, as this court has held, the first trial, whether it resulted in a verdict or not, and although the verdict and judgment may have been set aside; because the express requirement was that the application for removal must, in any event, be made before or *at the term* at which said cause *could* be *first* tried. No such requirement is found in the act of 1887, in respect to cases sought to be removed upon the ground of prejudice or local influence. While, in respect to all cases of removal except those upon the ground of prejudice or local influence, the latter statute provides that the application shall be made at the time, or at any time before the defendant is required by the laws of the State, or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff, the removal, *because of prejudice or local influence*, may be applied for "*at any time* before the trial thereof." This difference in the language of the two acts means, we think, something more than the court attributes to it. Congress could hardly have intended to give the defendant citizen of another State simply the time between his answering or pleading, and the calling of his case for the first trial thereof, to determine whether he should apply for a removal upon the ground of prejudice or local influence. In our judgment, it meant to give the right of removal, upon such ground, at any time, when the case is not actually on trial, and when there is in force no judgment

fixing the rights of the parties in the suit. If a case is open *for* trial, on the merits, an application for its removal before that trial commences is made "before the trial thereof." In our opinion, the interpretation adopted by the court defeats the purpose which Congress had in view for the protection of persons sued elsewhere than in the State of which they are citizens.

THOMPSON v. UNITED STATES.

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

No. 124. Argued December 15, 16, 1891. — Decided January 11, 1892.

The tax imposed upon distilled spirits by Rev. Stat. § 3251, as amended by the act of March 3, 1875, 18 Stat. 339, c. 127, attaches as soon as the spirits are produced, and cannot be evaded except upon satisfactory proof, under section 3221, of destruction by fire or other casualty.

When distilled spirits upon which a tax has been paid are exported, they are to be regauged at the port of exportation alongside of, or on, the vessel, and the drawback allowed is to be determined by this gauge, although a previous gauge may have shown a greater amount.

The execution of an exportation bond, under the internal revenue laws, is only evidence of an intention to export; and it is open to doubt whether the actual exportation can be considered as beginning until the merchandise leaves the port of exportation for the foreign country.

This was an action on a bond in the penal sum of $41,000, given by the defendant Thompson and his sureties for the exportation of certain distilled spirits. The bond was dated October 23, 1885, and after reciting a prior bond given on the 8th of April, 1885, by the same parties, conditioned for the delivery of certain distilled spirits therein named on board ship at the port of Newport News, Virginia, for exportation to Melbourne, Australia, and for the performance of certain other things therein named, and after further reciting that it was found desirable to deliver a portion of such spirits on board ship at the port of New York for exportation to Bre-

men, namely nine hundred and twenty-nine packages of Bourbon whiskey, the marks and numbers of which were given, by certain railways to New York, from distillery warehouse No. 63 in the 8th district of the State of Kentucky, was conditioned "that if the whole of the aforesaid merchandise shall be safely delivered to the Collector of Customs at the said port of New York within fifteen days from date hereof, and if the said John B. Thompson, principal, shall export or cause to be exported the said merchandise in accordance with the internal revenue laws and the regulations of the Treasury Department made in pursuance thereof immediately on the arrival of said merchandise at said port of New York, and shall within fifteen days thereafter produce to the collector of internal revenue for the 8th district of the State of Kentucky the certificate of the Collector of Customs of the said port of New York showing that the said merchandise has been duly exported, and shall also produce within nine months thereafter his certificate that the said merchandise has been duly landed at the port of Bremen or at some other port without the jurisdiction of the United States, or shall produce satisfactory proof of the loss thereof at sea without fault or neglect of the owner or shipper thereof as required by law and regulations, then this obligation to be void," etc.

The breach of the condition of the bond laid in the petition was that the defendants failed to deliver to the Collector of Customs at New York, within fifteen days, or within any other time, 1065 gallons of the said spirits, as appeared from a regauge made on October 27, 1885, the object of the suit being to recover the tax of ninety cents a gallon on the said deficiency, being $958.50, with interest at the rate of one per cent per month, and a penalty of five per cent.

The prior bond alluded to in the bond in suit was executed by the same parties April 8, 1885, and recited that Thompson, the principal, had made request to the collector of the 8th district of the State of Kentucky for the transportation of 1085 packages of Bourbon whiskey to the port of Newport News for exportation, and contained similar conditions to the bond in suit, except that it provided for exportation by the way of Newport News, within seven months from the date of such

bond, to Melbourne, Australia. It appeared that the 929 packages covered by the bond in suit were part of the 1085 packages covered by the prior bond. It also appeared that the deficiency of 1065 gallons in the spirits represented the loss thereon by evaporation and leakage while the same were in warehouse and previous to transportation for export.

The answer, among other things, denied that the said 1065 gallons were removed from the bonded warehouse, or that the collector ever demanded the tax of the defendants; and further, that the bond in suit was given to meet the requirements of certain rules and regulations of the Treasury Department, and that at the time the prior bond was given, April 8, the spirits on which it was sought to collect the tax were in the packages covered by such bond; that by the acceptance of said bond of April 8 the spirits referred to therein were free from any obligation for taxes, and were in due process of exportation on and after such date, to Bremen, Germany, where they have arrived; and that the tax sued for was a deficiency tax upon the spirits covered by the bond of October 23, 1885, which were actually exported, and to allow the recovery of such tax would be to enforce an export duty on the spirits exported as aforesaid, in violation of the prohibition of the Constitution of the United States in that particular. The answer contained further averments not necessary to be noticed here. The government demurred to each paragraph of the answer, and the demurrer was sustained as to all such paragraphs except the first, upon which there was a trial, resulting in a judgment and verdict for the full amount claimed, namely, $1023.61, with interest, etc. A writ of error was sued out from the Circuit Court, by which the judgment of the District Court was affirmed. A writ of error was thereupon sued out from this court.

Mr. Philip B. Thompson, Jr., for appellants.

Mr. Assistant Attorney General Maury for appellee.

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

Opinion of the Court.

The sole question presented for our consideration in this case is whether defendants are liable for the tax upon 1056 gallons of spirits lost by evaporation between the giving of the first bond in April, 1885, and the second bond on October 23d of the same year. This depends upon the construction of the excise laws of Congress regulating the taxing and exportation of distilled spirits manufactured in this country. By Revised Statutes, section 3248, distilled spirits are defined to be "that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, etc. . . . *and the tax shall attach to this substance as soon as it is in existence as such.*" By section 3251, as amended by the act of March 3, 1875, 18 Stat. 339, c. 127: "There shall be levied and collected on all distilled spirits . . . a tax of ninety cents on each proof gallon, or wine gallon when below proof, to be paid by the distiller, owner or person having possession thereof, before removal from the distillery bonded warehouse." By section 3293, as amended by the act of May 28, 1880, 21 Stat. 145, provision is made for the entry and deposit of all spirits removed to the distillery warehouse, requiring that "the said distiller or owner shall *at the time of making said entry* give his bond . . . conditioned that the principal named in said bond shall pay the tax on the spirits as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse, and within three years from the date of said entry. . . . If it shall appear at any time that there has been a loss of distilled spirits from any cask or other package hereafter deposited in a distillery warehouse, other than the loss provided for in section 3221 of the Revised Statutes of the United States" [which authorized an abatement of taxes upon satisfactory proof of actual destruction by accidental fire or other casualty while in any distillery warehouse], "which, in the opinion of the Commissioner of Internal Revenue, is excessive, he may instruct the collector of the district in which the loss has occurred to require the withdrawal from warehouse, of such distilled spirits, and to collect the tax accrued upon the original quantity of distilled

spirits entered into the warehouse in such cask or package, notwithstanding that the time specified in any bond given for the withdrawal of the spirits entered into warehouse in such cask or package has not expired."

The evident intention of Congress, to be gathered from these provisions is, that the tax shall attach as soon as the spirits are produced, and that such tax shall not be evaded except upon satisfactory proof, under section 3221, of destruction by fire or other casualty.

The spirits covered by this bond were put in defendant Thompson's own warehouse, and were originally intended to be entered for exportation to Melbourne, Australia, and in pursuance of such intention, the bond of April 8, 1885, was given. At this time the spirits were regauged in obedience to section 17 of the act of May 28, 1880, 21 Stat. 149, which provides that "whenever the owner of any distilled spirits shall desire to withdraw the same from the distillery warehouse, or from a special bonded warehouse, he may file with the collector a notice giving a description of the packages to be withdrawn, and request that the distilled spirits be regauged. . . . If upon such regauging it shall appear that there has been a loss of distilled spirits from any cask or package, without the fault or negligence of the distiller or owner thereof, taxes shall be collected only on the quantity of distilled spirits contained in such cask or package at the time of the withdrawal thereof from the distillery warehouse, or special bonded warehouse." Under this provision of the law an allowance for outage, or loss by evaporation while in warehouse, was then duly made; but instead of being exported to Melbourne the spirits were kept in the warehouse until the period of seven months named in the bond of April 8, 1885, as the time limited for exporting, had nearly expired, and until it was too late to export by the way of Newport News without a breach of the conditions of the bond. Thereupon the distiller determined to export the bulk of these packages through the port of New York to Bremen, and accordingly they were again entered for exportation, and the second exportation bond of October 23 was executed, under which the exportation was made.

There seems to be no provision in this act for a second regauging, or allowance for outage, in case the spirits are not actually withdrawn from the warehouse after the first regauging, provided for in section 17. Nor does there seem to have been any other notice to the collector, or a request for regauging, as contemplated in that section. It would seem to be just and equitable, if from any cause, not arising from his own fault, the owner should fail to export the liquors under the first regauging, he should be entitled, at any time within the three years provided by the same act, to make another request for regauging, and be entitled to an allowance for any deficiency for evaporation occurring after the prior regauging; but the law seems to contemplate but one notice of withdrawal, and the regulation of the commissioner, circular No. 296, requires that where spirits covered by an exportation bond are actually removed from the distillery warehouse for exportation, the gauger shall carefully reinspect each package, and if an additional outage is found to exist in any of the packages so inspected, which reduces the number of taxable gallons in the packages, as last previously reported, he shall report the same to the collector, and the collector shall at once require payment of the tax on the taxable gallons represented by such reduction, even though it is alleged that the loss is occasioned by a casualty. This regulation was within the scope of the commissioner's authority and was in force when the second bond was given.

By Revised Statutes, section 3329, provision is made for the exportation of distilled spirits "upon which all taxes have been paid," and minute regulations prescribed for the method of such exportation, one of which is that "the casks or packages shall be inspected and gauged *alongside of or on the vessel* by the gauger designated by said collector, under such rules and regulations as the Secretary of the Treasury may prescribe," and "the drawback allowed shall include the taxes levied and paid upon the distilled spirits exported . . . *as per last gauge of said spirits prior to exportation*," etc. By section 3330, provision is made for the withdrawal of distilled spirits from bonded warehouses, for exportation in the original

casks, without the payment of taxes, under regulations to be prescribed by the Commissioner of Internal Revenue, with a proviso "that the bonds required to be given for the exportation of distilled spirits shall be cancelled upon the presentation of satisfactory proof and certificates that said distilled spirits have been landed at the port of destination named in the bill of lading, or upon satisfactory proof that after shipment the same were lost at sea without fault or neglect of the owner or shipper thereof."

Taking these provisions together, it is evident that when spirits upon which the tax has been paid, are exported, they are regauged at the port of exportation *alongside of or on the vessel*, and the drawback allowed is determined by *the amount of this gauge*, notwithstanding a previous gauge may have shown a greater amount. The result is that the owner receives no drawback upon any deficiency occurring prior to the last regáuge. While section 3330, regulating the export of spirits upon which the tax has not been paid, does not contain similar provisions, it is very improbable that Congress should have intended to exempt the deficiency in the case of exportations without payment of tax, and tax it in case of drawbacks upon exportations after payment of tax.

Defendant's position that the spirits in this case were in process of exportation after the execution of the bond of April 8 is untenable. Exportation is defined to be the act of carrying or sending merchandise abroad, and it cannot be considered as beginning until the spirits are removed from the warehouse for that purpose. The execution of the bond is evidence of nothing more than an intention to export. As well could the taking out of a passport, or the engagement of passage upon a transatlantic steamer, be regarded as the commencement of a journey to foreign parts. Indeed, it may admit of doubt whether exportation can be considered as beginning until the merchandise leaves the port of export for a foreign country. That the execution of the bond was not the commencement of exportation is also evident in this case from the fact that the exportation provided for in the first bond, by the way of Newport News, was wholly abandoned, and a

second bond was executed in October covering an export to Bremen through the port of New York. As the exportation which was actually made, was not contemplated at all when the first bond was given, how is it possible to say that this was the beginning of such exportation? If the giving of the bond can in any sense be said to be the commencement of the exportation, it must apply to the bond which was given to cover the export which was actually made, and as the evaporation occurred before that time, we do not think that the constitutional inhibition against the taxation of articles exported from a State is drawn in question.

As the law contemplated but one withdrawal entry for exportation, and made allowance only for a deficiency upon such entry, it was within the power of the collector to assess a tax upon the deficiency that accrued between the dates of the two bonds, since that deficiency represented spirits that could not be exported and were not within the exemption of any statute.

The act of December 20, 1879, 21 Stat. 59, providing for an allowance to be made for leakage or loss by any unavoidable accident "occurring during transportation from a distillery warehouse to the port of export," cuts no figure in this case, since the evaporation occurred before the spirits left the distillery warehouse, and before the execution of the last bond.

The case is doubtless one of considerable hardship to the defendants, but in view of the exceeding stringency of the laws with respect to the taxation of distilled spirits, we do not see our way to relieve them from the payment of this tax, and the judgment of the court below is therefore

Affirmed.

Mr. Justice Field dissented.

Names of Counsel.

IN RE FASSETT, Petitioner.

ORIGINAL.

No. 10. Original. Argued December 14, 15, 1891. — Decided January 11, 1892.

The collector of customs at the port of New York seized a British built steam pleasure yacht, purchased in England by a citizen of the United States, and duly entered at that port, the seizure being for the alleged reason that the vessel was liable to duty as an imported article. Her owner filed a libel in admiralty against her and the collector in the District Court of the United States for the Southern District of New York, claiming the delivery of the vessel to him and damages against the collector. Under process from the court the vessel was attached and taken possession of by the marshal, and due notice was given. The collector appeared personally in the suit, and put in an answer, and the district attorney put in a claim and an answer on behalf of the United States. The substance of the answers was that the vessel was liable to duty as an imported article. The collector applied to this court for a writ of prohibition to the District Court, alleging that that court had no jurisdiction of the suit. This court, without considering the question of the liability of the vessel to duty, denied the writ on these grounds:

(1) The District Court had jurisdiction of the vessel and of the collector;
(2) The question whether the vessel was liable to duty as an imported article was *sub judice* in the District Court;
(3) The subject matter of the libel was a marine tort, cognizable by the District Court;
(4) It being alleged in the answers, that the vessel was detained by the collector "under authority of the revenue laws of the United States," she was, under § 934 of the Revised Statutes, subject to the order and decree of the District Court;
(5) The libellant had no remedy under the Customs Administrative act of June 10, 1890, 26 Stat. 131; and the only way in which the vessel could be brought under the jurisdiction of a court of the United States was by the institution of the libel.

THE case is stated in the opinion.

Mr. Solicitor General for the petitioner.

Mr. Elihu Root (with whom was *Mr. Samuel B. Clarke* on the brief) opposing.

Opinion of the Court.

Mr. Justice Blatchford delivered the opinion of the court.

On the 7th of May, 1891, Frederick W. Vanderbilt, a native-born citizen of the United States, residing in the city of New York, purchased in England, from one Bailey, who was her registered owner, a sea-going, schooner-rigged, screw steamship, called the Conqueror, built at Glasgow, Scotland, of the gross tonnage of 371.91 tons, designed, intended and constructed to navigate the high seas, not in the conveyance of passengers or merchandise for hire, but as a pleasure yacht only, which was the only use to which she ever had been put, or was intended to be put, by the purchaser. Bailey delivered to the latter a bill of sale in due form. The yacht was navigated to Halifax and thence to the United States, arriving in the port of New York on July 6, 1891. Her master made due entry of her at that port, and reported her arrival to the collector of customs there, and delivered to him the necessary manifest. The collector thereupon collected light-money upon her, under § 4225 of the Revised Statutes. The master also presented to the collector the said bill of sale, for record and certification. It was recorded in the collector's office, and he endorsed upon it a certificate, and delivered it back, so endorsed, to the master. The certificate was dated July 13, 1891, and was to the effect that the bill of sale was in the form and substance valid and effective in law, and had been duly recorded in his office, and that Vanderbilt was a citizen of the United States.

Prior to July 1, 1891, and to the arrival of the yacht in the waters of the United States, Vanderbilt had been and continued to be a member of the "Royal Mersey Yacht Club," and the vessel was enrolled among the yachts belonging to that club, which is a regularly organized yacht club of Great Britain, which country extends like privileges to the yachts of the United States; and, under § 4216 of the Revised Statutes, she was privileged to enter and leave any port of the United States without entering or clearing at the custom-house or paying tonnage tax.

On the 21st of August, 1891, the Assistant Secretary of the

Treasury notified J. Sloat Fassett, then collector of customs at the port of New York, that the Solicitor of the Treasury had advised the Treasury Department that the yacht was liable to duty under the fair intendment of the tariff act, and directed the collector to take the necessary steps for the appraisement of her for duty, and to have the duty upon her assessed and collected according to law.

On the 27th of August, 1891, in the navigable waters of the United States, in the harbor of New York, off Stapleton, within the jurisdiction of the District Court of the United States for the Southern District of New York, Fassett, without the consent and against the will of Vanderbilt, forcibly took possession of the yacht and deprived Vanderbilt of the use and control of her, and detained her for the enforcement of the payment of duties upon her.

On the 1st of September, 1891, Vanderbilt filed a libel in the District Court of the United States for the Southern District of New York, against the yacht and Fassett, setting forth the foregoing matters, and averring that the seizure of the yacht by Fassett was illegal and wrongful, and solely upon the claim that she was an article imported into the United States, within the fair intendment of the customs-revenue laws, and as such liable to duty; that the duties which accrued upon her importation were unpaid; and that the collector was entitled to keep her in custody until they should be paid or secured; and averring that she was not seized under any claim of authority given by any provision of the laws of the United States relating to commerce and navigation, or of any law providing a penalty or forfeiture. The libel further averred that the yacht was not an imported article within the true intent and meaning of the tariff or customs-revenue laws of the United States; that Fassett, in his official capacity or otherwise, had no authority to keep possession of her; and that the premises were within the admiralty and maritime jurisdiction of the United States and of the court. The libel prayed for process against the yacht and Fassett personally, and for the delivery of the yacht to the libellant, and for the condemnation of Fassett to pay damages and costs.

On the filing of the libel, the proper stipulation for costs was given on the part of the libellant, and process of attachment was issued against the vessel, returnable September 15, 1891, with a monition to Fassett. By the return to that process, it appeared that the marshal had not seized the vessel. On motion, and after hearing both parties, the court issued an *alias* process, on September 24, 1891, returnable October 6, 1891. The marshal made a return to this that he had attached her on September 29, 1891, and given the proper notice. Fassett having resigned his office, Francis Hendricks was appointed collector of customs in his place, and on October 1, 1891, took possession of the vessel and held her for the payment of duties upon her, as an article imported into the United States. As the marshal's return to the *alias* process did not show that the vessel was in his custody, the court issued to him on October 8, 1891, a third process, returnable October 13, 1891, to which he made return that, on October 8, 1891, within the jurisdiction of the court, he had attached her by taking full and exclusive possession of her; that since such attachment he had been and was in exclusive possession of her under said process; and that he had given due notice.

On the 13th of October, 1891, the United States attorney entered his appearance as proctor for Fassett personally and as late collector, on behalf of the United States, and for Hendricks as collector and claimant, on behalf of the United States. On October 15, 1891, he filed an answer and exceptions for Fassett personally, and a claim, answer and exceptions for Fassett, as late collector, on behalf of the United States, and a claim, answer and exceptions of Hendricks, collector, on behalf of the United States. The substance of those papers was to the effect that the possession of the vessel by the collector was not wrongful, because she was an article imported from a foreign country and subject to duties under the revenue laws of the United States; that the court had no jurisdiction of the matters contained in the libel, because the cause was not a civil cause of admiralty and maritime jurisdiction, and the possession of the collector, on behalf of the United States, was provided for by the revenue laws of the United States, and the

vessel was properly taken or detained by the collector under authority of such laws, and in custody of the law; and a restitution of the vessel to the collector was asked for.

On the 19th of October, 1891, on a petition to this court, filed by Fassett, setting forth the material parts of the foregoing statement, this court issued an order to the judge of the District Court of the United States for the Southern District of New York, returnable November 2, 1891, to show cause why a writ of prohibition should not issue to him, to prohibit him from further holding the aforesaid plea. To this order to show cause the judge has made due return, and the matter has been argued here by the counsel for both parties.

The principal question discussed at the bar was as to whether the Conqueror is liable to duty as an article imported from a foreign country into the United States; but, in the view we take of the case, we do not find it necessary or proper to consider that question, because we think that upon other grounds the writ of prohibition must be denied.

It is contended on behalf of the petitioner, Fassett, that when he, as collector, took possession of the yacht and decided that she was dutiable, the only remedy open to her owner was to pay under protest the duties assessed upon her, and in that way secure possession of her, with the right thereafter, as provided in sections 14 and 15 of the Customs Administrative Act, of June 10, 1890, 26 Stat. 131, 137, 138, to obtain a refund of those duties by taking an appeal from the decision of the collector to the board of general appraisers, and appealing, if necessary, from that board to the Circuit Court of the United States.

The idea embodied in the libel is, that if the yacht was not an imported article, the act of the collector in forcibly taking possession of her was tortious, and, as that act was committed on the navigable waters of the United States, the District Court, as a court of admiralty, had jurisdiction, in a cause of possession, to compel the restitution of her. The libel presents for the determination of the District Court, as the subject matter of the suit, the question whether the yacht is an imported article, within the meaning of the customs-revenue

laws. The matter is *sub judice* in the District Court. All it has done so far towards determining the question is to issue process and obtain control of the vessel, so that the question might be formally raised by pleading, and to receive the pleadings of the respondent and the claimant, raising the question. The District Court has jurisdiction to determine the question, because it has jurisdiction of the vessel by attachment, and of Fassett by monition; and for this court to decide in the first instance, and in this proceeding, the question whether the yacht is an article imported from a foreign country, and subject to duty under the customs-revenue laws, would be to decide that question as a matter of original jurisdiction, and not of appellate jurisdiction, while, as a question of original jurisdiction, it is duly pending before the District Court of the United States, on pleadings which put that very question in issue.

In November, 1891, this court was petitioned by one Sturges to issue a writ of prohibition to forbid the District Court of the United States for the Eastern District of New York, sitting as a Court of Admiralty, from further proceeding in certain causes in which it had entertained libels against certain vessels, *in rem*, and had attached the vessels, Sturges claiming title to them, as a receiver appointed by a state court of New York, by a prior title, and having set up such title, in answers to the libels, and alleged want of jurisdiction in the District Court over the vessels. This court denied the application for the writ without delivering any opinion, but the ground of the denial was that the matter was in course of litigation in the District Court, on due process.

A like view was taken by this court in *Ex parte Easton*, 95 U. S. 68; *Ex parte Gordon*, 104 U. S. 515; *Ex parte Ferry Company*, 104 U. S. 519; *Ex parte Hagar*, 104 U. S. 520; and *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 625, 626.

The subject matter of the libel is a marine tort, cognizable in a cause of possession in admiralty by any District Court of the United States which finds the vessel within the territorial limits of its process. Constitution, art. 3, sec. 2; Rev. Stat. § 563; *Slocum* v. *Mayberry*, 2 Wheat. 1; *The North Cape*, 6 Bis-

sell, 505; *The J. W. French*, 13 Fed. Rep. 916; *The Haidee*, Stewart's Vice-Adm. Cases (Quebec), 25; *Matter of Blanshard*, 2 B. & C. 244; *The Beatrice*, 37 Law Jour. N. S. Adm. 10; *The Telegrafo*, L. R. 3 P. C. 673, 686; *Burke* v. *Trevitt*, 1 Mason, 96; *L'Invincible*, 1 Wheat. 238; *The Santissima Trinidad*, 7 Wheat. 283; Betts' Adm. Prac. 19; Benedict's Admiralty, § 311; Williams & Bruce Adm. Prac. 17; Cohen's Adm. Law, 32; Henry's Admiralty, §§ 19, 31; *Phila. &c. Railroad* v. *Havre de Grace Steam Tow Boat Co.*, 23 How. 209; *Galena &c. Packet Co.* v. *Rock Island Bridge Co.*, 6 Wall. 213; *Jackson* v. *The Magnolia*, 20 How. 296; *Leathers* v. *Blessing*, 105 U. S. 626.

It is provided by § 2785 of the Revised Statutes, that the owner of imported merchandise shall make entry of it with the collector within a specified time. Section 2963 provides that when merchandise imported into the United States has not been duly entered, it shall be deposited in the public warehouse and there remain. Section 2964 provides that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, the merchandise shall be taken possession of by the collector and deposited in the public stores, there to be kept, subject at all times to the order of the importer, on payment of the proper duties and expenses. Section 2973 provides that if the merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, it is then to be appraised and sold by the collector at public auction, and the proceeds, after deducting for storage and other charges and expenses, including duties, are to be paid over to the importer. Section 934 provides as follows: "All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

By their respective claims, answers and exceptions, Fassett, as late collector, and Hendricks, as collector, both of them allege that the vessel is "property taken or detained by the

collector of the port, under authority of the revenue laws of the United States, and in custody of the law." Such property, by § 934 of the Revised Statutes, is expressly made subject "to the orders and decrees of the courts of the United States having jurisdiction thereof." On the facts set forth in the libel, the District Court of the United States for the southern District of New York had jurisdiction of the vessel, as property detained by the collector under authority of a revenue law of the United States; and, while it was so in the custody of the law that it must continue to be detained by the collector, subject "only to the orders and decrees of the courts of the United States having jurisdiction thereof," it was subject to such orders and decrees.

As the District Court in the present case has jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition is not intended to take the place of exceptions to the libel for insufficiency, and will issue only in case of a want of jurisdiction either of the parties or the subject matter of the proceeding.

The libellant has no other remedy than the filing of this libel. He has none under the Customs Administrative Act, of June 10, 1890. 26 Stat. 131. By § 14 of that act, the decision of the collector as to "the rate and amount" of duties chargeable upon imported merchandise is made final and conclusive, unless the owner or importer, within the time limited after the ascertainment and liquidation of duties, shall give notice in writing to the collector, with the reasons for his objections, and, if the merchandise is entered for consumption, shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment, the collector is to transmit the papers to a board of three general appraisers, who are to examine and decide the case, and their decision, or that of a majority of them, is to be final and conclusive, except when, under § 15 of the act, an application shall be filed in the Circuit Court of the United States. By § 15 application may be made to that court for a review of the questions of law and fact involved in the decision of the board of general appraisers; and, on the evidence taken by that

board, and further evidence, if given, that court is to hear and determine such questions of law and fact "respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." By § 25 the right of action is taken away to sue a collector or other officer of the customs on account of any rulings or decisions as to the classification of the merchandise or the duties charged thereon, or the collection of any dues, charges or duties on, or on account of, such merchandise, or any other matter or thing as to which, under the act of June 10, 1890, the owner or importer may be entitled to appeal from the decision of the collector or other officer, or from any board of appraisers provided for in the act.

The appeal provided for in § 15 brings up for review in court only the decison of the board of general appraisers as to the construction of the law, and the facts respecting the classification of imported merchandise, and the rate of duty imposed thereon under such classification. It does not bring up for review the question of whether an article is imported merchandise or not; nor, under § 15, is the ascertainment of that fact such a decision as is provided for. The decisions of the collector from which appeals are provided for by § 14 are only decisions as to "the rate and amount" of duties charged upon imported merchandise, and decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character. Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector has no authority to make any determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the District Court, on which the rights of the libellant depend.

Under the Customs Administrative Act, the libellant, in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a

consular certificate to that effect, and thus estop himself from maintaining the fact which he alleges in his libel, that she is not imported merchandise.

The vessel in this case was not seized for forfeiture. If she had been, that seizure would be one to be followed by a suit for forfeiture, instituted by the United States, and thus she would be brought within the jurisdiction of a court of the United States. But she is not to be prosecuted in court by an affirmative proceeding instituted by the United States to recover the duties upon her as an imported article, which are claimed by the United States; and thus the only way in which she can be brought under the jurisdiction of a court of the United States is by the institution of the libel in question.

The writ of prohibition is denied.

EAMES *v.* KAISER.

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

No. 125. Argued and submitted December 16, 1891. — Decided January 11, 1892.

C. & Co. commenced suit against K. in Texas and caused his property to be attached on the ground that he was about to convert it or a part of it into money for the purpose of placing it beyond the reach of his creditors. K. sued C. & Co. to recover damages for the wrongful issue and levy of those attachments. On the trial of the latter case, proof was made tending to show fraud on the part of K. by putting his property into notes and placing them beyond the reach of his creditors, and, among other things he testified as a witness in his own behalf, that on the day of the levy or the next day a large amount owed to him was put into negotiable notes. On cross-examination he was asked what he had done with the notes. Plaintiff's counsel objected, and the objection was sustained. *Held*, that this was error.

THE court stated the case as follows:

This action was originally commenced in the District Court of Tarrant County, Texas, by Samuel Kaiser against H. B.

Claflin & Co., alleged to be a firm composed of plaintiffs in error and H. B. Claflin, and L. Levinson & Co., another firm, composed of L., Michael, and Max Levinson, all averred to be citizens of New York, to recover damages for the wrongful issue and levy of two writs of attachment against Kaiser, one in favor of H. B. Claflin & Co., and the other in favor of L. Levinson & Co. These attachment suits were commenced in the Circuit Court, and the affidavits upon which the writs issued alleged that Kaiser "was about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors."

A citation was served by copy, with a certified copy of the petition, by the delivery thereof to a member of each of the defendant firms in New York on July 17 and 18, 1883, under arts. 1230 and 1234 of the Revised Civil Statutes of Texas. Sayles's Tex. Civ. Stats. vol. 1, p. 418.

September 20, 1883, the defendants filed a plea to the jurisdiction and also moved to quash the process; and with said plea and the motion to quash, filed general and special demurrers and a general denial. On the same day, defendants filed petition and bond for the removal of the suit to the Circuit Court of the United States, and it was accordingly removed on the 21st of September. The original attachment suits of Claflin & Co. and L. Levinson & Co. were pending in the Circuit Court, and in the case commenced by Claflin & Co., Kaiser had pleaded his damages in reconvention, and after this suit was removed into the Circuit Court, Claflin & Co. moved that Kaiser be required to elect which suit for damages he would prosecute, and the motion being granted, Kaiser elected to prosecute this independent action. On the 21st of January, 1884, Kaiser moved the court to quash the plea of Claflin & Co. and Levinson & Co. to the jurisdiction, and strike out their motion to quash, and on the 28th of that month the motion was sustained as to Claflin & Co. and overruled as to Levinson & Co., the court being of opinion that the plea and motion had been waived by Claflin & Co.'s motion to require plaintiff to elect; and thereupon the plea to the jurisdiction was quashed, and the motion to set aside the service was stricken out, as to

Counsel for Plaintiffs in Error.

Claflin & Co. Thereafter Claflin & Co. filed an amended answer containing demurrers and a general and special denial. Kaiser demurred in his turn and denied the averments of the amended answer by a supplemental petition.

The cause, having been tried, resulted in a verdict for the plaintiff, assessing his damages at $20,057.23, principal, and interest at the rate of 8 per cent per annum from November 17, 1882, being $8293.49, making a total of $28,350.72; and judgment was entered upon the verdict. A motion for a new trial was made and overruled.

The bill of exceptions stated, among other things, "that on the trial of the above cause the plaintiff Kaiser, being upon the stand as a witness for himself, and having testified that his stock on July 1, 1882, was of the value, at cost, of 22,807 dollars, and that he bought in July and August, 1882, 51,747 dollars' worth of additional goods; having also testified that from July 1 to November 17, 1882, the latter being the date of the levy of attachments upon his merchandise, he had sold at retail 12,000 dollars' worth of goods; that he had sold at wholesale to Sapowski Bros., whose credit in New York was not so good as Kaiser's, 33,000 dollars' worth of goods, at wholesale; to Keersky, 5162 dollars' worth; to May, at wholesale, 1207 dollars' worth; that on the day before his stock of merchandise was attached the said Sapowski Bros. owed him 13,815 dollars, plaintiff having drawn on him for large sums in favor of other creditors, and that said indebtedness was put in the shape of negotiable notes on the day said attachment was levied, or on the next day, was then, on cross-examination by defendants' counsel, asked what he had done with said notes; to this question the plaintiff's counsel objected on the ground that what had transpired after said attachment was levied was immaterial and irrelevant; this objection was sustained by the court and the defendants excepted."

Other exceptions were also taken not material to be stated here.

Mr. M. L. Crawford and *Mr. Sawnie Robertson*, for plaintiffs in error, submitted on their brief.

Mr. A. H. Garland for defendant in error. *Mr. H. J. May* was with him on the brief.

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

The affidavit on which the attachment writ in favor of Claflin & Co. issued, averred that Kaiser was "about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors," and this action was predicated upon the falsity of that averment.

The record discloses that proof was adduced upon the trial tending to show an intent on Kaiser's part, at the time of the suing out and levy of the attachment, to defraud his creditors by secreting his property, by putting it into the shape of notes, and by fraudulently placing them beyond the reach of his creditors; and it also appears from the evidence in chief of Kaiser, as a witness in his own behalf, that on the day of the levy of the attachment, or the next day, an amount of $13,815, owed to him, "was put in the shape of negotiable notes." The Circuit Court refused to allow Kaiser to be asked on cross-examination what he did with these notes. In this ruling there was error. Upon the issue involved, the defendants were entitled to a wide latitude in cross-examining the party charged with fraudulent conversion when testifying for himself. If the particular indebtedness to Kaiser was turned into notes, and the notes were converted into money before the attachment issued, or simultaneously, that fact sustained the charge of the conversion of the property into money, and with the other evidence justified the inference that this was for the purpose of placing it beyond the reach of his creditors. Defendants were not called upon in propounding the question to the witness to state what they expected to prove by him, which it would have been ordinarily quite impossible for them to do, but inasmuch as he had testified in his own favor that the notes were obtained at or about the time of the attachment, the defendants were entitled to push the inquiry further and elicit from the witness all the circumstances surrounding the obtaining and the final disposition of that paper.

Indeed as the evidence tended to show an intent on Kaiser's part, at the time of the suing out of the attachment, to defraud his creditors by putting his property into the shape of notes and placing them beyond their reach, proof of Kaiser's acts of a similar nature, occurring immediately after the attachment writ issued, would have been admissible if in casual relation with what the whole evidence showed was one transaction. Of course, this would not be so as to independent and isolated action after the issue of the writ, but when happening in immediate connection with what preceded, and as part of one whole, the evidence would be admissible; and we are clear that, tested by the record before us, the question was legitimate and proper on cross-examination, and the objection should not have been sustained.

The judgment is therefore reversed and the cause remanded to the Circuit Court, with a direction to grant a new trial.

Mr. Justice Blatchford took no part in the decision of this case.

NORTHERN PACIFIC RAILROAD COMPANY *v.* WASHINGTON TERRITORY *ex rel.* DUSTIN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No. 24. Argued March 24, 1891. — Decided January 4, 1892.

Mandamus will not lie to compel a railroad corporation to build a station at a particular place, unless there is a specific duty, imposed by statute, to do so, and clear proof of a breach of that duty.

A petition for a mandamus to compel a railroad corporation to perform a definite duty to the public, which it has distinctly manifested an intention not to perform, is rightly presented in the name of the State, at the relation of its prosecuting attorney, and without previous demand.

The Northern Pacific Railroad Company (whose charter authorized it to locate, construct and maintain a continuous railroad from Lake Superior to Puget Sound, "by the most eligible route, as shall be determined by said company," within limits broadly described, and directed that its

Statement of the Case.

road should "be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances,") constructed its railroad through the county of Yakima, and stopped its trains for a while at Yakima City, then the county seat and the principal town in the county; but, on completing its road four miles further to North Yakima, a town which it had laid out on its own land, established a freight and passenger station there, and ceased to stop its trains at Yakima City. Thereupon a writ of mandamus was applied for to compel it to build and maintain a station at Yakima City, and to stop its trains there. Afterwards, and before the hearing, Yakima City rapidly dwindled, and most of its inhabitants removed to North Yakima, which became the principal town in the county, and was made by the legislature the county seat; there were other stations which furnished sufficient facilities for the country south of North Yakima; the earnings of this division of the road were insufficient to pay its running expenses; and the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated at North Yakima than at Yakima City. *Held*, that a writ of mandamus should not issue.

A PETITION in the name of the Territory of Washington, at the relation of the prosecuting attorney for the county of Yakima and four other counties in the Territory, was filed in the district court of the fourth judicial district of the Territory, on February 20, 1885, for a mandamus to compel the Northern Pacific Railroad Company to erect and maintain a station at Yakima City, on the Cascade Branch of its railroad, extending from Pasco Junction on the Columbia River up the valley of the Yakima River, and through the county of Yakima, towards Puget Sound, and to stop its trains there to receive and deliver freight, and to receive and let off passengers.

The Northern Pacific Railroad Company was incorporated by act of Congress of July 2, 1864, c. 217, and was thereby "authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly, by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of

the Columbia River, to a point at or near Portland in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth." By § 5 of its charter, it was enacted "that said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron; and a uniform gauge shall be established throughout the entire length of the road." And by § 20 it was enacted "that the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act." 13 Stat. 366, 368, 372.

The petition set forth at length the size and importance of Yakima City and its need of railroad accommodations; alleged that it was the county seat of Yakima County, a county having more than 4000 inhabitants, and had a courthouse where courts of the United States and of the Territory were held, and a United States land office; that the defendant had refused to establish a freight and passenger station or to stop its trains at Yakima City, but was building a freight and passenger station and stopping its trains at the rival town of North Yakima, four miles further north, which it had laid out on its own unimproved land, and was ruining Yakima City for the purpose of enhancing the value of its own town site.

The answer, filed June 1, 1885, said nothing as to the courthouse; admitted that at the time of filing the petition there

was a United States land office at Yakima City, but alleged that it had since been removed by order of the President of the United States to North Yakima; admitted that Yakima City heretofore had 500 inhabitants, but alleged that since the construction of the defendant's railroad two-thirds of them had removed with their houses and other buildings to North Yakima, and others were continually abandoning it, and no buildings or business were replacing those taken away; denied that it had laid out the town of North Yakima for the purpose of enhancing the value of its own property or for the purpose of injuring the property of any other person, town or city; and alleged that there was not business enough to warrant more than one station on this part of its road, and that North Yakima was a much larger and more prosperous town than Yakima City ever was, and was a more convenient point for the people of the neighboring valleys, who were more than fifteen times as many, and had more than fifteen times as much taxable property, as the people living in Yakima City and its immediate vicinity.

The parties also made allegations and denials, and (after the filing of a replication not copied in the record) introduced evidence at the trial by a jury, as to the matters afterwards stated in the special verdict, which was returned October 17, 1885, in answer to forty-six questions submitted by the court, and was in substance as follows:

In January, 1885, the defendant carried freight and passengers for hire on its railroad to and from Yakima City, and kept an agent there who attended to the freight and sold tickets to passengers. But before February 20, 1885, having completed its road to North Yakima, it ceased to stop its trains at Yakima City, and established a freight and passenger station at North Yakima; and, pursuant to § 4 of its charter, tendered its road to the United States as fully completed and equipped from Pasco Junction to or beyond Yakima City, and caused to be appointed by the President of the United States commissioners to examine and report on the condition of the road. On March 16, 1885, that part of its road from Pasco Junction by Yakima City to North Yakima had not been

turned over to the operating department of the company, but the freight and passenger trains were not run as subordinate to the construction of the road.

In January, 1885, Yakima City was the oldest and largest town, and the most important business centre, on the Cascade Branch of the defendant's railroad, between the Columbia River and Puget Sound. On February 20, 1885, and when the defendant built and operated its road to Yakima City, the amount of business done at Yakima City annually was $250,000, its population was 500, and there was no other town or business centre of any importance in Yakima County.

On October 17, 1885, Yakima City was the largest town, and the most important business centre in the county, except the town of North Yakima; the population of Yakima City was 150; there were seventy children attending school there; and it had two hotels, a flour mill, thirteen stores and places of business, twenty-seven dwelling houses and but a limited amount of industries requiring railroad facilities. The amount of business furnished by Yakima City to the defendant over that portion of its road between Pasco Junction and North Yakima in the summer of 1885 was in June 16,000 lbs., in July 4000 lbs., in August none, in September 2400 lbs., in October none; and during that period no product of Yakima City or the country adjoining was furnished by any one to be carried over the defendant's road.

There is a safe and suitable place for a freight and passenger station in Yakima City on the line of the defendant's road, and the defendant has the ability to construct and maintain such a station there, with freight and passenger facilities. If the defendant had done so, Yakima City would have retained its former size and importance. No demand was ever made upon the defendant for the establishment of a freight and passenger station there. The expense of constructing and fitting for practical use a station and warehouse at Yakima City would be about $8000, and of keeping the requisite agents there $150 a month. The wear and tear and cost of stopping a train at a station is $1.

The passenger and freight traffic of the people living in the

valleys of the streams entering the Yakima River at and near Yakima City and North Yakima, considering them as a community, would be better accommodated at North Yakima than at Yakima City. There are other stations for receiving freight and passengers on that part of the defendant's railroad, extending from Pasco Junction to North Yakima, called Yakima Division, furnishing sufficient facilities for all the country below North Yakima; and the earnings of that division are not sufficient to pay its running expenses.

On the verdict of the jury and the admissions in the pleadings, each party moved for judgment; and on April 23, 1886, the District Court ordered a peremptory mandamus to issue, in accordance with the prayer of the petition. The record showed that the District Court during the previous proceedings in the case was held at Yakima City, but at the time of rendering judgment was held at North Yakima, to which the county seat and the court-house had been removed pursuant to the statute of the Territory of January 9, 1886. Laws of Washington Territory of 1885–6, pp. 57, 457. On appeal to the Supreme Court of the Territory, the judgment of the District Court was affirmed. 3 Wash. Ter. 303. The defendant thereupon sued out this writ of error, and assigned the following errors:

"First. That the proceedings were not commenced by the proper relator, or in the name or on behalf of the real party in interest.

"Second. That Yakima City is the real party in interest.

"Third. The application and petition do not state facts sufficient to constitute a cause of action.

"Fourth. The findings of the jury are not sufficient to sustain and are inconsistent with the judgment rendered thereon by the court.

"Fifth. The jury found that existing depot and stations between North Yakima and Pasco furnished sufficient railroad-station facilities.

"Sixth. The jury found affirmatively that the railroad, at the time of the application and the return thereto, was in the hands of the railroad contractors and construction department.

"Seventh. That the business furnished said railroad company by said Yakima City and its people and transacted at said Yakima City by said railroad was not sufficient to pay the running expenses of a station at said place.

"Eighth. The jury found that no demand whatever was ever made upon the Northern Pacific Railroad Company for the said station or other depot facilities mentioned in the said application and the judgment of said court.

"Ninth. No facts are found showing any necessity for other or additional stations and facilities than those already furnished.

"Tenth. The charter of the Northern Pacific Railroad Company vests in said company a discretionary power in reference to locating and constructing and maintaining its stations.

"Eleventh. That the matters set forth in the application and findings by the jury are not matters which the law specially enjoins as a duty resulting from an office, trust or station.

"Twelfth. That the judgment affirming the judgment of the District Court rendered on the findings of the jury, and the writ thereon, are vague, uncertain and insufficient, in not directing and defining what said Northern Pacific Railroad Company was to do under said judgment and writ, especially as to the character, kind and class of station and facilities to be furnished, and requires an impossibility, in this, to wit, that said station be constructed immediately."

Mr. A. H. Garland for plaintiff in error. *Mr. James McNaught* and *Mr. H. J. May* were with him on the brief.

No appearance for defendant in error.

