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UNITED STATES REPORTS

VOLUME 147

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1892

J. C. BANCROFT DAVIS

REPORTER

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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.

JOHN MARSHALL HARLAN, Associate Justice.[1]

HORACE GRAY, Associate Justice.

SAMUEL BLATCHFORD, Associate Justice.

LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.[2]

DAVID JOSIAH BREWER, Associate Justice.

HENRY BILLINGS BROWN, Associate Justice.

GEORGE SHIRAS, Jr., Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.

CHARLES HENRY ALDRICH, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Justice Harlan, having been appointed an Arbitrator on the part of the United States in the Behring Sea Fur-Seal Arbitration in Paris, heard argument for the last time, this term, on Monday, December 5, 1892, and left for Paris soon after.

[2] Mr. Justice Lamar heard argument for the last time December 8, 1892. He died at Macon, Georgia, January 23, 1893, and was buried there on Friday, the 26th of January. The Chief Justice and Justices Blatchford, Brewer, and Brown attended the funeral.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1892.

IOWA *v.* ILLINOIS.

ORIGINAL.

No. 5. Original. Submitted November 28, 1892. — Decided January 3, 1893.

The true line, in a navigable river between States of the Union which separates the jurisdiction of one from the other, is the middle of the main channel of the river.

In such case the jurisdiction of each State extends to the thread of the stream, that is, to the "mid-channel," and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

The boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River.

As the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings cross the Mississippi River, it is ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two States, and that such commission be required to make the proper examination, and to delineate on maps prepared for that purpose, the true line as determined by this court, and report the same to the court for its further action.

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THE case is stated in the opinion.

Mr. John Y. Stone, Attorney General of the State of Iowa, and *Mr. James C. Davis* for complainant.

Mr. George Hunt, Attorney General of the State of Illinois, for respondent.

Mr. Justice Field delivered the opinion of the court.

The Mississippi River flows between the States of Iowa and Illinois. It is a navigable stream and constitutes the boundary between the two States; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two States for the purposes of taxation and other purposes of government.

The complainant, the State of Iowa, contends that, for taxation, and for all other purposes, the boundary line is the middle of the main body of the river, taking the middle line between its banks or shores without regard to the "steamboat channel," as it is termed, or deepest part of the stream, and that, to determine the banks or shores, the measurements must be taken when the water is in its natural or ordinary stage, neither swollen by floods nor shrunk by droughts.

On the other hand, the defendant, the State of Illinois, claims that, for taxation and all other purposes, its jurisdiction extends to the middle of "the steamboat channel" of the river, wherever that may be, whether on its east or west bank — the channel upon which commerce on the river by steamboats or other vessels is usually conducted, and which for that reason is sometimes designated as "the channel of commerce."

The State of Iowa in its bill alleges: That prior to and at the time of the treaty between England, France and Spain, in 1763, 3 Jenkinson's Treaties, 177, the territory now comprising the State of Iowa was under the dominion of France, and the territory now comprising the State of Illinois was under the dominion of Great Britain, and that, by the treaty named, the middle of the river Mississippi was made the boundary line between the British and French possessions in North America.

That by the treaty of Paris between Great Britain and the United States, which was concluded September 3, 1783, 3 Jenkinson's Treaties, 410, Art. II, and 8 Stat. 80, the territory comprising the State of Illinois passed to the United States;

and that by the purchase of Louisiana from France, under the treaty of April 30, 1803, 8 Stat. 200, the territory comprising the State of Iowa passed to the United States.

That the boundary between the territory comprising the States of Illinois and Iowa remained the middle of the river Mississippi, as fixed by the treaty of 1763.

That by the act of Congress of April 18, 1818, known as the act enabling the people of Illinois to form a State constitution, (3 Stat. 428, c. 67,) the northern and western boundaries of Illinois were defined as follows: Starting in the middle of Lake Michigan, at north latitude forty-two degrees and thirty minutes, "thence west to the middle of the Mississippi River, and thence down along the middle of that river to its confluence with the Ohio River," and that the constitutions of Illinois of 1818, 1848 and 1870 defined the boundaries in the same way.

And the bill further alleges that the State of Illinois and its several municipalities bordering on the Mississippi River claim the right to assess and do assess and tax, as in Illinois, all bridges and other structures in the river from the Illinois shore to the middle of the steamboat channel, or channel of the river usually traversed by steam and other crafts in carrying the commerce of the river, whether such channel is east or west of the middle of the main body or arm of the river; and that they thus assess and tax, as in that State, the bridge of the Keokuk and Hamilton Bridge Company across the river from Keokuk, Iowa, to Island No. Four, in Hancock County, Illinois, from the west shore of the island westward 2462 feet to the east end of the draw of the bridge, and to a point not over 580 feet east from the Iowa shore of the river and 941 feet west of the middle of the main arm or body of the river at that point.

That the steamboat channel, or channel of the river where boats ordinarily run in carrying the commerce of the river, varies from side to side of the river, sometimes being next to the Illinois shore and then next to the Iowa shore, and, at most points in the river, shifting from place to place as the sands of its bed are changed by the current of the water; that at the point of the Keokuk and Hamilton bridge mentioned

the river bed is rock and not subject to much change; that at that point, were it not for the bridge, the middle of the steamboat channel would be, and was before the bridge was erected, fully 300 feet east of the east end of the draw in the bridge, or 880 feet from the Iowa shore of the river and 2162 feet from the shore of the river in Illinois on Island No. Four; that at places in the river there are two or more channels equally accessible and useful for navigation by steamboats and other crafts carrying the commerce of the river; and that at the Keokuk and Hamilton bridge the channel used by steamboats is partly artificial, constructed by excavation of rock from