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

A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

If, as in *Union Pacific Railroad* v. *Hall*, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water, (as was held to be the case in *State* v. *Hartford & New Haven Railroad*, 29 Conn. 538,) and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. *New Orleans &c. Railway* v. *Mississippi*, 112 U. S. 12; *People* v. *Boston & Albany Railroad*, 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point, when it would not be remunerative. *York & North Midland Railway* v. *The Queen*, 1 El. & Bl. 858; *Great Western Railway* v. *The Queen*, 1 El. & Bl. 874; *Commonwealth* v. *Fitchburg Railroad*, 12 Gray, 180; *State* v. *Southern Minnesota Railroad*, 18 Minnesota, 40.

The difficulties in the way of issuing a mandamus, to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself, are much increased when it is sought to compel the corporation to establish or to maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards entrusted by the legislature with that duty, than by the ordinary judicial tribunals.

The defendant's charter, after authorizing and empowering it to locate, construct and maintain a continuous railroad "by the most eligible route, as shall be determined by said company," within limits described in the broadest way, both as to the terminal points and as to the course and direction of the road; and vesting it with "all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth;" enacts that the road "shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances." The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the discretion in these respects of a corporation entrusted with such large discretionary powers upon the more important questions of the course and the termini of its road. The contrast between these general words and the specific requirements, which follow in the same section, that the rails shall be manufactured from American iron, and that "a uniform gauge shall be established throughout the entire length of the road" is significant.

To hold that the directors of this corporation, in determining the number, place and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases.

The constitution of Colorado of 1876, art. 15, sec. 4, provided that "all railroads shall be public highways, and all railroad companies shall be common carriers;" and that "every railroad company shall have the right with its road to intersect, connect with or cross any other railroad." Section 6 of the same article was as follows: "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or

facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager or employé thereof, shall give any preference to individuals, associations or corporations in furnishing car or motive power." The General Laws of Colorado of 1877, c. 19, § 111, authorized every railroad company "to cross, intersect or connect its railways with any other railway;" "to receive and convey persons and property on its railway;" and "to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation and use of passengers, freights and business interests, or which may be necessary for the construction or operation of said railway." This court held that section 6 of article 15 of the constitution of Colorado was only declaratory of the common law; that the right secured by section 4 to connect railroads was confined to their connection as physical structures, and did not imply a connection of business with business; and that neither the common law, nor the constitution and statutes of Colorado, compelled one railroad corporation to establish a station or to stop its cars at its junction with the railroad of another corporation, although it had established a union station with the connecting railroad of a third corporation, and had made provisions for the transaction there of a joint business with that corporation. Chief Justice Waite, in delivering the opinion, said: "No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited, both by the common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special

accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power." *Atchison, Topeka & Santa Fé Railroad* v. *Denver & New Orleans Railroad*, 110 U. S. 667, 681, 682.

The Court of Appeals of New York, in a very recent case, refused to grant a mandamus to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1200 inhabitants and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the State, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by Judge Danforth, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose; because the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and to erect and maintain all necessary

and convenient buildings and stations "for the accommodation and use of their passengers, freight and business;" and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than an inquest for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station-house, nor the enlargement of one." "As to that, the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by mandamus also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation." "Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by any fair or reasonable construction be implied." *People* v. *New York, Lake Erie & Western Railroad*, 104 N. Y. 58, 66, 67.

In *Commonwealth* v. *Eastern Railroad*, the Supreme Judicial Court of Massachusetts, in holding that a railroad corporation, whose charter was subject to amendment, alteration or repeal at the pleasure of the legislature, might be required by

a subsequent statute to construct a station and stop its trains at a particular place on its road, said: "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or do any way business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine; and their determination on this point must be conclusive." 103 Mass. 254, 258.

Upon the same principle, the Supreme Judicial Court of Maine compelled a railroad corporation to build a station at a specified place on its road in accordance with an order of railroad commissioners, expressly empowered by the statutes of the State to make such an order, and to apply to the court to enforce it. Maine Stat. 1871, c. 204; *Railroad Commissioners* v. *Portland & Oxford Railroad*, 63 Maine, 270.

In *Southeastern Railway* v. *Railway Commissioners*, a railway company was held by Lord Chancellor Selborne, Lord Chief Justice Coleridge and Lord Justice Brett, in the English Court of Appeal, to be under no obligation to establish stations at any particular place or places unless it thought fit to do so; and was held bound to afford improved facilities for receiving, forwarding and delivering passengers and goods at a station once established and used for the purpose of traffic, only so far as it had been ordered to afford them by the railway commissioners within powers expressly conferred by act of parliament. 6 Q. B. D. 586, 592.

The decision in *State* v. *Republican Valley Railroad*, 17

Nebraska, 647, cited in the opinion below, proceeded upon the theory, (inconsistent with the judgments of this court in *Atchison &c. Railroad* v. *Denver & New Orleans Railroad*, and of the Court of Appeals of New York in *People* v. *New York &c. Railroad*, above stated,) that, independently of any statute requirements, a railroad corporation might be compelled to establish a station and to stop its trains at any point on the line of its road at which the court thought it reasonable that it should.

The opinions of the Supreme Court of Illinois, though going farther than those of most other courts in favor of issuing writs of mandamus to railroad corporations, afford no countenance for granting the writ in the case at bar. In *People* v. *Louisville & Nashville Railroad*, 120 Illinois, 48, a mandamus was issued to compel the company to run all its passenger trains to a station which it had once located and used in a town made a terminal point by the charter and which was a county seat; because the corporation had no legal power to change its location, and was required by statute to stop all trains at a county seat. In *People* v. *Chicago & Alton Railroad*, 130 Illinois, 175, in which a mandamus was granted to compel a railroad company to establish and maintain a station in a certain town, the petition for the writ alleged specific facts making out a clear and strong case of public necessity, and also alleged that the accommodation of the public living in or near the town required, and long had required, the establishment of a station on the line of the road within the town; and the decision was that a demurrer to the petition admitted both the specific and the general allegations, and must therefore be overruled. The court, at pages 182, 183, of that case, and again in *Mobile & Ohio Railroad* v. *People*, 132 Illinois, 559, 571, said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised

in good faith, and with a due regard to the necessities and convenience of the public." But in the latter case the court also said: "The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point." page 570. "The rule has been so often announced by this court that it is unnecessary to cite the cases, that a mandamus will never be awarded unless the right to have the thing done which is sought is clearly established." page 572. And upon these reasons the writ was refused.

Section 691 of the Code of Washington Territory of 1881, following the common law, defines the cases, in which a writ of mandamus may issue, as "to any inferior court, corporation, board, officer or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." By the same code, in mandamus, as in civil actions, issues of fact may be tried by a jury; the verdict may be either general or special, and, if special, may be in answer to questions submitted by the court; and material allegations of the plaintiff not denied by the answer, as well as material allegations of new matter in the answer not denied in the replication, are deemed admitted, but a qualified admission cannot be availed of by the other party, except as qualified. §§ 103, 240, 242, 694, 696; *Breemer* v. *Burgess*, 2 Wash. Ter. 290, 296; *Gildersleeve* v. *Landon*, 73 N. Y. 609. The replication filed in this case, not being copied in the record sent up, may be assumed, as most favorable to the defendant in error, to have denied all allegations of new matter in the answer.

The leading facts of this case, then, as appearing by the

special verdict, taken in connection with the admissions, express or implied, in the answer, are as follows: The defendant at one time stopped its trains at Yakima City, but never built a station there, and, after completing its road four miles further to North Yakima, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of filing the petition for mandamus was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. No other specific facts as to North Yakima are admitted by the parties or found by the jury. The defendant could build a station at Yakima City, but the cost of building one would be $8000, and the expense of maintaining it $150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses. The special verdict includes an express finding (which appears to us to be of pure matter of fact, inferred from various circumstances, some of which are evidently not specifically found, and to be in no sense, as assumed by the court below, a conclusion of law) that there are other stations for receiving freight and passengers between North Yakima and Pasco Junction, which furnish sufficient facilities for the country south of North Yakima, which must include Yakima City; as well as an equally explicit finding (which appears to have been wholly disregarded by the court below) that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. It also appears of record that, after the verdict and before the District Court awarded the writ of mandamus, the county seat was removed, pursuant to an act of the territorial legislature, from Yakima City to North Yakima.

The mandamus prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not

to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the Territory at the relation of its prosecuting attorney; *Attorney General* v. *Boston*, 123 Mass. 460, 479; Code of Washington Territory, § 2171; and no demand upon the defendant was necessary before applying for the writ. *Commonwealth* v. *Allegheny Commissioners*, 37 Penn. St. 237; *State* v. *Board of Finance*, 9 Vroom, 259; *Mottu* v. *Primrose*, 23 Maryland, 482; *Attorney General* v. *Boston*, 123 Mass. 460, 477.

But upon the facts found and admitted no sufficient case is made for a writ of mandamus, even if the court could under any circumstances issue such a writ for the purpose set forth in the petition. The fraudulent and wrongful intent, charged against the defendant in the petition, is denied in the answer, and is not found by the jury. The fact that the town of North Yakima was laid out by the defendant on its own land cannot impair the right of the inhabitants of that town, whenever they settled there, or of the people of the surrounding country, to reasonable access to the railroad. No ground is shown for requiring the defendant to maintain stations both at Yakima City and at North Yakima; there are other stations furnishing sufficient facilities for the whole country from North Yakima southward to Pasco Junction; the earnings of the division of the defendant's road between those points are insufficient to pay its running expenses; and to order the station to be removed from North Yakima to Yakima City would inconvenience a much larger part of the public than it would benefit, even at the time of the return of the verdict. And, before judgment in the District Court, the legislature, recognizing that the public interest required it, made North Yakima the county seat. The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in *Great Western Railway* v. *The Queen*, already cited, "there is a very great difference between an indictment for not fulfilling a public duty, and a mandamus commanding the

party liable to fulfil it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. *Texas & Pacific Railway* v. *Marshall*, 136 U. S. 393.

For the reasons above stated, the judgment of the Supreme Court of the Territory must be reversed, and the case remanded, with directions to enter judgment for the defendant dismissing the petition; and Washington having been admitted into the Union as a State by act of Congress passed while this writ of error was pending in this court, the mandate will be directed, as the nature of the case requires, to the Supreme Court of the State of Washington. Act of February 22, 1889, c. 180, §§ 22, 23; 25 Stat. 682, 683.

Judgment reversed, and mandate accordingly.

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

I dissent from the opinion and judgment in this case.

The question is not whether a railroad company can be compelled to build a depot and stop its trains at any place where are gathered two or three homes and families; nor whether courts can determine at what locality in a city or town the depot shall be placed; nor even whether, when there are two villages contiguous, the courts may determine at which of the two the company shall make its stopping place, or compel depots at both. But the case here presented is this: A railroad company builds its road into a county, finds the county seat already established and inhabited, the largest and most prosperous town in the county, and along the line of its road for many miles. It builds its road to and through that county seat; there is no reason of a public nature why that should not be made a stopping place. For some reason, undisclosed, perhaps because that county seat will not pay to the managers a bonus, or because they seek a real estate speculation in establishing a new town, it locates its depot on the site of a "paper" town the title to which it holds, contiguous to this established county seat; stops only at the one, and refuses to stop at the

other; and thus, for private interests, builds up a new place at the expense of the old; and for this subservience of its public duty to its private interests, we are told that there is in the courts no redress; and this because Congress in chartering this Northern Pacific road did not name Yakima City as a stopping place, and has not in terms delegated to the courts the power to interfere in the matter.

A railroad corporation has a public duty to perform, as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the State of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts.

UNITED STATES *v.* DES MOINES NAVIGATION AND RAILWAY COMPANY.

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

No. 987. Argued November 18, 19, 1891. — Decided January 11, 1892.

The title of the Des Moines Navigation and Railway Company to lands granted to the Territory of Iowa for the purpose of aiding in the improvement of the navigation of the Des Moines River by the act of August 8, 1846, 9 Stat. 77, c. 103, and to the State of Iowa for a like purpose by the joint resolution of March 2, 1861, 12 Stat. 251, and by the

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act of July 12, 1862, 12 Stat. 543, c. 161, having been sustained by this court in eight litigations between private parties, to wit: in *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Williams* v. *Baker*, 17 Wall. 144; *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153; *Wolsey* v. *Chapman*, 101 U. S. 755; *Litchfield* v. *Webster County*, 101 U. S. 773; *Dubuque & Sioux City Railroad* v. *Des Moines Valley Railroad*, 109 U. S. 329, and *Bullard* v. *Des Moines & Fort Dodge Railroad*, 122 U. S. 167, is now held to be good against the United States, as a grant *in præsenti*.

It is an undoubted proposition of law that the grantor of lands conveyed in trust is the only party to challenge the title in the hands of the trustee, or others holding under him, on account of a breach of that trust.

It appearing that the United States is only a nominal party, whose aid is sought to destroy the title of the Navigation Company and its grantees, in order to enable settlers to protect their titles, initiated by settlement and occupancy, the court holds the case of *United States* v. *Beebe*, 127 U. S. 338, to be applicable, where it was held that when a suit is brought in the name of the United States to enforce the rights of individuals, and no interest of the government is involved, the defence of laches and limitations will be sustained, as though the government were out of the case.

Where relief can be granted only by setting aside an evidence of title issued by the government, in the orderly administration of the affairs of the Land Department, the evidence in support must be clear, strong and satisfactory.

A general averment of fraud in a bill in equity, though repeated, is to be taken as qualified and limited by the specific facts set forth to show wherein the transaction was fraudulent; and in such case a demurrer to the bill admits only the truth of the facts so set forth and all reasonable inferences to be drawn therefrom.

The knowledge and good faith of a legislature are not open to question, but the presumption is conclusive that it acted with full knowledge and in good faith; and in this case the circumstances surrounding the transaction not only preclude the idea of misconduct or ignorance on the part of the legislature, but it is clear that the Navigation Company was a *bona fide* purchaser, within the meaning of the resolution of 1861, and intended as a beneficiary thereunder.

THE court stated the case as follows:

On August 8, 1846, an act was passed by the Congress of the United States granting certain lands to the then Territory of Iowa, to aid in the improvement of the navigation of the Des Moines River. 9 Stat. 77, c. 103. The first section defined the extent of the grant, and is in these words:

"*Be it enacted by the Senate and House of Representatives*

of the United States of America in Congress assembled, That there be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork (so-called) in said Territory, one equal moiety, in alternate sections, of the public lands, (remaining unsold, and not otherwise disposed of, encumbered or appropriated,) in a strip five miles in width on each side of said river; to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

On January 9, 1847, (the Territory in the meantime having become a State,) its first general assembly passed a joint resolution accepting this grant. A question soon arose as to its extent. The northern limit of the improvement was the Raccoon Fork; and the contention on one side was that the grant extended no further than the improvement, and on the other, that, there being no limitation in the granting clause, it included lands on either side of the river up to its source, or at least to the northern boundary of the State.

This question was submitted at various times to the general executive officers of the United States having charge of the Land Department, with the result that conflicting opinions were given by them thereon. On February 23, 1848, Richard M. Young, the Commissioner of the General Land Office, by letter addressed to the state authorities, ruled that "the State is entitled to the alternate sections within five miles of the Des Moines River, throughout the whole extent of that river, within the limits of Iowa."

On March 2, 1849, Robert J. Walker, Secretary of the Treasury, to whose department at that time the control of the administration of public lands belonged, replying to a communication from the representatives of the State of Iowa in Congress, sustained the ruling of the Commissioner of the General Land Office. In his letter he says: "I concur with you in the views contained in your communication, and am of the opinion that the grant in question extends, as therein stated, on both sides of the river, from its source to its mouth,

but not to lands on the river in the State of Missouri. I have transmitted your communication and accompanying papers, with a copy of this letter, to the Commissioner of the General Land Office."

On June 1, 1849, notice was issued from the General Land Office to the registers and receivers of the local land offices to reserve from sale all the odd-numbered sections within five miles of the river up to the northern limits of the State, and lists were directed to be prepared of the sales and locations within those limits already made, with a view of certifying the remainder to the State. After these lists had been completed, but before any further action was taken, the Department of the Interior was created by Congress, and the administration of public lands transferred to that department; and on April 6, 1850, Thomas Ewing, the Secretary of the Interior, ruled that the Raccoon Fork was the limit of the grant. His ruling is contained in a letter of that date, to the Commissioner of the General Land Office, as follows:

"Sir: Having considered the question submitted to me connected with the claim of the State of Iowa to select, under the act of August 8, 1846, lands for the improvement of the Des Moines River, I am clearly of the opinion that you cannot recognize the grant as extended above the Raccoon Fork without the aid of an explanatory act of Congress. It is clear to my mind, from the language of the act of August 8, 1846, itself, that it was not the intent of the act to extend it further."

He, however, added this further direction:

"As Congress is now in session, and may take action on the subject, it will be proper, in my opinion, to postpone any immediate steps for bringing into market the lands embraced in the State's selections."

Application was made to the President to reverse this ruling. The question was referred by the President to the Attorney General, and, on July 19, 1850, Reverdy Johnson, the then Attorney General, advised the President that he concurred with the views of the Secretary of the Treasury, and dissented from those of the Secretary of the Interior;

holding that the grant extended to the northern limits of the State.

Before any action was taken on this opinion, President Taylor died, and a new administration succeeded; and, on June 30, 1851, the then Attorney General, John J. Crittenden, in response to inquiry, gave it as his opinion, differing from his predecessor, that the grant terminated at the Raccoon Fork. The Secretary of the Interior concurred in the opinion of the Attorney General, but at the same time continued the reservation of the lands from market made by his predecessor; and afterwards, believing that the question of title was one for the decisions of the courts, approved the selection made by the State, up to the northern limits, without prejudice to the rights of other parties. His letter of instructions to the Commissioner of the General Land Office, of date October 29, 1851, was in these words:

"DEPARTMENT OF THE INTERIOR,
"*Washington, October* 29, 1851.

"SIR: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month.

"I have reconsidered and carefully reviewed my decision of the 26th of July last, and, in doing so, find that no decision which I can make will be final, as the question involved partakes more of a judicial than an executive character, which must ultimately be determined by the judicial tribunals of the country; and although my own opinion on the true construction of the grant is unchanged, yet, in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve the selections, without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary. You will please, therefore, as soon as may be practicable, submit for my ap-

proval such lists as may have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa, above the Raccoon Fork, as far as the surveys have progressed, or may hereafter be completed and returned.

"Very respectfully, etc.,

"A. H. H. STUART, *Secretary.*

"The Commissioner of the General Land Office."

And the lists having been made out, were by the Secretary approved in the qualified way indicated in the letter, and thereafter transmitted to the state authorities and to the local land offices.

Subsequently, and at its December term, 1859, the question as to the extent of the grant came before this court, and in the case of *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66, it was held that the Raccoon Fork was the northern limit of the grant, and that the State took no title to lands above that fork. After this decision, and on March 2, 1861, a joint resolution passed Congress, in these words:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the title which the United States still retain in the tracts of land along the Des Moines River, and above the mouth of the Raccoon Fork thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior, as part of the grant by act of Congress approved August eight, eighteen hundred and forty-six, and which is now held by bona fide purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa." 12 Stat. 251.

And on July 12, 1862, the following act:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the grant of lands to the then Territory of Iowa, for the improvement of the Des Moines River, made by the act of August eight, eighteen hundred and forty-six, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between

the Raccoon Fork and the northern boundary of said State; such lands are to be held and applied in accordance with the provisions of the original grant, except that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines and Minnesota railroad, in accordance with the provisions of the act of the general assembly of the State of Iowa, approved March twenty-two, eighteen hundred and fifty-eight. And if any of said lands shall have been sold or otherwise disposed of by the United States before the passage of this act, excepting those released by the United States to the grantees of the State of Iowa under the joint resolution of March second, eighteen hundred and sixty-two, the Secretary of the Interior is hereby directed to set apart an equal amount of lands within said State to be certified in lieu thereof: *Provided*, That if the said State shall have sold and conveyed any portion of the lands lying within the limits of this grant the title of which has proved invalid, any lands which shall be certified to said State in lieu thereof by virtue of the provisions of this act shall inure to and be held as a trust fund for the benefit of, the person or persons respectively whose titles shall have failed as aforesaid." 12 Stat. 543, c. 161.

Long prior to the last three matters noticed, the State had taken action in respect to the improvement of the Des Moines River and had disposed of the lands covered by the grant as it was claimed to be, including those above as well as those below the Raccoon Fork. Such action and disposition had been in this way: Some work was done by the State, in the first instance, through its board of public works. Thereafter, and on December 17, 1853, a contract was made with Henry O'Reilly therefor. This was released on June 8, 1854, and on June 9, 1854, a new contract was entered into between the State and the principal defendant herein, the Des Moines Navigation and Railway Company. By its terms, the navigation company was to expend in the improvement not less than $1,300,000, and to receive in pay the lands at $1.25 per acre; the lands to be conveyed from time to time as $30,000 worth of work was done, in pursuance of the original act of Congress.

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Under this agreement, the navigation company proceeded to do some work on the improvement. On March 22, 1858, the State of Iowa passed an act, whose recital and first clause are as follows:

"Whereas the Des Moines Navigation and Railroad Company have heretofore claimed, and do now claim, to have entered into certain contracts with the State of Iowa, by its officers and agents, concerning the improvement of the Des Moines River, in the State of Iowa; and whereas disagreements and misunderstandings have arisen, and do now exist, between the State of Iowa and said company, and it being conceived to be to the interests of all parties concerned to have said matters, and all matters and things between said company and the State of Iowa, settled and adjusted: Now, therefore, be it

"*Resolved by the General Assembly of the State of Iowa*, That for the purpose of such settlement, and for that purpose only, the following propositions are made by the State to said company: That the said company shall execute to the State of Iowa full releases and discharges of all contracts, agreements and claims with or against the State, including rights to water rents which may have heretofore or do now exist, and all claims of all kinds against the State of Iowa, and the lands connected with the Des Moines River improvement, excepting such as are hereby by the State secured to the said company; and also surrender to said State the dredge-boat and its appurtenances, belonging to said improvement; and the State of Iowa shall, by its proper officer, certify and convey to the said company all lands granted by an act of Congress, approved August 8th, 1846, to the then Territory of Iowa, to aid in the improvement of the Des Moines River, which have been approved and certified to the State of Iowa by the general government, saving and excepting all lands sold or conveyed, or agreed to be sold or conveyed, by the State of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant, and said company or its assignees, shall have right to all of said lands as herein granted to them as fully as the State of Iowa could have under or by

virtue of said grant, or in any manner whatever, with full power to settle all errors, false locations, omissions or claims in reference to the same, and all pay or compensation therefor by the general government, but at the costs and charges of said company, and the State to hold all the balance of said lands, and all rights, powers and privileges under and by virtue of said grant, entirely released from any claim by or through said company; and it is understood that among the lands excepted and not granted by the State to said company are 25,487.87 acres lying immediately above Raccoon Fork, supposed to have been sold by the general government, but claimed by the State of Iowa." Revised Laws of Iowa, 1860, p. 906.

The proposition of settlement made by this act was accepted by the navigation company on April 15, 1858, and the terms of the settlement carried into effect. On April 28, 1858, the governor of the State certified to the President the amount expended in the work, and the amount of land to be conveyed to the navigation company under the settlement. The certificate was in these words:

"EXECUTIVE CHAMBER, IOWA,
"*Des Moines, April* 28, 1858.

"To His Excellency JAMES BUCHANAN, President of the United States:

"I, Ralph P. Lowe, governor of the State of Iowa, as required by act of Congress approved August 8, 1846, 'granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines River in said Territory,' do hereby certify that there has been expended from time to time prior to the date hereof on the improvement of said river, as the work has progressed, and the money has been required, under certain contracts made by the State of Iowa with the Des Moines Navigation & Railroad Company, the sum of three hundred and thirty-two thousand six hundred and thirty-four $\frac{4}{100}$ dollars ($332,634.04), and in consideration of said expenditures on said improvement, and in pursuance of the provisions of the act of Congress approved as aforesaid,

there will be conveyed to said Des Moines Navigation & Railroad Company two hundred and sixty-six thousand one hundred and seven $\frac{23}{100}$ acres (266,107 $\frac{23}{100}$ acres) of the land belonging to said grant, and which have been certified and approved to the State of Iowa under said act for the prosecution of the improvement of said river Des Moines.

"In testimony whereof, I, Ralph P. Lowe, governor of the State of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed, together with my signature.

"[SEAL.] RALPH P. LOWE.

"By the Governor:

"ELIJAH SELLS, *Secretary of State.*"

And on the 3d of May, 1858, the governor conveyed to the navigation company, by fourteen deeds, the lands referred to.

On September 28, 1889, the present suit was commenced by the filing of the bill in behalf of the United States, in the Circuit Court of the United States for the Northern District of Iowa; in which bill the complainant prayed that on final hearing a decree might be entered cancelling and setting aside the certificate of the United States made by the Secretary of the Interior, the resolution of settlement passed by the General Assembly of the State of Iowa, and the deeds of the governor to the navigation company, made in pursuance of such settlement, and quieting and confirming plaintiff's title to all the lands. To this bill were made parties defendant the navigation company and several individuals holding title to tracts of land by conveyance from it. The navigation company demurred to the bill; the other defendants answered. Proofs were taken under the issues presented by the bill and answer; and on final hearing a decree was entered sustaining the demurrer of the navigation company, and on the merits dismissing the bill. 43 Fed. Rep. 1. From such decree the United States appealed to this court.

Mr. Attorney General for the United States, appellant.

This is a suit by the United States to reclaim from the defendants lands conveyed by legislative grant to the State of Iowa upon a trust for the purpose of improving the navigation of the Des Moines River, and received by the State upon that trust, but for which the defendants have conveyances from the State in violation of that trust. Commencing in 1846, the date of the original grant, the subject matter has been one of constant dispute for over forty years. On the one hand, speculators represented by the defendant, the navigation company, have claimed vast tracts of the best land in Iowa under alleged grants from the State. On the other hand, hundreds, perhaps thousands, of hard-working pioneers have settled and made their homes upon these lands. Other railroad companies have claimed them under other grants.

The executive officers of the national government have made a multitude of conflicting rules in reference to them. The legislature of Iowa has passed statutes with reference to them; the executive of Iowa has attempted to dispose of them by administrative acts, and the courts of Iowa have attempted to settle their titles by judicial decisions. This court, in a large number of cases involving collateral issues, has made many decisions, which, as between the parties before the court, are conclusive; but now, for the first time, the party possessed of the original title, the party which made the grant to the State upon the trust, the only party which ever had, or now has, a right to question the action of its trustee in the premises — the United States — comes into court, asserts that the conveyances under which the defendants claim title have been made in violation of its rights, shows that the conditions upon which the trust was created have been violated throughout, and demands a restoration of so much of the property as has not passed into the hands of innocent purchasers without notice.

Such being the case, in presenting the claim of the United States I shall have little to do or to say with reference to the action of any party except the United States; and little to do and little to say with reference to the action of the United States, except as it has spoken and acted through Congress, which was the only branch of the government by which this land could be conveyed.

Argument for Appellant.

The sole authoritative action of the United States in the premises, by which title to this property has been or could be conveyed, is found in three acts of Congress, viz.: the act of August 8, 1846, (*ante* 511,) the joint resolution of March 2, 1861, (*ante* 513,) and the act of July 12, 1862, (*ante* 515). The first of these acts was accepted by the legislature of Iowa, January 9, 1847. The State thereby took these lands in trust and could make no conveyance thereof, except according to the terms of the act of 1846. Congress not only never released the lands from the trust, but in the act of 1862, under which the defendants claim, expressly provided that the grant of lands above the fork should be subject to all the terms of the trust in the statutes of 1846.

I. As a trustee, the State of Iowa held these lands just as any other trustee would have held them. It took them not as a sovereign in its sovereign governmental capacity, but as a municipal corporation dealing with property interests and as a trustee to execute the trust reposed in it by the grant. Dillon Mun. Corp. 3d ed. §§ 567–573; *Vidal* v. *Girard*, 2 How. 127; *Mayor of Philadelphia* v. *Elliott*, 3 Rawle, 170; *Perin* v. *Carey*, 24 How. 465; *Girard* v. *Philadelphia*, 7 Wall. 1; *Swann* v. *Lindsey*, 70 Alabama, 507.

Taking the property under said trust, the State, as trustee, could dispose of it only in accordance with the terms of the trust. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Farnsworth* v. *Minnesota & Pacific Railroad*, 92 U. S. 49; *Rice* v. *Railroad Co.*, 1 Black, 358; *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Wheeler* v. *Walker*, 2 Connecticut, 196; *S. C.* 7 Am. Dec. 264; *Hayden* v. *Stoughton*, 5 Pick. 528.

Upon these authorities it may and will be assumed in this argument that the State of Iowa took the title to the lands covered by the act of 1846, in trust, and that it could not make a title to them by conveyance, except in accordance with the terms of the trust.

II. From August 8, 1846, to March 2, 1861, no further action was taken by Congress with reference to this land grant. A vast amount of negotiations between the executive officers of the general government, the officers of the State of Iowa, and

private citizens, and a vast amount of legislation by the State of Iowa and negotiations and contracts between that State and sundry parties, having or claiming to have an interest in these lands, were had. But all such negotiations, pretended contracts and legislation were utterly void and ineffective so far as the lands in dispute are concerned, (if for no other reason,) because the grant, under the statute of 1846, did not cover an acre of land north of the Raccoon Fork. *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66.

Then came the joint resolution of March 2, 1861, *ante* 513, which brings us to the main point of contest, at least, so far as this argument is concerned. The Des Moines Navigation and Railway Company contends that it is within the scope and meaning of this joint resolution, that, on March 2, 1861, it held the lands in controversy as a *bona fide* purchaser under the State of Iowa. This we deny. Upon this question of *bona fides* the burden both of averment and proof is on the defendants.

So far as the navigation and railway company is concerned, the case was dismissed upon demurrer to the bill, that company being claimant of most of the lands. It is by defendants, of course, conceded that the averments of the bill are to be taken as true, but it is contended that these averments are insufficient to put in issue this question of *bona fides*. To this assertion I answer that the question of *bona fides* is a question of fact; that if it were a law case it would be a question for a jury; and that in a pleading an averment of *bona fides*, or the reverse, is in itself an averment of fact. It may be that, in some cases, upon motion, a naked allegation of *bona fides*, or the reverse, might be required to be made more specific; but as against a denial, or as against a demurrer, it is sufficient as an averment of a fact.

The averments in the bill, admitted by the demurrer, are: that the company did but a very small fraction of the work it pretended to do; that it abandoned the undertaking covered by its contract; that it received, in lands below Raccoon Fork, a sum vastly in excess of any just demand; that, in short, very little expenditure was made upon this great work,

for which the vast land grant was made by Congress, and that for such work as was done the company was paid several times more than the amount to which it was entitled. It further appears by averments in the bill, as well as by the Exhibit A, being the joint resolution of the legislature forming substantially the alleged contract between the State and the company in 1858, that from beginning to end there was no pretence of compliance with the terms and conditions of the trust, as set out in the grant of 1846, but that both this company and the State appear to have treated the act of Congress of 1846 as making a grant to the State, absolute and unrestrained by any conditions whatsoever.

Under these circumstances it seems too plain for argument, first, that this company was not, as matter of fact, a *bona fide* purchaser or holder of these lands, and second, as matter of law, that no party, with notice, receiving a deed from a party holding the title to lands in trust, in violation of the terms of such trust, can be a *bona fide* holder of such lands. Perry on Trusts, 277; Bl. Com. Book II, 337.

The bill further alleges that at the date and passage and approval of said resolution of 1861, and as the foundation and cause of the same, a large number of persons had in good faith bought of the State of Iowa, paying cash therefor, large quantities of land for the purpose of making their homes thereon, and had with such purpose actually taken possession thereof and settled thereon, and were then holding the same; and it was for the purpose of protecting these persons that said resolution of Congress was passed, and they were the persons meant and intended in said resolution, and no others, who are referred to in said resolution as *bona fide* purchasers of the State of Iowa.

To these persons, therefore, who were entitled to protection in the occupation of the lands they had purchased in good faith, and in pursuance of the repeated decisions of the executive officers of the government, and who had improved the lands and made their homes upon them, this resolution could and was intended to apply. But, as matter of law, it is quite immaterial to whom the resolution did apply, for it is very

clear that it did not and could not apply to the navigation company and that is sufficient for the purposes of this case.

III. If, as seems clear, this company took nothing under the joint resolution of March 2, 1861, the next question is, did it take anything under the act of Congress of July 12, 1862?

The legal effect of that act was to convey to the State of Iowa, upon exactly the same terms as were prescribed in the original grant of 1846, the lands within the limits named north of the Raccoon Fork and south of the northern boundary of the State of Iowa, except as those terms are modified in the provision "that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines and Minnesota Railroad, in accordance with the provisions of the act of the general assembly of the State of Iowa, approved March 22, 1858." As under the act of 1846 the State was a trustee, and could not make a conveyance of an acre of the lands, except in accordance with the provisions of the trust, so, after the enactment of this law, it held the lands above the fork subject to the same limitations and conditions. The effect of those limitations and conditions has already been discussed.

IV. This brings us to the question whether, by reason of estoppels, Iowa statutes or otherwise, the navigation company can claim anything under the grants from the State of 1858 in the land north of the Raccoon Fork. Our contention is, that, aside from the fact that the State held these lands in trust, and could therefore only convey in accordance with the trust, the navigation company can claim nothing under the grants of 1858 for the reason that the grants contained no warranty, and therefore a subsequent title does not inure to the benefit of the navigation company.

There are, however, decisions which uphold the proposition that a conveyance, such as this, being in direct breach of trust, would be void, and therefore, even if accompanied by warranties, would not work a grant by estoppel; but as in this case there are no covenants that question is not material. There is, however, another reason why the navigation company cannot claim these lands, and could not even if the pretended grant

by the State were accompanied by covenants of warranty. An estoppel by deed is operative against the grantor to prevent fraud and injustice. The principle is that a grantor who assumes to convey and warrant property which he has not, if he afterward acquire it, shall not be permitted to assert his title against his grantee, because to do so would be to work a wrong; but this principle would have no application to the Federal government in this case, and the navigation company is in no condition to assert such a principle. The Federal government conveyed this property to the State upon a trust; the navigation company attempted to obtain it from the State through a breach of this trust. Under these circumstances, upon no principle can a grant by estoppel be set up by the navigation company against the government.

Nor is the case of the defendant helped by the Code of Iowa, of which section 1202 reads as follows: "Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor to the extent of that which the deed purports to convey inures to the benefit of the grantee." The defendant can get no benefit from this statute because it does not apply to the State at all. Bacon's Abridgment, tit. Prerogative, 3–5; *United States* v. *Knight*, 14 Pet. 301, 315; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *Greene*, 4 Mason, 427.

V. But it is objected that this claim is stale; that the United States ought to be barred by its laches; that this suit might have been brought many years ago; that this navigation company has been paying the taxes and expending money on this land, etc. The answers to all this are very plain and easy. First, the claims of the United States are not subject to statutes of limitation, nor can the charge of laches be successfully asserted against the United States. *United States* v. *The Dalles Military Road Company*, 140 U. S. 599, 632; *United States* v. *Insley*, 130 U. S. 263, 266. And in the second place, if the suit were by a private citizen, the plea of laches would not be available, because it is the case of an express trust, and until the State of Iowa in some authoritative man-

ner repudiates the trust, the statute of limitations would not begin to run, and the charge of laches would not be well founded. The claim that the defendant has an equity by reason of having expended money in taxes, etc., is fully answered in one of the cases upon which the defendant mainly relies, namely, *Homestead Company* v. *Valley Railroad*, 17 Wall. 153, where parties whose good faith was not challenged had made large expenditures in the payment of taxes, but were denied by this court any equities by reason thereof.

VI. Finally, it is contended that whatever may be the merits of this case they are foreclosed by the adjudications of this court in the large number of decisions already made in collateral cases which are cited by appellees. I think it is not difficult to show that this contention is unfounded, and that there is before the court a broad highway of solid legal principle upon which the court may travel to the conclusion sought by the government, without touching, much less crossing or upsetting, any decision heretofore made by the court. I have carefully examined all the decisions of this court cited by defendants upon this question, and in not one of them is there a sentence that shows that the *bona fides* of the navigation company or of the other defendants as holders of this property has ever been questioned, or the right of the United States to demand an accounting of its trustees, or to assert its title to lands which have been conveyed in violation of the plain terms of the trust under which the title passed from the United States, has ever been raised or considered for a moment. The contest here is not between *bona fide* settlers as against each other, but this litigation is in the interests of *bona fide* settlers against speculators who have appropriated these lands in violation of law and of the principles of common honesty.

VII. The only other question calling for attention is the relation of the appellees, other than the navigation company; and this, I think, presents no difficulty. They claim as innocent *bona fide* purchasers from the navigation company. If, as we think is entirely clear, it is shown that the title of the navigation company is not good, then its grantees cannot succeed except as they show themselves to be *bona fide* purchasers, for

value, and without notice. The burden of proof as to the *bona fides* in this matter is upon these claimants. *Clements* v. *Moore*, 6 Wall. 299; *Haskins* v. *Warren*, 115 Mass. 514; *Nickerson* v. *Meacham*, 5 McCrary, 511; *Peck* v. *Mallams*, 10 N. Y. 509; *Lakin* v. *Sierra Butte Gold Mine Company*, 25 Fed. Rep. 337.

Mr. C. H. Gatch for all the appellees except the Des Moines Navigation and Railway Company. *Mr. William Connor* was with him on the brief.

Mr. Benton J. Hall for the Des Moines Navigation and Railway Company, appellee. *Mr. Frank T. Brown* was with him on the brief.

Mr. John Y. Stone for appellant. *Mr. D. C. Chase* also filed a brief for same.

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

Prior to the decision of this court in *Dubuque &c. Railroad Co.* v. *Litchfield*, 23 How. 66, which decision was announced in 1860, it was a disputed question whether the grant extended above the Raccoon Fork. The opinions and rulings of the executive officers of the government were conflicting; and it is not strange that many settled upon these lands in the belief that they were public lands of the United States, and open to settlement. But if they were not in fact open to settlement — if the title legally and fairly passed to the navigation company — no relief from the hardships occasioned by their mistake can be furnished by the courts, whose functions are limited to declaring where, in the face of conflicting claims, the title really rests. We pass, therefore, to the consideration of the matter of title.

It will be observed, in the first place, that there is in this case no question as to the priority of claim. The single question is whether the defendant's title is good as against the

government. If so, it is unquestionably prior to all claims of the settlers, for, as appears, as early as June, 1849, the lands to the northern limits of the State were reserved from settlement and sale by direction of the Land Department; and this reservation was continued in force notwithstanding the subsequent conflicting rulings as to the extent of the grant and the adjudication of this court as to the extent of its limits. The validity of this reservation was sustained in the case of *Wolcott* v. *Des Moines Company*, 5 Wall. 681, decided at December term, 1866. In that case it was held that, even in the absence of a command to that effect in the statute, it was the duty of the officers of the Land Department, immediately upon a grant being made by Congress, to reserve from settlement and sale the lands within the grant; and that, if there was a dispute as to its extent, it was the duty to reserve all lands which, upon either construction, might become necessary to make good the purposes of the grant. This ruling as to the power and duty of the officers of the Land Department has since been followed in many cases. *Bullard* v. *Des Moines & Fort Dodge Railroad*, 122 U. S. 167, and cases cited in the opinion.

As lands properly reserved are not open to settlement or sale, it follows that the lands above Raccoon Fork were at the time of the passage of the resolution of 1861 wholly within the disposing power of Congress; and no rights could have attached, by occupancy or otherwise, which would burden the title, or either legally or equitably affect any grant or disposition which Congress might then see fit to make. By that resolution Congress relinquished to the State all the title of the United States, (and that was a full and absolute title,) to such tracts of land as were then held by *bona fide* purchasers under the state law; and by the act of the succeeding year, the grant was in terms extended to the northern limits of the State, so that all alternate sections above the Raccoon Fork, not theretofore disposed of by the State to *bona fide* purchasers, thereby passed to the State. As the original grant in 1846 was within settled rules of construction a grant *in præsenti*, (*Deseret Salt Company* v. *Tarpey*, *ante* 241, and cases cited in the opinion,) the act of 1862, which was a mere extension of

the grant, took effect and passed title at once to the State; and the resolution of 1861, which was in terms a relinquishment, also operated as an immediate transfer of title. By the reservation, therefore, full title was retained in the United States; and by the resolution of 1861, and the act of 1862, the same full title passed *eo instanti* to the State.

But if by the resolution title passed to the State, it also at the same time passed through the State to the real beneficiaries of this resolution, to wit, *bona fide* purchasers under the State of Iowa. Section 1202 of the Code of Iowa, of 1851, reads as follows: "Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor to the extent of that which the deed purports to convey enures to the benefit of the grantee." The deeds made by the State to the navigation company recite that, "the State of Iowa does hereby sell, grant, bargain and convey to the said Des Moines Navigation and Railroad Company the following referred to and described lands, to wit," (describing them,) "to have and hold the above-described lands and each and every parcel thereof, with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging." These were deeds purporting to convey a full title. That is the general rule, and such is the import of section 1232, Code of Iowa, 1851, prescribing forms for deeds.

Even if there were no such statute with respect to after-acquired titles, the manifest intent of Congress in the resolution was, not to transfer the title to the State to be by it disposed of as it saw fit, but to the State solely for the benefit of *bona fide* purchasers. The inference from the language, standing by itself, is made certain by the act of 1862, where it refers to the lands covered by this resolution as lands "released by the United States to the grantees of the State of Iowa, under the joint resolution of March 2, 1862." This is an interpretation by Congress of the scope of that resolution, and shows to whom Congress intended that the lands should pass.

Was the navigation company a *bona fide* purchaser under the State? Of course if it was, the other defendants who

hold under it also were. It is claimed by the appellant that the *bona fide* purchasers referred to were certain parties who had bought portions of these lands from the State of Iowa, paying cash therefor, for the purpose of making homes, and who had taken possession thereof and were then occupying the same. But the term "*bona fide* purchaser" has a well-settled meaning in the law. It does not require settlement or occupancy. Any one is a *bona fide* purchaser who buys in good faith and pays value. To limit the term as here used to settlers is to interpolate into the statute a restriction which neither the language nor the surrounding circumstances justify. The term itself, as stated, has no such restricted meaning; and while it may be that there were individuals holding tracts which they had separately settled on and paid for, yet it was also true that the great body of the lands had been conveyed to the navigation company in payment for work done on the Des Moines improvement. This was a well-known fact; and if Congress had intended to distinguish between settlers and other purchasers, it would not have used language whose well-understood meaning included both. If anything can be drawn from the debates in Congress at the time of the passage of this resolution, it sustains this construction. As appears from the Senate proceedings, when the resolution was pending, the fact that a large portion of these lands had been conveyed to the navigation company for work done on the improvement, was stated, and an attempt was made to limit the relinquishment to lands "by the said State sold to actual settlers." Instead of that, the words now used were inserted, to wit, "*bona fide* purchasers under the State of Iowa." Congressional Globe, part 2, 2d Sess. 36th Congress, 1130 to 1133. Independently, however, of any inference from these Congressional proceedings, there can be no doubt that a party doing work under a contract with the State, making a settlement and receiving a conveyance of these lands in payment for that work, is a *bona fide* purchaser. If so, this cause of action fails, and the bill must be dismissed.

But the case does not rest here. The title to these lands has often been brought in question in cases determined by this

court, and its uniform ruling has been in favor of the validity of the title of the navigation company. A review of some of these cases will be instructive. In *Wolcott* v. *Des Moines Company*, *supra*, it appeared that Wolcott had purchased from the navigation company, the principal defendant in this case, a half section of land above the Raccoon Fork, and received a warranty deed therefor. On the decision in *Dubuque & Pacific Railroad* v. *Litchfield*, *supra*, that the grant extended only to the Raccoon Fork, he sued the navigation company for breach of covenant, alleging that the title to the tract sold had failed. This court affirmed the judgment of the Circuit Court against him. After referring to its decision in respect to the extent of the grant of 1846, it quoted the resolution of 1861 and the act of 1862, and added: "If the case stopped here it would be very clear that the plaintiff could not recover; for, although the State possessed no title to the lot in dispute at the time of the conveyance to the Des Moines Navigation and Railroad Company, yet, having an after-acquired title by the act of Congress, it would enure to the benefit of the grantees, and so in respect to their conveyance to the plaintiff. This is in accordance with the laws of the State of Iowa." It then noticed the contention of the plaintiff, that the title to this tract did not pass to the navigation company by this later legislation, because prior thereto, and on May 15, 1856, Congress had made a grant to the State of six alternate sections on each side of certain proposed railroads, to aid in their construction. The tract was within the limits of this grant, but the court held that the title to it did not pass thereby, because of the previous reservation made in 1849, the grant by its terms excepting from its operation all lands reserved by "any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any purpose whatsoever." It will be seen that this decision not only determined the validity and scope of the reservation, but also interpreted the effect of the resolution, as operating to transfer full title to the navigation company.

In 1873, the cases of *Williams* v. *Baker* and *Cedar Rapids Railroad Co.* v. *Des Moines Navigation Co.*, 17 Wall. 144, and

Homestead Company v. *Valley Railroad*, 17 Wall. 153, were decided. The first two cases were disposed of by one opinion. Both were suits to quiet title. One side claimed under the river grant and the other under the railroad grant of 1856. Decrees in favor of the river grant were sustained. In the opinion, the court noticed the long contest as to the scope of the original grant, and the final determination thereof, in the case of *Railroad Company* v. *Litchfield*. It then observed: "This decision was received as a final settlement of the long contested question of the extent of the grant. But it left the State of Iowa, which had made engagements on the faith of the lands certified to her, in an embarrassed condition, and it destroyed the title of the navigation company to lands of the value of hundreds of thousands of dollars, which it had received from the State for money, labor and material actually expended and furnished. What was also equally to be regretted was, that many persons, purchasers for value from the State or the navigation company, found their supposed title an invalid one." And after referring to the legislation of 1861 and 1862, it added: "This legislative history of the title of the State of Iowa, and of those to whom she had conveyed the lands certified to her by the Secretary of the Interior as a part of the grant of 1846, including among her grantees the Des Moines Navigation and Railroad Company, needs no gloss or criticism to show that the title of the State and her grantees is perfect, unless impaired or defeated by some other and extrinsic matter which would have that effect;" and closed the opinion in these words: "We, therefore, reaffirm, first, that neither the State of Iowa, nor the railroad companies, for whose benefit the grant of 1856 was made, took any title by that act to the lands then claimed to belong to the Des Moines river grant of 1846; and, second, that by the joint resolution of 1861, and the act of 1862, the State of Iowa did receive the title for the use of those to whom she had sold them as part of that grant, and for such other purposes as had become proper under that grant."

In the third case, which was also a contest between a claimant under the railroad grant and parties claiming under the river

grant, the validity of the latter was affirmed, and in its opinion the court said: "It is, therefore, no longer an open question that neither the State of Iowa nor the railroad companies, for whose benefit the grant of 1856 was made, took any title by that act to the lands then claimed to belong to the Des Moines River grant of 1846, and that the joint resolution of 2d of March, 1861, and the act of 12th of July, 1862, transferred the title from the United States and vested it in the State of Iowa for the use of its grantees under the river grant."

Again, in 1879, the question of this grant came before this court in *Wolsey* v. *Chapman*, 101 U. S. 755, 771. In that case the claim adverse to the river grant originated in this way. On September 4, 1841, Congress passed an act, 5 Stat. 453, c. 16, by the eighth section of which there was granted to each State 500,000 acres of land for purposes of internal improvement. By the constitution of Iowa, under which the State was admitted, this grant was appropriated to the use of common schools, (Constitution of Iowa, 1846, Article 9, "School Funds and Schools," section 3,) and this appropriation was assented to by Congress by a special act. 9 Stat. 349. On July 20, 1850, the agent of the State having charge of the school lands selected the particular tract in controversy as a part of this school grant; and thereafter, and in 1853, the appropriate proceedings being had, a patent was issued by the State to Wolsey. The grant of 1841 was one which required selection, and so no rights accrued to the State to this tract under such grant until the selection on July 20, 1850, but that, as we have seen, was several months after the lands had been reserved for the river grant. The court, in an elaborate opinion by Chief Justice Waite, reviewed all the legislation and the previous decisions of the court, and reaffirmed those decisions. The deed from the State to the navigation company, under which Chapman claimed, being subsequent to the patent from the State to Wolsey, it was contended that the former could not question the title thus previously conveyed. Upon this matter the court said: "Of this we entertain no doubt. If the State had no title when the patent issued to Wolsey, he

took nothing by the grant. No question of estoppel by warranty rises, neither does the after-acquired title enure to the benefit of Wolsey, because when the United States made the grant in 1861 it was for the benefit of *bona fide* purchasers from the State, under the grant of 1846. This is evident as well from the tenor of the joint resolution of 1861 as from the act of 1862. The relinquishment under the joint resolution is of all the title which the United States retained in the tracts of land above the Raccoon Fork, 'which have been certified to said State improperly by the Department of the Interior as part of the grant by the act of Congress approved August 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa;' and by the act of 1862 the lands are in terms to be held and applied in accordance with the provisions of the original grant. This legislation, being in *pari materia*, is to be construed together, and manifests most unmistakably an intention on the part of Congress to put the State and *bona fide* purchasers from the State just where they would be if the original act had itself granted all that was finally given for the river improvement. The original grant contemplated sales by the State in execution of the trust created, and the *bona fide* purchasers referred to must have been purchasers at such sales. This being so, the grant when finally made enured to the benefit of Chapman rather than Wolsey."

At the same term the case of *Litchfield* v. *County of Webster* was decided, 101 U. S. 773, 775. The question in that case was at what time the title to these lands passed from the United States, and the lands became subject to taxation. In disposing of that question, the Chief Justice, speaking for the court, observed: "We think, however, that, for the year 1862 and thereafter, they were taxable. By the joint resolution, Congress relinquished all the title the United States then retained to the lands which had before that time been certified by the Department of the Interior as part of the river grant, and which were held by *bona fide* purchasers under the State. No further conveyance was necessary to complete the transfer, and the description was sufficient to identify the property. The title thus relinquished enured at once to the benefit of the

purchasers for whose use the relinquishment was made. All the lands involved in this suit had been certified, and Litchfield, or those under whom he claims, were *bona fide* purchasers from the State."

Again, in 1883, the case of *Dubuque & Sioux City Railroad* v. *Des Moines Valley Railroad*, 109 U. S. 329, came to this court on error to the Supreme Court of the State of Iowa. This was an action to recover lands and quiet title, and in which the parties respectively claimed under the railroad grant of 1856 and the river grant; and, again, the Chief Justice delivered the opinion of the court, and in it said: "The following are no longer open questions in this court. . . . That the act of July 12, 1862, c. 161, 12 Stat. 543, 'transferred the title from the United States and vested it in the State of Iowa, for the use of its grantees under the river grant.' *Wolcott* v. *Des Moines Company*, 5 Wall. 681; *Williams* v. *Baker*, 17 Wall. 144; *Homestead Company* v. *The Valley Railroad Company*, 17 Wall. 153; *Wolsey* v. *Chapman*, 101 U. S. 755, 767."

Still later, and in 1886, another attempt was made to disturb the title held under the river grant in the case of *Bullard* v. *Des Moines & Fort Dodge Railroad*, 122 U. S. 167, which also came here on error to the Supreme Court of the State of Iowa. The contention in that case in behalf of the plaintiff in error was that the resolution of 1861, which relinquished to the State the title to lands held by *bona fide* purchasers under it, operated to terminate the reservation from sale made by the Land Department for the benefit of the river grant, and thus left all lands above the Raccoon Fork not then held by *bona fide* purchasers open to settlement and free for the attaching of any other grant from that time and up to the act of 1862, which in terms extended the river grant to the northern limits of the State, and, of course, included all lands, whether held by *bona fide* purchasers or otherwise. But this court sustained the decision of the Supreme Court of Iowa, and ruled that the reservation from sale made by the Land Department was not terminated by the resolution of 1861, but continued in force until the act of 1862.

Such have been the decisions of the court in respect to this grant and titles, decisions running through twenty-five years, all affirming the same thing, and all without dissent. It would seem, if the decisions of this court amount to anything, that the title of the navigation company to these lands was impregnable. Indeed, the emphatic language more than once used, as quoted above, appears like a protest against any further assault upon that title.

Nor has this line of decisions been confined to this court. It runs through the reports of the Supreme Court of Iowa. In addition to the two cases, heretofore referred to, coming from that court to this, and in which its decisions were sustained, may be noticed the following: *Bellows* v. *Todd*, twice before that court, and reported in 34 Iowa, 18 and 39 Iowa, 209. This was an action of ejectment brought by Bellows, holding under the navigation company, against Todd, claiming to have settled upon the premises under the preëmption and homestead laws of the United States in 1860. On the first trial the court refused to give the following instruction: "If the jury find from the evidence that the lands in controversy were certified to the State of Iowa in 1853, under the act of Congress of 8th August, 1846, and that the same have been conveyed by the State of Iowa to the Des Moines Navigation and Railroad Company, and by said company to plaintiff's grantors, and by them to the plaintiff in this action, then the plaintiff is entitled to recover." When the case came before the Supreme Court, (34 Iowa,) the refusal to give this instruction was adjudged error, and the case remanded for a new trial. On the second trial the plaintiff requested the following instruction: "The plaintiff in this action claims title to the lands described in his petition under conveyances from the grantees of the Des Moines Navigation and Railroad Company, and the defendant, as one ground of his defence, alleges that he has been in the continuous occupation and possession of said land for ten years prior to the commencement of this action, and that by reason of such occupation and possession his title is superior and paramount to that of the plaintiff; but if the jury find from the evidence that this land was certified

to the State of Iowa under the act of Congress of August 8, 1846, and has been conveyed by the State to the Des Moines Navigation and Railroad Company, under which plaintiff holds, then the State having acquired title to said land by the joint resolution of Congress of March 2, 1861, the title of the State, so acquired, enured to the benefit of said company and its grantees and the plaintiff, and if this action was commenced within ten years from the date of the passage of said joint resolution, then the plaintiff is entitled to recover in this action notwithstanding the alleged occupation and possession of defendant," which was refused; and in 39 Iowa the refusal to give this instruction was adjudged error, and the judgment reversed and the case remanded. The significance of this instruction is apparent, inasmuch as the action was commenced on May 19, 1870, less than ten years from the resolution of March, 1861. In its opinion in this last case the court observes "that the title which the State acquired under the resolution of March 2, 1861, enured to the benefit of the Des Moines Navigation Company and its grantees, under the circumstances set forth in the instruction, is elemental. Revision, § 2210; Code, § 1931."

In addition, there is a series of cases of which *Stryker* v. *Polk County*, 22 Iowa, 131; *Litchfield* v. *Hamilton County*, 40 Iowa, 66; and *Goodnow* v. *Wells*, 67 Iowa, 654, are examples, in which it was held that these lands were subject to taxation for the year 1861. Of course, they could not be subject to taxation unless by the resolution the title had passed not simply from the United States, but also through the State to its grantees; and repeatedly, in different ways, is it asserted in the opinions in these cases that the title had so passed. We have thus a concurrence of opinion on the part of the Supreme Court of Iowa and this court for a quarter of a century in favor of the validity of the title acquired by the navigation company. It would seem as though the period of rest as to this question of title ought by this time to have been reached.

But the government is the complainant, induced doubtless to bring this suit by the act of the legislature of March 28, 1888, which purports to relinquish for the State its trust and

to reconvey to the United States all its right and title to these lands, as well as by the urgent appeals of the settlers, and the claim is, that its presence as a party introduces new questions into the litigation, questions not at all affected by the prior decisions. It is the original grantor, and its contention is that while the title of its grantee may be unassailable by other persons, it has the right to challenge it because the grant was made in trust for a specific purpose, and that trust has not been properly executed, nor the lands appropriated to the purposes thereof. That the proposition of law which underlies this claim is correct, cannot be doubted. The grantor of lands conveyed in trust may be the only party with power to complain of the breach of that trust, or on account of such breach to challenge the title in the hands of the trustee or others holding under him; and the title conveyed, voidable alone at its instance, may be good as against all the world besides.

Before, however, examining the applicability of this proposition of law to the case at hand, one or two preliminary thoughts naturally arrest the attention. There has been long delay in presenting this claim. A third of a century has passed since the State conveyed to the navigation company, and more than a quarter of a century since Congress relinquished and granted to the State the title to these lands. During that time there have been marvellous changes in the population, the industries, the business interests of the State; legislatures and courts have been busy determining rights and establishing relations based upon the vesting of title in the navigation company. A proposition to destroy this title, and to put at naught all that has been accomplished in respect thereto and based thereon during these years, is one which may well make us pause. While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defence on the ground of laches or limitation, *United States* v. *Nashville, Chattanooga &c. Railway*, 118 U. S. 120, 125; *United States* v. *Insley*, 130 U. S. 263; yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to

enforce the rights of individuals, and no interest of the government is involved, the defence of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties. *United States* v. *Beebe*, 127 U. S. 338. In that case a bill was brought by the United States to set aside certain patents issued to one Roswell Beebe, and the charge was that Beebe by fraudulent practices obtained the patents. But it also appeared that certain individuals claimed to have equitable titles to the land by virtue of prior locations; and that the effect of a decree cancelling the patents would be simply to enable such other parties to perfect their equitable titles. Forty-five years had elapsed since the patents were issued, and this court declining to enter into any inquiry as to whether the patents were fraudulently obtained, ruled that the defence of laches was complete, because the government was only a nominal and not the real party in interest.

The history of the present litigation shows that the long contest has been between the navigation company and its grantees on the one side and settlers claiming the right to preemption or homestead, or parties claiming under the railroad grants, on the other. The bill alleges:

"And complainant further alleges and charges that, at the time of the said settlement of 1858, and at all other times theretofore, there existed in the constitution of the State of Iowa, from the time of the admission of said State into the Union in 1846, a provision in the words following, to wit, 'The general assembly shall not locate any of the public lands which have been or may be granted by Congress to this State, and the location of which may be given to the general assembly, upon lands actually settled, without the consent of the occupant. The extent of the claim of any occupant so exempted shall not exceed three hundred and twenty acres.' That at the time of the pretended settlement, so made between the State of Iowa and the said navigation company, and at all times when the State has attempted to dispose of lands covered by the grant of 1846 and the said act of 1862, which are in controversy in this suit, said lands were occupied by

persons who had settled upon them in tracts of not more than 320 acres to each person, in the belief that they were open to location, settlement, preëmption and purchase under the land laws of the United States, and at said time they were occupying said lands in tracts not larger than 320 acres to each, and the said State of Iowa was thereby and therefore prohibited under said constitutional provision from disposing or attempting to dispose of any of the lands in controversy, since none of said persons so occupying said lands consented to any sale or disposition of them whatever."

And in the brief of the Attorney General it is stated that "the contest here is not between *bona fide* settlers as against each other, but this litigation is in the interests of *bona fide* settlers against speculators who have appropriated these lands in violation of law and of the principles of common honesty."

The district judge, deciding this case in the court below, said: "Any purpose to call in question the title of parties in actual possession, holding under the State or the navigation company, is expressly disclaimed in the bill, it being averred that the benefit of a decree in favor of complainant is sought only as to such lands as are now actually occupied by settlers who do not hold title under the State or the navigation company, the same amounting to 109,057 acres." And, after deciding the legal question in favor of the navigation company, he goes on to discuss and suggest what in equity and justice the government should do for the benefit of these settlers. We should be closing our eyes to manifest facts if we did not perceive that the government was only a nominal party, whose aid was sought to destroy the title of the navigation company and its grantees, in order to enable the settlers to perfect their titles, initiated by settlement and occupancy; and in that event, the delay of thirty years is such a delay as a court of equity forbids. At any rate, it makes most apt the observation of Mr. Justice Miller, speaking for the court in the case of *United States* v. *Throckmorton*, 98 U. S. 61, 64, in which case a bill had been filed to set aside a decree rendered more than twenty years before: "It is true that the United States is not bound by the statute of limitations, as an indi-

vidual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity. But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest."

Even if this be regarded as a bill brought by the United States simply to protect its own interests, and recover its own property, still it is well settled that where relief can be granted only by setting aside a grant, a patent or other evidence of title, issued by the government, in the orderly administration of the affairs of the Land Department, the evidence in support must be clear, strong and satisfactory. Muniments of title issued by the government are not to be lightly destroyed. *Kansas City, Lawrence &c. Railroad* v. *Attorney General*, 118 U. S. 682; *Maxwell Land Grant Case*, 121 U. S. 325, 381; *Colorado Coal Company* v. *United States*, 123 U. S. 307. In the second of these cases Mr. Justice Miller, speaking for the court, said: "It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

Returning now to the special contention on the part of the government: It is scarcely necessary to determine whether the trust was one following the lands, or merely in the proceeds of the sales of the lands, and whose faithful performance is a question only between the United States and the State, as was finally determined to be the state of the trust created by the "swamp land" grant. *Mills County* v. *Railroad Companies*,

107 U. S. 557. We pass rather to inquire in what manner the State performed the duties or trust imposed by the acceptance of this grant, in so far as such performance affects the title to the lands in controversy. The general purpose of the grant was to aid the Territory or State in improving the navigation of the Des Moines River. The second section of the act prescribed the conditions under which the Territory or State might sell the lands, as follows:

"SEC. 2. And be it further enacted, That the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by the State to be formed out of the same, except as said improvements shall progress; that is, the said Territory or State may sell so much of said lands as shall produce the sum of thirty thousand dollars, and then the sales shall cease, until the governor of said Territory or State shall certify the fact to the President of the United States that one-half of said sum has been expended upon said improvement, when the said Territory or State may sell and convey a quantity of the residue of said lands, sufficient to replace the amount expended, and thus the sales shall progress as the proceeds thereof shall be expended, and the fact of such expenditure shall be certified as aforesaid."

The third section declared that the price should not be less than the minimum price of other public lands. So that all that the act provided for was, that the State should appropriate the lands to the improvement of the river; that it should make no sales at less than $1.25 per acre; and that its sales should not anticipate its expenditures by more than $30,000. Now, it is not pretended that the State appropriated the lands to any other purpose, or that the price at which it sold was less than $1.25 per acre. The contract between it and the navigation company provided for conveyances only as the work progressed, and money was expended by the company; and the settlement proposed by the legislature and accepted by the company, and the certificate made by the governor to the President, showed that the navigation company had expended money enough to justify the conveyance of all the lands which were in fact conveyed. On the face of the

transaction, therefore, the duties imposed by the trust were exactly and properly performed, and the title of the navigation company passed to it in strict compliance with the very letter of the statute. But it is earnestly contended that the navigation company was not a *bona fide* purchaser; that while it claimed to have expended $330,000 on the improvement, in truth it had not expended half that amount; that by means of its false representations, and by threats of bringing suit against the State and obtaining damages against it, it induced the legislature to pass the resolution of 1858, offering terms of settlement; that the work of improving the river was unfinished, not more than one-tenth of the work necessary therefor having been done; and that the State has wholly abandoned the undertaking.

With respect to the last two allegations it is not perceived how, if true, they can affect the title of the navigation company to lands deeded by the State to it in payment of work done. Surely the title to lands which the State conveyed at the inception of the undertaking, either for cash or for work done thereon, cannot fail because the State failed to complete the improvement. No land could have been sold if the purchaser's title had depended upon such a condition.

If we examine the testimony, there is nothing in it worthy of mention tending to impeach the *bona fides* of the transaction between the State and the navigation company. Only one witness was offered by the plaintiff to prove the amount of work done by the navigation company, and the influences by which the action of the legislature was induced, and his testimony carries on its face abundant evidences of its own unworthiness. In the face of the deliberate proceedings of the legislature and the executive officers of the State, in respect to a matter of public interest, open to inspection and of common knowledge, something more than the extravagant and improbable statements of one witness, made thirty years after the event, is necessary to overthrow the settlement. Indeed, counsel for the government make slight reference to this testimony; but rest their case upon the allegations of the bill, which as against the principal defendant, the navigation company,

were admitted by demurrer. It is urged that there is an express averment that the navigation company and its grantees are not and never were *bona fide* purchasers of the lands, or any part thereof. But such a general averment, though repeated once or twice, is to be taken as qualified and limited by the specific facts set forth to show wherein the transaction between the State and the navigation company was fraudulent. Where a bill sets out a series of facts constituting a transaction between two parties, a demurrer admits the truth of those facts and all reasonable inferences to be drawn therefrom, but not the conclusion which the pleader has seen fit to aver. And the fact which stands out conspicuously, is the resolution proposing settlement which passed the legislature of the State of Iowa in March, 1858. That act is beyond challenge. The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge, and in good faith. It is true the bill alleges that its passage was induced by the navigation company, by false representations and threats of suits; but such an allegation amounts to nothing. In Cooley's Constitutional Limitations, (5th ed. 222,) the author, citing several cases, observes: "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And, although it has sometimes been urged at the bar that the courts ought to inquire into the

motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon." See also *Fletcher* v. *Peck*, 6 Cranch, 87; *Ex parte McCardle*, 7 Wall. 506; *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535; *Powell* v. *Pennsylvania*, 127 U. S. 678. And in this case the circumstances surrounding the transaction preclude the idea of misconduct or ignorance on the part of the legislature. The threat of suit, when the State could not be sued except at its own will, could not have been very persuasive. The work done by the navigation company was open to inspection. It was done along the line of the principal river in the State. It was in fact made a matter of examination and report; and, while the amount expended by the navigation company might not have been known to the exact dollar, yet, in a general way, the cost of what had been done could easily have been ascertained, and must have been known. But if no lack of good faith can be imputed to the State, the party making the offer of settlement, does it not follow necessarily that none can be imputed to the navigation company, the party accepting the offer; for how can fraud be imputed to one who simply accepts terms of settlement voluntarily offered by another? And if this settlement was made in good faith and without fraud, is it not clear that the navigation company, taking the lands which the State offered in payment for the work which it had done, took those lands as a *bona fide* purchaser, and, therefore, comes within the letter and spirit of the resolution of 1861? And here the significance of this resolution is evident. It was passed by Congress after the settlement, proposed by the Iowa legislature in 1858, had been accepted by the navigation company, and deeds had passed in accordance therewith. Its passage imports full knowledge of antecedent facts upon which it is based. In *Powell* v. *Pennsylvania*, 127 U. S. 678, 686, referring to action had by the legislature of the State, this court said: "The legislature of Pennsylvania, upon the fullest investigation as we must conclusively presume, and upon reasonable grounds,

as must be assumed from the record," etc. So, Congress, by this resolution of 1861, knowing that this settlement had been offered by the State of Iowa and accepted by the navigation company, knowing that such act on the part of the legislature conclusively implied full knowledge and good faith, and that an acceptance of such offered settlement by the navigation company also implied good faith, knowing also that the conveyances made under this settlement embraced the major portion of the lands, must be assumed to have approved such settlement and intended to relinquish to the navigation company the title supposed to have been conveyed by the settlement and deeds. Surely it cannot be, that when it knew the import and implication of the legislative act, Congress thought to repudiate it, or invite investigation into a matter which otherwise stood foreclosed of all inquiry. As its own acts were free from imputation, it knew that the acts of the legislature of the State of Iowa were also free from imputation, and that a settlement which that legislature had offered could not be challenged for fraud; and with that knowledge it confirmed the title which the legislature of Iowa had attempted to convey. Surely under those circumstances the courts are not at liberty to probe the matters surrounding this settlement, to see if some party did not misrepresent the facts, and utter falsehoods. So, if we narrow the inquiry to the mere language of the bill, in view of all the facts disclosed therein, and of those legislative and judicial proceedings which are matters of common knowledge and need not be averred, it is evident that the government has not made out its case. And, if we broaden the inquiry to all the facts disclosed by the testimony, it is clear beyond doubt that the navigation company was a *bona fide* purchaser within the meaning of the resolution of 1861, and intended as a beneficiary thereunder.

It follows from these conclusions that there was no error in the ruling of the Circuit Court dismissing the bill, and its decree is

Affirmed.

COUNSELMAN v. HITCHCOCK.

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

No. 1026. Argued December 9, 10, 1891. — Decided January 11, 1892.

Under the 5th Amendment to the Constitution of the United States, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," where a person is under examination before a grand jury, in an investigation into certain alleged violations of the interstate commerce act of February 4, 1887, 24 Stat. 379, and the amendatory act of March 2, 1889, 25 Stat. 855, he is not obliged to answer questions where he states that his answers might tend to criminate him, although § 860 of the Revised Statutes provides that no evidence given by him shall be in any manner used against him, in any court of the United States, in any criminal proceeding.

The case before the grand jury was a criminal case.

The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself; but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime.

The ruling in *People* v. *Kelly*, 24 N. Y. 74, that the words "criminal case" mean only a criminal prosecution against the witness himself, disapproved.

The protection afforded by § 860 is not co-extensive with the constitutional provision.

Adjudged cases on this subject, in courts of the United States, and of the States, reviewed.

As the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed on constitutional provisions for the protection of personal rights, would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation.

It is a reasonable construction of the constitutional provision, that the witness is protected from being compelled to disclose the circumstances of his offence, or the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.

Statement of the Case.

No statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the constitution.

In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.

The witness, having been committed to custody for his refusal to answer, is entitled to be discharged on *habeas corpus*.

On the 21st of November, 1890, while the grand jury in attendance upon the District Court of the United States for the Northern District of Illinois was engaged in investigating and inquiring into certain alleged violations, in that district, of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, c. 104, 24 Stat. 379, and the amendments thereto, approved March 2, 1889, c. 382, 25 Stat. 855, by the officers and agents of the Chicago, Rock Island and Pacific Railway Company, and by the officers and agents of the Chicago, St. Paul and Kansas City Railway Company, and by the officers and agents of the Chicago, Burlington and Quincy Railroad Company, and the officers and agents of various other railroad companies having lines of road in that district, one Charles Counselman appeared before the grand jury, in response to a subpœna served upon him, and after having been duly sworn, testified as follows:

"Q. Your name is Charles Counselman?

"A. Yes, sir.

"Q. You are the sole member of Charles Counselman & Co.?

"A. Yes, sir.

"Q. Engaged in the grain and commission business in the city of Chicago?

"A. Yes, sir.

"Q. Have you been a receiver of grain from the West during the past two years?

"A. Yes, sir.

"Q. Over what roads did you ship grain received by you during the present summer of 1890?

"A. The Rock Island and Burlington, principally.

"Q. From what States was most of the grain shipped?

"A. From Kansas and Nebraska, I think.

"Q. What did your receipts in bushels amount to of corn in the months of May, June and July, 1890?

"A. I have no idea; I could not tell you.

"Q. Five hundred thousand bushels a month?

"A. I cannot tell you.

"Q. How many men have you employed during the last year? What is the usual number of men employed in connection with your business?

"A. I have, I think, six or seven men in my office.

"Q. Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago, from points outside of this State, less than the tariff or open rate?

"A. That I decline to answer, Mr. Milchrist, on the ground that it might tend to criminate me.

"Q. During the past year have you received rates upon the Chicago, Rock Island and Pacific from points outside of the State to the city of Chicago, at less than the tariff rates?

"A. That I decline to answer on the same ground.

"Q. I will ask you the same question with reference to the Burlington.

"A. I answer in the same way.

"Q. The same with reference to Atchison.

"A. I can't recollect that we have done any business with that road.

"Q. I will ask you whether you have during the last year received a rate less than the tariff rate on what is called the 'Diagonal' or Stickney road?

"A. Not to my knowledge.

"Q. Who attends to the freight department of your business?

"A. Myself and Mr. Martin.

"Q. Have you or the firm of Charles Counselman & Co. received any rebate, drawback or commission from the Chicago, Rock Island and Pacific Railroad Company, or the Chicago, Burlington and Quincy Railroad Company, on the transportation of grain from points in the States of Nebraska

and Kansas, to the city of Chicago, in the State of Illinois, during the past year, whereby you secured the transportation of said grain at less than the tariff rates established by said railroad?

"A. I decline to answer on the same ground."

The grand jurors thereupon filed in said court, on the 22d of November, 1890, their report, signed by their foreman and clerk, certifying to the court the several questions which Counselman so refused to answer. Thereupon, the judge of the court granted a rule on Counselman to show cause why he should not answer the said questions, a hearing was had, and the court made an order, on the 25th of November, 1890, which found that the excuses and reasons advanced on behalf of Counselman, as to why he should not answer said questions, were wholly insufficient, and directed that he appear before the grand jury without delay, and there answer the said questions, and also such further questions touching the matter under inquiry by the grand jury, and which should be pertinent to such inquiry, as should be propounded to him by any member of the grand jury, or the district attorney, or any of his assistants.

Counselman was again called before the grand jury, and the same questions, together with other kindred questions, were submitted to him to answer; and he refused to answer them and each of them, for the same reasons. The grand jury, by its report, signed by its foreman and clerk, reported to the court that Counselman still refused to answer the questions which he had previously refused to answer, and upon the same grounds, and that there were also propounded to him by the district attorney and the grand jury additional questions, which, and the answers thereto, were as follows:

"Q. Do you know whether or not the Chicago, Rock Island and Pacific Railroad Company transported for any person, company or corporation in the city of Chicago, during the year last past, grain from any point in the States of Nebraska, Kansas or Iowa, to the city of Chicago, in the State of Illinois, for less than the established rates in force on such road at the time of such transportation?

"A. I decline to answer, on the ground that my answer might tend to criminate me.

"Q. Do you know any person, corporation or company who has obtained their transportation of grain from points or places in the States of Iowa, Nebraska or Kansas, to the city of Chicago, over the Chicago, Rock Island and Pacific Railroad, during the past year, at a rate and price less than the published and legal tariff rate at the time of such shipment?

"A. I decline to answer for the reason that my answer might tend to criminate me.

"Q. Do you know whether the Chicago, Rock Island and Pacific Railroad Company, within the past year, has charged, demanded or received from any person, company or corporation in the city of Chicago any less rate than the open rate, or rate established by said railroad company, on grain or other property transported by the said railroad company from points in the States of Nebraska, Kansas and Iowa, to the city of Chicago, in the State of Illinois? If you have such knowledge, give the name of such shipper of whom said rate was charged, demanded or received, and the amount of such rate and shipments, stating fully all the particulars within your knowledge.

"A. I decline to answer, for the reason that my answer might tend to criminate me.

"Q. Do you know whether the Chicago, Rock Island and Pacific Railroad Company, during the year A.D. 1890, has paid to any shipper, at the City of Chicago, any rebate, refund or commission on property and grain transported by such company from points in the States of Kansas, Nebraska or Iowa, whereby such shipper obtained the transportation of such grain or property from the said points in said States to the city of Chicago, in the State of Illinois, at a less rate than the open or tariff rate, or the rate established by said company? If you have such knowledge, state the amount of such rebates, the drawbacks, or commissions paid, to whom paid, the date of the same, and on what shipments; and state fully all the particulars within your knowledge relating to such transaction or transactions.

"A. I decline to answer, for the reason that my answer might tend to criminate me."

Thereupon, after a hearing, the court on November 25, 1890, adjudged Counselman to be in contempt of court, and made an order fining him $500 and the costs of the proceeding, and directing the marshal to take him into custody and hold him until he should have answered said questions, and all questions of similar import which should be propounded to him by the grand jury, or the district attorney, or any assistant district attorney, in the presence of such jury, and until he should pay such fine and costs. Under that order he was taken into custody by the marshal and held.

On the 26th of November, 1890, he filed in the Circuit Court of the United States for the Northern District of Illinois a petition setting forth the foregoing facts, and praying for a writ of *habeas corpus*. The petition alleged that the grand jury had no jurisdiction or authority to make the investigation in question, or to submit to him the several questions referred to; that his answers to those questions would tend to incriminate him, and, by compelling him to answer them, he would be compelled to be a witness against himself in the criminal proceeding and investigation pending before the grand jury, and in any criminal proceedings which might be brought as a result of such investigation, contrary to the provisions of the Constitution of the United States, and especially the Fourth and Fifth Amendments thereof; that the District Court had no jurisdiction to compel him to answer said questions; that its order to that effect was contrary to the Constitution and laws of the United States, and was void; that the District Court had no jurisdiction so to adjudge him in contempt; that the order imposing a fine upon him and committing him to the custody of the marshal was void; and that he was held in custody without legal right, and contrary to the Constitution and laws of the United States.

On the same day, the Circuit Court issued a writ of *habeas corpus*, returnable forthwith, the return to which by the marshal was that Counselman was held under the order of the District Court, made November 25, 1890. The case was heard

on November 28, and on December 18, the Circuit Court, held by Judge Gresham, delivered an opinion, (44 Fed. Rep. 268,) and made an order adjudging that the District Court was in the exercise of its rightful authority in doing what it had done, overruling the motion of Counselman for his discharge, dismissing his petition, remanding him to the custody of the marshal, discharging the writ of *habeas corpus*, and adjudging against Counselman the costs of the proceedings. He excepted to the order and appealed to this court, and an order was made admitting him to bail pending the appeal.

Mr. John N. Jewett and *Mr. James C. Carter* for appellant.

Mr. Assistant Attorney General Parker and *Mr. G. M. Lambertson* for appellee.

I. If the record is silent as to jurisdictional facts, the court will presume jurisdiction to exist if the grand jury could, under any circumstances, investigate the class of crimes under consideration. In a collateral attack on a judgment of the United States courts, jurisdiction is presumed, although in a proceeding by error the judgment would be overthrown. *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267; *McCormick* v. *Sullivant*, 10 Wheat. 192; *In re Cuddy*, 131 U. S. 280; *Galpin* v. *Page*, 18 Wall. 350; *Kempe* v. *Kennedy*, 5 Cranch, 173; *Ex parte Bigelow*, 113 U. S. 328.

The appellant having alleged a total want of jurisdiction, must prove it. The truth of the allegation cannot be left to surmise or presumption. Appellants have offered no proof. This Court has gone so far as to say that a judgment is valid as against a collateral attack, although it affirmatively appears that the court is without jurisdiction. *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 128 U. S. 552, 557.

II. A witness is not entitled to plead the privilege of silence except "in a criminal case" against himself. It will be observed that the common law rule extends a broader privilege to the witness than the words of the Constitution. By the common law a witness in any case in any court was entitled

to refuse to answer where the answer would have a tendency to criminate him. The common law rule was embodied in 14 and 15 Vict. c. 99, § 3: "Nothing therein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable, to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself."

III. Congress, in submitting the clause of the Fifth Amendment to the Constitution, intended to limit and qualify the common law rule. That part of the Fifth Amendment discussed here, was originally proposed by Mr. Madison in the following language, and stood in this connection: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

The debates upon this clause show that it was objected to because it "contained a general declaration in some degree contrary to laws passed, the member objecting alluding to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment to that purpose, which amendment being adopted, the clause as amended was unanimously agreed to." Annals of Congress, vol. 1, p. 782; *United States* v. *Three Tons of Coal*, 6 Bissell, 387. It is therefore apparent that the clause in the Constitution limits and qualifies the common law rule. It is only "in a criminal case" that a witness can refuse to answer.

An investigation before a grand jury is in no sense "a criminal case." The inquiry is for the purpose of finding whether a crime has been committed, and whether any one shall be accused of an offence. The inquiry is secret; there is no accuser, no parties, plaintiff or defendant. The whole proceeding is *ex parte*, the testimony being confined to one side, and the evidence adduced is not governed by the rules or the manner or method by which testimony is adduced or admitted

on the trial of cases in court. Such an investigation is not a criminal case within the meaning of the Constitution. *United States* v. *Reed*, 2 Blatchford, 435, 464. See also *People* v. *Kelly*, 24 N. Y. 74; *United States* v. *Brown*, 1 Sawyer, 531, 535.

IV. Section 860 of the Revised Statutes takes away from the witness the right to refuse to answer on the ground that such answer might tend to criminate him. That section is as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

This section is taken from the act of February 25, 1868, 15 Stat. 37, c. 13, entitled "An Act for the Protection in certain Cases of Persons making Disclosures as Parties, or testifying as Witnesses." Before its passage voluntary admissions were always admissible in evidence against an accused. The Fifth Amendment sought only to preclude the use of involuntary testimony, while the act in terms excludes both voluntary and involuntary admissions. Thus, instead of invading, it adds to the guaranties of the Constitution, and is a new safeguard for individual rights and liberties.

The remarks in the senate upon it throw light upon its purposes. Mr. Frelinghuysen, in introducing the bill, said: "The object of the bill is to relieve parties in making disclosures and witnesses testifying from subjecting themselves to forfeitures and penalties. The government finds it necessary that some such bill should be passed, as where they seek a disclosure parties plead the fact that it will subject them to forfeitures and penalties, and so the government is debarred from getting such evidence as it is essential for it to have. It only applies to courts of the United States." Mr. Trumbull, in the course of the debates, said: "This bill proposes that he [the witness] shall not be excused from testifying on the

ground that the answer might be used against him in a penal proceeding or a criminal proceeding. Of course the court would compel him to answer if it was a proper case." And Mr. Garrett Davis said: "I understand the bill is based upon the common law principle that no man should be compelled to give evidence against himself in criminal and penal cases. I hold that this is the intention upon which this bill has been introduced. I understand the immunity which it gives to an individual is this, that when he is compelled to make a disclosure in giving evidence, or in written pleadings, where he is compelled by the law and the words of the proceeding in court to give evidence involuntarily, any disclosure he makes shall not be used against him in any criminal or penal prosecution or any suit that is quasi penal. That is a correct principle. It is one that has been embodied in the laws of Kentucky, with which I am familiar, for a great many years, and I think the provision of this bill is a very proper one."

It is claimed that the statute only applies to voluntary admissions given in *civil cases*. There is certainly nothing in the language of the act to sustain this assertion. What warrant is there for limiting those words to civil actions? We might with as much reason argue that the act was only intended to apply to criminal proceedings. If Congress intended to limit the act to disclosures and evidence obtained in civil causes it would have been very careful to say so, and would not have used the words "judicial proceeding."

In several cases in the Federal courts this statute has been construed as holding that the witness is not protected by the Constitution from being compelled to give testimony called for, though it might implicate him in a crime, as he is fully protected by statute against the use of such testimony on his trial. *United States* v. *Brown*, 1 Sawyer, 531; *United States* v. *McCarthy*, 18 Fed. Rep. 87; *United States* v. *Three Tons of Coal*, 6 Bissell, 379; *In re Counselman*, 44 Fed. Rep. 268.

In several of the state courts similar provisions in state constitutions and state legislation have received a similar construction.

The constitution of the State of New York is identical with

the clause under consideration in the Fifth Amendment to the Constitution of the United States. The legislature of that State enacted that "Every person offending against either of the preceding sections of this article shall be a competent witness against any other person so offending, and may be compelled to offer and give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons, but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." The court of appeals held that the witness "was not protected by the Constitution from answering before the grand jury." *People* v. *Kelly*, 24 N. Y. 74. This ruling was affirmed in *People* v. *Sharp*, 107 N. Y. 427.

Like decisions have been made in Arkansas, *State* v. *Quarles*, 13 Arkansas, 307; in Indiana, *Wilkins* v. *Malone*, 14 Indiana, 153, and *Bidgood* v. *The State*, 115 Indiana, 275; in North Carolina, *La Fontaine* v. *Southern University*, 83 Nor. Car. 132; in California, *Ex parte Rowe*, 7 California, 184; and in Georgia, *Higdon* v. *Heard*, 14 Georgia, 255.

Decisions in other state courts are cited in support of the contention that the indemnity statute is not co-extensive with the Fifth Amendment of the Constitution because it does not grant the witness complete immunity. These decisions are — in Massachusetts, *Emery's Case*, 107 Mass. 172; in New Hampshire, *State* v. *Nowell*, 58 N. H. 314; in Virginia, *Cullen* v. *Commonwealth*, 24 Grattan, 624. An examination will show that these decisions are not in point, as they are based upon the phraseology of constitutions different from that of the Fifth Amendment.

In Massachusetts the constitution provided that "No subject shall be held to answer for any crimes or offences until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself." The exonerating statute was as follows: "But the testimony of any witness examined before said committee upon the subject aforesaid, or any statement made, or paper produced by him upon such examination, shall not be used as evidence against such witness in any civil or criminal proceed-

ing in any court of justice: Provided, however, that no official paper or record produced by such witness on such examination shall be held or taken to be included within the privilege of said evidence so as to protect such witness in any civil or criminal proceeding aforesaid."

In New Hampshire the provision in the bill of rights is identical with that of Massachusetts. The statute of indemnity provides that "no clerk, servant or agent of any person accused of a violation of this chapter shall be excused from testifying against his principal for the reason that it may thereby criminate himself; but no testimony so given by him shall in any prosecution be used as evidence, either directly or indirectly, against him; nor shall he be thereafter prosecuted for any offence so disclosed by him."

In *Cullen* v. *Commonwealth* the decision is based on the language of the eighth clause of the constitution of Virginia: "Nor can he be compelled to give evidence against himself."

V. The witness does not claim his privilege on the ground that he may furnish clews and give the names of witnesses that may lead to his conviction on testimony other than his own, but declines on the ground that his *answer* if repeated may criminate him. But the claim that the witness may uncover clews and furnish the names of witnesses that may assist the government to convict him of a crime is not within the privilege. Archbold Crim. Prac. & Plead., 8th Am. ed. 399; 2 Hawk. Pl. Crown, Bk. 2, c. 46, § 38. In a note to Archbold, the rule is said to be as follows: Though some have thought otherwise, the later cases are uniform to the point that a circumstance tending to show guilt may be proved although it was brought to light by a declaration inadmissible *per se*, as having been obtained by improper influence. *Rex* v. *Wilson*, Holt N. P. 597, 598, note; *State* v. *Moore*, 1 Haywood (N. C.) 482.

VI. If the furnishing of clews or evidence by witnesses to be proved by independent witnesses is within the privilege, the act of February 25, 1868, Rev. Stat. § 860, is broad enough to protect the witness and exclude such evidence.

Appellant contends that this section is not broad enough to

support the requirement of giving evidence because it does not extend complete immunity to the accused. The enforcement of such a conclusion would nullify most investigations instituted under legislative authority. Absolute and complete indemnity would be equivalent to a pardon, and thus a legislative encroachment upon executive prerogative, and therefore void. Sen. Rep. No. 253, April 11, 1876, 44 Cong. 1st Sess.

If it shall be established that section 860 is ineffectual from lack of breadth and that a grant of absolute indemnity is void for the reason suggested, not only the law of 1868, and the similar provision in the act to regulate commerce between the States, but the law applicable to testimony given before committees of Congress and many valuable state enactments will be overthrown and injurious consequences will follow.

VII. If the Constitution had provided that any testimony of a witness or party or any information furnished by him should not be used or resorted to by the government to convict him, then its provisions would be as broad as the contention of counsel for appellant.

That the words "shall not be compelled to be a witness against himself" have no such extended significance is patent when we consider the purpose of this amendment, the causes which led to its adoption, and the mischief it sought to remedy.

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

In the opinion of the Circuit Court, it was held that, under the Fifth Amendment to the Constitution, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," a person cannot be compelled to disclose facts before a court or grand jury which might subject him to a criminal prosecution, or his property to forfeiture; that, under the Interstate Commerce Law, it is made a criminal offence, punishable by fine and imprisonment, for any officer or agent of a railroad company to grant any shippers of merchandise from one State to another, and for any such shipper to contract for or receive, a rate less than the tariff or open rate; that shippers, as well as the officers, agents

and employés of corporations engaged in the carrying business between States, are made subject to the penalties of the statute; but that, as the protection of § 860 of the Revised Statutes was co-extensive with that of the Constitution, Counselman was entitled to no privilege under the Constitution; that if thereafter he were to be prosecuted for the offence, § 860 would not permit his admissions to be proved against him; that his refusal to testify was not a refusal to testify in a proceeding to obtain evidence upon which he might be indicted, but in a proceeding to obtain evidence upon which others might be indicted; and that, although in his testimony he might disclose facts and circumstances which would open up sources of information to the government, whereby it might obtain evidence not otherwise obtainable to secure his conviction, yet, if his testimony could not be repeated in any subsequent proceeding against him or his property, he was protected as fully by § 860 as the Constitution intended he should be.

Section 860 is a reënactment of § 1 of the act of February 25, 1868, c. 13, 15 Stat. 37, which provided as follows: "That no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: *Provided*, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid."

Section 860 provides as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section

shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

By § 10 of the Interstate Commerce Act, of February 4, 1887, c. 104, 24 Stat. 382, as amended by § 2 of the act of March 2, 1889, c. 382, 25 Stat. 857, unlawful discrimination in rates, fares or charges, for the transportation of passengers or property, is made subject not only to a fine of not to exceed $5000 for each offence, but to imprisonment in the penitentiary for not over two years, or to both, in the discretion of the court. By § 12 of the act of 1887, 24 Stat. 383, as amended by § 3 of the act of 1889, 25 Stat. 858, the Interstate Commerce Commission is authorized and required to execute and enforce the provisions of the act, and on the request of the commission, it is made the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper court, and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of the act and for the punishment of all violations thereof.

It is contended by the appellant that the grand jury of the District Court was not in the exercise of its proper and legitimate authority in prosecuting the investigations specifically set out in its two reports to the District Court; that those reports could not be made the foundation of any judicial action by the court; that the Interstate Commerce Commission was specially invested by the statute with the authority to investigate violations of the act and charged with that duty; and that no duty in that respect was imposed upon the grand jury, until specific charges had been made.

But in the view we take of this case, we do not find it necessary to intimate any opinion as to that question in any of its branches, or as to the question whether the reports of the grand jury, in stating that they were engaged in investigating and inquiring into "certains alleged violations" of the acts of 1887 and 1889 by the officers and agents of three specified railway and railroad companies, and the officers and agents of various other railroad companies having lines of road in the

district, (there being no other showing in the record as to what they were investigating and inquiring into,) are or are not consistent with the fact that they were investigating specific charges against particular persons; because we are of opinion that upon another ground the judgment of the court below must be reversed.

It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in *any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

Opinion of the Court.

It is argued for the appellee that the investigation before the grand jury was not a criminal case, but was solely for the purpose of finding out whether a crime had been committed, or whether any one should be accused of an offence, there being no accuser and no parties plaintiff or defendant, and that a case could arise only when an indictment should be returned. In support of this view reference is made to article 6 of the amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, to be confronted with the witnesses against him, to have compulsory process for witnesses, and the assistance of counsel for his defence.

But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments, is much narrower than a "criminal case," under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.

We cannot yield our assent to the view taken on this subject by the Court of Appeals of New York, in *People* v. *Kelly*, 24 N. Y. 74, 84. The provision of the constitution of New York of 1846, (Art. 1, sec. 6,) was that no person shall "be compelled, in any criminal case, to be a witness against himself." The court, speaking by Judge Denio, said: "The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offence. But it must be a prosecution against *him;* for what is forbidden is that he should be compelled to be a witness against himself." This ruling, which has been followed in some other cases, seems to us, as applied to the provision in the Fifth Amendment to the Constitution of the United States, to take away entirely its true meaning and its value.

It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or

subject him to fines, penalties or forfeitures. *Rex* v. *Slaney*, 5 Carr. & P. 213; *Cates* v. *Hardacre*, 3 Taunt. 424; *Maloney* v. *Bartley*, 3 Camp. 210; 1 Starkie on Evidence, 71, 191; *Case of Sir John Freind*, 13 Howell's State Trials, 16; *Case of Earl of Macclesfield*, 16 Howell's State Trials, 767; 1 Greenl. Ev. § 451; 1 Burr's Trial, 244; Wharton's Crim. Ev. 9th ed. § 463; *Southard* v. *Rexford*, 6 Cowen, 254; *People* v. *Mather*, 4 Wend. 229; *Lister* v. *Boker*, 6 Blackford, 439.

The relations of Counselman to the subject of inquiry before the grand jury, as shown by the questions put to him, in connection with the provisions of the Interstate Commerce Act, entitled him to invoke the protection of the Constitution. *The State* v. *Nowell*, 58 N. H. 314; *Emery's Case*, 107 Mass. 172.

It remains to consider whether § 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows, that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

The constitutional provision distinctly declares that a person

shall not "be compelled in any criminal case to be a witness against himself;" and the protection of § 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso.

In some States, where there is a like constitutional provision, it has been attempted by legislation to remove the constitutional provision, by declaring that there shall be no future criminal prosecution against the witness, thus making it impossible for the criminal charge against him ever to come under the cognizance of any court, or at least enabling him to plead the statute in absolute bar of such prosecution.

A review of the subject in adjudged cases will be useful.

In *Commonwealth* v. *Gibbs*, 3 Yeates, 429, and 4 Dall. 253, in 1802, the declaration of rights in the constitution of Pennsylvania of 1776, declared, that no man can "be compelled to give evidence against himself," and the same language was found in the constitution of 1790. Under this, the Supreme Court of Pennsylvania held that the maxim that no one is bound to accuse himself extended to cases where the answer might involve him in shame or reproach; and it held to the same effect in *Lessee of Galbreath* v. *Eichelberger*, 3 Yeates, 515, in 1803.

In June, 1807, Chief Justice Marshall, in the Circuit Court of the United States for the District of Virginia, in *Burr's Trial*, 1 Burr's Trial, 244, on the question whether the witness was privileged not to accuse himself, said: "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate himself, the

court can demand no other testimony of the fact. . . . According to their statement," (the counsel for the United States,) "a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

In 1853, in *State* v. *Quarles*, 13 Arkansas, 307, the declaration of rights in the constitution of Arkansas of 1836, (Art. 2, sec. 11,) had declared that in prosecutions by indictment or presentment, the accused "shall not be compelled to give evidence against himself." Quarles was indicted under a gaming law, for betting money on a game of chance. A *nolle prosequi* having been entered as to one Neal, against whom a like prosecution was pending, Neal was sworn as a witness for the State, and informed of the *nolle prosequi*, and that no indictment for a similar offence would be preferred against him, and was asked whether he had seen Quarles bet money at cards within a specified time. Neal refused to answer the

question, alleging that he feared that he would criminate himself thereby. The trial court refused to compel him to answer, and, the jury having found for the defendant, the State appealed. There was a statute of Arkansas which read as follows: "In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence."

The Supreme Court of Arkansas held, that, although witnesses were not expressed in the terms of the provisions of the bill of rights, yet they were substantially embraced to the full extent of a complete guarantee against self-accusation; and that the privilege of the bill of rights was that a witness should not be compelled to produce the evidence to prove himself guilty of the crime about which he might be called to testify. But it was further held that, by the statute, the legislature had so changed the rule, by directing that the testimony required to be given should never be used against a witness for the purpose of procuring his conviction for the crime or misdemeanor to which it related, that it was no longer necessary for him to claim his privilege in regard to such testimony, in order to prevent its afterwards being used against him; and that the only question was, whether the statutory regulation afforded sufficient protection to the witness, responsive to the new rule and to the constitutional guarantee against compulsory self-accusation. It was held, that the statute sufficiently guarded witnesses from self-accusation, within the meaning of the constitution, to make it lawful for the courts to compel them to testify as to all matters embraced by the provisions of the statute on that subject.

In *Higdon* v. *Heard*, 14 Georgia, 255, in 1853, it was said that the constitution of Georgia declared that "no person shall be compelled in any criminal case to be a witness against himself." In that case the plaintiff had filed a bill in equity praying a discovery as to property which he alleged the defendants had won from him in a game of cards. The bill

was demurred to on the ground that the law of the State compelling a discovery of gaming transactions was unconstitutional, because such transactions were criminal, and the statute did not grant an absolute and unconditional release from punishment, and because the defendants could not make the discovery sought without criminating themselves and incurring penalties. The demurrer was overruled by the Supreme Court of Georgia, on the ground that, although all persons were protected by the constitution from furnishing evidence against themselves which might tend to subject them to a criminal prosecution, they received their protection by virtue of an act of Georgia of 1764, because, under that act, their answers could not be read in evidence against them in any criminal case whatever, being excluded by the constitution.

In *Ex parte Rowe*, 7 California, 184, in 1857, the constitution of California of 1849 provided, (Art. 1, sec. 8,) that no person shall "be compelled, in any criminal case, to be a witness against himself." Rowe had been committed for refusing to answer, under an order of the court, certain questions propounded to him by the grand jury in an examination concerning the disposition of certain moneys taken from the state treasury, on the ground that his answer would disgrace him and would tend to subject him to a prosecution for felony. The Supreme Court of California, on *habeas corpus*, considered the construction and constitutionality of the 5th section of an act passed April 16, 1855, which provided that "the testimony given by such witness shall in no instance be used against himself in any criminal prosecution." The court held that the provision of the constitution was intended to protect the witness from being compelled to testify against himself in regard to a criminal offence; that he could not be a witness against himself unless his testimony could be used against him in his own case; and that the statute gave the witness that protection which was contemplated by the constitution, and therefore he was bound to answer.

In 1860, in *Wilkins* v. *Malone*, 14 Indiana, 153, the constitution of Indiana of 1851, in its bill of rights, (Art. 1, sec. 14,) had declared that "no person in any criminal prosecution shall be

compelled to testify against himself." In a suit brought by Malone to recover on a promissory note, the defence pleaded usury and offered to examine Malone as a witness to prove the usury. The plaintiff objected, on the ground that such examination would criminate himself, and the objection was sustained. On appeal to the Supreme Court of Indiana by the defendants, it was held that the constitutional provision protected a person from a compulsory disclosure, in a civil suit, of facts tending to criminate him, whenever his answer could be given in evidence against him in a subsequent criminal prosecution. The court referred to *State* v. *Quarles*, *supra*, and *Higdon* v. *Heard*, *supra*, and to the statute of Indiana, (1 Rev. Stats. p. 345, sec. 8,) which provided that a person charged with taking illegal interest might be required to answer, but that his answer should not be used against him in any criminal prosecution for usury. The court held that by this statute the constitutional privilege of the party was fully secured to him, although he might disclose circumstances which might lead to a criminal prosecution.

In 1861, in the Court of Appeals of New York, *People* v. *Kelly*, 24 N. Y. 74, the constitution of New York of 1846 declared, that no person shall "be compelled, in any criminal case, to be a witness against himself." In that case, one Hackley, as a witness before the grand jury on a complaint against certain aldermen for feloniously receiving a gift of money under an agreement that their votes should be influenced thereby in a matter then pending before them in their official capacity, in answer to a question put to him as to what he had done with certain money which he had received, said that any answer which he could give to the question would disgrace him, and would have a tendency to accuse him of a crime, and he demurred to the question. Having been ordered by the Court of General Sessions of the Peace to answer it, he still refused, and was adjudged guilty of contempt and put in prison. On a writ of *habeas corpus*, he was remanded into custody by the Supreme Court, and he appealed to the Court of Appeals.

By chapter 539 of the Laws of New York of 1853, it was

enacted, by § 2, that § 14 should be added to article 2, title 4, chapter 1, part 4, of the Revised Statutes. The act provided that the giving of money to any member of the common council of a city, with intent to influence his action upon any matter which might be brought before him in his official capacity, should be an offence punishable by fine or imprisonment in a state prison or both; and § 14 provided that every person offending against the statute should "be a competent witness against any other person so offending," and might be compelled to give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." A similar provision was contained in chapter 446 of the Laws of 1857, in § 52.

The Court of Appeals considered the question whether those provisions were consistent with the true sense of the declaration of the constitution, and said, speaking by Judge Denio (p. 82): "The mandate that an accused person should not be compelled to give evidence against himself, would fail to secure the whole object intended, if a prosecutor might call an accomplice or confederate in a criminal offence, and afterwards use the evidence he might give to procure a conviction, on the trial of an indictment against him. If obliged to testify, on the trial of the coöffender, to matters which would show his own complicity, it might be said, upon a very liberal construction of the language, that he was compelled to give evidence against himself — that is, to give evidence which might be used in a criminal case against himself. . . . It is, of course, competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify, on the trial of another person, to facts which would prove himself guilty of a crime, without indemnifying him against the consequences, because I think, as has been mentioned, that by a legal construction the constitution would be found to forbid it." But the court went on to say: "If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own

guilt apparent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission, on his own trial, would tend to prove him guilty of a criminal offence. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offence. But it must be a prosecution against *him;* for what is forbidden is that he should be compelled to be a witness against himself. Now if he be prosecuted criminally, touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against himself, by force of any compulsion used towards him to procure, in the other case, testimony which cannot possibly be used in the criminal case against himself." The court held therefore, that Hackley was not protected by the constitution of New York from answering before the grand jury.

In 1871, in *Emery's Case*, 107 Mass. 172, article 12 of the declaration of rights in the constitution of Massachusetts of 1780 had declared, that no subject shall be "compelled to accuse or furnish evidence against himself." A statute of Massachusetts, of March 8, 1871, chapter 91, entitled "An act for the better discovery of testimony and the protection of witnesses before the joint special committee of the state police," provided as follows: "No person who is called as a witness before the joint special committee on the state police, shall be excused from answering any question or from the production of any paper relating to any corrupt practice or improper

conduct of the state police, forming the subject of inquiry by such committee, on the ground that the answer to such question or the production of such paper may criminate or tend to criminate himself, or to disgrace him, or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee upon the subject aforesaid or any statement made or paper produced by him upon such an examination, shall not be used as evidence against such witness in any civil or criminal proceeding in any court of justice; *provided, however*, that no official paper or record, produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so to protect such witness in any civil or criminal proceeding as aforesaid, and that nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid."

Emery was summoned as a witness before the joint special committee of the senate and house of representatives of the general court "to inquire if the state police is guilty of bribery and corruption." Interrogatories were propounded to him by the committee which he declined to answer. On a report of the facts to the senate, it ordered his arrest for contempt. He was brought before the senate and asked the following question: "Are you ready and willing to answer before the joint special committee, appointed by this senate and the house of representatives of Massachusetts, to inquire if the state police is guilty of bribery and corruption, the following questions, namely: *First.* Whether, since the appointment of the state constabulary force, you have ever been prosecuted for the sale or keeping for sale of intoxicating liquors. *Second.* Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police? If so, state fully what sums, and to whom you have thus paid money, and also what you know of such corrupt practice and improper conduct." He answered in writing as follows: "Intending no disrespect to the honorable senate, I answer, under advice of counsel, that I am ready and willing to answer the first question; but I decline to answer the second question,

upon the grounds, *First*, that the answer thereto will accuse me of an indictable offence; *Second*, that the answer thereto will furnish evidence against me by which I can be convicted of such an offence." The senate thereupon committed him to the custody of the sergeant-at-arms, to be confined in jail for twenty-five days, or until the further order of the senate, unless he should sooner answer the questions. He was imprisoned accordingly, and the case was brought before Judge Wells of the Supreme Judicial Court on a writ of *habeas corpus*, and was fully argued. It was held under advisement and for conference with the other judges; and in the opinion subsequently delivered by Judge Wells it is stated, that that opinion had the approval and unanimous concurrence of all the members of the court. It is said in the opinion, in regard to the second question put to the witness: "It is apparent that an affirmative answer, to the question put to him, might tend to show that he had been guilty of an offence, either against the laws relating to the keeping and sale of intoxicating liquors, or under the statute for punishing one who shall corruptly attempt to influence an executive officer by the gift or offer of a bribe. Gen. Sts. c. 163, § 7."

In regard to the clause above quoted from the bill of rights, the opinion says: "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offence by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation of himself, within the

meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption; instead of compelling him to answer and then excluding his admissions so obtained, when afterwards offered in evidence against him. This branch of the constitutional exemption corresponds with the common law maxim, *nemo tenetur seipsum accusare*, the interpretation and application of which has always been in accordance with what has been just stated. Broom Max. 5th ed. 968; Wingate Max. 486; Rosc. Crim. Ev. 2d Am. ed. 159; Stark. Ev. 8th Am. ed. 41, 204, and notes; 1 Greenl. Ev. § 451, and notes." The opinion then cites the case of *People* v. *Kelly* (*supra*) as holding that the clause in the constitution of New York of 1846 protected a witness from being compelled to answer to matters which might tend to criminate himself, when called to testify against another party; and also, *People* v. *Mather*, 4 Wend. 229, as declaring that the exemption in the constitution of New York extended to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although that fact alone would not indicate any crime. The opinion then proceeds: "The third branch of the provision in the constitution of Massachusetts, 'or furnish evidence against himself,' must be equally extensive in its application; and, in its interpretation, may be presumed to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of

those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself. Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions, as admissions of facts sought to be established therein." The court then proceeds to hold that those constitutional provisions applied to investigations before a legislative body.

Passing then to consider the effect of the statute of 1871, the opinion says: "It follows from the considerations already named, that, so far as this statute requires a witness, who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from all liabilities, for protection against which the privilege is secured to him by the constitution. The statute does undertake to secure him against certain of those liabilities, to wit, the use of any disclosures he may make, as admissions or direct evidence against him, in any civil or criminal proceeding." The opinion then refers to the case of *People* v. *Kelly*, *supra*, and says that that decision was made upon the ground that the terms of the provision of the constitution of New York protected the witness only from being compelled "to be a witness against himself," and did not protect him from the indirect and incidental consequences of a disclosure which he might be called upon to make.

The opinion then says: "The terms of the provision in the constitution of Massachusetts require a much broader interpretation, as has already been indicated; and no one can be required to forego an appeal to its protection, unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or

causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that it cannot and was not intended to so operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein. The result is, that, in appealing to his privilege, as an exemption from the obligation to answer the inquiries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer upon that ground was not, and could not be considered as, disorderly conduct, or a contempt of the authority of the body before which he was called to answer. There being no legal ground to authorize the commitment upon which he is held, he must be discharged therefrom."

In *Cullen* v. *Commonwealth*, 24 Gratt. 624, in 1873, Cullen, when asked before a grand jury to state what he knew of a certain duel, declined to answer, because the answer would tend to criminate him. The Hustings Court ordered him to answer, and, on his still refusing to do so, fined him and committed him to jail. The case was brought before the Court of Appeals of Virginia. The bill of rights of the constitution of Virginia of 1870, in § 10 of article 1, provided that no man can "be compelled to give evidence against himself." That provision had existed in the bill of rights of Virginia as far back as June 12, 1776, and of it the Court of Appeals said that it was the purpose of its framers "to declare, as part of the organic law, that no man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any other proceeding;" and that the provision could not be confined "only to cases in which a man is called on to give evidence himself in a prosecution pending against him."

The opinion then cited *People* v. *Kelly*, and *Emery's Case* hereinbefore referred to, as sustaining its view, and proceeded

to consider the effect of an act of Virginia, passed October 31, 1870, in regard to duelling, which provided as follows: "Every person who may have been the bearer of such challenge or acceptance, or otherwise engaged or concerned in any duel, may be required, in any prosecution against any person but himself, for having fought, or aided or abetted in such duel, to testify as a witness in such prosecution; but any statement made by such person, as such witness, shall not be used against him in any prosecution against himself." The court held that the effect of the statute was to invade the constitutional right of the citizen, and to deprive the witness of his constitutional right to refuse to give evidence tending to criminate himself, without indemnity, and that the act was, therefore, to that extent, unconstitutional and void. It held further that, before the constitutional privilege could be taken away by the legislature, there must be absolute indemnity provided; that nothing short of complete amnesty to the witness, an absolute wiping out of the offence as to him, so that he could no longer be prosecuted for it, would furnish that indemnity; that the statute in question did not furnish it, but only provided that the statement made by the witness should not be used against him in a prosecution against himself; that, without using one word of that statement, the attorney for the commonwealth might in many cases, and in a case like that in hand, inevitably would, be led by the testimony of the witness to means and sources of information which might result in criminating the witness himself; and that this would be to deprive the witness of his privilege, without indemnity. The judgment of the Hustings Court was reversed.

In *State* v. *Nowell*, 58 N. H. 314, in 1878, article 15 of the bill of rights in the constitution of New Hampshire of 1792, declared, that no subject shall "be compelled to accuse or furnish evidence against himself." Nowell refused to testify before a grand jury as to whether, as a clerk for one Goodwin, he had sold spirituous liquors, and whether Goodwin sold them or kept them for sale. He declined to answer on the ground that his evidence might tend to criminate himself. A statute of the State (Gen. Stat. c. 99, § 20) provided as follows: "No

clerk, servant or agent of any person accused of a violation of this chapter, shall be excused from testifying against his principal, for the reason that he may thereby criminate himself; but no testimony so given by him shall, in any prosecution, be used as evidence, either directly or indirectly, against him, nor shall he be thereafter prosecuted for any offence so disclosed by him." A motion having been made, before the Supreme Court of New Hampshire, for an attachment against him for contempt for refusing to testify, that court, after quoting the provision in the bill of rights, said: "The common law maxim (thus affirmed by the bill of rights) that no one shall be compelled to testify to his own criminality, has been understood to mean, not only that the subject shall not be compelled to disclose his guilt upon a trial of a criminal proceeding against himself, but also that he shall not be required to disclose, on the trial of issues between others, facts that can be used against him as admissions tending to prove his guilt of any crime or offence of which he may then or afterwards be charged, or the sources from which, or the means by which, evidence of its commission or of his connection with it may be obtained. *Emery's Case*, 107 Mass. 172, 181."

In regard to the statute, the court said that the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; that he was to be secured against all liability to future prosecution as effectually as if he were wholly innocent; that this would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which he might be required to testify; that the statute of New Hampshire went further than the statute of Massachusetts considered in *Emery's Case*, because it provided that the witness should not be thereafter prosecuted for any offence so disclosed by him; that the witness had, under the statute, all the protection which the common law right, adopted by the bill of rights in its common law sense, gave him; that, if he should be prosecuted, a plea that he had disclosed the same offence on a lawful accusation against his

principal would be a perfect answer in bar or abatement of the prosecution against himself; and that, unless he should testify, the motion for the attachment must be granted.

In 1880, in *La Fountaine* v. *Southern Underwriters*, 83 N. Car. 132, the constitution of North Carolina of 1876 had provided, in the declaration of rights, (Article 1, sec. 11,) that, "in all criminal prosecutions, every man has the right . . . to . . . not be compelled to give evidence against himself." One Blacknall, as a witness in a hearing before a referee in a civil suit, had refused to answer a question as to his possession of certain books, on the ground that indictments were pending against him, connected with the management of the affairs of the association owning the books, and that his answer to the question might tend to criminate him. The case was heard before an inferior state court, which ruled that he must answer the question. On appeal to the Supreme Court of North Carolina, it held that the fair interpretation of the constitutional provision was to secure a person, who was, or might be, accused of crime, from making any compulsory revelations which might be used in evidence against him on his trial for the offence; that, as the witness was protected from the consequences of the discovery, and the facts elicited could be given in evidence in no criminal prosecution to which they were pertinent, the plaintiff in the case was entitled to all the information which the witness possessed, whether it did or did not implicate the witness in a fraudulent transaction; that the inquiry could not be evaded upon any ground of the self-criminating answer which might follow, although the answers of the witness could not be used against him in any criminal proceeding whatever; and that his constitutional right not to "be compelled to give evidence against himself" would be maintained intact and full.

In *Temple* v. *Commonwealth*, 75 Virginia, 892, in 1881, the same § 10 of article 1 of the bill of rights of the constitution of Virginia of 1870, that was considered in *Cullen* v. *Commonwealth*, *supra*, was in force. An indictment had been found by a grand jury, on the evidence of Temple, against one Berry, for setting up a lottery. On the trial of Berry before the

petit jury, Temple refused to testify, on the ground that by so doing he would criminate himself; and for such refusal he was fined and imprisoned for contempt by the Hustings Court. The case was taken to the Court of Appeals by writ of error. That court cited with approval *Cullen's Case*, *supra*, and held that it was applicable. It appeared that in the Hustings Court, the attorney for the Commonwealth was asked whether any prosecution was pending against Temple in that court, or whether it was the intention of such attorney to institute a proceeding against Temple for being concerned in a lottery, to both of which questions he replied in the negative.

The Court of Appeals held that Temple had a right to stand upon his constitutional privilege, and not to trust to the chances of a further prosecution; that the court could offer him no indemnity that he would not be further prosecuted, nor could the attorney for the Commonwealth; that Temple had a right to remain silent whenever any question was asked him, the answer to which might tend to criminate himself; that the great weight of authority in the United States was in favor of the rule that, when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer, unless it was perfectly clear, from a careful consideration of all the circumstances in the case, that the witness was mistaken, and that the answer could not possibly have such a tendency; and that the Hustings Court had no right to compel Temple to answer the question propounded to him, and to fine and imprison him for his refusal to answer it. The court further held, that the statute of the State which provided that no witness giving evidence in a prosecution for unlawful gaming should ever be proceeded against for any offence of unlawful gaming committed by him at the time and place indicated in such prosecution, did not apply to the case then in hand, because setting up a lottery was not within the statute against unlawful gaming. The judgment of the Hustings Court was reversed.

In *Boyd* v. *United States*, 116 U. S. 616, in 1886, this court, in considering the Fifth Amendment to the Constitution of

the United States, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the Fourth Amendment, which declares that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, said, speaking by Mr. Justice Bradley (p. 631): "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." It was further said (p. 633): "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him

to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

In that case, the fifth section of the act of June 22, 1874, 18 Stat. 187, which authorized the court in revenue cases to require the defendant or claimant to produce his private papers in court, or else the allegations of the government's attorney would be taken as confessed, was held to be unconstitutional and void, as applied to a suit for a penalty or to establish a forfeiture of the goods of the party, because it was repugnant to the Fourth and Fifth Amendments to the Constitution; and it was held that a proceeding to forfeit the goods was a criminal case within the meaning of the Fifth Amendment. Mr. Justice Miller, in the concurring opinion of himself and Chief Justice Waite in the case, agreed that it was a criminal one, within the meaning of the Fifth Amendment, and that the effect of the act of Congress was to compel the party on whom the order of the court was served, to be a witness against himself.

In *People* v. *Sharp*, 107 N. Y. 427, in 1887, the Court of Appeals of New York had under consideration the provision

of article 1, § 6, of the constitution of New York of 1846, that no person shall "be compelled, in any criminal case, to be a witness against himself," and the provision of § 79 of the Penal Code of New York, title 8, chapter 1, in regard to bribery and corruption, which was in these words: "A person offending against any provision of any foregoing section of this code relating to bribery, is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or investigation, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted, shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution." Sharp and others were indicted for bribing a member of the common council, and Sharp was tried separately. It was proved that he had been examined as a witness before a committee of the state senate, and there gave testimony which the prosecution claimed was evidence of his complicity in the crime; and that testimony was offered in evidence by the prosecution. The testimony had been given under the compulsion of a subpœna, and was admitted at the trial, against the objection that the disclosures before the senate committee were privileged. The Court of Appeals held that § 79 of the Penal Code made the constitutional privilege inapplicable, because it indemnified or protected the party against the consequences of his previous testimony. The court cited with approval the case of *People* v. *Kelly*, *supra*.

In *Bedgood* v. *The State*, 115 Indiana, 275, in 1888, the Supreme Court of Indiana had under consideration the provision of article 1, § 14 of the bill of rights of the constitution of Indiana of 1851, which provides that "no person in any criminal prosecution shall be compelled to testify against himself," and the provision of § 1800 of the Revised Statutes of Indiana of 1881, to the effect that testimony given by a witness should not be used in any prosecution against him. On

a trial before a petit jury in a criminal case against others, a woman had refused to answer a question, on the ground that the answer might criminate her. The Supreme Court held that, as the statute prohibited her testimony from being used against her, it completely protected her, and the judgment was reversed because the trial court had erroneously refused to require her to answer the question.

This review of the cases above referred to shows that in the constitutions of Georgia, California and New York the provision is identically or substantially that of the Constitution of the United States, namely, that no person shall "be compelled in any criminal case to be a witness against himself;" while in the constitutions of Pennsylvania, Arkansas, Indiana, Massachusetts, Virginia, New Hampshire and North Carolina it is different in language, and to the effect that "no man can be compelled to give evidence against himself;" or that, in prosecutions, the accused "shall not be compelled to give evidence against himself;" or that "no person in any criminal prosecution shall be compelled to testify against himself;" or that no person shall be "compelled to accuse or furnish evidence against himself;" or that no man can "be compelled to give evidence against himself;" or that, in all criminal prosecutions, "every man has the right to not be compelled to give evidence against himself."

Under the constitutions of Arkansas, Georgia, California, Indiana, New York, New Hampshire and North Carolina it was held that a given statutory provision made it lawful to compel a witness to testify; while in Massachusetts and Virginia it was held that the statutory provisions were inadequate, in view of the constitutional provision. In New Hampshire, and in New York under the Penal Code, it was held that the statutory provisions were sufficient to supply the place of the constitutional provision, because, by statute, the witness was entirely relieved from prosecution.

But, as the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed

upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be "compelled to accuse or furnish evidence against himself," such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be "compelled in any criminal case to be a witness against himself." Under the rulings above referred to, by Chief Justice Marshall and by this court, and those in Massachusetts, New Hampshire, and Virginia, the judgment of the Circuit Court in the present case cannot be sustained. It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him." *Emery's Case*, 107 Mass. 172, 182.

It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of § 860 of the Revised Statutes that it does not undertake to compel self-criminating evidence from a party or a witness. In several of the state statutes above referred to, the testimony of the party or witness is made compulsory, and in some either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify.

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not

supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's Case*, in Massachusetts, than to that of *People* v. *Kelly*, in New York; and we consider that the ruling of this court in *Boyd* v. *United States*, *supra*, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.

It is contended on the part of the appellee that the reason why the courts in Virginia, Massachusetts and New Hampshire have held that the exonerating statute must be so broad as to give the witness complete amnesty, is that the constitutions of those States give to the witness a broader privilege and exemption than is granted by the Constitution of the United States, in that their language is that the witness shall not be compelled to accuse himself, or furnish evidence against himself, or give evidence against himself; and it is contended that the terms of the Constitution of the United States, and of the constitutions of Georgia, California and New York are more restricted. But we are of opinion that, however this difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language.

From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer. The judgment of the Circuit Court must, therefore, be

Reversed, and the case remanded to that court, with a direction to discharge the appellant from custody, on the writ of habeas corpus.

Syllabus.

McNEE *v.* DONAHUE.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 121. Argued and submitted December 14, 1891. — Decided January 11, 1892.

In ejectment plaintiff claimed title to certain parcels of land by purchase from the State of California under its selection of lands as part of the Agricultural College grant from Congress of July 2, 1862, 12 Stat. 503, c. 130; certification thereof by the United States Land Department thereunder; and subsequent patent from the State to him. Defendant claimed legal title by a prior purchase from the State under prior state selections, [1] by purchase and location of state land warrants issued by the State under the grant of 500,000 acres made to it by section eight of act of September 4, 1841, 5 Stat. 453, c. 16, and [2] by purchase of indemnity land, selected in lieu of school sections sixteen and thirty-six, granted by the act of Congress of March 3, 1853, 10 Stat. 244, c. 145, and lost by inclusion within Mexican grants subsequently confirmed; further claiming that both selections were confirmed by the first section of the Act of Congress of July 23, 1866, 14 Stat. 218, c. 219, passed before the selection, certification and patenting under which plaintiff claims. *Held*,

(1) That the first section of the act of July 23, 1866, must be construed in connection with section two of that act, and, as thus construed, it did not confirm the selections under the 500,000 acre grant, those selections not having been made of lands previously surveyed by authority of the United States: but said section, thus construed, did confirm the lands selected in lieu of the school sections taken by the Mexican grants, such selected lands having been previously surveyed by authority of the United States, and notice of such selection having been given to the register of the local land office, and the lands having been sold to a *bona fide* purchaser, in good faith, under the laws of the State;

(2) That confirmation to the State of its title enured to the benefit of its grantee without any further action by the land department or by the State.

A legislative confirmation of a claim to land with defined boundaries, or capable of identification, perfects the title of the claimant to the tract, and a subsequent patent is only documentary evidence of that title.

No title to lands under the Agricultural College grant of 1862, under which plaintiff claims, vested in the State until their selection and listing to the State, which was subsequent to the time at which the title of the United States passed to the defendant.

No trust was created by such grant which prevented land subject to selection thereunder from being taken under prior selections in satisfaction

Statement of the Case.

of other grants. No trust could arise against the State thereunder until its receipt of all or a portion of the proceeds arising from the sale of the property, and no disposition of such proceeds could affect the title acquired by other parties, from the sale of such lands thereunder.

Defendant having, after his general denial of the allegations of the complaint, for a further separate answer and defence, set up his claim of title to demanded premises by cross-complaint, and prayed affirmative relief thereon by cancellation of the State's patent to the plaintiff, or by charging him as trustee of the title and compelling him to convey the premises to the defendant, such a mode of setting up an equitable defence to an action for the possession of land being allowable under the system of civil procedure prevailing in California, the judgment of the Supreme Court of that State, declaring such trust and directing such conveyance, is affirmed.

THE court stated the case as follows:

This is an action for the possession of certain parcels of land in the county of Santa Clara, California, embracing one hundred and six acres and a fraction of an acre, and constituting, according to the United States survey lots one (1) and two (2), of section twenty-six (26), township six (6) south, range one (1) west, Mount Diablo meridian. It was brought in the Superior Court of that county. The plaintiff, in his complaint, alleges ownership of the lands and right of possession on the 16th of June, 1882, and ever afterwards; the wrongful and unlawful entry thereon, on that day, by the defendant, and his exclusion of the plaintiff therefrom, to the latter's damage of five thousand dollars; and that the value of their use and occupation is two thousand dollars a year. He therefore prays judgment for their possession, for the damages sustained, and for the value of their use and occupation until final judgment.

The defendant, in his answer, denies the material allegations of the complaint, and then, as a separate defence, by way of a cross-complaint, sets up various matters upon which he claims to have acquired the equitable title of the premises, and prays that a patent of the State for them to the plaintiff, and upon which he relies for a recovery in this case, may be adjudged null and void, or, that he hold the legal title under it in trust for the defendant, and be decreed to convey the premises to him.

Opinion of the Court.

The plaintiff answered the cross-complaint, and the case was tried by the court without the intervention of a jury. After finding the facts, it held, as a conclusion of law, that the defendant was entitled to a judgment; that the plaintiff take nothing by his action; that the defendant was entitled at the commencement of the action, and was still entitled, to the possession of the premises, and was their equitable owner; and that the plaintiff holds the legal title, under a patent by the State of California, bearing date June 18, 1882, in trust for the defendant, and should execute and deliver a conveyance of the premises to him. Judgment in conformity with this conclusion was accordingly entered. On appeal to the Supreme Court of the State it was affirmed, and the case is brought to this court, on writ of error, by the plaintiff.

Mr. S. F. Leib for plaintiff in error.

Mr. Philip G. Galpin and *Mr. Wilbur G. Zeigler* for defendant in error submitted on their brief.

Mr. Justice Field delivered the opinion of the court.

Under the system of procedure in civil cases which obtains in California an equitable defence as well as a legal defence may be set up to an action for the possession of land. It is required in such case that the grounds of equitable defence be stated separately from the defence at law. The answer, to that extent, is in the nature of a cross-complaint, and must contain, substantially, the allegations of a bill in equity. It must set forth a case which would justify a decree adjudging that the title held by the plaintiff should be conveyed to the defendant, or that his action for the possession of the premises should be enjoined. Wherever the two defences are presented in this way, the equitable one should, as a general rule, be disposed of before the legal remedy is considered. Its disposition may, and generally will, render unnecessary any further proceeding with the action at law. *Gibson* v. *Chouteau*, 13 Wall. 92, 103; *Quinby* v. *Conlan*, 104 U. S. 420; *Estrada* v. *Murphy*, 19 California, 248, 273.

The controversy in this case involves a consideration of different acts of Congress granting lands to the State of California. The question to be determined is to which of the parties the title of the United States passed. The plaintiff claims title under a grant made by the act of Congress of July 2, 1862, 12 Stat. 503, c. 130, "donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," and amendatory and supplementary acts, contending that the premises in controversy were selected as part of such lands apportioned to the State of California and patented by the State to him.

The defendant claims title to the premises from two sources; one, from the eighth section of the act of Congress of September 4, 1841, 5 Stat. 453, c. 16, granting five hundred thousand acres of lands for purposes of internal improvement, to each new State upon her admission into the Union, alleging that the parcels in controversy are a part of such lands; the other, from the sixth and seventh sections of the act of Congress of March 3, 1853, granting to the State of California sections sixteen (16) and thirty-six (36), of each township, for the purposes of schools, and providing for the selection in certain cases of other lands in their stead, the parcels in controversy having been selected in part satisfaction of such school sections. 10 Stat. 244, c. 145.

It will facilitate the apprehension of the questions presented for determination if the claims of the defendant be first considered, and, therefore, to them we now direct our attention.

The act of Congress of September 4, 1841, to appropriate the proceeds of the sales of the public lands and to grant preemption rights designates in its first section several States to which ten per cent of the net proceeds of the sales of the public lands, made after a certain date, within their limits, shall be paid. Its eighth section is as follows: "And be it further enacted, That there shall be granted to each State specified in the first section of this act five hundred thousand acres of land for purposes of internal improvement: *Provided*, that to each of said States which has already received grants for said purposes, there is hereby granted no more than a quantity of land

which shall, together with the amount such State has already received as aforesaid, make five hundred thousand acres, the selections in all of the said States to be made within their limits respectively in such manner as the legislature thereof shall direct; and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States, in said States respectively, shall have been surveyed according to existing laws. And there shall be, and hereby is, granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land, including such quantity as may have been granted to such State before its admission, and while under a territorial government, for purpose of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

The first clause of this section, it will be observed, uses the words "there shall be granted," and not that "there is hereby granted," and they import, as held in *Foley* v. *Harrison*, 15 How. 433, 447, only that a grant shall be made in future. It was accordingly adjudged in that case that a patent of Louisiana for lands selected by her officers from the grant to the State under the act of 1841 did not pass the title to the patentee, the court observing: "It could not have been the intention of the government to relinquish the exercise of power over the public lands that might be located by the State. The same system was to be observed in the entry of the lands by the State as by individuals, except the payment of the money; and this was necessary to give effect to the act, and to prevent conflicting entries."

The authorities of California gave a different construction to the latter clause of the eighth section of the act of 1841. The words there used are, "there shall be, and hereby is, granted to each new State," which they treated as a present grant of the quantity designated, and not as the promise of

one in the future, construing the concluding words, "to be selected and located as aforesaid," as referring merely to the form of selection and the quantity of the several parcels, and not as limiting the location to lands previously surveyed. And they did not see any policy or interest of the general government to be subserved by postponing the possession and enjoyment of its bounty, so long as conformity was ultimately secured in the locations made with the public surveys. In *Doll* v. *Meador* the Supreme Court of the State said: "Conformity in the locations with the sectional divisions and subdivisions is required, to preserve intact the general system of surveys adopted by the Federal government, and to prevent the inconvenience which would ensue from any departure therefrom. When, therefore, any location is made by the State, previous to the survey of the United States, it must be subject to change, if, subsequently, upon the survey being made, it be found to want conformity with the lines of such survey. With this qualification, and the further qualification of a possible reservation by a law of Congress, or a proclamation of the President, previous to the survey — which may require further change, or the entire removal of the location — we do not perceive, either in the language of the act, or the object to be secured, any limitation upon the right of the State to proceed at once to take possession and dispose of the quantity to which she is entitled by the grant. It would hardly be pretended that she would be deprived of the bounty of the general government, if no surveys were ever directed by its authority, or that the enjoyment of the estate vested in her would be suspended indefinitely, by reason of its inaction in the matter." 16 California, 295, 315, 327.

The State legislated upon a similar construction of the latter clause of the act of Congress. Surveys of the public lands in California were not directed by any law of Congress until the year 1853, and were not made to any large extent for years afterwards, but in May, 1852, in advance of such surveys, the legislature of the State passed an act providing for the sale of the 500,000 acres. It authorized the governor to issue land warrants for not less than one hundred and sixty, and not

more than three hundred and twenty acres, in one warrant, to the amount of the 500,000 acres, and the treasurer to sell them at two dollars per acre, and the purchasers and their assigns to locate them, on behalf of the State, upon any vacant and unappropriated lands belonging to the United States within the State of California, subject to such location, but it declared that no such location should be made except in conformity to the law of Congress, in not less than three hundred and twenty acres in one body. The fifth section provided that the location should secure to the purchaser the right to the possession of the land until the government survey, after which the lines of the location should be made to conform to the lines of sections, quarter sections and fractional sections of such survey.

In July, 1853, one James T. Ewing purchased of the treasurer of California, under this act, two land warrants, issued by the governor of the State, each for one hundred and sixty acres. These warrants, by various transfers, came, in September, 1853, into the possession and ownership of one Stephen Franklin, who, during that month, located them upon three hundred and twenty acres of land in Santa Clara County, in one body, embracing the premises in controversy. The land located was sufficiently designated by lines, distances and courses in the field. The entry of the location was made in the office of the clerk of the county, and the lands were surveyed by its surveyor, who gave the locator a certificate setting forth its bounds and the number of acres it included. The clerk thereupon recorded the certificate in the book of records of school-land warrants in his office. The county surveyor afterwards made out a duplicate of the survey and certificate of the location and forwarded them to the office of the surveyor general of the State. The location was made in conformity with the law of the State. The lands were unappropriated public lands of the United States, and were vacant, except as occupied by Franklin, the locator, and were located as part of the 500,000 acres granted to the State by the act of September 4, 1841. Franklin was then in the actual possession of the 106.84 acres in controversy, and other lands adjacent thereto, making, alto-

gether, five hundred and seventy-eight acres, which were cultivated and improved by him as a single farm. He occupied the whole tract until 1862, when his interest was purchased by James Donahue, now deceased, who went into possession of the premises and continued in their use until his death in 1864 or 1865, when his interest passed by devise or descent to his son, the defendant.

But, notwithstanding that in locating the state warrants Franklin complied with the requirements of the state law, and both he and his successor, James Donahue, continued in the possession and use of the land, their claim of title to the $106\frac{84}{100}$ acres under the location was not recognized by the Land Department of the general government. A great number of similar locations were treated in like manner. The right of the State to make any selections in advance of the public surveys of the United States was denied by the department, upon its construction of the act of Congress. And even when official surveys had preceded the location, the transfer of any title by the state authorities to the land located was also denied, the department taking the position that, until the lands selected were listed over or patented to the State, no title passed from the United States.

Under this conflict of opinion between the authorities of the State and of the Land Department as to the title to the land located under the land warrants issued by the governor, great embarrassment was experienced by holders of lands thus located, and interests of vast magnitude, which had grown up under the action of the State, were believed to be endangered. In this condition of affairs it is not surprising that the holders of the lands resorted to various measures to strengthen their title, and also sought relief from Congress.

There were several other grants of lands by Congress to the State, and for their sale provision was also made by different acts of the legislature. The act of Congress "to provide for the survey of the public lands in California, the granting of preëmption rights therein, and for other purposes," passed March 3, 1853, granted sections sixteen and thirty-six in each township to the State, as already mentioned, for school pur-

poses. And the same act, among other things, provided that where those school sections were taken by private claims other lands might be selected in their place by the proper authorities of the State. Those sections in one of the townships in Santa Clara County were included within the exterior limits of Mexican grants, subsequently confirmed. Accordingly, in 1862, the state authorities took measures, pursuant to an act of the legislature passed for such cases, to obtain other lands in lieu of them, and selected the $106\frac{84}{100}$ acres, in controversy in this action, and other land adjoining them, making in all $225\frac{80}{100}$ acres, in lieu of a portion of the school sections. The State then sold the lands to James Donahue, mentioned above, at the time a citizen of the United States, and he paid the full purchase price therefor, the last instalment on the 20th of January, 1864, and the State issued to him a certificate of purchase. In May, 1866, the township, in which the lieu lands selected were situated, was surveyed by the authorities of the United States, and the plat of the survey was returned and filed in the United States local land office of the district embracing the township. After the survey, and on the 30th of May, 1866, the state authorities again, and in part satisfaction of the grant by Congress of the school sections, selected and relocated the same $106\frac{84}{100}$ acres of land with the other lands adjoining, and on the same day notified, in writing, the register of the United States land office for the district of such selection and relocation. (Act relating to indemnity school selections in the State of California. 19 Stat. 267, c. 81.)

In 1864 the Supreme Court of California changed its previous ruling as to the power of the State to make selections from the grant in advance of the surveys of the general government, receding from its decision in *Doll* v. *Meador*, cited above, and holding that no title to any portion of the land granted vested in the State until such survey was made, thus giving no effect to the character of the grant as one *in præsenti*, and making the immediate enjoyment of the bounty of the government dependent upon the action of the surveying officers, rather than the will of Congress. *Terry* v. *Megerle*, 24 California, 609. This decision, whether or not subject to

criticism, was subsequently adhered to, and has been since so constantly followed by that court as to be no longer open to question; and the title of the State to the lands covered by the grant in question has been adjusted upon its assumed correctness. For the time, however, it served to increase the embarrassments previously existing of holders of locations made in advance of such surveys. It left them without any protection except that arising from their possession.

As stated above, relief was sought by an appeal to Congress from the embarrassments following this state of affairs, which was asked not only for holders under the selections and locations mentioned, but also for holders under other grants to the State, and such appeal resulted in the passage on July 23, 1866, of the act to quiet land titles in California. 14 Stat. 218, c. 219. Upon this law the defendant relies for the confirmation of his title to the lands located under the land warrants by his predecessor in interest, Stephen Franklin, as part of the 500,000 acre grant, and that defence failing, upon the confirmation of his title to the indemnity lands selected in part satisfaction of the school sections taken by Mexican grants.

The first section of the act declared that in all cases where the State of California had previously made selections of any portion of the public domain in part satisfaction of a grant made to the State by an act of Congress, and had disposed of the same to purchasers in good faith under her laws, the lands so selected should be and were thereby confirmed to the State. The words of the section are, "the lands so selected shall be, and hereby are, confirmed to said State." From this confirmation were excepted selections of lands to which any adverse preëmption, homestead or other right had, at the date of the passage of the act, been acquired by a settler under the laws of the United States, and of lands reserved for naval, military or Indian purposes, and of mineral lands, or of lands claimed under a valid Mexican or Spanish grant, or of land which, at the passage of the act, was included within the limits of any city, town or village, or within the county of San Francisco.

The second section provided that where the selections mentioned in the first section had been made of land which had

been surveyed by authority of the United States, it should be the duty of the authorities of the State, where it had not already been done, to notify the register of the United States land office for the district in which the land was located, of such selections, and that the notice should be regarded as the date of the State's selection; and it required the Commissioner of the General Land Office, immediately after the passage of the act, to instruct the several local registers to forward to the General Land Office, after investigation and decision, all such selections which, if found to be in accordance with section one of this act, the Commissioner should certify over to the State in the usual manner.

The third section provided that where the selections named in the first section had been made of land which had not been surveyed by authority of the United States, but which had been surveyed by authority of and under the laws of the State, and the land sold to purchasers in good faith, such selections should, from the date of the passage of the act, when marked off and designated in the field, have the same force and effect as preëmption rights of a settler on unsurveyed public lands.

Under the provision of the first section of this act the defendant contends, and the court below ruled to that effect, that the lands selected from the grant by the act of 1841, that is, from the 500,000 acres donated to the State, were confirmed and the title of the State thereto perfected. The confirmation, it was argued, operated as a present grant, and perfected the State's title from the date of the act. That construction would undoubtedly be correct if the provisions of the first section were not modified by those of the second section. The first section declares in general terms that where selections of any portion of the public domain have been made by the State in part satisfaction of a grant of Congress to her, and she has disposed of the same to purchasers in good faith under her laws, the lands so selected are confirmed to the State. The object of the section is to confirm the title to lands thus selected and sold by the State. But the second section declares that when the selections have been made of lands surveyed by authority of the United States, it shall be

the duty of the state authorities, when it had not already been done, to notify the register of the United States local land office of such selections, and that this notice shall be regarded as the date of the State's selection. It follows, therefore, that the lands confirmed by the first section are those selected from lands previously surveyed by authority of the United States, and of which selection notification had been or should thereafter be given to the register of the local land office. Now it does not appear, from the record, that any lands under consideration in this case were selected from the grant of 1841, that is, from the grant of 500,000 acres, after the lands had been surveyed by authority of the United States, and, of course, no notification had been or could be given of any such selection. The selections made under that grant, that is, the locations upon the state warrants possessed by Franklin, were of lands surveyed only by authority of the State, and such selections when marked off and designated on the field could, by the third section of the act of 1866, only have the force and effect of preëmption rights of a settler on unsurveyed public lands. Such recognition could be of no benefit to the defendant in establishing his defence in the present case. It is, therefore, upon the effect of the act of 1866, on the lieu lands selected in place of the school sections covered by the Mexican grants, that he must rely. Notification of such selections was made to the register of the local land office, after the survey in May, 1866, of the township in which the selected lands were situated.

It follows that by the first section of the act of 1866, as modified by the second section, the lieu lands selected in place of the school sections, after the survey of the township, were confirmed and the title of the State thereto was perfected from the date of the act. The legislative confirmation was not only a recognition of the validity of the claim of the State, but it operated as effectually in perfecting her title as a grant or quit-claim from the government. As held in *Langdeau* v. *Hanes*, 21 Wall. 521, 530, "if the claim be to land with defined boundaries or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent

patent is only documentary evidence of that title." The tract confirmed here was of specific boundaries, and, after the confirmation, no further evidence of the title of the confirmee was needed. As this court said in *Whitney* v. *Morrow*, 112 U. S. 693, 695: "If by a legislative declaration a specific tract is confirmed to any one, his title is not strengthened by a subsequent patent from the government. That instrument may be of great service to him in proving his title, if contested, and the extent of his land, especially when proof of its boundaries would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of Congress." The confirmation of the State's title enured immediately to the benefit of her grantee, the father of the defendant, without any further action of the Land Department or of the State.

The plaintiff contends against this conclusion that he obtained a better right to the demanded premises under the grant of July 2, 1862, to the State of land for the establishment of an agricultural college, or college for the mechanic arts, alleging that such premises were a part of the land apportioned to the State under that grant. To the consideration of that position we now turn our attention.

On the 2d of July, 1862, Congress passed an act "donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts." 12 Stat. 503, c. 130. The first section provides as follows: "That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act." Under this section the State of California became entitled to one hundred and fifty thousand acres for the purposes designated.

The second section of the act provides as follows: "That

the land aforesaid, after being surveyed, shall be apportioned to the several States in sections or subdivisions of sections, not less than one-quarter of a section; and whenever there are public lands in a State subject to sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said State shall be entitled shall be selected from such lands within the limits of such State, and the Secretary of the Interior is hereby directed to issue to each of the States in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said State may be entitled under the provisions of this act, land scrip to the amount in acres for the deficiency of its distributive share."

The act also contains various provisions intended to secure the proper application of the proceeds of the sale of the lands donated to the purposes intended. It also declares that no State shall be entitled to its benefits unless the State expresses her acceptance of the act within two years from the date of its approval, a period which was, by a subsequent act, extended for two years more. California, however, expressed her acceptance within the time required, and, on the 23d of March, 1863, passed an act to create and organize the University of California, which embraced provisions for a college for the benefit of agriculture and the mechanic arts.

By subsequent acts the State was allowed to select the lands granted from any lands within her limits, subject to pre-emption, settlement, entry, sale or location under any laws of the United States. 15 Stat. 67, c. 55, § 4, p. 68; 16 Stat. 581, c. 126.

On the 10th of September, 1873, one William W. Johnston made application to the regents of the University of California to purchase the one hundred and six acres and a fraction of an acre in controversy in this case, under the act of Congress of July 2, 1862, and his application was accepted. On the following day, September 11, 1873, the land agent of the university proceeded to select and locate several parcels of land in the office of the register of the United States for the district, including the lands which Johnston had applied to pur-

chase, and gave him a certificate, he, at the time, paying $111.84, that being all that was then required of him. On the 2d of November, 1874, the parcels of land selected were certified by the Commissioner of the General Land Office as being subject to selection under the act of July 2, 1862, and free from conflict, and the list was approved by the Secretary of the Interior, subject to any valid interfering rights existing at the date of the selection. On the 24th of April, 1879, Johnston assigned and transferred his certificate of purchase to the plaintiff, and he paid to the regents of the university the balance of the purchase price. At the time of his application to purchase, and of payment on account, Johnston had notice of the defendant's rights and interests in the premises; and the plaintiff also had such notice at the time of the assignment to him and his payment of the balance of the purchase money. On the first of June, 1882, the United States listed over the lands to the State, and, on the 17th of that month, the State executed her patent to the plaintiff for the premises in controversy. Upon this patent the plaintiff asserts title to the premises and claims their recovery. The proceedings taken for the acquisition of the land appear to have been regular in form and to have been sufficient to transfer the title to the State had not the property been previously vested in the defendant by the purchase by his father of the lands selected in place of the school sections covered by Mexican grants.

Our conclusion is that, after the confirmation by the first section of the act of July 23, 1866, of the lands in controversy selected in place of the school sections, the township in which the selected lands are situated having been previously surveyed by authority of the United States, the premises were not subject to the grant to the State for the establishment of an agricultural college. No title to lands under that grant vested in the State until their selection, and listing to the State, which was some years subsequent to the time at which the title of the United States passed to the defendant.

There was no such trust created by the act making the grant of July 2, 1862, and its acceptance by the State, as to

prevent land, which might otherwise have been selected for the establishment of the college intended, from being previously selected by other grantees of the United States of unlocated quantities of land. No trust against the State could arise until proceeds from the sale of the property granted, or some portion of it, had been obtained and come into her possession. Whatever disposition she might subsequently make of the proceeds, in carrying out the object intended, or in defeating it, could have no bearing upon the title acquired by other parties from the sale of the lands. *Mills County* v. *Railroad Companies*, 107 U. S. 557; *Emigrant Co.* v. *County of Adams*, 100 U. S. 61; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635, 655.

The judgment must, therefore, be *Affirmed.*

PHELPS *v.* SIEGFRIED.

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

No. 655. Submitted January 7, 1892. — Decided January 11, 1892.

Invoices of merchandise entitled to free entry were required, in August, 1889, to conform to the requirements of sections 2853, 2854, 2855 and 2860 of the Revised Statutes.

United States v. *Mosby*, 133 U. S. 273, affirmed and applied.

This action was brought against the collector of customs at the port of San Francisco, to recover the value of ten packages of tea imported by the plaintiffs in August, 1889.

The complaint averred that the merchandise in question was entitled to free entry, but that, although plaintiffs had done everything the law required of them, the defendant, as collector of the port of San Francisco, had refused to allow entry of the said merchandise or to deliver the same to the plaintiffs except on the condition that plaintiffs should deliver to defendant a consular invoice from the United States consul at Yokohama, Japan, declaring the cost or value of said merchan-

Argument for Defendants in Error.

dise in Japan, or should give a bond in $100 conditioned for the delivery of such an invoice within a prescribed time. The complaint averred that there was no warrant of law for this action of the collector.

The defendant demurred to the complaint, but the court overruled the demurrer. The defendant thereupon said that the facts in the case were fully set forth in the complaint, and that he could not answer further, whereupon judgment was entered for plaintiff, as prayed for in his complaint. This writ of error was sued out to review that judgment.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. John S. Mosby for defendants in error.

The plaintiff in error relies on the case of *United States* v. *Mosby*, 133 U. S. 273, as decisive of this. It is admitted that that case is an authority in point. It is respectfully submitted that there was error in the judgment of the court on that question, and that it should be overruled. The decision in that case seems to have been based on a construction of sections 2853, 2854, 2855 and 2860, Rev. Stat., without reference to other sections that explain them. When all the provisions on the subject of consular invoices are read together as a whole, it is clear that they were never intended to apply to free importations; they are in fact repugnant to such a construction.

In *United States* v. *Mosby* the court says: "In addition to this, it is entirely clear that the question of determining whether goods to be shipped will, when imported into the United States, be free from duty is a question which could not be left to the determination of a consul." With all due respect it seems to be a *non sequitur* to say that a consul determines that imports are free of duty in a case where he is not called on to perform any official duty in regard to them. As the consul never hears of a shipment where he certifies no invoice, it is hard to see how it is left to him to determine whether the goods are free or dutiable, or where his judgment comes in.

Statement of the Case.

THE CHIEF JUSTICE: The judgment is reversed and cause remanded, with a direction to sustain the demurrer and to dismiss the action, upon the authority of *United States* v. *Mosby*, 133 U. S. 273.

Reversed.

MAGONE *v.* ROSENSTEIN.

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

No. 145. Argued January 7, 8, 1892. — Decided January 11, 1892.

Soft wood boxes, imported from Sweden, containing parlor matches, or safety matches, are not subject to duty under the act of March 3, 1883, 22 Stat. c. 121, p. 488, § 7, p. 523.

Oberteuffer v. *Robertson*, 116 U. S. 499, affirmed and applied.

THE defendant in error imported into the port of New York from Sweden 301 cases of matches known as parlor matches, and ten cases of matches known as safety matches. The boxes contained about seventy matches each, and were made of very thin pieces of soft wood covered with paper, and so constructed that the receptacle containing the matches fitted snugly into the cover like a drawer and could be slid out of the cover at either end for the purpose of withdrawing the contents.

The defendant, as collector, classified the soft wood boxes for duty separately from the matches, and liquidated the duties on the boxes at the rate of 100 per cent *ad valorem*, the cost of packing not being included therein. The duty so levied on the parlor-match boxes amounted to $315.43, and on the safety-match boxes to $69.57.

The importer duly protested and brought this action to recover back the duties on the boxes paid in obedience to said assessment.

It was admitted by the counsel for the plaintiff in error that the undoubted effect of the testimony was to show that the

surface on each box for producing ignition had for its sole object to facilitate the consumer's use of the contents of the box, and had no particular utility as a covering or protection for such contents.

The verdict was for the plaintiff. The defendant sued out this writ of error.

Mr. Assistant Attorney General Maury for plaintiff in error.

Section 7 of the act of March 3, 1883, 22 Stat. 523, c. 121, provides as follows:

"Sec. 7. That sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States, and section fourteen of the act entitled 'An act to amend the customs revenue laws, and to repeal moities,' approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum *ad valorem* upon the actual value of the same."

The precise effect of the proviso of this section was not, perhaps, considered in *Oberteuffer* v. *Robertson*, 116 U. S. 499, the cartons, etc., used in that case being clearly for the sole purpose of protecting the merchandise during transportation, nor has the proviso been the subject of decision in any subsequent case in this court.

The duty of 100 per cent was assessed on the value of the boxes in which the matches were imported, in obedience to the

requirement of the proviso that such assessment should be made in all cases where coverings of any kind, in which merchandise was imported, were "of any material or form designed to evade duties thereon, *or designed for use otherwise than in the bona fide transportation of goods to the United States.*"

It was held by the collector, and properly held, we submit, that the prepared surface put on each match box contained in the importation showed an intention that the box should perform an important, not to say necessary, function in the consumption of its contents.

Indeed, it is clear that safety matches would hardly be merchantable without a prepared surface on each box. And while the prepared surface on the parlor-match box is not so necessary, it answers an important end in facilitating ignition, and thereby tending to protect the walls and furniture of houses from being used for that purpose.

It would seem, therefore, that in assessing duty, as stated, the collector acted in conformity to the law.

Mr. Henry Aplington for defendant in error. *Mr. Nelson Smith* was with him on the brief.

THE CHIEF JUSTICE: The judgment is affirmed upon the authority of *Oberteuffer* v. *Robertson*, 116 U. S. 499.

Affirmed.

KENNEDY *v.* McKEE.

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

No. 126. Submitted December 16, 1891. — Decided January 4, 1892.

The statutes of Texas in relation to assignments for the benefit of creditors, 1 Sayles's Civil Stats. 61, 62, 68, Arts. 65*a*., 65*c*. and 65*s*., do not contemplate an assignment of partnership property only by partners for the benefit of creditors, and while such an assignment may be valid as to

Statement of the Case.

creditors who accept its provisions, creditors who do not may levy upon the property conveyed by it, subject, it may be, to the rights of the accepting creditors.

There being no brief filed for defendant in error, and no argument made in his behalf, the court confines its consideration of the case to the decision of the questions raised by the counsel for plaintiff in error, without considering the case in any other aspect.

THE court stated the case as follows:

This action was brought upon the official bond of the late James A. McKee, marshal of the United States for the Northern District of Texas, to recover damages for the seizure of certain goods, wares and merchandise, under attachments sued out from the court below, January 25, 1884, by Crow, Hargardine & Co. and Goodbar, White & Co., respectively, against the property of Moseley Brothers, a firm composed of W. P. Moseley, S. P. Moseley, R. T. Moseley, and F. P. Moseley and doing business in the counties of Grayson and Limestone, Texas.

The plaintiff alleged that the property in question was not subject to those attachments, but belonged at the time, and was in the rightful, exclusive possession of W. E. Doyle, under and by virtue of a deed of assignment executed January 23, 1884.

That deed of assignment was as follows:

"THE STATE OF TEXAS, }
"*Limestone County.* }

"Know all men by these presents that we, Moseley Brothers, a mercantile firm composed of W. P. Moseley, S. P. Moseley, R. T. Moseley and F. P. Moseley, and doing business in the cities of Mexia and Denison, said State, in consideration of the sum of one dollar to us in hand paid by W. E. Doyle, of said county and State, have this day transferred, assigned and set over, and by these presents do transfer, assign and set over, to the said W. E. Doyle, assignee, all of our property of every character and description, real and personal and mixed, a more complete and perfect description of which property will hereafter and as soon as it can be done be filed with said assignee,

in trust, nevertheless, and for the following purposes and uses, to wit: Whereas, the said Moseley Bros. are justly indebted to various parties — a more complete description of the names and amounts due to each will be hereafter filed with said assignee — and which indebtedness we are unable to pay, and being desirous of securing to our said creditors an equitable and just distribution of our said property: Now, therefore, in consideration of the premises, we hereby authorize and empower the said W. E. Doyle to take full and exclusive control of the property herein conveyed and transferred, and to convert the same into money and apply the proceeds to the payment and satisfaction of our said indebtedness in the proportion of the respective claims of such of our creditors as shall accept these presents after paying all proper and necessary costs incident to the execution of this trust; and the said Doyle is hereby authorized and empowered to sign all the deeds, conveyances, acquittances and receipts, and to institute and defend any and all suits necessary and proper for the full execution of the trust herein created, provided that there is reserved out of the operations of this instrument such property as is exempt from forced sale under the constitution and laws of this State.

"Witness our hands this January 23, 1884.

"(Signed)	S. P. Moseley.
" "	R. T. Moseley.
" "	Moseley Bros."

On the day this deed bears date, S. P. Moseley and R. T. Moseley appeared before a notary public of Limestone County and severally acknowledged that they had executed and delivered it for themselves and for the firm of Moseley Brothers, for the purposes and considerations stated in it. And it appears from the certificate of the county clerk of that county that the deed, with the notary's certificate, was filed in his office for record at nine o'clock on the morning of January 24, 1884, and was duly recorded, the same day, at ten o'clock.

The petition alleged, among other things, that, on the 23d day of January, 1884, the firm of Moseley Brothers was insolvent,

and being insolvent, S. P. Moseley and R. T. Moseley, on that day, "for themselves and for said firm, in their own names and in the name of said firm, with the knowledge and consent of their copartners, the said W. P. Moseley and the said F. P. Moseley, the former being sick and absent and the latter absent from the county," made, executed and delivered said deed to W. E. Doyle, who duly qualified as assignee; that "the making of said deed of assignment had been discussed and agreed to by all the members of said firm before it was made, and was ratified immediately afterwards and before any adverse right had been acquired by each of said partners who did not sign the same individually;" that "no property was owned by said firm, or any of the members thereof not conveyed thereby except such as was exempted from forced sale by the constitution and laws of Texas;" that after the levy of the above attachments Doyle resigned the place of assignee, and was succeeded by the plaintiff, who was appointed assignee by the judge of the county court upon the written application of the accepting creditors of Moseley Brothers; and that the plaintiff accepted the position of assignee, giving bond and qualifying as required by law, and becoming the lawful assignee of Moseley Brothers.

The case was heard below upon demurrers, general and special, filed by the defendants. The special demurrer showed that the petition was excepted to as insufficient in law upon the following grounds: 1, one or more partners could not make an assignment for the benefit of creditors that would bind the copartnership, and pass the property of the firm; 2, an assignment by two of the partners only could not be ratified by the partners not signing or executing the same, so as to interfere with rights of creditors accruing before such ratification, and any pretended ratification which would operate as an assignment of real estate could not take place by parol or by parol ratification; 3, the deed, signed and executed by two of the partners only, could not and did not purport to convey and pass the individual and separate property of the partners not signing it, and, consequently, the deed was void upon its face; 4, the deed does not, on its face, show that it was made

by Moseley Brothers as insolvent debtors, or by them in contemplation of insolvency.

The demurrers were sustained, and, the plaintiff declining to amend, the action was dismissed with costs to the defendants.

The statutes of Texas in force when the above assignment was made provided: "Art. 65*a*. Every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all of his real and personal estate other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and however made or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as provided by law in conveyances of real estate or other property." "Art. 65*c*. Any debtor desiring to do so, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto, the debtor shall thereupon be and stand discharged from all further liabilities to such consenting creditors on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debtor a release therefrom; provided, that such debtor shall not be discharged from liabilities to a creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor." "Art. 65*s*. Any attempted preference of one creditor or creditors of such assignor shall be deemed fraudulent and without effect." Act of March 24, 1879, as amended April 7, 1883, Sayles's Texas Civil Stat. vol. 1, pp. 61, 62, 68.

Mr. Sawnie Robertson for plaintiff in error.

The only ground upon which the invalidity of this assignment can be asserted is, the failure to embrace in it the private property of all of the members of the firm, as well as the

partnership property. It is contended, in support of the judgment of the Circuit Court, that in the case of *Donoho* v. *Fish*, 58 Texas, 164, it was held that no assignment is good under the Texas statute, unless it conveys the whole of the property of the partner and of every member thereof not exempt from forced sale.

There is an expression in the opinion in that case that gives some color to this claim; but an examination of the case will show that the assignment then before the court provided for releases by the creditors, which the one now in controversy does not do.

The distinction in this respect between the two classes of assignments is apparent. When a release is exacted of a creditor, the whole of the property that is subject to the demands of the creditor should be surrendered by the assignment. On the other hand, when no release is exacted — when the creditor surrenders no right or remedy — no good reason exists why the assignment should not stand good for such property as it conveys for the benefit of all of the creditors alike rather than be subjected alone to the demands of a single attaching creditor.

The doctrine contended for has not been announced by the Supreme Court of Texas in a single case where the assignment in question was like the one now before the court — one for the equal benefit of all creditors without exacting a release. On the contrary, every case subsequent to *Donoho* v. *Fish Bros. & Co.* has carefully limited the rule to assignments that exact releases. *Baylor County* v. *Craig*, 69 Texas, 330; *Turner* v. *Douglass*, 77 Texas, 619; *Still* v. *Focke*, 66 Texas, 715; *Coffin* v. *Douglas*, 61 Texas, 406, 410; *Shoe Co.* v. *Ferrell*, 68 Texas, 638.

No appearance for defendants in error.

Mr. Justice Harlan, after stating the facts as above reported, delivered the opinion of the court.

As no brief has been filed in behalf of the defendants in error, and as we are not informed by the record of the precise

ground upon which the court below proceeded, we will restrict our examination of this case to the single ground upon which the plaintiff in error questions the correctness of the judgment. After referring to the provisions of the above statute, he says that the only ground upon which the invalidity of the assignment of January 23, 1884, can be asserted is the failure to embrace in it the private property of all the members of the firm as well as the property of the partnership. We take this to be a concession that the deed did not pass the private property of the individual members of the firm. This concession was, we think, required by a reasonable interpretation of that instrument. The words used import an assignment by the firm of only firm property to pay the debts due by the firm to such creditors as would accept the provisions of the deed. So that the inquiry is, whether the statute relating to assignments for the benefit of creditors embraced such a deed as the one in question. We lay out of view the allegation in the petition that no property was owned by Moseley Brothers or by any of the members of the firm that was not conveyed by the deed, except such as was exempted from sale by law, because the officer, having in his hands an attachment against property, so conveyed, can only be guided, in the absence of actual notice, by the legal effect of the deed. As said in *Donoho* v. *Fish Bros. & Co.*, 58 Texas, 164, 166, 167, "a deed which purports to convey only such property as the makers thereof own as copartners cannot be held to pass the title to any other without making for the makers of the deed a contract which they never intended." Besides, the allegation referred to does not distinctly state that the several partners owned no property in their respective individual rights. It is rather the statement of a legal conclusion, namely, that all the property which the assignors owned, whether as partners or in their respective individual rights, not exempt from forced sale, was conveyed by the deed of assignment; whereas, as we have stated, the words of the deed do not embrace any property, except such as the firm of Moseley Brothers owned.

In *Donoho* v. *Fish Bros. & Co.*, which was the case of an assignment by a partnership of partnership property for the

benefit of such creditors as would accept its provisions and release the debtors, the court said: "Such an assignment is not contemplated by the act, even if there were no restriction in it upon the right of all creditors to participate in the proceeds of the sale of the property by requiring a release of the debtor; for the act contemplates that all of the property, real and personal, of the debtors making the assignment, except such as is exempt from forced sale, whether the same be partnership property or such as is owned by each partner in his own individual right, shall pass by the assignment. The law does not undertake to make assignments for debtors; it provides how an assignment may be made, and aids and makes complete an assignment which evidences an intention of the debtor to comply with its provisions." After observing that if the deed of assignment purported to convey all the property belonging to the members of a firm, however defective in form, it would pass not only the property each partner owned in his individual right, but also such as they owned in partnership, the court proceeded: "If, however, copartners could under the act make an assignment of partnership property only for the benefit of the creditors of the firm alone, . . . there would be an insuperable objection to such an assignment containing a clause requiring a release of the debtors by the creditors as a condition to the right to participate in the proceeds of the assigned property. . . . He who wants the benefit of the act by which he seeks to be released from his just debt, without full payment, must comply with the act by conveying to the assignee all of the property required to be conveyed, whether the same be owned by him individually, or as a member of a firm, and if he does not do so by the terms of his deed aided by the law, his assignment is void and interposes no obstacle to creditors in collecting their debts by usual process."

Subsequently, in *Coffin* v. *Douglas*, 61 Texas, 406, 407, the Supreme Court of Texas said: "In the case of *Donoho* v. *Fish Bros. & Co.*, 58 Texas, 164, it was held that an assignment made by partners, which did not purport to pass title to all the property owned by the partnership, and by the members

thereof in their separate rights, and not exempted from forced sale, could not be sustained as a valid assignment under the act of March 24, 1879." So in *Still* v. *Focke*, 66 Texas, 715, 723: "A partnership may make an assignment for the benefit of creditors, but in such case, the property of the partnership, and the property of each member of it, which is subject to forced sale, must pass by the assignment." See also *Turner* v. *Douglass*, 77 Texas, 619, 620, 621.

It is, however, contended by the plaintiff that *Donoho* v. *Fish Bros. & Co.*, and the other cases cited, were cases of deeds of assignment of firm property only, which required creditors, accepting their provisions, to discharge the debtors from their respective claims; whereas, the deed here in question did not exact releases from the accepting creditors. There is no good reason, it is argued, why a deed, which does not require releases from creditors as a condition of participating in the benefits of an assignment, "should not stand good for such property as it conveys for the benefit of all the creditors alike rather than be subjected alone to the demands of a single attaching creditor." We cannot assent to the interpretation so placed by plaintiff upon the cases cited. It may well be doubted whether the requirement in the deed of assignment, that the proceeds of the property shall be applied to the payment and satisfaction of the firm's indebtedness "in the proportion of the respective claims of such of our creditors as shall accept these presents," does not import that such creditors must release the assignors; otherwise the reference to accepting creditors was meaningless. Independently of this view, the Supreme Court of Texas distinctly holds, in the cases cited, that the statute in question did not contemplate an assignment by partners for the benefit of creditors of partnership property only, that is, such an assignment is not provided for by, and cannot be administered under, that statute. An assignment of that character may be valid as between the assignors and the creditors who accept its provisions. But no reason is given other than the one above stated — which we deem insufficient — why such an assignment would be an obstacle in the way of creditors who do not accept its provisions,

from collecting their debts in the ordinary modes prescribed by law, or why the marshal might not, in the discharge of his duty, have levied the attachments in his hands upon the property in dispute, subject, it may be, to the rights of creditors who accepted the proceeds of the property covered by the deed. The issue in the present action is not, and could not be, whether Crow, Hargardine & Co. and Goodbar, White & Co. had sufficient grounds for suing out their attachments against the property of Moseley Brothers, nor as to the duty of the marshal to execute them by levying upon any property or interest in property that was subject to an attachment issued against the property of that firm. The issue is as to the authority of that officer to seize, as the property of the firm of Moseley Brothers, the particular property embraced by the deed of January 23, 1884. We have seen that no title passed to Doyle, the assignee, in virtue of the statute regulating assignments for the benefit of creditors; and as the contrary view is the only ground upon which the correctness of the judgment below seems to be questioned in this court, we need not consider the case in any other aspect.

Judgment affirmed.

UNITED STATES *v.* ALABAMA GREAT SOUTHERN RAILROAD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 749. Submitted January 8, 1892. — Decided January 18, 1892.

When the Executive Department charged with the execution of a statute gives a construction to it, and acts upon that construction for a series of years, the court looks with disfavor upon a change whereby parties who have contracted with the government on the faith of the old construction may be injured; especially when it is attempted to make the change retroactive, and to require from the contractor repayment of moneys paid to him under the former construction.

The postal appropriation act of July 12, 1876, c. 179, fixed a rate of pay to railroads for carrying the mails, and provided that roads constructed in whole or in part by a land grant, conditioned that mails should be transported at a rate to be fixed by Congress, should receive only 80 per cent

of that rate. As applied to a line of road a part of which only was constructed with such aid, the department held, and acted in accordance therewith for many years, that it was entitled to the percentage pay for the portion of the line so constructed, and to full pay for the remainder. Subsequently, the Department reversed this construction, and claimed that the mails should be carried over the whole line at the reduced rate, and it accordingly withheld from sums due for current transportation not only the 20 per cent thereon, but a sufficient amount to settle claims for past transportation on that basis. The railroad company sued to recover the pay withheld. The Court of Claims gave judgment in its favor, and this court affirms that judgment.

THE court stated the case as follows:

This was a petition by the appellee to recover certain sums, amounting to $4620.74, alleged to be due it for the carriage of mails which had been deducted from what was claimed to be its proper compensation by the order of the Postmaster General. There was also a counter claim by the United States for over-payments. The facts found by the Court of Claims were substantially as follows:

Claimant is a corporation organized under the laws of Alabama, and operates a railroad running southwest from Chattanooga, Tennessee, to the southern boundary of Tennessee, across the northwestern corner of Georgia, and through the States of Alabama and Mississippi to Meridian in the latter State. This road is 295.45 miles in length. By the acts of June 3 and August 1, 1856, 11 Stat. 17 and 30, Congress granted certain public lands to the States of Alabama and Mississippi to aid in the construction of certain railroads in those States. That part of the road now composing the line of this company, lying in the States of Alabama and Mississippi, 263.85 miles in length, was aided by this grant. The construction of that part of the railroad lying in the States of Tennessee and Georgia was not aided by land grants from the United States, and is 31.6 miles in length, of which 5.7 miles is not owned by the claimant, but is operated under lease. The United States mail was carried over this railroad from July, 1876, to July, 1880, by the Alabama and Chattanooga Railroad Company, and from the latter date to the present time

by the appellee, the Alabama Great Southern Railroad Company. By section 5 of the act of June 3, 1856, 11 Stat. 17, c. 41, making land grants to the State of Alabama in aid of certain railroads, it was enacted "that the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same." Section 5 of the act of August 1, 1856, making a similar grant to the State of Mississippi, was identical with this.

By the postal appropriation act of July 12, 1876, 19 Stat. 78, 82, c. 179, it was provided in section 13, "that railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act."

In construing this section in connection with the transportation of the mails by the Alabama and Chattanooga Railroad Company, the Postmaster General decided that the section required that the reduced rate should be paid for carrying the mails only upon that part of its road which had been aided by the land grant, and that the full rate allowed to roads which had not been thus aided should be paid for the residue of this road. The railroad company was therefore paid upon this basis from July 1, 1876, to June 30, 1880. At this time, the railroad having passed into the hands of the appellee, payments to the Alabama and Chattanooga Company ceased. The same service, however, was performed by the appellee, and compensation was paid to it upon the same basis from July 1, 1880, to June 30, 1885. In August, 1885, the Postmaster General then in office reviewed the act of July 12, 1876, reversed the construction given to it by his predecessors, and decided that it required the payment of the reduced rate to the appellee over the whole of its line with the exception of the 5.7 miles operated under lease. This construction was given not on account of any mistake of fact in the original

orders under which payment had been made, but upon the ground of a supposed error of law in the interpretation of section 13. He gave to his opinion both a prospective and a retroactive effect, and ordered, first, that all future payments should be made on the reduced basis; and, second, that an account should be taken of all payments made by his predecessors since July 1, 1876, for mail service over this road in excess of the rate he held to be proper, and that this sum should be withheld from the amount due to the claimant.

Upon this state of facts the Court of Claims gave judgment for the appellee, both for the amount withheld for services prior to the revised construction of the law, and for the amounts becoming due subsequent to such construction.

The opinion of the court is reported in 25 C. Cl. 30. From the judgment thus rendered the United States appealed to this court.

Mr. Assistant Attorney General Parker for appellant.

No one disputes or questions that the railroad line of claimant was constructed in part, and in the main, by land grants made by Congress, on the condition specified.

It therefore follows, of necessity, that claimant has no standing to make any contention in the premises against the 20 per cent deduction made because of the act of Congress of 1876, and because of the land grants it had received with the condition attached thereto.

It is understood that the opinion below admits that the literal import of the language inclines to a conclusion adverse to the claimant.

The court then seeks to strengthen its position by an imagined case, or combination of cases, saying that "in the consolidation and extension of our railroad systems it may easily be that a company with a thousand miles of track has absorbed a land grant of 50 miles, and it can hardly be supposed that Congress intended to reduce the compensation on 950 miles of track to 80 per cent, while alongside of it a rival road of a thousand miles is to receive 100 per cent."

It cannot be claimed that the courts may change the laws

because cases of hardship may arise under enactments as they are left by Congress.

As no such cases as those suggested above have existed it may be fairly inferred that both railroads and Congress may be trusted to prevent the existence of the unreasonable consequences supposed by the court below.

It must be conceded that the language employed by Congress is neither ambiguous nor obscure, and also that its fair and natural import is to render this whole line from Wauhatchie to Meridian a land-grant road, subject to the 20 per cent reduction as to mail compensation.

Mr. M. D. Brainard, *Mr. Charles King* and *Mr. William B. King* for appellee.

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

This case depends upon the construction to be given to section 13 of the act of July 12, 1876, which reads as follows: "Section 13. That railroad companies whose railroad was constructed *in whole or in part* by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act." As it is admitted that the construction of so much of this road as lay within the States of Alabama and Mississippi, amounting to 263.85 miles, was aided by the proceeds of lands granted by the acts of Congress of June 3, 1856, 11 Stat. 17, c. 41, and August 11, 1856, 11 Stat. 30, c. 83, and the residue of such road lying within the States of Tennessee and Georgia, amounting to 31.6 miles, was constructed without such aid, the question is presented whether the government is entitled to the transportation of the mail over the whole of such road at eighty per cent of the compensation provided for roads which have received no aid from Congress, or whether such percentage applies only to so much of the road as lies within the States of Alabama and Mississippi.

The difficulty arises from the fact that, by section 13, above

quoted, all roads "constructed in whole or in part" by Congressional land grants are bound to carry at the reduced rates. These words, however, are susceptible of several constructions. They may mean such roads as received grants of land the proceeds of whose sale were sufficient to pay the entire or only the partial cost of their construction. In this case the language would be confined to the linear parts of such roads as receive the aid of the land grants, — in the case under consideration, only that part of the road lying in Alabama or Mississippi. Or they may mean that railroads, any linear part of which received the aid of a land grant of Congress in its construction, should be bound to carry the mails at a reduced rate over the entire line. This, which is doubtless the literal reading of the statute, supports the contention of the government in this case. As applied to the particular facts of the present case, this interpretation of the statute would work no great hardship, since the unaided part of the road was but little more than ten per cent of the entire line; but, if the case were reversed, and the aided part amounted only to ten per cent of the entire road, it would be equally within the words of the statute, and the injustice of the construction would become clearly apparent, especially in the case put in the opinion of the learned judge of the court below, if there were a parallel rival road, unaided by a Congressional grant, receiving the full compensation allowed by law. It would also result from this, that if there were two separate roads forming a continuous line, one of which was aided and the other unaided by a land grant, each receiving its appropriate compensation, and these roads were subsequently consolidated, the aided portion would draw after it its own compensation at the reduced rate, and would compel it to be applied to the whole line.

But these words are still susceptible of a third construction, viz., that any railroad the entire line of which or only certain linear portions of which had been constructed by a Congressional land grant, should receive the reduced rate properly proportioned to the part which had received such aid; and that, as to the unaided portion, it should receive the full com-

pensation allowed by law. This was the construction given to it by the Postmaster General and by the accounting officers of the Treasury at the time the act was passed, and the Alabama and Chattanooga Railroad Company and its successor, the appellee, was, and continued to be, paid upon that basis from 1876 to 1885, by six Postmasters General, when in 1885, the then incumbent of the office reversed the rulings of his predecessors, and not only subjected the entire line to the reduced rates, but made such construction retroactive, and enforced repayment of what the road had for nine years received under the prior construction.

We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department — a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case — should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government. These principles were announced as early as 1827 in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210, and have been steadily adhered to in subsequent decisions. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 39; *United States* v. *Macdaniel*, 7 Pet. 1; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Moore*, 95 U. S. 760, 763.

The construction we have given to this act is also in harmony with that given to the Pacific Railroad Act of 1862 in *United*

States v. *Kansas Pacific Railway Co.*, 99 U. S. 455, and the Thurman Act of May 7, 1878, in *United States* v. *Central Pacific Railroad Company*, 118 U. S. 235.

There was no error in the judgment of the Court of Claims, and it is, therefore,

Affirmed.

SOUTH BRANCH LUMBER COMPANY *v.* OTT.

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

No. 135. Argued December 18, 1891. — Decided January 18, 1892.

The question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority in the courts of the United States.

The decisions of the highest court of Iowa with regard to the statute of that State regulating such provisions now codified in section 2115 of the Code, hold: (1) that it does not prevent partial assignments with preferences, or sales or mortgages of any or all of the party's property in payment of or security for indebtedness; its operation being limited to the matter of general assignments: (2) that several instruments, executed by a debtor at about the same time, may be considered as parts of one transaction, and as in law forming but one instrument; and if, so construed, they have the effect of a general assignment with preferences, they are within the denunciation of the statute: (3) that although several instruments may be executed by the debtor at about the same time, they do not necessarily create one transaction, nor must they necessarily be considered as one instrument; but the decision of whether they do or not, and whether they come within the denunciation of the statute, or not, must depend, in each case, upon the character of the instruments, the circumstances of the case and the intent of the parties.

When the effect of invalidating such an assignment, without preferences on its face, by reason of previous preferential transactions claimed to be part of it, will be to let in to preference another creditor attaching after the assignment, the court will be justified in adhering to the letter of the statute, when the circumstances permit it.

THE court stated the case as follows:

On April 27, 1886, George Ott, one of the defendants, doing business at Davenport, Iowa, made a general assignment of

all his property, for the benefit of his creditors, to Charles F. Meyer. The next day complainant commenced its action at law in the District Court of Scott County, Iowa, against Ott, to recover $37,191.69, and caused a writ of attachment to be issued against the property of Ott. The writ was served by a levy upon certain real estate; and by the garnishment of Meyer, the assignee, and also of Charles Hill and Addie Kloppenberg, holders of chattel mortgages against Ott.[1] The action was removed by the plaintiff to the Circuit Court of the United States for the Southern District of Iowa, and thereafter proceeded to judgment on September 17, 1887, for $40,261.34. Shortly after such removal complainant commenced this suit, in aid of the action in attachment, by filing its bill in that court, the object of which was to have the assignment declared void, and a receiver appointed of the property. The debtor, Ott, his assignee, Meyer, the chattel mortgagees, Hill and Kloppenberg, and the guardian of the latter, were made parties defendant. Thereafter Meyer, the assignee, died, and in his place were substituted his successor, J. B. Meyer, and his executrix, Auguste Meyer. Answers were filed, proofs taken and at the June, 1887, term, a decree was entered sustaining the validity of the assignment, but adjudging the mortgage to Hill fraudulent as against complainant, and ordering that the assignee, out of the funds in his possession, pay to complainant the sum of $3225, the amount due on that chattel mortgage. From this decree the plaintiff has appealed to this court.

Mr. Frank J. Smith (with whom was *Mr. J. M. Flower* on the brief) for appellant.

The provision of the Iowa statutes under which it is claimed the assignment in controversy is void, is as follows: "No general assignment of property by an insolvent, or in contem-

[1] Both mortgages were executed and delivered February 20, 1886, and both were withheld from record until April 26. The one to Hill was to secure him as indorser. The one to Kloppenberg to secure his granddaughter, a minor, of whose estate he had been appointed guardian, and whose moneys he had taken into his business.

plation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." Iowa Rev. Stats. sec. 2115, p. 569: tit. Of Assignments for Creditors. It is well settled by the general current of authority in Iowa, that where an insolvent debtor, in contemplation of making a voluntary assignment for the benefit of creditors, gives security to one or more of his creditors by separate instruments, followed by an assignment, all of said instruments will be construed together as an assignment with preferences and therefore void under the statute. *Cole* v. *Dealham, Garnishee*, 13 Iowa, 551; *Van Patten* v. *Burr*, 52 Iowa, 518; *Farwell* v. *Jones*, 63 Iowa, 316; *Perry* v. *Vezina*, 63 Iowa, 25; *Gage* v. *Parry*, 69 Iowa, 605.

Such being the rule, it becomes necessary to examine the facts, about which there is little dispute. The chief controversy is upon the time when Ott began to contemplate making an assignment. The facts bearing on it are briefly these. On April 12, Beidler, the appellant's secretary, had an interview with Ott. He had with him a statement of Ott's financial condition, which, in his opinion, showed insolvency, and which showed an enormous increase of liabilities over assets, as compared with his statement of the preceding year. At this meeting, Beidler insisted that the debt must be reduced, although it does not appear that he threatened suit, although the claim was so large and the circumstances were such that Ott might reasonably apprehend a vigorous effort to enforce collection in the near future, unless the amount was materially lessened. In the forenoon of April 26th Ott evidently felt that a crisis had been reached in his affairs, and consulted a lawyer for the first time so far as known, and from thence on was actively engaged in putting his affairs in order.

This is what he did on that day: (1) He told Peters, his attorney, to record the Kloppenberg mortgage, which had never been delivered, and it was filed for record at six minutes past five P.M. (2) He told Hill that he might have his mortgage, given to secure him as endorser, recorded, which was filed for record at seven minutes past five. (3) He directed his book-

keeper to make out and give to Christ. Mueller three drafts on customers for $1239.46 as collateral security for a debt owing to him, which drafts were delivered by the clerk. (4) He personally delivered to T. W. McClelland, for T. W. McClelland & Co., a draft upon one of his customers for $660.80, as collateral security for *a debt not then due*, with a statement that he was in trouble and did not propose to go back on his friends. On the morning of the 27th of April, at or about the time of executing the assignment, Ott, by an instrument in writing, drawn up by his attorney who drew the assignment, pledged four carloads of merchandise for the payment of a freight bill of $826.57. Whether this reached the freight agent before the assignment was recorded cannot be determined, but the security was recognized by the assignee and the debt paid.

All of these transactions were purely voluntary upon the part of Ott, as much so as the assignment itself. No compulsion was used or even threatened *by any* of the creditors who were preferred, to obtain these securities. It is vastly more reasonable to suppose that these preferences were given because Ott was contemplating a voluntary assignment than that the assignment was made because he had voluntarily given the preferences. The real question is, had Ott *in contemplation* the making of an assignment at the time of these transactions? and not whether he had made up his mind to do so.

Some men are so constituted that they do not regard their minds as made up so long as the opportunity to change their views remains, or until matters have proceeded so far that such change is impossible. Ott must have looked at the matter in this light, and for the purposes of this case concluded that his mind was made up when he had actually executed the assignment, and not before; for when he is asked whether the papers were being prepared on the afternoon of the 26th, he testifies simply to a belief that they were not, because he hadn't yet reached a conclusion; that is, made up his mind. The assignment itself, with its *three pages* of carefully prepared schedules of assets and liabilities, is a flat contradiction of and sufficient to discredit his testimony. So complete a list

of creditors, with a list of their addresses and the amounts due to each, could never have been prepared on the morning of the 27th of April so as to be filed before 9 o'clock.

The testimony of Ott as to his secret intent, wholly unsupported, inconsistent with itself and contradicted as to material matters, by the testimony of other witnesses, is entitled to no weight as against the irresistible conclusion to be drawn from the series of acts and transactions which preceded and culminated in a voluntary assignment within the space of twenty-four hours.

Some stress is laid by the learned judge who decided this case in the court below upon the inequitable result of holding the Ott assignment void, as it would give to the attachment creditors the entire estate. Undoubtedly it would be much more satisfactory to a court of equity, had the law provided that the preferences and not the assignment should be void. The fact that the penalty imposed by the legislature was a harsh one, and operated unjustly upon the right of others, seems to have been something of an obstacle in the way, in determining Ott's intent.

The inquiry is: do the facts and circumstances and the testimony show that Ott, by his various transactions and instruments, has made an assignment with preferences? If he has done so, then all he has done is void by the terms of the statute. If the testimony is sufficient to justify that conclusion, when the law makes the preferences void, the same result must follow, though the law makes the assignment void.

Mr. John C. Bills for appellees.

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

The single question in this case is as to the validity of the assignment. Its invalidity is claimed under section 2115 of the Code of Iowa: "No general assignment by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims."

Iowa Rev. Stats. 569. This statute has been in force since 1851. Code, 1851, § 977; Revision, 1860, § 1826. The assignment in question, standing by itself presents no ground of challenge. It purports to be a general assignment, is for the benefit of all creditors and contains no preferences; but the contention of plaintiff is, that, nearly cotemporaneously with it, were executed by Ott, the assignor, certain other instruments, which are to be taken as part of the one transaction, and by which preferences were given. The object of the statute was to secure equality among creditors, an object which certainly has the merit of equity. Curiously enough, counsel for plaintiff insists that this equity misled the Circuit Court, and protests against its like influence upon our judgment, while strenuously insisting upon such a construction of the transaction as will enable his client to obtain that preference which it was the purpose of the statute to prevent. He says: "Some stress is laid by the learned judge who decided this case in the court below upon the inequitable result of holding the Ott assignment void, as it would give to the attachment creditors the entire estate. Undoubtedly it would be much more satisfactory to a court of equity had the law provided that the preferences and not the assignment should be void. The fact that the penalty imposed by the legislature was a harsh one, and operated unjustly upon the right of others, seems to have been something of an obstacle in the way, in determining Ott's intent." But if we apply the letter alone of the statute, then he has no cause of complaint; for the assignment standing by itself is without preferences, and only an assignment with preferences is denounced. Only by going beyond the letter and, in obedience to the spirit, inquiring whether antecedent instruments were not so related to the assignment as fairly to be taken as parts thereof, and constituting with it but one transaction, has the plaintiff any standing in court. But shall we ignore the letter and heed the spirit to give a party a standing in court, and then ignore the spirit and heed only the letter in the further consideration of the case?

The rights of the parties are determined by this local statute, and the construction placed thereon by the Supreme Court of

the State is decisive. The question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority in the courts of the United States. *Brashear* v. *West*, 7 Pet. 608, 615; *Allen* v. *Massey*, 17 Wall. 351; *Lloyd* v. *Fulton*, 91 U. S. 479, 485; *Sumner* v. *Hicks*, 2 Black, 532, 534; *Jaffray* v. *McGehee*, 107 U. S. 361, 365; *Peters* v. *Bain*, 133 U. S. 670, 686; *Randolph* v. *Quidnick Co.*, 135 U. S. 457; *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 235.

This statute, which, as we have seen, has been in force in the State of Iowa for thirty years, has been repeatedly before its highest court. In the margin may be found a list of cases decided by that court, in which it has been the subject of construction.[1] These propositions seem to be established.

First, this section does not prevent partial assignments with preferences, or sales or mortgages of any or all of the party's property in payment of or security for indebtedness. Its operation is limited to the matter of general assignments, and does not destroy that *jus disponendi* which is an incident to title. *Cowles* v. *Rickets*, 1 Iowa, 582; *Fromme* v. *Jones*, 13 Iowa, 474; *Lampson* v. *Arnold*, 19 Iowa, 479, 486. In this

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[1] *Cowles & Co.* v. *Rickets*, 1 Iowa, 582; *Meeker* v. *Sanders*, 6 Iowa, 61; *Burrows* v. *Lehndorff*, 8 Iowa, 96; *Johnson* v. *McGrew*, 11 Iowa, 151; *Fromme* v. *Jones*, 13 Iowa, 474; *Cole* v. *Dealham*, 13 Iowa, 551; *Graves* v. *Alden*, 13 Iowa, 573; *Buell* v. *Buckingham & Co.*, 16 Iowa, 284; *Hutchinson & Co.* v. *Watkins*, 17 Iowa, 475; *Ruble* v. *McDonald*, 18 Iowa, 493; *Lampson & Powers* v. *Arnold*, 19 Iowa, 479; *Lyon* v. *McIlvaine*, 24 Iowa, 9; *Davis & Co.* v. *Gibbon*, 24 Iowa, 257, 263; *Farwell & Co.* v. *Howard & Co.*, 26 Iowa, 381; *Van Patten & Marks* v. *Burr*, 52 Iowa, 518; *Van Patten & Marks* v. *Burr*, 55 Iowa, 224; *Kohn Bros.* v. *Clement, Morton & Co.*, 58 Iowa, 589; *Van Horn* v. *Smith*, 59 Iowa, 142; *Perry* v. *Vezina*, 63 Iowa, 25; *Farwell* v. *Jones*, 63 Iowa, 316; *Jaffray & Co.* v. *Greenbaum*, 64 Iowa, 492; *Cadwell's Bank* v. *Crittenden*, 66 Iowa, 237; *Carson et al.* v. *Byers et al.*, 67 Iowa, 606; *Gage & Co.* v. *Parry*, 69 Iowa, 605; *Garrett* v. *The Burlington Plow Co.*, 70 Iowa, 697; *Aulman* v. *Aulman*, 71 Iowa, 124; *Van Patten & Marks* v. *Thompson*, 73 Iowa, 103; *Bolles* v. *Creighton*, 73 Iowa, 199; *Loomis & Son* v. *Stewart*, 75 Iowa, 387; *King* v. *Gustafson*, 80 Iowa, 207; *Bradley* v. *Bischel*, 46 N. W. Rep. 755.

latter case the court enters into a full consideration of the import of the statute, and says: "This statute, it will be observed, does not limit or affect the right of an insolvent debtor, or one contemplating insolvency, or indeed, any other, to sell or mortgage a part or all of his property to one or more of his many creditors, in payment or security of a particular debt or debts. And this is true, although such sale or mortgage may, practically, defeat all other creditors than the grantee, from collecting their demands. Nor does the statute prohibit or interfere with the right of any debtor, as it existed prior to the statute, to make a partial assignment. In other words, the statute does not expressly, or by implication, extend any further, or apply to any instrument or conveyance, other than to a general assignment. *Bock* v. *Perkins*, 139 U. S. 628, 641. And, therefore, it is still competent for any debtor to pay a part of his creditors in full; to secure another part by mortgage, or deed of trust upon a part of his property; to make a partial assignment of still other property for the benefit of certain other creditors, with or without preference, and afterwards to make a general assignment. The statute simply provides that such general assignment shall not be valid, unless it is made for the benefit of all the creditors *pro rata*."

Second, several instruments executed by a debtor, at about the same time, may be considered as parts of one transaction, and in law forming but one instrument; and if, as thus construed, they have the effect of a general assignment with preferences, they are within the denunciation of the statute. *Burrows* v. *Lehndorff*, 8 Iowa, 96; *Cole* v. *Dealham*, 13 Iowa, 551; *Van Patten* v. *Burr*, 52 Iowa, 518.

And, third, that although several instruments may be executed by the debtor at about the same time, they do not necessarily create one transaction or are to be considered as one instrument; and whether they do or not, and whether they come within the denunciation of the statute, depend upon the character of the instruments, the circumstances of the case and the intent of the parties. *Lampson* v. *Arnold*, 19 Iowa, 479; *Van Patten* v. *Burr*, 55 Iowa, 224; *Perry* v. *Vezina*, 63 Iowa, 25; *Gage* v. *Parry*, 69 Iowa, 605; *Garrett* v. *Plow*

Company, 70 Iowa, 697; *Bolles* v. *Creighton*, 73 Iowa, 199; *Loomis* v. *Stewart*, 75 Iowa, 387.

The case of *Van Patten* v. *Burr*, in 52 and 55 Iowa, is instructive. In that case the debtor, being insolvent, had executed two chattel mortgages and an assignment, all bearing date November 30, 1878. When first presented to the Supreme Court it came on demurrer to the petition, in which it was alleged that the debtor, "in contemplation of insolvency, and being then insolvent, made, executed and delivered in writing a general assignment of his property for the benefit of his creditors, contained in three instruments executed by him," etc.; and, also, "that said instruments were intended to and do constitute as a whole a general assignment of his property for the benefit of creditors." And it was held, under such allegations, that the three instruments were to be treated as one, and together making a general assignment with preferences. The case went back for trial, and upon the testimony it appeared that one of the mortgages was accepted by the mortgagee without any knowledge of the contemplated assignment; and in 55 Iowa it was held that such mortgage was good.

In *Perry* v. *Vezina*, 63 Iowa, 25, it appeared that a chattel mortgage was executed about three hours before a general assignment; but as it was agreed that, when the mortgage was made, the debtor did not contemplate making the assignment, the latter was held valid. The court said: "But, to justify a court in finding that a mortgage may be taken in connection with some other instrument as constituting an assignment, it should appear that the mortgagor, at the time he made the mortgage, had the intention to make an assignment." Similar expressions are found in others of the cases cited. Obviously, it is a fair inference from these decisions that, as well said by Judge Love in deciding this case, "the intention of the assignor must be the true and guiding principle of decision." With what intent did Ott in this case execute the various instruments prior to the general assignment? Was he intending a general assignment, and seeking to evade the statute, and to give preferences by other instru-

ments? or was he, finding himself involved and likely to be closed out by some of his creditors, simply preferring some, uncertain as to what disposition he should make of the balance of his property after they had been secured?

Upon the basis of these rulings interpreting the scope and effect of this statute, we perceive no error in the conclusions of the Circuit Court. Quite an amount of testimony was offered, for the purpose of showing that the debt of the appellant was fraudulently contracted by Ott. The assumption seems to be, that if this be proved it follows that the assignment was made in violation of the statute, and void; but there is no sequence in these propositions. Even if it were established beyond doubt that Ott, with deliberate purpose to defraud the appellant, contracted this debt, this would not determine the scope or effect of his assignment. It were as reasonable to suppose that, having made the personal gain he designed, his interest ceased, and that he never contemplated an assignment until the very moment of its execution. Indeed, if he were guilty of fraud, in the first instance, it would imply a state of mind indifferent to all results after the primary purpose of his own profit had been secured.

It would be unjust, however, to the parties to leave this statement with the inference which might follow, that we consider it established that the debt was fraudulently contracted. The basis of the contention in this respect is in the inaccurate statements furnished by Ott to appellant in reference to his financial condition during the years prior to this assignment. Obviously they were so as to values; but as he named the property, his overestimate of value is not to be adjudged necessarily fraudulent. We note one matter upon which stress is laid: a quarry, valued by him at $14,000. Notwithstanding the testimony as to its utter worthlessness, yet he had invested large sums in trying to develop and work it, and was not without hopes of ultimately realizing much from it. He named this quarry as a part of his assets, and gave his estimate of its value. If the lumber company desired further information as to its location, its condition and its prospects, it could have asked of him, or made itself an independent in-

vestigation. If it was content with his statement, it must show not merely that he had overestimated, but, further, that he had fraudulently given the value. He furnished to the lumber company the data for investigation, and while *caveat emptor* is the rule as to the thing sold, *caveat venditor* is also the rule as to the pecuniary condition and solvency of the purchaser. Something more than overestimate of value on the purchaser's part is necessary before it can be said that on this account the debt was fraudulently contracted. A deliberate overestimate and an intention to defraud are essential.

But we do not care to tarry upon this feature of the case. The business relations between the lumber company and Ott had been running for a series of years. He had purchased from it to an amount exceeding $180,000. His business had averaged about $300,000 a year. His statements, while inaccurate and overestimated as to values, disclosed the property which he possessed, and enabled the lumber company to investigate. But whatever may have been the character of the relations between the lumber company and him, the inquiry before us is limited to the assignment; and here five matters are referred to and claimed by the appellant to be so related to it as to be in fact part and parcel of it, and thus together constituting a general assignment with preferences, within the denunciation of the statute. Two of them are chattel mortgages, executed on the 20th day of February, 1886, more than two months before the assignment; one to Charles Hill and the other to Addie Kloppenberg. That these were executed without any thought of an assignment is clear. At the time there was no threatened interference and no apparent danger of trouble to Ott in his business. The one to Hill was to secure him as an indorser. It is true, that while executed on February 20 and delivered to Hill, it was not recorded until the day before the assignment; and this failure to record was upon an agreement made by Hill with Ott for fear that such record would precipitate an attack upon the latter by his creditors. On this account it was adjudged void by the Circuit Court, a question which we cannot consider, as, the amount of the mortgage being less than five thousand dollars, Hill could bring no ap-

peal to this court. But this stipulated agreement not to record, while it may have vitiated the mortgage, in no manner affected the assignment made long after, and for the reason that when the one was executed there was no thought or intent on the part of Ott of the other. The same may be said of the mortgage to Addie Kloppenberg. She was a minor, a girl of about fourteen years of age, his granddaughter, of whose estate he had been appointed guardian, and whose moneys he had taken into his business. Security for these moneys he had been directed by the Probate Court, having charge of her estate, to give. Instead of real estate security he gave this chattel mortgage, and placed it in the hands of the attorney who was looking after the business of the estate, with a like suggestion not to record, and it was not in fact recorded until the day before the assignment. That he had this amount belonging to this minor in his possession is not questioned; that he gave the mortgage under the direction of the Probate Court is not disputed; and that he gave the same long before the closing out of his business was thought of is clear. Of course, it was not part of the assignment.

With respect to the three other matters, there is more of a question. It appears that on the 12th of April, on receipt of a statement of account, Francis Beidler, the representative of the appellant, came to Davenport to investigate the situation. The outcome of that investigation was not satisfactory. A demand was made for a reduction of the indebtedness. The plain import of the interview was that things could not continue as they had been. Two or three days before the assignment the bank with which Ott had been doing business for a series of years, and which had been discounting his drafts before acceptance, and which was at such time carrying about $11,000 of such drafts, intimated that it must have acceptances before discounting. His son, who was his principal salesman, his only travelling man, returned from one of his trips. While ordinarily selling from $18,000 to $20,000, his sales on that trip had practically amounted to nothing. Strikes in the Southwest were significant of labor troubles, and shadowed the business outlook. With these accumulating facts, evidently

Ott began to think that the end of his business career, at least so far as his present undertakings were concerned, was at hand. On the day before the assignment he gave to one Mueller, to whom he owed about $9000, drafts on his customers for goods sold to the amount of $1239.46. On the same day he gave to McClelland & Co., to apply on a debt of $900, a like draft to the amount of $660.80; and on the very morning of the assignment he sent a letter to George F. White, the agent of the railroad company, notifying him that he might hold four carloads of glass, then in the possession and on the tracks of the railroad company, as security for a balance of between eight and nine hundred dollars of freight due.

Now, these transactions were but shortly prior to the assignment. They were in a general sense contemporaneous with it. They took place when Ott was conscious of the impending danger of the closing out of his business, and they operated as preferences to these creditors. They were so nearly related in time to the assignment, and made under such circumstances, that if in an action at law and under proper instructions the question had been submitted to a jury whether they were made with a view to an assignment, and to evade the statute, and the verdict had been in the affirmative, it would be difficult to say that such verdict was not warranted by the testimony. All this may be, must be, conceded; yet over against it are these matters: The positive testimony of Ott, that when he gave these drafts to Mueller and McClelland, he had not determined upon an assignment. He knew that he was in financial trouble, and considered himself under special obligations as to one at least of these debts. His purpose was simply payment, and that he had a right to make. He supposed he should have to stop business, but in what manner the close should be brought about, whether by the action of creditors or his own voluntary transfer, was undetermined. He was waiting and considering, and only decided upon an assignment on the morning of the 27th. If such was the fact, then, within the rules laid down by the Supreme Court of Iowa, these preferences are not to be taken as part and parcel of the assignment, or as vitiating it.

Opinion of the Court.

In reference to the letter from Ott to White, with respect to holding the four carloads of glass as security for freights, it is clear that this was only putting in writing an agreement made long before. For the testimony of White and Ott both show, and to their testimony there is no contradiction, that White, months before, had again and again urged prompt payment of freights, and that Ott had agreed to always leave on the track goods enough to secure any amount of freight that might be due. The prior agreement, though oral, was valid; and the letter was not a new contract, giving then a preference, but only a written expression of that which had theretofore been agreed upon, and agreed upon when there was no thought of an assignment. This brings the transaction within the reasoning of this court in the case of *Hauselt* v. *Harrison*, 105 U. S. 401, in which, as against the claims of an assignee in bankruptcy, a transfer made immediately before the adjudication in bankruptcy was held to relate back and to carry into effect an agreement entered into long before, and, therefore, not to be vitiated by the bankruptcy proceedings.

Further, it may be stated, as sustaining the conclusions of the Circuit Court, that the payments made by Ott during the few days before and up to the very time of the assignment were not extraordinary, not differing from the usual course of his business in prior months. McClelland's and Mueller's were only partial payments, and made in consequence of repeated requests, so that he was not hastening unnecessarily to pay or secure them. And, further, though there was a mortgage on his homestead which he might have paid off, though there was money in the bank which he might have withdrawn and pocketed, he did neither; nor did he act as though intending an assignment, or seeking to benefit himself as much as possible prior thereto. His conduct seems to have been in the utmost good faith; and while these drafts did operate to secure these creditors a portion of their claims, yet they were not given under such circumstances that the court must conclude that they were in anticipation of an assignment; or find that he was guilty of untruth in his testimony, that, when he made

them he had not decided what to do. As intimated, the testimony in reference to these last matters does not leave the case free from doubt, yet we are of the opinion that the Circuit Court rightly read it, and properly held that it was not shown that at the date of those instruments Ott had determined upon an assignment. They were, therefore, valid as in the exercise by him of his undoubted *jus disponendi;* and the assignment, subsequently determined upon and subsequently made, was without preferences, was not void under the statute of Iowa, but was a valid general assignment, transferring all of the property then in his possession for the benefit of all his creditors.

The decree will be

Affirmed.

DELAWARE CITY, SALEM AND PHILADELPHIA STEAMBOAT NAVIGATION COMPANY *v.* REYBOLD.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF DELAWARE.

No. 138. Argued January 5, 6, 1892. — Decided January 18, 1892.

The plaintiff below sued in assumpsit to recover from the defendant company the sum of $2898.18. The first count was for money had and received to the plaintiff's use, being money paid by the United States for the pilotage, hire and service of a steam vessel. The claim under this count was, that a contract had been made with the plaintiff by which he was to prosecute the claim and receive to his own use whatever he might get for it. Such claims being unassignable under Rev. Stat. § 3477, the company received the money, and set up in defence as against the first count (1), that it never made the contract, and (2), that the assignment was illegal. The second count was for money due, and owing plaintiff, for work and labor in the prosecution of the claim. The jury returned a verdict for less than the sum claimed, without specifying under which count the damages were assessed. The Court of Errors and Appeals of the State of Delaware affirmed the judgment on the ground that it had no power to review the finding on a question of fact, and the finding on the second count being in plaintiff's favor there was no error in the rendition of the judgment by the court below on such a finding. *Held*, that the only Federal question raised in the case at the trial was not neces-

sarily involved in the trial of the issue under the second count, and that, as the judgment could be sustained under that count, this court was without jurisdiction.

Even if a Federal question was raised in the state court, yet, if the case was decided on grounds broad enough, in themselves, to sustain the judgment without reference to the Federal question, this court will not entertain jurisdiction.

THE case is stated in the opinion.

Mr. Anthony Higgins (with whom was *Mr. W. C. Spruance* on the brief) for plaintiff in error.

Mr. Edward G. Bradford (with whom was *Mr. George Gray* on the brief) for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an action of assumpsit brought in the Superior Court in and for New Castle County, Delaware, by Anthony Reybold against the Delaware City, Salem and Philadelphia Steamboat Navigation Company, a Delaware corporation, to recover a sum of money that had been received by the defendant company from the United States for the pilotage and hire of the steamboat Swan, which had been formerly owned by the company, and had been chartered to the government during the civil war.

The declaration contained the usual common counts. With respect to the two counts on which the plaintiff relied for a recovery, viz., (1) for money had and received, and (2) for work and labor performed, he filed a bill of particulars as follows:

"*First.* Money had and received by the defendant in this cause, to and for the use of the said plaintiff, to a large amount, to wit, the sum of two thousand eight hundred and ninety-eight dollars and eighteen cents, with legal interest thereon from the time the said defendant so had and received the same, to wit, from the twenty-ninth day of August A.D. 1882, said sum of money having been paid by the United States of America to the said defendant for the pilotage and

hire or service of a certain steam vessel, to wit, the Swan, formerly owned by the said defendant, and the said plaintiff being at the time of said payment and ever since entitled, as against the said defendant, to receive said money so paid as aforesaid.

"*Second.* Money due and owing at the time of the commencement of this cause from the said defendant to the said plaintiff, to a large amount, to wit, the sum of five thousand dollars, for the work, labor, care and diligence of the said plaintiff before that time done, performed and bestowed in and about the business of the said defendant, at the request of the said defendant, to wit, in and about the prosecution of a certain claim of the said defendant against the United States of America, amounting to a large sum of money, to wit, five thousand seven hundred and ninety-six dollars and thirty-six cents, for the pilotage and hire or service of a certain steam vessel, to wit, the Swan, formerly owned by the said defendant."

The defendant pleaded, (1) non-assumpsit; (2) payment; (3) set-off; and (4) the statute of limitations. Upon the issues thus joined the case went to trial. At the trial, as shown by the bill of exceptions, the plaintiff, to sustain the issue on his part, under the first count, submitted evidence tending to prove that in 1876 or 1877 the steamboat company had a claim against the United States, which it considered worthless, for the pilotage and hire of the steamboat Swan, formerly owned by it; that thereupon, at the request of the plaintiff, who was at that time one of the directors of the company, there was an agreement made and entered into between the plaintiff and the company that if he would undertake the collection of the claim he might have what he could get from it, provided the company should be at no expense in the matter; and that he afterwards prosecuted the claim to collection, and the steamboat company received a certain named sum of money as the proceeds thereof; to which sum the plaintiff claimed he was entitled, as money had and received to his use, under the provisions of the aforesaid agreement.

To sustain the issue raised under the second count, the

plaintiff introduced evidence tending to prove that, during a period of more than two years, he bestowed much care, work, labor and diligence in the prosecution of the claim against the United States to a successful termination; and his contention therefore was, that he was entitled to recover on a *quantum meruit* for such services.

The contention of the defendant was, (1) that no agreement had ever been made with the plaintiff whereby he was to receive and retain for his own benefit whatever he could collect from the government on the aforesaid claim, and that even if the agreement had been made, it could not be enforced because it was in violation of § 3477 of the Revised Statutes of the United States; and (2) that the plaintiff was not entitled to a recovery under the second count as on a *quantum meruit*, because the work was done under a contract claimed by it to be illegal: and on the trial of the case the defendant requested the court to charge the jury accordingly. The court, however, refused to charge as requested by the defendant, but instead thereof, over the objections of the defendant, gave to the jury the following instructions:

"3. That the company could not legally assign its claim, by gift or otherwise, to the plaintiff. Still, if the jury are satisfied from the evidence that he secured it by his efforts and expenditures in the production of the necessary proof, he is entitled to recover upon the count for money had and received, for the money received by the company was his money, and the company cannot be allowed in this action or under such a count to shelter itself under any defence of the illegality of the contract *inter sese*.

"4. The plaintiff may recover under the count for work and labor, under the circumstances shown by the proof of the plaintiff, if the jury believe it, such proof being that the directors furnished the plaintiff, upon its request, with the means — through its books and accounts — of prosecuting the claim. If, therefore, the company would avail itself of the fruits of the plaintiff's work and labor and services it should pay him what they are worth, the same as a man who sees another working in his corn field among other hired laborers should

pay him what his labor was worth, if the jury in such case should be satisfied that there was, from the circumstances, evidence of a hiring. That the question in the case in hand, as well as in that cited, was for the jury upon the facts proved."

The jury returned a verdict in favor of the plaintiff, without specifying under which count the damages were assessed, for a sum less by several hundred dollars than the amount which had been received by the defendant from the United States in satisfaction of the aforesaid claim, and judgment was entered upon the verdict. Exceptions having been saved, a writ of error was sued out from the Court of Errors and Appeals of the state, which affirmed the judgment below, a short opinion, as follows, being delivered:

"The action in the court below was assumpsit.

"The plaintiff's *narr.* contained two counts — one for money had and received, and the other for work and labor done.

"There was no count in the *narr.* upon any special contract. The jury in the court below heard the proof offered in support of these respective counts. They passed upon the sufficiency of that proof. Their judgment on this question was conclusive and final.

"This court has no jurisdiction to determine whether their verdict was right or wrong, and no power to review their finding upon a mere question of fact.

"This court in affirming the judgment below do so for the reason that the finding of the jury under the second count, for work and labor done, being in favor of the plaintiff below, there was no error in the rendition of the judgment by the court below upon such finding of the jury. The court declines to render any decision upon any other questions raised in the cause in the arguments of counsel, because it considers such questions as irrelevant."

A writ of error to that court brings the case here; and a motion to dismiss the writ of error for the want of jurisdiction, on the ground that no Federal question is involved, is the present matter to be considered.

Section 3477 of the Revised Statutes of the United States relied upon by the defendant as forbidding any assignment to

the plaintiff of its claim against the government, is as follows:

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

It is manifest from an inspection of this record that the only Federal question that could have arisen, or did arise, in this case in the trial court was, whether this section operated as a bar in law to any recovery by the plaintiff upon the cause of action embodied in the first count of his declaration. But that question did not necessarily enter into the cause of action arising under the second count of the declaration. That was on a *quantum meruit* for work done and labor performed by the plaintiff which enured to the benefit of the defendant. No Federal question was necessarily involved in that branch of the case. The question there was, whether the defendant should be held bound to pay to the plaintiff what his services in prosecuting the claim for its benefit were reasonably worth. His claim in this particular was in the nature of an attorney's fee for legal services performed, the basis of which does not rest on Federal law, but on the law and practice of the State in which the services are rendered; or, more properly, perhaps, on the principle of general law that one who accepts

the benefit of such services shall be held liable to pay what they are reasonably worth.

The cause was submitted to the jury upon the second count, and the charge of the trial court was broad enough to warrant a verdict upon that count alone, irrespective of any claim arising under the first count; and the opinion of the Court of Errors and Appeals clearly shows that the judgment was affirmed on the ground that the verdict of the jury was rendered on that count. The decision of the highest court of the state that the verdict of the jury was to be taken as rendered upon the second count involves no Federal question, but has relation only to the law of the State and the practice of the state courts.

If it be objected that the verdict of the jury could not have been rendered on the second count alone, because although it appears from the record that the work and labor of prosecuting the claim to a successful termination was performed by the plaintiff, yet the record fails to show that any evidence was adduced upon the trial before the jury of the value of such work and labor and services, the answer is, (1) that the bill of exceptions does not purport to set out, even in substance, all the evidence bearing on the issues in the case. It is manifest from the face of the bill of exceptions that what is stated to be the evidence given is set forth in a condensed form, and that the charge of the court to the jury assumed that there was evidence in support of the value of the services performed on which the second count was based. We think, therefore, that in the absence of any statement in the bill of exceptions that all of the evidence is set forth, that what is set forth is a mere summary; and, as the attention of the trial court was not called to the want of any evidence upon the point of the value of the services which the charge assumes to have been before the jury at the time the charge was given, the objection of such want of evidence cannot avail the plaintiff in error in an appellate court. (2) The very fact that the verdict is for an amount several hundred dollars less than what the plaintiff would have been entitled to recover on the claim set forth in the first count, is proof that it was rendered not on

that count, but necessarily on the second count. If the plaintiff was entitled to recover at all on the first count, he was entitled to recover the full amount demanded in that count, and the verdict, being for less than that amount, must have been rendered on the second count.

For these reasons we think it apparent that the judgment sought to be reviewed by this writ of error was not based on any question arising under § 3477 of the Revised Statutes, but upon questions arising out of the cause of action set forth in the second count of the declaration; and that that judgment proceeded upon grounds broad enough in themselves, and irrespective of any Federal question, to support it. Whether correct or not, upon those grounds, it is not our province to inquire, because it does not involve a Federal question.

The rule is well-settled that, even if a Federal question was raised in the state court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment, without reference to the Federal question, this court will not entertain jurisdiction. The authorities in support of this rule are too numerous for citation. We cite only a few of the more recent ones: *De Saussure* v. *Gaillard*, 127 U. S. 216; *Beaupré* v. *Noyes*, 138 U. S. 397; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635; *Walter A. Wood Company* v. *Skinner*, 139 U. S. 293; and the following, at this term of the court: *Hammond* v. *Johnston*, *ante*, 73; *City of New Orleans* v. *New Orleans Water Works Co.*, *ante*, 79; *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679.

This case comes clearly within the rule announced, and the principle of the authorities cited; and the writ of error is, therefore,

Dismissed.

PETRI *v.* COMMERCIAL NATIONAL BANK OF CHICAGO.

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

No. 1071. Submitted January 4, 1892. — Decided January 18, 1892.

A national bank, located in one State, may bring suit against a citizen of another State, in the Circuit Court of the United States for the District wherein the defendant resides, by reason alone of diverse citizenship.

THE court stated the case as follows:

The Commercial National Bank of Chicago, a national banking association, duly organized under the laws of the United States in that behalf, and located in Illinois, brought suit, May 6, 1890, in the Circuit Court of the United States for the Northern District of Texas, against A. C. Petri and Oswald Petri, citizens of the State of Texas, and doing business in that State under the firm name and style of A. C. Petri & Brother, to recover the amount of several drafts, held by the bank, drawn by Meyer & Sons Company, a corporation of Illinois, on the defendants and accepted by them.

The defendants demurred on the ground that the Circuit Court was without jurisdiction to entertain the suit, and also interposed certain defences not drawn in question here. The demurrer was overruled and final judgment given in favor of plaintiff for the sum of $3328.66, with interest and costs, whereupon the defendants prosecuted a writ of error from this court to review the action of the Circuit Court upon the question of jurisdiction.

Mr. W. Hallett Phillips for plaintiffs in error.

The question is, whether a national bank has now the right of suing in the Federal courts a citizen of a different State from that in which it is located, by reason alone of diverse

citizenship. The legislation on this subject will be found in the margin.[1]

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[1] 1. *Act of June* 3, 1864, *c.* 106, 13 *Stat.* 99.

SEC. 8. Such association . . . may make contracts, sue and be sued, complain and defend, in any court of law and equity as fully as natural persons. [Now embodied in Rev. Stat. § 5135.] Sec. 57. That suits, actions and proceedings, against any association under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established; or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however*, That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district or territorial court of the United States, held in the district in which the association is located. [Now found in Rev. Stat. § 5198, as amended by the act of February 18, 1875, 18 Stat. 320, c. 80, and § 5237.]

2. *Revised Statutes.*

SEC. 563. The district courts shall have jurisdiction as follows: . . . Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held. . . . Sec. 629. The Circuit Courts shall have original jurisdiction as follows: . . . Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

3. *Act of July* 12, 1882, 22 *Stat.* 162, *c.* 290.

. . . *Provided, however*, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.

4. *Act of March* 3, 1887, 24 *Stat.* 552, *c.* 373, *as reënacted August* 13, 1888, 25 *Stat.* 433, *c.* 866.

SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The status of a national bank in the Federal courts is determined by section 4 of the act of 1888, reënacting the language of section 4 of the act of 1887.

These acts contain the latest legislative declarations on the subject and constitute the present law. They adopt as the test of *jurisdiction* the right of suit in controversies between individual citizens of the same State. They also ordain that a national bank shall for the general purposes of litigation be deemed to be a citizen of the State in which it is located.

We submit, that the right of a national bank to sue in the Federal courts, is not conferred by the general provisions of law conferring such right in cases of diverse citizenship, but depends on the particular legislation applicable alone to national banks, in the acts of 1887, 1888.

It is not denied that the act of 1887 in so far changed the prior law, as to thenceforth prevent a national bank from suing in the Federal courts in the State where located. This privilege was formerly possessed under section 639 of the Revised Statutes. But there is nothing in the language of this act which necessarily shows that Congress, while prohibiting a national bank from suing in the Federal courts in the State where located, authorized it in all cases to sue in the Federal courts in other States.

The act of 1882 had already placed national banks on the same footing, as respects jurisdiction of the Federal courts, as that possessed by non-federal banks, or, in other words, the same jurisdiction as that possessed generally by citizens of different States. Its language is that the jurisdiction for suits brought by or against such associations, with certain exceptions not here material, "shall be the same and not other than the jurisdiction by or against banks not organized under any law of the United States."

If Congress had intended the jurisdiction, as provided in the act of 1882, to continue, they would either have retained its language in any new enactment or, what is more reasonable, they would not have made a new enactment, as the old law fully covered the subject matter.

The declaration in the act of 1887, that national banks

"shall, for the purposes of all actions by or against them and all suits in equity, be deemed citizens of the States where respectively located," ought not to control the subsequent clause specifying the extent of the jurisdiction of the Federal courts. The two clauses are not conflicting. The entire language can be given full effect. The section was not a piece of ill-digested or hasty legislation. It was not a part of the original bill as it passed the House of Representatives. It was reported in the Senate as an amendment from the judiciary committee of that body, and was adopted as such. On this committee were such lawyers as Mr. Edmunds and Mr. Evarts. We must assume that, emanating from such authority, the phraseology of the section was carefully selected, and every part of it should be given its full meaning.

Mr. John Selden for defendant in error.

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

The question is whether a national bank located in one State may bring suit against a citizen of another State in the Circuit Court of the United States for the district wherein the defendant resides, by reason alone of diverse citizenship.

National banks are empowered to sue and be sued, complain and defend, in any court of law and equity as fully as natural persons. Rev. Stat. § 5136. The first national banking act, that of February 25, 1863, 12 Stat. c. 58, 665, 681, provided in § 59 that suits by and against banks organized thereunder might be brought in any "circuit, district or territorial court of the United States held within the district in which such association may be established;" and by the act of June 3, 1864, c. 106, § 57, 13 Stat. 99, 116, there was added to this "or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Both these provisions were carried into § 5198 of the Revised Statutes, by the amendatory act of February 18, 1875, c. 80, 18 Stat. 316, 320.

Following section 11 of the Judiciary Act, the first subdivision of § 629, Revised Statutes, conferred jurisdiction on the Circuit Courts of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeded the sum or value of five hundred dollars and the suit was between a citizen of the State where it was brought and a citizen of another State; and by subdivision ten jurisdiction was given "of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations."

Under section one of the act of March 3, 1875, determining the jurisdiction of Circuit Courts of the United States and regulating the removal of causes from state courts, 18 Stat. 470, the Circuit Courts had original cognizance of suits arising under the Constitution, laws or treaties of the United States, as well as of those in which there were controversies between citizens of different States, and by section two, jurisdiction by removal in like cases was conferred.

Suits by or against national banks might therefore be brought or removed upon the ground of diverse citizenship, or of subject matter, since as they were created by Congress, and could acquire no right, make no contract and bring no suit, which was not authorized by a law of the United States, a suit by or against them was necessarily a suit arising under the laws of the United States. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 823; *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778, 781; *Pacific Railroad Removal Cases*, 115 U. S. 1. And of course national banks as well as state banks and individuals might bring or remove suits otherwise arising under the Constitution, laws or treaties of the United States. By the proviso to the 4th section of the act of Congress of July 12, 1882, c. 290, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," it was provided: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not

other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun: and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." 22 Stat. 162, 163. Hence the jurisdiction of the Circuit Courts over suits by or against national banks could no longer be asserted on the ground of their Federal origin, as they were placed in the same category with banks not organized under the laws of the United States. *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778, 781; *Whittemore* v. *Amoskeag National Bank*, 134 U. S. 527, 530.

So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the Circuit Courts, that was taken away, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different States or under the Constitution or laws of the United States, except in that respect, remained unchanged.

The fourth section of the act of Congress of March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, is as follows:

"SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 25 Stat. 436.

In view of the language of the second clause of the first branch of this section, it is contended that the Federal courts

cannot exercise the same jurisdiction in respect of national banks, by reason of diverse citizenship, as they possess in controversies between individual citizens of different States.

The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled; and it is also held that it is the duty of the court to ascertain the meaning of the legislature from the words used and the subject matter to which the statute relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it. *Brewer's Lessee* v. *Blougher*, 14 Pet. 178; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115.

The act of 1887 largely superseded the previous legislation relating to the jurisdiction in general of the Circuit Courts. Under the first section jurisdiction of all suits of a civil character, and involving a given sum or value, arising under the Constitution or laws of the United States, or in which there might be a controversy between citizens of different States, was retained. And so far as national banks were concerned, the jurisdiction could be exercised whether dependent upon the subject matter or the citizenship.

Out of abundant caution, the first clause of the first branch of the fourth section provided that national banks, for the purposes of actions by or against them, should be deemed citizens of the States in which they were respectively located; and this involved the right to sue, or be sued by, a citizen of another State in the United States courts. Hence, as has been well said, if the second clause were to be construed as contended, it would in effect take away what had just been recognized. *First National Bank* v. *Forest*, 40 Fed. Rep. 705.

But had the section terminated with the first clause, the question might have arisen as to whether a national bank could, because of its Federal character, bring suits in the Federal courts, or remove causes thereto, as had been originally the case. And apparently to obviate this the clause was added subjecting these banks to the same rules applicable to citizens of the States where they were located. No reason is perceived

why it should be held that Congress intended that national banks should not resort to Federal tribunals as other corporations and individual citizens might. The fact that there are cases between individual citizens of the same State in which the Circuit Courts might have jurisdiction, as where the case arises under the Constitution, laws or treaties of the United States, or the controversy relates to lands claimed under grants of different States, so far from sustaining the contention that the phraseology in question was designed to limit the jurisdiction as to national banks to such cases, justifies the conclusion that it is only to them that the second clause applies. The use of the word "between" is perhaps open to criticism, but it seems to us clear that the clause was intended to have, and must receive, the same effect and operation as that of the proviso to the fourth section of the act of July 12, 1882, that is to say, that the Federal courts should not have jurisdiction by reason of the subject matter other than they would have in cases between individual citizens of the same State, and so not have jurisdiction because of the Federal origin of the bank. But jurisdiction dependent upon diversity of citizenship was provided for by the first section and the first clause of the first branch of the fourth section of the act of 1887, and no limitation in that regard was intended.

The demurrer was rightfully overruled, and the judgment is

Affirmed.

NISHIMURA EKIU *v.* UNITED STATES.

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

No. 1393. Argued and submitted December 16, 1891. — Decided January 18, 1892.

The act of March 3, 1891, c. 551, forbidding certain classes of alien immigrants to land in the United States, is constitutional and valid.

Upon a writ of *habeas corpus*, if sufficient ground for the prisoner's detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment.

Statement of the Case.

Inspectors of immigration under the act of March 3, 1891, c. 551, are to be appointed by the Secretary of the Treasury.

The decision of an inspector of immigration, within the authority conferred upon him by the act of March 3, 1891, c. 551, that an alien immigrant shall not be permitted to land, because within one of the classes specified in that act, is final and conclusive against his right to land, except upon appeal to the commissioner of immigration and the Secretary of the Treasury; and cannot be reviewed on *habeas corpus*, even if it is not shown that the inspector took or recorded any evidence on the question.

HABEAS CORPUS, sued out May 13, 1891, by a female subject of the Emperor of Japan, restrained of her liberty and detained at San Francisco upon the ground that she should not be permitted to land in the United States. The case, as appearing by the papers filed, and by the report of a commissioner of the Circuit Court, to whom the case was referred by that court "to find the facts and his conclusions of law, and to report a judgment therein," and by the admissions of counsel at the argument in this court, was as follows:

The petitioner arrived at the port of San Francisco on the steamship Belgic from Yokohama, Japan, on May 7, 1891. William H. Thornley, commissioner of immigration of the State of California, and claiming to act under instructions from and contract with the Secretary of the Treasury of the United States, refused to allow her to land; and on May 13, 1891, in a "report of alien immigrants forbidden to land under the provisions of the act of Congress approved August 3, 1882, at the port of San Francisco, being passengers upon the steamer Belgic, Walker, master, which arrived May 7, 1891, from Yokohama," made these statements as to the petitioner: "Sex, female. Age, 25." "Passport states that she comes to San Francisco in company with her husband, which is not a fact. She states that she has been married two years, and that her husband has been in the United States one year, but she does not know his address. She has $22, and is to stop at some hotel until her husband calls for her."

With this report Thornley sent a letter to the collector, stating that after a careful examination of the alien immigrants on board the Belgic he was satisfied that the petitioner and five others were "prohibited from landing by the existing

Statement of the Case.

immigration laws," for reasons specifically stated with regard to each; and that, pending the collector's final decision as to their right to land, he had "placed them temporarily in the Methodist Chinese Mission, as the steamer was not a proper place to detain them, until the date of sailing." On the same day the collector wrote to Thornley, approving his action.

Thereafter, on the same day, this writ of *habeas corpus* was issued to Thornley, and he made the following return thereon: "In obedience to the within writ I hereby produce the body of Nishimura Ekiu, as within directed, and return that I hold her in my custody by direction of the customs authorities of the port of San Francisco, California, under the provisions of the immigration act; that by an understanding between the United States attorney and the attorney for petitioner, said party will remain in the custody of the Methodist Episcopal Japanese and Chinese Mission pending a final disposition of the writ." The petitioner remained at the mission house until the final order of the Circuit Court.

Afterwards, and before a hearing, the following proceedings took place: On May 16 the District Attorney of the United States intervened in opposition to the writ of *habeas corpus*, insisting that the finding and decision of Thornley and the collector were final and conclusive, and could not be reviewed by the court. John L. Hatch, having been appointed on May 14, by the Secretary of the Treasury, inspector of immigration at the port of San Francisco, on May 16 made the inspection and examination required by the act of March 3, 1891, c. 551, entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," (the material provisions of which are set out in the margin,[1]) and refused to

[1] SEC. 1. "The following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude," &c.

allow the petitioner to land, and made a report to the collector in the very words of Thornley's report, except in stating

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By sections 3 and 4, certain offences are defined and subjected to the penalties imposed by the act of February 26, 1885, c. 164, § 3, namely, penalties of $1000, "which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor," "as debts of like amount are now recovered in the Circuit Courts of the United States, the proceeds to be paid into the Treasury of the United States." 23 Stat. 333.

SEC. 6. "Any person, who shall bring into or land in the United States by vessel or otherwise, or who shall aid to bring into or land in the United States by vessel or otherwise, any alien not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

SEC. 7. "The office of superintendent of immigration is hereby created and established, and the President, by and with the advice and consent of the Senate, is authorized and directed to appoint such officer, whose salary shall be four thousand dollars per annum, payable monthly. The superintendent of immigration shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury, to whom he shall make annual reports in writing of the transactions of his office, together with such special reports in writing as the Secretary of the Treasury shall require."

SEC. 8. "Upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. But such removal shall not be considered a landing during the pendency of such examination. The medical examination shall be made by surgeons of the marine hospital service. In cases where the services of a marine hospital surgeon cannot be obtained without causing unreasonable delay the inspector may cause an alien to be examined by a civil surgeon, and the Secretary of the Treasury shall fix the compensation for such examination. The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record. During such inspection after temporary removal the superintendent shall cause such aliens to be properly housed, fed and cared for, and also, in his discretion, such as are

the date of the act of Congress, under which he acted, as March 3, 1891, instead of August 3, 1882; and on May 18,

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delayed in proceeding to their destination after inspection. All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers; and any such officer or agent or person in charge of such vessel, who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

"The Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia and Mexico so as not to obstruct or unnecessarily delay, impede or annoy passengers in ordinary travel between said countries: Provided, that not exceeding one inspector shall be appointed for each customs district, and whose salary shall not exceed twelve hundred dollars per year.

"All duties imposed and powers conferred by the second section of the act of August third, eighteen hundred and eighty-two, upon state commissioners, boards or officers acting under contract with the Secretary of the Treasury, shall be performed and exercised, as occasion may arise, by the inspection officers of the United States."

SEC. 10. "All aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offence; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid."

Sec. 11 provides for the return within one year of any alien coming into the United States in violation of law.

Sec. 12 saves all prosecutions and proceedings, criminal or civil, begun under any act hereby amended.

By sec. 13 the Circuit and District Courts of the United States are "in-

Hatch intervened in opposition to the writ of *habeas corpus*, stating these doings of his, and that upon said examination he found the petitioner to be "an alien immigrant from Yokohama, Empire of Japan," and "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge, and therefore inhibited from landing under the provisions of said act of 1891, and previous acts of which said act is amendatory;" and insisting that his finding and decision were reviewable by the superintendent of immigration and the Secretary of the Treasury only.

At the hearing before the commissioner of the Circuit Court, the petitioner offered to introduce evidence as to her right to land; and contended that the act of 1891, if construed as vesting in the officers named therein exclusive authority to determine that right, was in so far unconstitutional, as depriving her of her liberty without due process of law; and that by the Constitution she had a right to the writ of *habeas corpus*, which carried with it the right to a determination by the court as to the legality of her detention, and therefore, necessarily, the right to inquire into the facts relating thereto.

The commissioner excluded the evidence offered as to the petitioner's right to land; and reported that the question of that right had been tried and determined by a duly constituted and competent tribunal having jurisdiction in the premises; that the decision of Hatch as inspector of immigration was conclusive on the right of the petitioner to land, and could not be reviewed by the court, but only by the commissioner of immigration and the Secretary of the Treasury; and that the petitioner was not unlawfully restrained of her liberty.

On July 24, 1891, the Circuit Court confirmed its commissioner's report, and ordered "that she be remanded by the marshal to the custody from which she has been taken, to wit, to the custody of J. L. Hatch, immigration inspector for the port of San Francisco, to be dealt with as he may find that

vested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act;" and the act is to go into effect on April 1, 1891. 26 Stat. 1084–1086.

Argument for Appellant.

the law requires upon either the present testimony before him, or that and such other as he may deem proper to take." The petitioner appealed to this court.

Mr. Lyman I. Mowry, for appellant, submitted on his brief.

Intervenor Hatch had no power or authority in the premises: first, because he was not legally and properly appointed an inspector of immigration; and second, because the petitioner was ashore and within the United States before his appointment.

The act of March 3, 1891, creates a bureau of immigration, and provides for the appointment by the President of the United States, by and with the advice and consent of the senate, of a superintendent of immigration, who shall have his office in the city of Washington. As there is no provision in the act for the appointment of inspectors of immigration, such appointment would necessarily, and by the universal practice of the government be in the superintendent of immigration as the head of the department of immigration. The superintendent of immigration was appointed by the President long after the appointment of Hatch by the Secretary of the Treasury, and long after Hatch had decided upon the rights of the petitioner.

The petitioner having been brought ashore and within the United States by Thornley, there was nothing for Hatch to act upon, because if he were legally appointed inspector of immigration his examination must be made on board of the ship or after removal by him from the ship temporarily for examination. He had no power or authority to examine into the status of aliens already ashore in the United States.

Neither Thornley, Hatch nor the collector of the customs obeyed the instructions of the act of March 3, 1891.

That act says: "The inspection officers and their assistants shall have power to administer oaths and to take and consider testimony touching the rights of any such aliens to enter the United States, all of which shall be entered of record." There is in this case no such record as is contemplated by the statute.

The evidence shows the whole record made by Thornley, Hatch and the collector, and that consists of Thornley's letter to the collector, the collector's reply, Thornley's report to the collector and Hatch's report to the collector. There is nothing in this record that shows that either Thornley, Hatch or the collector administered any oaths, took or considered any testimony touching the rights of the petitioner to enter the United States or entered the same of record. Thornley's letter to the collector shows that he intended to take testimony, because he removed Nishimura Ekiu from the ship to the mission home, but Hatch received his appointment on the day following the removal, and Thornley then ceased to act. It is evident from an examination of his report to the collector that Hatch did nothing but make a stereotyped copy of Thornley's report.

The reports of Thornley and Hatch and the letter of the collector thereto attached show that the decisions of Thornley, Hatch and the collector were arbitrary, irregular and without testimony.

The powers conferred upon inspectors by the act are of such an extraordinary and far-reaching character, that it was the evident intention of Congress that such a record of their proceedings should be kept, as would be of some service to the government in case diplomatic complications should arise from the execution of the law.

Notwithstanding that some of the cases heretofore cited hold that the decision of the inspector upon the facts is not reviewable by the courts, yet the court did inquire into the facts in the cases of Cummings, Dietze and Bucciarello. *In re Cummings*, 32 Fed. Rep. 75; *In re Dietze*, 40 Fed. Rep. 324; *In re Bucciarello*, 45 Fed. Rep. 463.

Mr. Assistant Attorney General Parker for appellees.

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

As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this

court, notwithstanding the appeal was taken since the act establishing Circuit Courts of Appeals took effect. Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 828, 1115.

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100; 1 Phillimore (3d ed.) c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. Constitution, art. 1, sec. 8; *Head Money Cases*, 112 U. S. 580; *Chae Chan Ping* v. *United States*, 130 U. S. 581, 604–609.

The supervision of the admission of aliens into the United States may be entrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs and to inspectors acting under their authority. See, for instance, acts of March 3, 1875, c. 141; 18 Stat. 477; August 3, 1882, c. 376; 22 Stat. 214; February 23, 1887, c.

220; 24 Stat. 414; October 19, 1888, c. 1210; 25 Stat. 566; as well as the various acts for the exclusion of the Chinese.

An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful. *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Jung Ah Lung*, 124 U. S. 621; *Wan Shing* v. *United States*, 140 U. S. 424; *Lau Ow Bew*, *Petitioner*, 141 U. S. 583. And Congress may, if it sees fit, as in the statutes in question in *United States* v. *Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine or controvert the sufficiency of the evidence on which he acted. *Martin* v. *Mott*, 12 Wheat. 19, 31; *Philadelphia & Trenton Railroad* v. *Stimpson*, 14 Pet. 448, 458; *Benson* v. *McMahon*, 127 U. S. 457; *In re Oteiza*, 136 U. S. 330. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. *Murray* v. *Hoboken Co.*, 18 How. 272; *Hilton* v. *Merritt*, 110 U. S. 97.

The immigration act of August 3, 1882, c. 376, which was held to be constitutional in the *Head Money Cases*, above cited, imposed a duty of fifty cents for each alien passenger coming by vessel into any port of the United States, to be

paid to the collector of customs, and by him into the Treasury, to constitute an immigrant fund; by § 2, the Secretary of the Treasury was charged with the duty of executing the provisions of the act, and with the supervision of the business of immigration to the United States, and, for these purposes, was empowered to make contracts with any state commission, board or officers, and it was made their duty to go on board vessels and examine the condition of immigrants, "and if on such examination there shall be found among such passengers any convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land;" and by § 3, the Secretary of the Treasury was authorized to establish rules and regulations, and to issue instructions, to carry out this and other immigration laws of the United States. 22 Stat. 214.

The doings of Thornley, the state commissioner of immigration, in examining and detaining the petitioner, and in reporting to the collector, appear to have been under that act, and would be justified by the second section thereof, unless that section should be taken to have been impliedly repealed by the last paragraph of section 8 of the act of March 3, 1891, c. 551, by which all duties imposed and powers conferred by that section upon state commissions, boards or officers, acting under contract with the Secretary of the Treasury, "shall be performed and exercised, as occasion may arise, by the inspection officers of the United States." 26 Stat. 1085.

But it is unnecessary to express a definite opinion on the authority of Thornley to inspect and detain the petitioner.

Putting her in the mission house, as a more suitable place than the steamship, pending the decision of the question of her right to land, and keeping her there, by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of *habeas corpus*, left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship.

Before the hearing upon the writ of *habeas corpus*, Hatch

was appointed by the Secretary of the Treasury inspector of immigration at the port of San Francisco, and, after making the inspection and examination required by the act of 1891, refused to allow the petitioner to land, and made a report to the collector of customs, stating facts which tended to show, and which the inspector decided did show, that she was a "person likely to become a public charge," and so within one of the classes of aliens "excluded from admission into the United States" by the first section of that act. And Hatch intervened in the proceedings on the writ of *habeas corpus*, setting up his decision in bar of the writ.

A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. *Ex parte Bollman & Swartwout*, 4 Cranch, 75, 114, 125; *Coleman* v. *Tennessee*, 97 U. S. 509, 519; *United States* v. *McBratney*, 104 U. S. 621, 624; *Kelley* v. *Thomas*, 15 Gray, 192; *The King* v. *Marks*, 3 East, 157; *Shuttleworth's Case*, 9 Q. B. 651.

The case must therefore turn on the validity and effect of the action of Hatch as inspector of immigration.

Section 7 of the act of 1891 establishes the office of superintendent of immigration, and enacts that he "shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury." By § 8 "the proper inspection officers" are required to go on board any vessel bringing alien immigrants and to inspect and examine them, and may for this purpose remove and detain them on shore, without such removal being considered a landing; and "shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record;" "all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary

of the Treasury;" and the Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia and Mexico, "provided that not exceeding one inspector shall be appointed for each customs district."

It was argued that the appointment of Hatch was illegal because it was made by the Secretary of the Treasury, and should have been made by the superintendent of immigration. But the Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than "in the President alone, in the courts of law or in the heads of departments;" the act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the Secretary of the Treasury; and appointments of such officers by the superintendent of immigration could be upheld only by presuming them to be made with the concurrence or approval of the Secretary of the Treasury, his official head. Constitution, art. 2, sec. 2; *United States* v. *Hartwell*, 6 Wall. 385; *Stanton* v. *Wilkeson*, 8 Ben. 357; *Price* v. *Abbott*, 17 Fed. Rep. 506.

It was also argued that Hatch's proceedings did not conform to section 8 of the act of 1891, because it did not appear that he took testimony on oath, and because there was no record of any testimony or of his decision. But the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record.

The decision of the inspector of immigration being in conformity with the act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's

official superiors, and in accordance with the provisions of the act. Section 13, by which the Circuit and District Courts of the United States are "invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act," evidently refers to causes of judicial cognizance, already provided for, whether civil actions in the nature of debt for penalties under sections 3 and 4, or indictments for misdemeanors under sections 6, 8 and 10. Its intention was to vest concurrent jurisdiction of such causes in the Circuit and District Courts; and it is impossible to construe it as giving the courts jurisdiction to determine matters which the act has expressly committed to the final determination of executive officers.

The result is, that the act of 1891 is constitutional and valid; the inspector of immigration was duly appointed; his decision against the petitioner's right to land in the United States was within the authority conferred upon him by that act; no appeal having been taken to the superintendent of immigration, that decision was final and conclusive; the petitioner is not unlawfully restrained of her liberty; and the

Order of the Circuit Court is affirmed.

Mr. Justice Brewer dissented.

BIRD *v.* BENLISA.

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

No. 139. Argued January 6, 1892. — Decided January 26, 1892.

When land in Florida assessed for taxation is not assessed to the owner or occupant, or to an unknown owner, and also by an official or accurate description sufficient to impart notice to the owner, the title of the purchaser at a sale made for non-payment of the tax so assessed is not protected by the provision in the statutes of Florida limiting the right of action of the former owner, to recover the possession of the lands sold, to one year after the recording of the tax deed; but the sale and the deed are nullities within the decisions of the Supreme Court of Florida.

Statement of the Case.

THE court stated the case as follows:

This was an action of ejectment brought in the Circuit Court of Orange County, Florida, on May 25, 1887. The action was subsequently removed to the Circuit Court of the United States for the Northern District of Florida. A trial in that court resulted in a verdict and judgment for the defendant in error, plaintiff below. That such judgment was correct, is conceded, unless plaintiff's right to recover was defeated by a tax deed, with accompanying record and possession. That deed purported to be based on a sale for the taxes of 1873, and the description therein was as follows: Section 39, township 16, of range 27; section 37, in township 17, of range 27; and section 38, in township 17, of range 28; containing nine thousand nine hundred and nine and three-quarters (9909¾) acres, lying and being in Orange County, Florida. It was executed December 13, 1876, and recorded the same day. The assessment roll was produced in evidence, and on it was found no description like that contained in the deed. There was, however, this entry, which plaintiff in error claimed was intended as a description of the lands found in the deed, to wit,

Owner.	Des. of land.	Sec.	Town.	Range.	Acres.	Am't.
Mazell, Partin & Partin.....	Alexander..... Spring Creek..... Grant.....	...	...	...	7800	$18 22

Defendant relied on section 63 of chapter 1976 of the Laws of 1874, page 27, (which is the same as section 20, chapter 1877, Laws of 1872,) as follows:

"No suit or proceeding shall be commenced by a former owner or claimant, his heirs or assigns, or his or their legal representatives, to set aside any deed made in pursuance of any sale of lands for taxes, or against the grantee in such deed, his heirs or assigns or legal representatives, to recover

the possession of said lands, unless such suit or proceedings be commenced within one year after the recording of such deed in the county where the lands lie, except upon the grounds that the said lands were not subject to taxation, or that the taxes were paid or tendered, together with the expenses chargeable thereon before sale, and the recording of such deed shall be deemed such assertion of title or such entry into possession by the grantee, his heirs or assigns, as to authorize such suit or proceedings against him or them as for an actual entry."

Mr. J. B. C. Drew and *Mr. A. H. Garland* (with whom was *Mr. H. J. May* on the brief) for plaintiff in error.

Mr. J. C. Cooper (with whom was *Mr. H. E. Davis* on the brief) for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

It is true that this tax deed is regular in form, but there is no connection between the description in it and any to be found in the assessment roll; and it has been held by the Supreme Court of Florida, that the limitation section does not prevent a suit by the owner to recover lands after the lapse of a year, when "the calls in the deed of the clerk are materially different from the lands described on the assessment roll, and sold by the collector." *Carncross* v. *Lykes*, 22 Florida, 587. In that case it appeared that on the assessment roll the land was described as "blocks 10, 12, 13 and 16," while the deed purported to convey "blocks 10, 12 and 13, in the town of Tampa, and according to the general map of said town." In the opinion the court said: "The description of the land on the assessment roll is an important element in the purchaser's title, and it must be sold by the collector and deeded by the clerk in accordance with such description. . . . The statute was intended to prevent, after the lapse of a year, suits by the former owner for recovery of lands upon technical grounds, for informalities and irregularities in the proceedings. It contemplated that the deed of the clerk alluded to would be to lands assessed, and none other. The clerk can only make a

deed to the lands sold by the collector. The collector can only sell the lands as described on the assessment roll. . . . Sec. 20, above, only extends its protection to the lands assessed, because, if other lands, or lands differing materially in description, are deeded by the clerk, the deed 'is not a deed made in pursuance of a sale of lands for taxes,' nor is a suit for the recovery of possession thereof a suit for lands sold for taxes."

In *Grissom* v. *Furman*, 22 Florida, 581, the difference between the description on the assessment roll and in the tax deed consisted simply in a reversal in the numbers of the township and range, the former being "township 21, range 11," and the latter, "township 11, range 21," but it was held that the deed was a nullity. In *Townsend* v. *Edwards*, 25 Florida, 582, the tax deed being regular in form, the trial court had refused to permit the introduction of the assessment roll in evidence. The Supreme Court reversed the judgment, on the ground of error in that ruling, thus reaffirming the cases in 22 Florida. In *Sloan* v. *Sloan*, 25 Florida, 53, an action to remove a cloud upon the title, which cloud consisted in a tax deed, it appeared that this deed was regular in form, but it having been alleged and proved that the assessment was made by the collector of revenue, and not by the assessor of taxes, it was held that the deed was voidable, and was not within the protection of the limitation section heretofore referred to. The court observed: "If the lands were assessed on the roll when it went into the hands of the collector, the owner was presumed to know it, and if he did not pay the taxes and a sale was made, and a deed executed, he was also charged with notice of the consequences which the statute imposed upon him. If the lands were not upon such roll, he was likewise presumed to know it, and that the only consequence was that they would be assessed the next year as well for that as for the preceding year, but the law did not call upon him to anticipate either an assessment or sale by the collector or subject him to the provisions of the sixty-third section on account of such assessment or sale. This tax deed is not within the protection of the sixty-third section, but is a cloud upon the land described in it."

In Kansas, a like ruling has been made as to the necessity of a conformity of the description in the tax deed to that on the assessment roll. *Hewitt* v. *Storch*, 31 Kansas, 488, which ruling was followed by this court in a case coming from that State — *Stout* v. *Mastin*, 139 U. S. 151. It follows, therefore, that on the face of the record there was disclosed no assessment or sale of the lands described in the deed, and the latter must fall within the condemnation of the cases referred to.

But there was testimony tending to show that the tract in controversy was sometimes called in the community the "Alexander Spring Creek Grant," and it is contended by plaintiff in error that an assessment by this description was sufficient, and sustains a deed describing the land with official accuracy. We cannot assent to this proposition. The land was not known to the state or United States records by any such description. A history of the title will be instructive. While Florida was still a Spanish province, and on the 15th of September, 1817, Antonio Huertas petitioned the governor of the province for a grant of 15,000 acres, which petition was on the same day sustained, and a decree entered that such a grant be made. On the 13th of December, 1820, he petitioned for a survey of the grant in four parcels, one being of 10,400 acres, which was approved and the survey made. After the annexation of Florida and prior to the year 1873, by proper proceedings in the Federal court under the authority of the acts of Congress, the title to this tract of 10,400 acres was confirmed to Moses E. Levy, and a survey thereof made and approved by the surveyor general of the United States for that State. Township and range lines were run through the tract according to the general rules for the survey of public lands of the United States, though it does not appear that the boundaries of these lands as surveyed conform fully to such lines. So upon the face of the United States records, the land was known either as the Moses E. Levy part of the Huertas grant, or as described by the survey, or by the township and range numbers.

Now, the second clause of section 17, chap. 1713, Laws of 1869, in reference to assessments, requires:

"A description of each tract or parcel of land to be taxed, specifying under appropriate heads the township, range and section in which the land lies, or if divided into lots and blocks, then the numbers of the lot and block, and the full cash value of each lot, tract or parcel, such value to be taken from the taxpayer under oath."

And section 20 of the same chapter provides:

"If the land assessed be less or other than a subdivision according to the United States survey, and unless the same is divided in lots and blocks so that it can thereby be definitely described, it shall be described by the boundaries thereof, or in such other manner as to make the description as definite as may be."

This land having been surveyed, the separate townships and ranges might have been stated; or if it was all to be assessed as one tract, and the description by the boundaries was too long for insertion, then the description by the name known to the records, and which would impart notice to the owner, should have been used. The owner, as the Florida Supreme Court has repeatedly held, has a right to rely upon the assessment roll, and if his land be not upon it, to assume that it will not be sold; but on the contrary, is liable to be placed upon the roll of the succeeding year. But is he bound to hunt through the assessment roll beyond the proper official description to see if his land may not be found described by some term which is more or less commonly used in the community?

Further, this tract was one of about 10,000 acres; the original petition was for a tract of 10,400 acres; the United States survey made it 10,457.34 acres; but the tract here assessed was only one of 7800 acres. While accuracy in the number of acres may not be vital, yet so large a variation indicates that another tract was intended, or that only a part of this tract (and which part is not indicated) was assessed; either of which was fatal.

Still further, the law required that the assessment should be in the name of the owner or occupant, with a proviso, that if the land be unoccupied it might be to "unknown owner." Laws 1869, c. 1713, secs. 6, 7, 17 and 19. These lands were

assessed to Mazell, Partin & Partin. There is no pretence that they, or either of them, ever had any title to or possession of, or connection with, the land. Under such circumstances, it has been held by the Supreme Court of Florida that the assessment is a nullity, and that no title passes by the sale. *L'Engle* v. *Railroad Co.*, 21 Florida, 353; *L'Engle* v. *Wilson*, 21 Florida, 461. In the latter of these cases the assessment was made to the "estate of Parkhurst," and it was held that it and the sale based thereon were void. The court was urged to hold that the provisions of the statute in this respect were directory, but it declined to so hold, and ruled that they were imperative. In the former of the cases the assessment was in the name of W. L. Seymour, who claimed title under a foreclosure sale, but as it appeared that such foreclosure sale had passed no title, it was ruled that both assessment and sale were worthless. In its opinion the court said: "The tax is a lien on the land only when legally assessed. This lien attaches and has relation to the time at which the assessment was made. *Spratt* v. *Price*, 18 Florida, 289. We hold that a valid assessment of the land in accordance with the laws regulating assessments, c. 3099, Laws of Florida, acts of 1879, (and the law in this respect was similar to that of 1869,) is necessary and indispensable to make good the title of a purchaser at a tax sale; without such assessment no lien attaches to the land. An assessment, therefore, of lands to a person other than the owner, such person not being the occupant thereof, is not a valid assessment, and the purchaser at a tax sale based on such assessment takes no title."

So it appears that this land was not assessed to the owner or occupant, or to an unknown owner. It was not assessed by any official or accurate description. Within the decisions, therefore, of the Supreme Court of Florida the sale and deed were nullities, and beyond the protecting influence of the limitation statute.

The judgment was right, and it is

Affirmed.

CONVERS *v.* ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY.

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

No. 154. Argued January 11, 1892. — Decided January 26, 1892.

When a railroad company initiates proceedings in Illinois to acquire land for its road, and a defendant appears and claims ownership of the tract, and no denial is made to this claim, and only evidence as to the amount of compensation is presented for the consideration of the jury, and the jury awards a sum as such amount, the judgment should either direct the payment of this sum to such owner, or the deposit of the same with the county treasurer for his benefit.

THE court stated the case as follows:

On June 7th and 10th, 1887, respectively, the Atchison, Topeka and Santa Fé Railroad Company in Chicago, the defendant in error, filed two petitions in the County Court of Cook County, Illinois, to condemn the right of way through certain lands. The present plaintiff in error was made a party defendant to each of those proceedings. He appeared, and in each filed a cross-petition, alleging his ownership of a particular tract, and praying specified damages for its appropriation to the uses of the railroad company. Thereafter, being a citizen and resident of New Jersey, he filed petitions and bonds for removal of the cases to the Circuit Court of the United States for the Northern District of Illinois. The removal papers alleged a separable controversy between Convers and the railroad company. After removal there was a consolidation of the two cases, and, no one appearing in that court but himself and the railroad company, the issues were submitted to a jury upon pleadings of this nature: on the part of the railroad company, petitions disclosing its proposed right of way, asking an appropriation of the lands therefor, and an ascertainment of the damages; and cross-petitions by Convers,

alleging that he was the owner of particular tracts described within this right of way, and the damages which he would sustain by their appropriation by the railroad company, and praying compensation therefor. To the averments in the pleadings on either side there was no formal denial, and upon these pleadings the case went to trial. The jury found the amount of damages to be $12,000. The verdict, after describing the lands, recited: "And that the owners and parties interested therein are entitled to the sum of twelve thousand dollars, the value of the land taken and all improvements thereon, in full compensation for the same." Upon such verdict the plaintiff in error moved for a judgment in his favor for $12,000, the total amount of the damages; but this was refused, and the judgment which was entered ignored him, and decreed that for the particular tracts described "the sum of money awarded by the jury in and by their said verdict to the owners and parties interested in the property above described is a just compensation for the taking of said premises for the railroad purposes of the petitioner herein, and for all damages to property not taken. And it is further ordered that the petitioner pay to the county treasurer of Cook County, Illinois, for the benefit of the owners and parties interested in the premises above described, the sum of twelve thousand dollars, ($12,000), being the amount awarded by said jury in and by their said verdict. It is further ordered, adjudged and decreed that upon the making of said payment to the said county treasurer, the petitioner, the Atchison, Topeka and Santa Fé Railroad Company in Chicago, may enter upon the premises above described and the use of the same for railroad purposes." To reverse such judgment, Convers sued out a writ of error from this court.

Mr. Charles M. Sturges for plaintiff in error.

Mr. Charles S. Holt (with whom was *Mr. Norman Williams* on the brief) for defendant in error.

I. On the record Convers appears as the only "owner or person interested in" the property. The jury properly ascer-

tained the *entire value*, and the judgment in effect awards that value to Convers as specifically as if his name had been used. The form of the verdict and judgment cannot possibly prejudice his rights.

II. The verdict and judgment are right. If there had been adverse claimants before the court, Convers would have had no right to a determination by the condemnation jury of the question whether he was or was not the owner. A jury impanelled under the eminent domain acts of Illinois has no duty or power to pass on questions of title. Such questions are to be determined by the court or by a common law jury, as the nature of the case may require. Rev. Stats. Ill. c. 47, (title, "Eminent Domain,") §§ 2, 8, 10, 16; c. 24, (title, "Cities, Villages and Towns,") §§ 127, 129.

The jury has nothing to do with any question except the *amount* of compensation. *Smith* v. *C. & W. I. Railway Co.*, 105 Illinois, 511; *South Park Commissioners* v. *Todd*, 112 Illinois, 379; *DeBuol* v. *F. & M. Railway Co.*, 111 Illinois, 499; *Railroad Company* v. *Haslam*, 73 Illinois, 494; *C. & W. I. Railway Co.* v. *Prussing*, 96 Illinois, 203; *Suver* v. *C. S. F. & C. Railway Co.*, 123 Illinois, 293; *Grayville & Mattoon Railroad Co.* v. *Christy*, 92 Illinois, 337; *Henry* v. *Centralia & Chester Railroad Co.*, 121 Illinois, 264; *O'Hare* v. *C., M. & N. Railway Co.*, (Supreme Court of Illinois, October, 1891,) 28 N. E. Rep. 925.

Neither the Constitution nor the statutes give a right to trial by jury on questions of title.

Mr. Justice Brewer delivered the opinion of the court.

The single question in this case is, whether the verdict and judgment responded to the issues tendered by the pleadings. A bill of exceptions was prepared, showing that the testimony presented to the jury was simply as to the damages resulting from the appropriation of the proposed right of way by the railroad company; and that no testimony was offered by Convers as to the extent and nature of his title, and none by the railroad company in any manner challenging it. By the

express language of the verdict the amount found by the jury was the total amount of compensation due for the appropriation of this right of way through the particular tracts claimed by Convers. As that matter was properly determined, there is no necessity for a new trial, or further inquiry as to the amount of damages. But upon the pleadings we think a judgment ought to have been entered in terms in favor of Convers for such damages, or at least one directing their appropriation to him personally, and that the question as to who was entitled thereto ought not to have been, by the form of the judgment, left open to further inqury.

The bill of rights of the constitution of Illinois (Constitution 1870, art. 2, sec. 13) declares: "Private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the State, shall be ascertained by a jury, as shall be prescribed by law."

The eminent domain act, passed under this constitutional provision, (Revised Statutes, Illinois, 1874, chapter 47, p. 475,) directs in terms that just compensation for private property taken "shall be ascertained by a jury as hereinafter prescribed." (Sec. 1.) The procedure thereafter provided was a petition by the party authorized to take the property to a judge of the circuit or county court, describing the property and naming the owners appearing of record, if known, or if not known, stating that fact, and praying that the compensation be assessed. (Sec. 2.) In the one petition any number of parcels of property might be included, and the compensation for each assessed separately by the same or different juries. (Sec. 5.) Process was to be served, as in cases in chancery, (sec. 4,) a trial had, and the verdict, or report of the jury as it is called, was "to clearly set forth and show the compensation ascertained to each person thereto entitled." (Sec. 9.) The oath to be taken by the jury contemplated also the same separate ascertainment. (Sec. 8.) "Sec. 10. The judge or court shall upon such a report, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same, upon payment of full compensation, as ascertained as aforesaid." Section 11

adds that "any person not made a party may become such by filing his cross-petition," and that his rights "shall thereupon be fully considered and determined." Sec. 14 is as follows: "Payment of compensation adjudged may, in all cases, be made to the county treasurer, who shall, on demand, pay the same to the party thereto entitled, taking receipt therefor, or payment may be made to the party entitled, his, her or their conservator or guardian."

These sections make it clear that under the pleadings the judgment entered upon this report or verdict should either have directed payment to the plaintiff, or that the deposit with the county treasurer was for his benefit. In other words, Convers's right to this money should have been settled by the judgment, and not left open to further inquiry.

It is unnecessary to consider what rule obtains when the railroad company puts in issue the fact or extent of the claimant's title or interest. It is enough to dispose of the case here presented.

While the precise question does not appear to have been determined by the Supreme Court of the State, its rulings are in this direction. *Bowman* v. *Railway Company*, 102 Illinois, 459; *Johnson* v. *Railway Company*, 116 Illinois, 521; *Suver* v. *Railway Company*, 123 Illinois, 293. In the first of these cases it was held that the provision in the statute, that several tracts of lands belonging to different persons might be included in one petition, and the compensation for each separately assessed by the same or different juries, extended to cases where different persons had distinct interests in the same tract, and that in such cases the damage to each might be separately ascertained. In the second, the court decided that each owner might have his damages assessed before a separate jury, and was entitled to his single appeal from the judgment; and, also, that, if a cross-petition set forth only evidence of claimant's title, and was uncertain in the description of his interest in the property, such defect was ground for demurrer, but did not justify a dismissal on motion. And, in the third, the petition of the railroad company, averring that four persons named had or claimed an interest in a tract described, and there being

no other averment in the petition or cross-petition of separate interests in such parties, a finding of the gross amount to be paid to them was sustained. In that case, also, it was held that certain defects alleged to exist in the petition must, to be taken advantage of, be challenged by demurrer. These cases all indicate that proceedings under the eminent domain act may be divided into distinct controversies between the railroad company and each party owning or having a separate interest in any tract; and that a controversy, thus separated, is to proceed according to the ordinary rules concerning trials, with a certainty in verdict and a finality in judgment. They sustain the conclusion we have heretofore expressed in this case.

The judgment will be

Reversed, and the case remanded, with instructions to enter a judgment in terms securing to Convers the amount of the damages found by the jury.

The Chief Justice took no part in the decision of this case.

HEDDEN *v.* ISELIN.

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

No. 144. Argued January 7, 1892. — Decided January 26, 1892.

In a suit to recover back customs duties paid under protest, where the only question tried was, whether in re-appraisement proceedings the importer was denied rights secured to him by law; *Held*,

(1) It was proper to admit in evidence a protest filed by the importer with the re-appraisers, as a paper showing what rights the importer claimed, and especially his claim that the merchant appraiser was not qualified;

(2) A motion to direct a verdict for the defendant was properly denied, the court having ruled in accordance with the decision of this court in *Auffmordt* v. *Hedden*, 137 U. S. 310, and having instructed the jury fully and properly, and there being no exception to the charge, and a question proper for the jury.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Francis Lynde Stetson for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Supreme Court of the State of New York, in June, 1886, by William E. Iselin, John G. Neeser and Alfred Von Der Muhl, against Edward L. Hedden, collector of the port of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover the sum of $2124.14, with interest from June 26, 1886, as an alleged excess of customs duties, paid under protest, on the importation of silks by the steamer Normandie, entered June 20, 1885, and of satins composed of cotton and silk, by the steamer Belgenland, entered June 18, 1885. The case was tried before Judge Wheeler and a jury, in December, 1886, and the jury found a verdict for the plaintiffs for $2124.14 on which a judgment was entered for them for that amount and costs, November 5, 1887. To review that judgment, the defendant has brought a writ of error.

On the appraisement of the goods, they had been increased in valuation more than ten per cent above the invoice valuation, and additional duty and a penal duty being imposed in each case, the importers asked for a re-appraisement, pursuant to statute, before the general appraiser and a merchant appraiser.

No question of the classification or rating of the goods imported was presented; but the importers claimed that, in the re-appraisement proceedings, they were denied rights which were secured to them by law. The court remarked, in its charge to the jury: "The only question we have to try is, whether there has been a substantial re-appraisement according to the law and according to the rights of these importers;"

and the court stated the questions which it submitted to the jury as follows: "If the plaintiffs were not cut off from any substantial right and the appraisers followed their own judgment and discretion fairly and really, then return a verdict for defendants. If the appraisers were controlled by some outside influence, so that they didn't act their own judgment, then return a verdict for the plaintiffs. Or, if the plaintiffs were cut off from their fair chance to be there when the appraisal was made, from seeing their goods and pointing out the quality to the appraisers, then return a verdict for the plaintiffs."

The first error alleged by the defendant is that the court erred in admitting, under objection, a paper of protest filed with the re-appraisers during the proceedings in respect to the re-appraisement of the goods imported by the Normandie. A witness, Mr. Barnett, who had represented the plaintiffs in the proceedings and had charge of the two importations throughout testified that, at the time of the re-appraisement, he delivered to Mr. Brower, the general appraiser, a written paper, addressed to the latter and the merchant appraiser, a copy of which appears in the bill of exceptions, stating that the importers demanded to be present during the re-appraisement and to present personally, as well as by their employés and their agents, and also by witnesses desired to be furnished, fully informed upon the subject matter, testimony as to the true dutiable value of the importation by the Normandie, and to have reasonable opportunity to cross-examine witnesses and to test and disprove testimony to be introduced against the correctness of the invoice; and alleging that the merchant appraiser, Mr. Booth, was not qualified to act under the statute. The defendant objected to the admission of that paper in evidence, as incompetent, irrelevant and immaterial; but the objection was overruled and the defendant excepted.

We see no error in receiving the paper in evidence. It was part of the proceedings which took place before the re-appraisers, and appears to have been presented to them for the purpose of showing what rights the importers claimed, and especially their claim that the merchant appraiser was not qualified. It was objected to as a whole; and it was not put

in as evidence that the importers had the rights which they thus claimed, but merely to show that they had protested seasonably.

It is also assigned for error that the court ought to have directed the jury to find a verdict for the defendant. At the close of the plaintiffs' testimony, the defendant moved the court to direct such a verdict. But the court declined to do so. The defendant excepted, and then put in his evidence; and, at the close of the evidence on both sides, he renewed his motion for the direction of a verdict for him, on the ground that, on the whole evidence, the plaintiffs were not entitled to recover. That motion was denied, and the defendant excepted.

The bill of exceptions does not state that it contains the whole of the evidence. In denying the motion which was thus made at the close of the plaintiff's testimony, the court, having heard full argument on the point on both sides, referred to a circular from the Secretary of the Treasury, which had been read in evidence and is set forth at length in the bill of exceptions, dated June 9, 1885, and being No. 6957, on the subject of the re-appraisement of merchandise, and directed to the general appraiser at New York City, and the material parts of which are set forth at length on pages 316, 317 and 318 in the report of the case of *Auffmordt* v. *Hedden*, 137 U. S. 310. The court said, in its remarks denying the motion for a verdict for the defendant, that in conformity with the views of the Secretary, expressed in the circular, the re-appraisers were not a court to hear witnesses and counsel; that the importers would have a right, on the re-appraisement, to attend, to see that the re-appraisers had their goods and to call attention to any of the qualities of the goods; that the court expressed no opinion as to whether the importers would have the right to see such testimony in writing, applicable to the value of the goods, as the re-appraisers might take; that, on the testimony of the witness Barnett, the jury might think that the importers were cut off from a fair right to be there when their goods were examined (not when the re-appraisers were deliberating as to the value of the goods); and that the question of fact as to

whether, under that view, there had been a proper re-appraisement ought to go to the jury.

If the finding of the jury was against the weight of the evidence, the remedy was by a motion for a new trial, which does not appear to have been made; and this court cannot exercise a function which was that of the jury.

It appears by the record that the importers, in September, 1885, had protested to the collector, in the case of the Belgenland, against the employment of Mr. Roberts, the merchant appraiser, on the ground that he was not a discreet and experienced merchant, familiar with the character and value of the merchandise; that they made the protest before mentioned, in the case of the Normandie, against Mr. Booth, the merchant appraiser in that case; that Mr. Booth was a manufacturer of silk goods, at Paterson, New Jersey, of the same general description as those imported by the plaintiffs on the Normandie; that there was a competition between such goods as were imported by the plaintiffs by the Normandie, and those manufactured by Mr. Booth; that Mr. Roberts had expressed himself personally to Mr. Barnett, in conversation at different times, in language showing strong prejudice against importers generally of silk goods, and had specifically stated that he thought most of them were foreigners in league with foreigners on the other side for the receipts of merchandise at the port of New York at a price a great deal less than the goods were worth on the other side; that it could only be through a combination that they could get the goods in that way; and that he thought the whole thing was a fraud.

It does not appear by the bill of exceptions that the defendant excepted to any part of the charge of the court to the jury; but he presented to the court seventeen separate requests to charge the jury, in regard to which the bill of exceptions states that "the court declined to charge otherwise than as already charged, and denied each of such requests except as charged;" and that the defendant excepted to each of such rulings.

It is assigned for error that, under the charge and the rulings of the court, the jury was permitted improperly to find

that the re-appraisers did not act upon their own judgment, but were controlled by outside influences.

The eleventh request to charge was as follows: "That the statute empowers the Secretary of the Treasury to establish rules and regulations, not inconsistent with the laws of the United States, to secure a just, faithful and impartial appraisal of all merchandise imported into the United States." The court substantially so ruled in its remarks on the denial of the first motion to direct a verdict for the defendant; and it ruled nothing to the contrary in its charge to the jury. Judge Wheeler was the judge who afterwards ruled to the same effect in *Auffmordt* v. *Hedden*, which ruling was affirmed by this court in that case, in 137 U. S. 310. The judgment in the case of *Auffmordt* v. *Hedden* was entered in the Circuit Court in July, 1887. The present case was tried in December, 1886, and judgment was entered November 5, 1887. Our decision in *Auffmordt* v. *Hedden* was rendered December 8, 1890.

We see nothing in the conduct of the trial in the present case which is contrary to the rulings of this court in *Auffmordt* v. *Hedden*. The court, in its charge to the jury, sustained the instructions of the Secretary of the Treasury of June 9, 1885, and did not say anything to the contrary of what were afterwards the rulings of this court in *Auffmordt* v. *Hedden*, and said that the importers had no right to say that certain witnesses should be produced before the re-appraisers, and that, although the importers had the right to have a fair opportunity to show their goods and to make suggestions in regard to them, they had no right to be there to examine witnesses or to explore the sources of the information of the re-appraisers, or to have counsel there, as such, to cross-examine witnesses and argue the case. It also charged the jury that the re-appraisers had a right to read the regulations.

The general appraiser, Mr. Brower, and the merchant appraisers, Messrs. Booth and Roberts, were examined as witnesses at the trial. The instructions in the circular of June 9, 1885, appear to have been regarded by the re-appraisers as guiding instructions in principle. But the question submitted to,

and passed upon by the jury, and found in favor of the plaintiffs, was whether the re-appraisers "were controlled by some outside influence, so that they didn't act their own judgment."

Judgment affirmed.

CLARK *v.* SIDWAY.

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

No. 140. Argued January 7, 1892. — Decided January 26, 1892.

Persons who jointly purchase land to hold it for a rise in value are not partners but are tenants in common, and either party can sue the other at law for reimbursement of allowances made by him on the joint account, without there having first been a final settlement and the striking of a balance.

In considering the amount necessary for the jurisdicton of this court on a writ of error, not only is the amount of the judgment against the plaintiff in error to be regarded, but, in addition, the amount of a counter claim which he would have recovered, if his contention setting it up had been sustained.

It was held that the plaintiff in error had no right to complain of the action of the court below in allowing a remittitur of $2700.75 on a verdict of $6700.75; or in allowing the jury to fill up, in open court, the amount of a verdict which they had signed and sealed, leaving a blank for the amount.

THE court stated the case as follows:

This is an action at law, brought October 13, 1880, by Leverett B. Sidway, a citizen of Illinois, for the use of John R. Lindgren, against Ezekiel Clark, a citizen of Iowa, in the Circuit Court of the United States for the Northern District of Illinois. The declaration claimed $8000. It alleged that on the 12th of August, 1872, one Cleaver and his wife, by a warranty deed, conveyed to the plaintiff certain land in Cook County, Illinois, subject to a trust deed executed by Cleaver and wife to one Gallup, to secure the payment of $8000 in five years from date, with interest at ten per cent per annum, in which warranty deed it was stated that Sidway assumed and

agreed to pay said debt to Gallup and to hold Cleaver harmless therefrom; that the deed with such recital and agreement was accepted by Sidway; that on the 23d of November, 1875, Sidway and his wife conveyed to Clark an undivided one-half interest in the land, subject, as recited in the deed, to the trust deed to Gallup; that in the deed to Clark the latter undertook and promised, as part of its consideration, that he would, and that he did, in and by the deed, assume and agree to pay one-half of the note for $8000, with interest thereon from August 12, 1872, and would save Sidway harmless therefrom, as well as from one-half of any further liability Sidway might be under, through the provisions contained in said trust deed; that Clark took and received the deed; that on the 3d of July, 1875, the note for $8000, with interest, became due and payable; that on the 12th of October, 1880, Clark neglected to pay the one-half of the note with interest, or any part of it, and did not save Sidway or keep him harmless from the payment of the note or interest; and that, by means thereof, Clark promised to pay to Sidway, when requested, the one-half of the note, to wit, $4000, and interest thereon from August 12, 1872. There was also a count containing the common counts for $8000, alleging an indebtedness on October 12, 1880.

Clark put in a special demurrer to the first count, setting forth several grounds of demurrer, and pleaded the general issue to the common counts and a statute of limitations of five years. Afterwards, he pleaded the general issue to the first count, also a want of consideration, and the fact that the deed to him from Sidway was intended by the parties as a security to Clark for $4000 due from Sidway to him, and that Clark did not purchase the premises in question otherwise than for the purpose of holding the deed by way of mortgage and security for such indebtedness. He further pleaded, as to both counts, a set-off and a counter-claim for moneys due from Sidway to him, to his damage $10,000.

Issue was joined by replications to these pleas and by a rejoinder to the replications.

The case was tried by a jury in November, 1885, but it failed

to agree. The case was again tried by a jury, in March, 1888, and a verdict was rendered finding the issue for the plaintiff, and assessing his damages at $6700.75. A motion was made for a new trial, and in May, 1888, a judgment was entered which stated that, the court intimating an opinion on such motion, the plaintiff, by leave of the court, entered a remittitur of $2700.75 on the verdict, and that the court thereupon overruled the motion for a new trial and awarded judgment for $4000 damages. A judgment was entered for the plaintiff for $4000, being the amount of the verdict less the remittitur and for costs. To review this judgment, which is entitled as in favor of Sidway for the use of John R. Lindgren, the defendant has brought a writ of error.

There is a bill of exceptions. It appears therefrom that Sidway contended that he and Clark purchased the land in question on joint account, in equal shares, for resale at a profit, upon an agreement to contribute equally to the purchase-money, interest and taxes; and that Clark maintained the contrary.

Clark prayed the court to charge the jury that, if they believed from the evidence that Sidway and Clark purchased the land in question on joint account, in equal shares, for resale at a profit, upon an agreement to contribute equally to the purchase-money and the taxes and interest, such understanding would constitute the parties copartners in such land speculation, and, in the absence of a final settlement and the striking of a balance, neither party could be sued at law by the other for reimbursement of advances made by him upon the joint account. The court refused so to charge, and Clark excepted to such refusal.

Clark also prayed the court to charge the jury that, if they found from the evidence that the Cleaver note of $8000, mentioned in the assumption clause of the deed of November 23, 1875, was held, at the time of the commencement of the suit, by the Illinois Trust and Savings Bank, and was not taken up or purchased by Sidway until some time in 1883, after the commencement of the suit, up to which time said bank was its holder for value, as collateral security to the demand note

of Sidway, of which it was also holder for value, such subsequent payment or purchase of the note would confer upon Sidway no cause of action in this suit to recover the amount so paid. The court refused so to charge, and Clark excepted to such refusal.

The court charged the jury that there was nothing in the point that the parties were partners in the transaction as to the land; and that, if they were joint purchasers of the land for the purpose of holding it for a rise in value, they were not partners, but were tenants in common, having an equal undivided interest, if their interest was equal. The court also charged the jury that, although Sidway had paid off the Cleaver note of $8000 while it was held by the Illinois Trust and Savings Bank, by giving his own note to that bank therefor, the bank taking his note as an investment, the court saw nothing that would prevent Sidway from recovering, and added: "In short, I see nothing in the case anywhere to prevent the plaintiff from recovering what he claims here — about $6700 and some cents — provided the jury find the main issue in the case in favor of the plaintiff — that is, that Mr. Clark assented to become with the plaintiff a joint purchaser, or purchaser on joint account, of the property in question. . . . If at any time you find that the understanding between the parties was that the defendant was to become an equal purchaser with the plaintiff, having an equal right in this property, and if he did so become an equal purchaser at any time in this property and liable to pay one-half of the purchase price, I see nothing in the case to prevent the plaintiff from recovering from the defendant that portion of the purchase-money which the defendant was under obligation to pay, and which he did not pay, and which the plaintiff was under obligation to pay, and did pay on the defendant's account." Clark excepted severally to the portions of the charge above indicated.

In addition to the above specific exceptions, it is stated in the bill of exceptions, after setting forth at length the charge, which covers six printed pages of the record, that Clark "excepted to the said charge as given to the jury."

The jury were directed by the court, by consent of parties, to sign and seal their verdict, if they found one, and to separate, if they saw fit, and return such verdict at the opening of court upon the following day. On the following day, at the opening of court, the jury returned into court, after having separated during the previous night, and rendered a verdict in the following form, dated the day before, and signed by the twelve jurors: "We, the jury, find for the plaintiff and assess the damage at six thousand seven hundred dollars and seventy-five cents," save that no amount was mentioned as the amount of damages found, but a blank was left therefor. Thereupon the court told the jury that they should have inserted the amount of damages in the verdict, and that they could retire and find the amount. The foreman of the jury then stated, in the presence and with the concurrence of the other jurors, that the jury had agreed upon the amount, which was the sum testified to by the plaintiff, about six thousand and seven hundred dollars, but that none of the jurors were able to remember the precise figures, and for that reason they had decided to defer inserting the amount until they should come into court; and they requested the court to give them the amount, as testified to by the plaintiff, from the court's minutes, and they would insert it in their verdict. Thereupon, the court, from its minutes, gave the jury the amount as testified to by the plaintiff as being the balance due him, and the foreman of the jury, in open court and without retiring, inserted such amount in the verdict, with the consent and concurrence of each and all the jurors. The court inquired of the jury if the verdict so filled up was the verdict of the jury one and all, and each and all of the jury answered that it was their verdict, and it was received and ordered to be recorded, and the jury was discharged. The bill of exceptions then goes on to say: "No exception was taken at the time to the jury filling out the blank in the manner they did, or to the receipt of the verdict. The recollection of the judge who tried the cause is, that the counsel for the defendant were not in court when the jury gave their verdict, but that afterwards, on the same day, they came into court, made a motion for a

new trial, and among other things took exception to the manner, as above stated, in which the blank for damages was filled and the verdict received, which exceptions were allowed by the court."

On the next day, the defendant filed a written motion for a new trial, one ground of which was the action of the court in aiding the memory of the jury in regard to the testimony, in order that the blank for the plaintiff's damages might be filled. The bill of exceptions states that, after argument upon the motion, on both sides, the court announced its intention of overruling the motion, provided the plaintiff would remit all damages mentioned in the verdict, in excess of $4000; that such remittitur was made; and that the defendant excepted to the action of the court.

Mr. C. C. Nourse (with whom was *Mr. George L. Paddock* on the brief) for plaintiff in error.

Upon plaintiff's theory of the case, and upon his evidence all the elements of a partnership were involved in the transaction. It was a trading venture in the which each party was to furnish half the capital, each was to have an equal share in the profits, and each to share equally in the losses. Sidway's letter of October 15, 1872, contemplates a mere trading venture, with more to follow. The payments to be made and the amounts to be expended were indefinite. The sale of the property might be in parcels. The jury found their verdict on the statement of Sidway. If it was true that the purchase was made on the joint account of the parties in 1872, and the title was held by Sidway in trust until November, 1875, and was held in trust for Sidway until the final disposition of the property, in 1879, then it was a copartnership in which Sidway must account for the profits received in a proper action. *Nicoll* v. *Ogden*, 29 Illinois, 323; *S. C.* 81 Am. Dec. 311; *Pierce* v. *Shippee*, 90 Illinois, 371; *Kuhn* v. *Newman*, 49 Iowa, 424; *Remington* v. *Allen*, 109 Mass. 47; *Beauregard* v. *Case*, 91 U. S. 134. "Whenever it appears that there is a community of interest in the capital stock, and also a com-

munity of interest in the profit and loss, then the case is one of actual partnership between themselves and as to third persons." *Berthold* v. *Goldsmith*, 24 How. 536.

Mr. John N. Jewett for defendant in error.

It is respectfully submitted that this court has no jurisdiction of the writ of error in this case, and for the reason that the judgment upon which that writ of error has been sued out, is for a sum less than the amount necessary to give to this court jurisdiction to inquire into the record or the errors of it. *Thompson* v. *Butler*, 95 U. S. 694; *Hilton* v. *Dickinson*, 108 U. S. 165; *Opelika City* v. *Daniel*, 109 U. S. 108; *Ala. Gold Life Ins. Co.* v. *Nichols*, 109 U. S. 232; *Dows et al.* v. *Johnson*, 110 U. S. 223; *First Nat. Bank* v. *Redick*, 110 U. S. 224; *Pacific P. Tel. Cable Co.* v. *O'Connor*, 128 U. S. 394; *North Pac. Railroad Co.* v. *Austin*, 135 U. S. 315, 318.

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

A motion is made to dismiss the writ of error, on the ground that the judgment against Clark is for only $4000, and that, therefore, this court has no jurisdiction of the case. But we are of opinion that the amount involved is not only the amount of the judgment against Clark, which he seeks to get rid of by this writ of error, but is, in addition, the amount which he claims as a counter-claim against Sidway, and which he would have recovered if his contention had been sustained. The aggregate is over $5000, and we, therefore, have jurisdiction.

As to the merits, the case was fairly put to the jury on the disputed question of fact as to whether Clark became a joint purchaser with Sidway of the land in question; and the jury have found against Clark on that question.

There was no error in the charge of the court, in the particulars excepted to, or in the refusals to charge the matter asked by Clark. The case shows that the jury must have found, and were warranted in finding, that Sidway made the purchase

for the joint benefit of himself and Clark; that Clark paid to Sidway $2031.40 toward the purchase-money, which was the amount thereof over and above the incumbrance which was assumed; that Clark afterwards paid to Sidway $450 on account of expenses, interest and taxes, in carrying the property; that afterwards Sidway paid the interest on the incumbrance and the taxes, until he had paid more than Clark paid; that the incumbrance matured July 1, 1875; that, Sidway being an officer of the Illinois Trust and Savings Bank, that bank purchased the Cleaver note and held it as collateral security for Sidway's personal note for the same amount, with authority to sell such collateral to pay the obligation of Sidway; that, in 1879, the bank sold the collateral, and it was purchased by Lindgren; that the net result of the sale was credited on Sidway's note, and the balance of that note was settled by Sidway, as between him and the bank, after this suit was commenced, and Sidway's individual note was paid; that, subsequently to the sale of the collateral note, and in July, 1879, the original incumbrance was foreclosed by a sale of the land, made by the trustee in the trust deed; that at the sale the land was bought by Lindgren, and the proceeds were credited on the Cleaver note, leaving a large amount unpaid, and a large obligation resting upon Sidway, growing out of the purchase of the land, one-half of which had been assumed by Clark in the deed to him executed by Sidway and wife; that that deed had been recorded by Sidway and forwarded to Clark, who received and kept it; that it contained the before-mentioned assumption by Clark and agreement to pay one-half of the incumbrance, and the interest thereon from August 12, 1872, and one-half of any further liability which Sidway might be under in consequence of the provisions of the trust deed; and that the foregoing matters were all consummated more than a year before this suit was brought.

This suit is founded upon the assumption clause in the deed from Sidway and wife to Clark. The note of Cleaver remained, when the suit was brought, in the ownership of Lindgren; and the action was, therefore, properly brought in the name of Sidway, for the use of Lindgren. The theory put

before the jury by Clark, and not sustained by their verdict, was that he had no connection with the purchase of the land; that the moneys which he advanced to Sidway were merely loans to the latter; and that the deed from Sidway and wife was only security for such loans.

The transaction between Sidway and Clark, of their joint purchase of the land, did not constitute a copartnership in respect thereto. It was a single, special adventure on joint account, involving the payment in equal proportions of designated sums of money. It was a mere community of interest in the property, and the agreement to share the profits and losses on the sale of the land did not create a partnership. The parties were only tenants in common, and the action at law would lie. *Jordan* v. *Soule*, 79 Maine, 590; *Gwinneth* v. *Thompson*, 9 Pick. 31; *Haven* v. *Mehlgarten*, 19 Illinois, 91; *Fowler* v. *Fowler*, 50 Connecticut, 256; *Dickinson* v. *Williams*, 11 Cush. 258; *Fisher* v. *Kinaston*, 18 Vermont, 489; *Fanning* v. *Chadwick*, 3 Pick. 420; *Coles* v. *Coles*, 15 Johns. 159; *Galbreath* v. *Moore*, 2 Watts, 89; *Harding* v. *Foxcroft*, 6 Maine, 76.

The defendant has no right to complain of the action of the court in allowing the plaintiff to remit all of the verdict in excess of $4000. Probably the court thought that the verdict embraced items which were not properly allowable under the declaration. There does not appear to be any ground for holding that the remittitur was made with a view to avoid the jurisdiction of this court.

We see no error in the action of the court in regard to the filling up of the amount in the verdict of the jury, even if the exception thereto can be considered as having been taken in time.

We have considered all the questions properly raised by the defendant, and all the alleged errors of which he has any right to complain, and see nothing in the record which would warrant the awarding by us of a new trial.

Judgment Affirmed.

HOME BENEFIT ASSOCIATION *v.* SARGENT.

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

No. 155. Argued January 12, 1892. — Decided January 26, 1892.

A policy of life insurance provided as a condition, that death of the assured "by his own hand or act, whether voluntary or involuntary, sane or insane, at the time" was a risk not assumed by the insurer. A suit to recover the amount of the policy was tried on the theory on both sides, that death from a shot from a pistol fired by accident by the assured, was covered by the policy: *Held*,

(1) Evidence drawn out on the cross-examination of a witness, which has a bearing on the testimony given by him on his direct examination, is competent, especially where it relates to a part of the same conversation;

(2) An inquiry as to what conversation was had with the plaintiff's agent is not competent, if it does not appear what the subject of the conversation was, or what was intended to be proved by it;

(3) In view of the contents of the proofs of death and of the evidence, the plaintiff was not estopped from claiming that the death of the assured was caused otherwise than by suicide, and it would not have been proper for the court to charge the jury that by the introduction of the proofs of death, the burden was put on the plaintiff to satisfy the jury, by a preponderance of evidence, that the assured died otherwise than by his own hand;

(4) The defendant having alleged in its answer, that the death of the assured was due to a cause excepted from the operation of the policy, it was not error for the court to charge the jury that the defendant was bound to establish such defence by evidence outweighing that of the plaintiff.

THE case is stated in the opinion.

Mr. Francis Lawton (with whom was *Mr. Austen G. Fox* on the brief) for plaintiff in error.

Mr. Miron Winslow for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Southern District of New York, by Hen-

rietta P. Sargent, a citizen of Massachusetts, against the Home Benefit Association, a life insurance association incorporated by the State of New York, to recover the sum of $5000, with interest from March 15, 1887, upon a policy of life insurance issued by the defendant, September 5, 1885, on the life of Edward F. Hall, Jr., for the benefit of the plaintiff, who was his sister.

Hall was made by the policy an accepted member of the life department of the defendant. By one of the conditions in the policy it was provided, that "death of the member by his own hand or act, whether voluntary or involuntary, sane or insane at the time," was a risk not assumed by the defendant under the policy.

The complaint alleged that the policy was in force on the 19th of October, 1886, when Hall died at the city of New York, and that his death was not caused by any of the causes excepted from the operation of the policy. It was set up in the answer, as a defence, that the death of Hall was brought about by his own hand and act, in that he died from the immediate effect of a shot from a pistol fired by his own hand, such shot having been fired by him with the intention of taking his own life.

The case was tried before Judge Coxe and a jury, which rendered a verdict for the plaintiff for $5350. A motion for a new trial was made before Judge Coxe, and was denied, the opinion of the court thereon being reported in 35 Fed. Rep. 711; and a judgment was thereafter rendered in favor of the plaintiff for $5350, with interest and costs, the whole amounting to $5517.99. To review that judgment, the defendant has brought a writ of error.

By the bill of exceptions it appears that, after the plaintiff rested her case, the defendant moved the court to direct a verdict for it, on the ground that the plaintiff had failed to show that she ever had presented to it, in accordance with the provisions of the policy, satisfactory evidence of Hall's death; but the court denied the motion. The defendant excepted, and then proceeded to put in evidence on its part. After it had rested, the plaintiff put in rebutting evidence on her part, and

then the defendant put in further evidence. It is not stated in the bill of exceptions that it contains all the evidence; but it is set forth at the close of what does appear, that the defendant moved the court to direct a verdict for the defendant, on the ground that the evidence showed that Hall died by his own hand. The court refused to do so, and the defendant excepted.

Parts of the charge of the court to the jury are set forth; and it is stated that the court charged the jury as to all other features of the case fully and in such manner that no exception was taken thereto, and that the portions of the court's charge to the jury which are not set forth did not in anywise bear on, or relate to, any matters contained in the defendant's requests to charge, hereinafter referred to.

Among the instructions of the court to the jury were the following: "The only question upon this proof is, did Edward F. Hall commit suicide? If he did, the policy is void. If he died in some other way — by accident or assassination — it would be otherwise. Upon that issue, the burden is upon the defendant to satisfy you by a fair preponderance of proof of the truth of this defence. . . . When the policy of insurance was introduced with evidence or admissions that the premiums had been paid, and proof was given of the death of the assured, the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into the court and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defence, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff, that that defence has been established."

The court, after stating that the defendant had introduced in evidence proofs of death furnished to it by the plaintiff, that the defendant insisted that the plaintiff, having produced those proofs, was estopped from saying that the cause of death there assigned was not truly assigned, and that such proofs asserted generally that Hall met his death by suicide while laboring under temporary aberration of mind, also instructed

the jury, that such proofs were proper evidence for them to consider, but were by no means conclusive evidence, and were to be taken by them in connection with the other testimony in the case, and given such weight in determining the main question as the jury might see fit to give them.

The court further instructed the jury, that the plaintiff's position was, first, that the burden being upon the defendant to satisfy them that Hall met death by his own hand, intending to kill himself, the plaintiff had a right to rely upon the alleged failure of the defendant to prove that fact; second, that it was asserted by the plaintiff that Hall's death might have been occasioned simply and solely by accident; and, third, that it might have been the result of assassination; and that, if the jury found that there was a failure on the part of the defendant to prove that Hall committed suicide, (whether he was in his right mind, or laboring under temporary insanity, being wholly immaterial,) or if they found upon the proofs that his death was caused by accident and nothing else, there must be a verdict for the plaintiff.

The defendant excepted (1) to the instruction that, on the question whether Hall committed suicide or not, the burden of proof was on the defendant to satisfy the jury by evidence which in their judgment outweighed that of the plaintiff, that his death was by suicide; (2) to the charge that the proofs of death were proper evidence in the case, but by no means conclusive; (3) to the submission to the jury of the question whether Hall died as the result of assassination, and to the charge that the evidence must be such as satisfied the jury of the truth of the fact in dispute.

Before the case was summed up to the jury by counsel, which was done before the giving of the charge, the defendant presented to the court fifteen several written requests to charge the jury. These requests are inserted in the bill of exceptions after the statement of the charge and the exceptions thereto, and it is stated, in regard to each of the requests, that the court refused so to charge "except as already charged," and that the defendant excepted to each refusal to charge.

Although there are twenty-five alleged errors set forth in

the assignment of errors filed in the court below, yet, as the brief of the plaintiff in error relies on but a few of them, we confine our attention to those thus relied on.

(1) One Andrew S. Brownell was examined as a witness for the defendant. At the time he was examined, in February, 1888, he was one of its directors, and had been its secretary in 1885. In December, 1886, he received, on behalf of the defendant, from one John Sherman Moulton, as agent of the plaintiff, certain proofs of death in the case. He testified that on that occasion he had a slight conversation with said Moulton on the subject of such proofs of death; that he (Brownell) looked at them and said they were incomplete, that the coroner's verdict did not accompany them; and that Moulton said it would be supplied in a few days. Brownell was then asked by the defendant: "Q. What was the substance of the understanding between you as to the manner in which Mr. Hall met his death, if that was mentioned between you?" His answer was: "A. That he had met his death by his inflicting a pistol shot, and that we must have the coroner's verdict, which he said would be furnished in a few days; and it came a few days later." Brownell was then asked by the plaintiff: "Q. Did you say to Mr. Moulton that you had known Mr. Hall well, in California, and that if it depended upon you the loss should be paid without any delay? Did you state that in that conversation or in any subsequent conversation?" This was objected to by the defendant as irrelevant, but the question was allowed and the defendant excepted. The answer was: "A. I think that I expressed such a personal feeling in the matter." He was then asked by the defendant: "Q. You say that you expressed such a personal feeling for Mr. Hall. What was your feeling as to your obligations to the defendant, in view of the risk excluded from the policy and the fact of the wound being self-inflicted? A. In view of the policy of the company, as shown in the certificate that has been presented here, the company could not pay it; it was against the policy of the company to assume the risk of a man's death by shooting or by self-inflicted wounds. Q. When you say that it was against the policy of the company, what do you mean by

that? A. Against the decision of the managers of the company as to the best interests of the company, taken as a whole. I did not mean the mere terms of the policy, but the settled course of business of the company."

It is contended by the defendant that the declaration by Brownell to Moulton that, if it depended upon him, (Brownell,) the loss should be paid without any delay, was irrelevant, and the admission of it in evidence constituted error. But we think the evidence was admissible. Brownell was a witness for the defendant, and the evidence in question was brought out on his cross-examination. He had stated on his direct examination that the substance of the understanding between him and Moulton, at the time the latter brought in the proofs of death, as to the manner in which Hall met his death, was "that he had met his death by his inflicting a pistol shot;" and the evidence in question, being drawn out on cross-examination, had a bearing upon the testimony which Brownell had given on his direct examination, implying that Moulton had stated that Hall met his death "by his inflicting a pistol shot." The evidence was as to a part of the same conversation; and we think it was relevant and competent.

(2) On the direct examination of Mr. Brownell as a witness for the defendant, he was asked the substance of a conversation which he had with one Charles W. Moulton, the agent or attorney of the plaintiff, in November, 1886, on an occasion when said Moulton, on behalf of the plaintiff, visited Brownell at the office of the defendant. The question was objected to by the plaintiff as immaterial, and was excluded, and the defendant excepted. A sufficient answer to this assignment of error is that the bill of exceptions does not state what the subject of the conversation was, or what was intended to be proved by it.

Charles W. Moulton was the father of John Sherman Moulton. Subsequently, when Brownell had been recalled by the defendant, and it had been proved that Charles W. Moulton was the plaintiff's agent, the question was repeated by the defendant as to what Charles W. Moulton said to Brownell when he visited the latter to make a claim on the defendant

for the payment of the $5000. The inquiry was again ruled out, it not being stated what the subject of the conversation was, or what was sought to be proved. The proofs of death were furnished to the defendant after this alleged conversation; and, even if the conversation related to the cause or manner of Hall's death, it could not bind the plaintiff, in the absence of any authority by the plaintiff to Moulton, to make any statement on the subject.

(3) It is contended by the defendant that the proofs of death, including the coroner's inquest, constituted an admission by plaintiff that Hall came to his death by his own hand, and that such admission was sufficient to create a legal right in the defendant to have a verdict directed for it. One of the defendant's requests to charge was that, the plaintiff, in her proofs of death, having stated to the defendant that the death was by suicide, it was incumbent upon her to prove, by a preponderance of evidence, that the statement was mistaken and that the death was the result of accident; and another was that, the plaintiff's proofs of death having been presented in her name, and by her agent in the matter, and constituting the essential preliminary to her action, they must stand as her acts, and the representations made therein must be taken as true, until at least some mistake was shown to have occurred in them.

The facts of this case are thus stated in the charge of the court to the jury, and there was no exception to such statement: "It appears to be undisputed that Edward F. Hall had lived about twenty years of his life in San Francisco. He frequently — habitually, perhaps — carried a pistol. He some time during his life kept a pistol under his pillow. He was a man of genial, sanguine temperament, hopeful — making plans as to the future — proud of his only son. But it also appears that, for a long series of years he had been suffering from severe headache — to such an extent that it created depression so strong at times that the doctor describes it as melancholia. It appears, further, that upon the evening prior to his death he was with a party of friends at the residence of Mr. Johnson, and there, in the presence of two or three witnesses, complained

of suffering intense pain in his head, frequently placing his hands to his head and complaining of the severe pain which he suffered. The pecuniary circumstances of Hall have not been disclosed here, further than the evidence as to borrowing money of his sister. It is in proof that he had a wife and son, his son in college, and that he took great interest in his future. But it is also proper that I should call your attention to the fact that at the moment of his death his wife was seriously ill — thought to be hopelessly ill — in a distant city. Upon the morning of the 19th of October, 1886, at 139 East 21st street, in this city, and between 7 and 7.30 o'clock of that morning, Edward F. Hall was found in the back hall-bedroom of the fourth story, with a severe wound in his right temple. The wound was so severe that it caused a comminuted fracture of the frontal bone, and fractures radiating up and down and backward from the hole in the right temple, sufficient, unquestionably, to produce his death. He was found lying upon his bed with the clothes drawn up under the armpits, his limbs relaxed, no evidence of any struggle having taken place, and near his right hand, within a few inches or very near it, was the pistol, probably, which has been shown in your presence, with three of its chambers discharged. There was also found upon his stand or desk a letter to his physician, in substance stating that he has been suffering terribly with headache, that he has had it for several days, that it is growing worse and has become wellnigh unbearable."

In the proofs of death furnished to the defendant, and signed by the plaintiff, was this question: "Was the death of deceased caused by his own hand or acts, or in consequence of a duel, or in violation of any law?" Her answer to this was: "See statement of coroner's physician, Dr. Jenkins." In the statement of Dr. Jenkins was this question: "State the immediate cause of death." His answer was: "Shock from penetrating pistol shot; wound of head (right temple); mental aberration superinduced by chronic headache." There was also this question to Dr. Jenkins: "Was the death of deceased caused or accelerated or aggravated by his own hand or acts?" His answer was: "I examined the deceased only as coroner's

physician, and therefore am unable to make any further statement than above, other than from the history. His mental condition was probably due to chronic headache, which was caused either by chronic meningitis or tumor of brain."

It is contended for the defendant that, because of the contents of the proofs of death, the plaintiff is estopped from claiming that Hall's death was caused otherwise than by suicide; and that, at least, the court should have held that the burden originally upon the defendant was shifted, by the introduction of the proofs of death, to the plaintiff, and it became her duty to satisfy the jury, by a preponderance of evidence, that Hall died otherwise than by his own hand.

But the defendant was not prejudiced by the statements and opinions contained in the proofs of death, and the plaintiff was not estopped thereby, as a matter of law. When the court was asked to charge the jury that by the introduction of those proofs the burden was shifted, the evidence was all before the jury, and was much more full and complete than that upon which Dr. Jenkins had based his opinion. He himself had been examined as a witness, and had testified as to what he knew or did not know at the time he made his certificate, and all the facts of the case, so far as they were known, had been explained in view of the contents of the proofs of death. It appeared that most of the statements in the certificate of Dr. Jenkins were based on hearsay. The instructions asked for in that respect, therefore, would have been erroneous.

Nor did the declarations in the proofs of death, when all taken together, necessarily amount to an admission that Hall committed suicide. The facts, or what Dr. Jenkins at the time supposed to be the facts, were stated in the proofs of death; and, although the defendant might have drawn therefrom the conclusion of suicide, they ought to be scrutinized carefully when they are sought to be used as amounting to an admission by the plaintiff that the policy was void. The language used by Dr. Jenkins in his certificate is not inconsistent with the theory of death by accident, especially in view of the fact, that when he came to the direct question as to whether

Hall's death was caused by his own hand or acts, he answered it by stating that he was "unable to make any further statements than above, other than from the history," the statements he had made above being that the "immediate cause of death" was "shock from penetrating pistol shot; wound of head (right temple); mental aberration superinduced by chronic headache." The jury were entirely at liberty to properly find that that wound, although self-inflicted, was accidental. The proofs of death and the entire evidence at the trial left it in doubt how Hall's death was caused, and it was for the jury to determine by their verdict. The court charged the jury that if they should find that Hall's death was caused by accident, they should find for the plaintiff. There was no exception to that instruction, and the case was tried on the theory that that was a correct construction of the policy. The 6th request of the defendant to charge was, that if the jury should find that Hall shot himself "in any manner except as by mere accident," the defendant was entitled to a verdict; the 10th request was, that the plaintiff had failed to give any evidence that the death was accidental; and the 12th request was, that the defendant was not bound to exclude every theory of accident.

(4) As to the exceptions to the charge of the court to the jury, we see no error therein. It is contended that there was no evidence from which the jury could find, as an affirmative fact, that Hall died by accident or assassination. In regard to this, as before remarked, the bill of exceptions does not purport to set forth all the evidence in the case. It was conceded that if Hall's death was by accident or assassination, the policy covered it, and, on the evidence given in the bill of exceptions, we think the jury were fully warranted in finding that it was by accident. The defendant having alleged in its answer that Hall's death was due to one of the causes excepted from the operation of the policy, it was not error for the court to charge the jury that the defendant was bound to establish such defence by evidence outweighing that of the plaintiff.

We think the court properly refused to charge in accordance with the requests made by the defendant, except as it

had already charged; and that it had already charged in terms sufficiently full and correct, as to the particulars now insisted upon to have been erroneous.

Judgment affirmed.

MR. JUSTICE BROWN dissenting. Upon the facts stated in the opinion of the court I think the jury should have been instructed to return a verdict for the defendant.

APPENDIX.

I.

ASSIGNMENTS TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.
For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.
For the Third Circuit, JOHN M. HARLAN, Associate Justice.
For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.
For the Sixth Circuit, HENRY B. BROWN, Associate Justice.
For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.
For the Eighth Circuit, DAVID J. BREWER, Associate Justice.
For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

February 1, 1892.

II.

SOME UNREPORTED PRACTICE CASES.

The following papers in the handwriting of the late Clerk of the Supreme Court, Mr. Carroll, were recently found in the Clerk's office. The Chief Justice directed them to be printed by the clerk for the use of the court.

UNITED STATES *v.* DAVENPORT'S HEIRS, No. 33, December term, 1851.

Mr. Coxe moved to dismiss this case, because the record referred to another record, and was therefore incomplete under the rule. *Mr. Attorney General* opposed the motion.

MR. CHIEF JUSTICE TANEY. When this rule was made the records were not printed, and it would have been very inconvenient to refer to other manuscript records of the court. But as the records are now printed, there is no inconvenience in the practice, and it tends to save expense. Moreover, there is in this record a stipulation of the counsel below to refer to another record of the same court now in this court, and which ought to bind the counsel here.

December 9, 1851. *Motion overruled.*

Mr. Attorney General for appellant.

Mr. Coxe and *Mr. H. Baldwin* for appellees.

This motion was made under what was then the 31st Rule; now the 8th Rule. The case, when reached, was argued and decided. The opinion of the court will be found in 15 How. 1.

No. 36. BEIN *v.* HEATH. Filed and docketed December 7, 1849.

Mr. Bradley moved for a certiorari. *Mr. Coxe* objected that the motion came too late, this being the third term that the case had been on the docket. *Mr. Bradley* replied that the record was not

printed at the last term, and that he had been taken into the case since the last continuance.

Mr. Chief Justice Taney. When this rule was made the records were not printed. Now, counsel rarely sees the record until it is printed, and if the motion is made within a reasonable time after the record is printed, and counsel has the opportunity of seeing it, a certiorari will be granted. But if, after the return, the other party desires to go to trial at this term, the party moving will not be entitled to a continuance.

December 9, 1851. *Certiorari awarded.*

Mr. Coxe and *Mr. A. O. Hale* for plaintiffs in error.

Mr. Bradley and *Mr. Bullard* for defendant in error.

This motion was made under what was then the 32d Rule; now the 14th Rule. The case was argued and decided on the merits, December term, 1851, and is reported in 12 How. 168.

No. 85. Larman *v.* Tisdale. Filed and docketed March 19, 1850.

No appearance for plaintiff in error. Appearance of *Mr. Stanton* entered for defendant in error. *Mr. Stanton* moved to dismiss this writ of error under the 54th Rule.

Mr. Chief Justice Taney. The object of the rule was to embrace a class of cases where there was no appearance, not to lay the foundation for a motion, but for the action of the court when the case is reached in the regular call of the docket, the counsel of defendant in error may avail himself of the 19th Rule if there be no appearance then entered for the plaintiff in error. The present motion must be overruled.

December 9, 1851. *Overruled.*

No appearance for plaintiff in error.

Mr. Frederick P. Stanton for defendant in error.

A previous motion to dismiss this case on the same ground, under the 54th Rule, now the 16th Rule, was made in December term, 1850, and is reported in 11 How. 586. The case was reached in its order on the regular call of the docket, January 22, 1851, when, on motion of *Mr. Stanton*, it was dismissed for want of appearance.

INDEX.

BANKRUPT.

BILL OF EXCHANGE.

CASES AFFIRMED.

CASES DISAPPROVED.

CASES DISTINGUISHED OR EXPLAINED.

CAVEAT EMPTOR.

1. The rule of *caveat emptor* applies exclusively to a purchaser, who must take care, and make due inquiries, and is bound by constructive as well as by actual notice — the latter being equivalent in effect to the former: but, in applying the rule, each case must be governed, in these respects, by its own peculiar circumstances. *Simmons Creek Coal Co.* v. *Doran*, 417.
2. Actual and unequivocal adverse possession is notice to a purchaser of land: because it is incumbent upon him to ascertain by whom and in what right it is held, and the unexplained neglect of this duty is equivalent to notice. *Ib.*
3. In this case the defendants had such notice as to put them on inquiry, and to charge them with knowledge of the facts. *Ib.*

COMMON CARRIER.

CONFLICT OF LAWS.

CONSTITUTIONAL LAW.

A. Of the United States.

CONTRACT.

EQUITY PLEADING.

When, by filing a replication to a plea in equity issue is taken upon the plea, the facts, if proven, will avail the defendant only so far as in law and equity they ought to avail him. *Pearce* v. *Rice*, 28.

A general averment of fraud in a bill in equity, though repeated, is to be taken as qualified and limited by the specific facts set forth to show wherein the transaction was fraudulent; and in such case a demurrer to the bill admits only the truth of the facts so set forth and all reasonable inferences to be drawn therefrom. *United States* v. *Des Moines Navigation & Railway Co.*, 510.

See PUBLIC LAND, 19.

ESTOPPEL.

See JUDGMENT, 2.

EVIDENCE.

1. None of the original deeds in appellant's chain of title having been produced, (though certified copies were attached to the pleadings,) and no independent evidence having been offered of payments of purchase money by defendants, *Held*, that, as against complainant, the recitals in the deeds could not be relied on as proof of such payment. *Simmons Creek Coal Co.* v. *Doran*, 417.
2. On the trial of a person indicted for murder, it appeared in evidence that the killing followed an attempt to rob. The court admitted, under objections, evidence tending to show that the prisoner had committed other robberies in that neighborhood, on different days, shortly before the time when the killing took place, and exceptions were taken. *Held*, that the evidence was inadmissible for any purpose. *Boyd* v. *United States*, 450.
3. C. & Co. commenced suit against K. in Texas and caused his property to be attached on the ground that he was about to convert it or a part of it into money for the purpose of placing it beyond the reach of his creditors. K. sued C. & Co. to recover damages for the wrongful issue and levy of those attachments. On the trial of the latter case, proof was made tending to show fraud on the part of K. by putting his property into notes and placing them beyond the reach of his creditors, and, among other things he testified as a witness in his own behalf, that on the day of the levy or the next day a large amount owed to him was put into negotiable notes. On cross-examination he was asked what he had done with the notes. Plaintiff's counsel objected, and the objection was sustained. *Held*, that this was error. *Eames* v. *Kaiser*, 488.

See INSURANCE;
PRACTICE, 2, 3;
PUBLIC LAND, 14.

EXCEPTION.

When a bill of exceptions is signed during the term, and purports to contain a recital of what transpired during the trial, it will be presumed that all things therein stated took place at the trial, unless from its language the contrary is disclosed. *New Orleans & North Eastern Railroad Co.* v. *Jopes*, 18.

See PRACTICE, 1, 6.

EXPRESS COMPANIES.

A state statute which defines an express company to be persons and corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies, does not invidiously discriminate against the express companies defined by it, and in favor of other companies or persons carrying express matter on other conditions, or under different circumstances. *Pacific Express Co.* v. *Seibert*, 339.

See CONSTITUTIONAL LAW, B, 1.

FIXTURE.

See LANDLORD AND TENANT;
RAILROAD, 2 (5).

FRAUD.

See BANKRUPT, 3;
EQUITY, 4;
EQUITY PLEADING, 2;
LEGISLATIVE ACTION;
RESCISSION OF CONTRACT, 3.

HABEAS CORPUS.

1. Upon a writ of *habeas corpus*, if sufficient ground for the prisoner's detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. *Nishimura Ekiu* v. *United States*, 651.
2. The decision of an inspector of immigration, within the authority conferred upon him by the act of March 3, 1891, c. 551, that an alien immigrant shall not be permitted to land, because within one of the classes specified in that act, is final and conclusive against his right to land, except upon appeal to the commissioner of immigration and the Secretary of the Treasury; and cannot be reviewed on *habeas corpus*, even if it is not shown that the inspector took or recorded any evidence on the question. *Ib.*

See CONSTITUTIONAL LAW, A, 23.

INDICTMENT.

See CRIMINAL LAW, 1, 2.

INSPECTOR OF IMMIGRATION.

Inspectors of immigration under the act of March 3, 1891, c. 551, are to be appointed by the Secretary of the Treasury. *Nishimura Ekiu* v. *United States*, 651.

See HABEAS CORPUS, 2.

INSURANCE.

A policy of life insurance provided as a condition, that death of the assured "by his own hand or act, whether voluntary or involuntary, sane or insane, at the time" was a risk not assumed by the insurer. A suit to recover the amount of the policy was tried on the theory on both sides, that death from a shot from a pistol fired by accident by the assured, was covered by the policy; *Held*,

(1) Evidence drawn out on the cross-examination of a witness, which has a bearing on the testimony given by him on his direct examination, is competent, especially where it relates to a part of the same conversation;

(2) An inquiry as to what conversation was had with the plaintiff's agent is not competent, if it does not appear what the subject of the conversation was or what was intended to be proved by it;

(3) In view of the contents of the proofs of death and of the evidence, the plaintiff was not estopped from claiming that the death of the assured was caused otherwise than by suicide, and it would not have been proper for the court to charge the jury that by the introduction of the proofs of death, the burden was put on the plaintiff to satisfy the jury, by a preponderance of evidence, that the assured died otherwise than by his own hand;

(4) The defendant having alleged in its answer, that the death of the assured was due to a cause excepted from the operation of the policy, it was not error for the court to charge the jury that the defendant was bound to establish such defence by evidence outweighing that of the plaintiff. *Home Benefit Association* v. *Sargent*, 691.

INTEREST.

See CONTRACT, 1.

INTERNAL REVENUE.

1. The tax imposed upon distilled spirits by Rev. Stat. § 3251, as amended by the act of March 3, 1875, 18 Stat. 339, c. 127, attaches as soon as the spirits are produced, and cannot be evaded except upon satisfactory proof, under section 3221, of destruction by fire or other casualty. *Thompson* v. *United States*, 471.

2. When distilled spirits upon which a tax has been paid are exported, they are to be regauged at the port of exportation alongside of, or on, the vessel, and the drawback allowed is to be determined by this

LACHES.

LANDLORD AND TENANT.

As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession. *Wiggins Ferry Co.* v. *Ohio & Mississippi Railway Co.*, 396.

See RAILROAD, 2 (1), (5).

LEGISLATIVE ACTION.

The knowledge and good faith of a legislature are not open to question, but the presumption is conclusive that it acted with full knowledge and in good faith; and in this case the circumstances surrounding the transaction not only preclude the idea of misconduct or ignorance on the part of the legislature, but it is clear that the Navigation Company was a *bona fide* purchaser, within the meaning of the resolution of 1861, and intended to be a beneficiary thereunder. *United States* v. *Des Moines Navigation & Railway Co.*, 510.

LEX LOCI.

See CONTRACT, 2.

LIMITATION, STATUTES OF.

See LACHES, 2;
TRUST, 3.

LOCAL LAW.

1. When land in Florida assessed for taxation is neither assessed to the owner or occupant, nor to an unknown owner, and also by an official or accurate description sufficient to impart notice to the owner, the title of the purchaser at a sale made for non-payment of the tax so assessed is not protected by the provision in the statutes of Florida limiting the right of action of the former owner, to recover the possession of the lands sold, to one year after the recording of the tax deed; but the sale and the deed are nullities within the decisions of the Supreme Court of Florida. *Bird* v. *Benlisa*, 664.
2. When a railroad company initiates proceedings in Illinois to acquire land for its road, and a defendant appears and claims ownership of the tract, and no denial is made to this claim, and only evidence as to the amount of compensation is presented for the consideration of the jury, and the jury awards a sum as such amount, the judgment should either direct the payment of this sum to such owner, or the deposit of the same with the county treasurer for his benefit. *Convers* v. *Atchison, Topeka & Sante Fé Railroad Co.*, 671.

California. *See* PUBLIC LAND, 19;
TRUST, 3.

MAILS, TRANSPORTATION OF.

The postal appropriation act of July 12, 1876, c. 179, fixed a rate of pay to railroads for carrying the mails, and provided that roads constructed in whole or in part by a land grant, conditioned that mails should be transported at a rate to be fixed by Congress, should receive only 80 per cent of that rate. As applied to a line of road a part of which only was constructed with such aid, the department held, and acted in accordance therewith for many years, that it was entitled to the percentage pay for the portion of the line so constructed, and to full pay for the remainder. Subsequently, the Department reversed this construction, and claimed that the mails should be carried over the whole line at the reduced rate, and it accordingly withheld from sums due for current transportation not only the 20 per cent thereon, but a sufficient amount settle claims for past transportation on that basis. The railroad company sued to recover the pay withheld. The Court of Claims gave judgment in its favor, and this court affirms that judgment. *United States* v. *Alabama Great Southern Railroad Co.*, 615.

MANDAMUS.

1. Mandamus will not lie to compel a railroad corporation to build a station at a particular place, unless there is a specific duty, imposed by statute, to do so, and clear proof of a breach of that duty. *Northern Pacific Railroad Co.* v. *Dustin*, 492.
2. A petition for a mandamus to compel a railroad corporation to perform a definite duty to the public, which it has distinctly manifested an intention not to perform, is rightly presented in the name of the State, at the relation of its prosecuting attorney, and without previous demand. *Ib.*
3. The Northern Pacific Railroad Company (whose charter authorized it to locate, construct and maintain a continuous railroad from Lake

Superior to Puget Sound, "by the most eligible route, as shall be determined by said company," within limits broadly described, and directed that its road should "be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances,") constructed its railroad through the county of Yakima, and stopped its trains for a while at Yakima City, then the county seat and the principal town in the county; but, on completing its road four miles further to North Yakima, a town which it had laid out on its own land, established a freight and passenger station there, and ceased to stop its trains at Yakima City. Thereupon a writ of mandamus was applied for to compel it to build and maintain a station at Yakima City, and to stop its trains there. Afterwards, and before the hearing, Yakima City rapidly dwindled, and most of its inhabitants removed to North Yakima, which became the principal town in the county, and was made by the legislature the county seat; there were other stations which furnished sufficient facilities for the country south of North Yakima; the earnings of this division of the road were insufficient to pay its running expenses; and the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated at North Yakima than at Yakima City. *Held*, that a writ of mandamus should not issue. *Ib.*

MECHANICS' LIEN.

1. A mechanics' lien is a creature of statute, not created by contract, but by statute, for the use of the materials, work and labor furnished under the contract, and the contract is presumably entered into in view of the statute. *Van Stone* v. *Stillwell & Bierce Manufacturing Co.*, 128.
2. It is settled law in Missouri that a contractor does not waive his right to file a mechanics' lien by receiving from the owner of the building a promissory note for the amount due, payable at a time beyond the expiration of the period within which he is required to file his lien; but, within the period within which suit must be commenced to enforce the lien, the taking of the note merely suspends the right of action. *Ib.*

MISTAKE.

See EQUITY, 4.

MORTGAGE.

See BANKRUPT, 3.

MOTION FOR NEW TRIAL.

See PRACTICE, 5.

MUNICIPAL BOND.

1. A statement, in the bond of a municipal corporation, that it is issued under the provisions of the act of the general assembly of Colorado of February 21, 1881, and in conformity with its provisions; that all the requirements of law have been fully complied with; that the total amount of the issue does not exceed the limits prescribed by the constitution of that State; and that the issue of the bonds had been authorized by a vote of a majority of the duly qualified electors of the county, voting on the question at a general election duty held, estops the county, in an action by an innocent holder for value to recover on coupons of such bonds, from denying the truth of these recitals. *Chaffee County* v. *Potter*, 355.
2. When there is an express recital upon the face of a municipal bond that the limit of issue prescribed by the state constitution has not been passed, and the bonds themselves do not show that it had, the holder is not bound to look further. *Ib.*
3. By virtue of Art. II, sec. 3 of the constitution of Iowa of 1857, which ordains that "no county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation — to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness," negotiable bonds, in excess of the constitutional limit, issued by a school district, and sold by its treasurer for the purpose of applying the proceeds of the sale to the payment of the outstanding bonded indebtedness of the district, pursuant to the statute of Iowa of 1880, c. 132, are void as against one who purchased them from the district with knowledge that the constitutional limit is thereby exceeded. *Doon Township* v. *Cummins*, 366.

MUNICIPAL CORPORATION.

See CONSTITUTIONAL LAW, A, 3.

NATIONAL BANK.

1. Fifty shares of the stock of a national bank were transferred to F. on the books of the bank October 29. A certificate therefor was made out but not delivered to him. He knew nothing of the transfer and did not authorize it to be made. On October 30 he was appointed a director and vice-president. On November 21 he was authorized to act as cashier. He acted as vice-president and cashier from that day. On December 12 he bought and paid for 20 other shares. On January 2 following, while the bank was insolvent, a dividend on its stock was fraudulently made, and $1750 therefor placed to the credit of F. on its books. He, learning on that day of the transfer of the 50 shares, ordered D., the president of the bank, who had directed the transfer of the 50 shares, to retransfer it, and gave to D. his check to the order of

PRINCIPAL AND AGENT.

PROHIBITION, WRIT OF.

PUBLIC LAND.

QUIA TIMET.

RAILROAD.

WITNESS.

WRIT OF ERROR.

WRIT OF PROHIBITION.

The collector of customs at the port of New York seized a British built steam pleasure-yacht, purchased in England by a citizen of the United States, and duly entered at that port, the seizure being for the alleged reason that the vessel was liable to duty as an imported article. Her owner filed a libel in admiralty against her and the collector in the District Court of the United States for the Southern District of New York, claiming the delivery of the vessel to him and damages against the collector. Under process from the court the vessel was attached and taken possession of by the marshal, and due notice was given. The collector appeared personally in the suit, and put in an answer, and the district attorney put in a claim and an answer on behalf of the United States. The substance of the answers was that the vessel was liable to duty as an imported article. The collector applied to this court for a writ of prohibition to the District Court, alleging that that court had no jurisdiction of the suit. This court, without considering the question of the liability of the vessel to duty, denied the writ on these grounds: (1) The District Court had jurisdiction of the vessel and of the collector; (2) The question whether the vessel was liable to duty as an imported article was *sub judice* in the District Court; (3) The subject matter of the libel was a marine tort, cognizable by the District Court; (4) It being alleged in the answers, that the vessel was detained by the collector "under authority of the revenue laws of the United States," she was, under § 934 of the Revised Statutes, subject to the order and decree of the District Court; (5) The libellant had no remedy under the Customs Administrative act of June 10, 1890, 26 Stat. 131; and the only way in which the vessel could be brought under the jurisdiction of a court of the United States was by the institution of the libel. *In re Fassett*, 479.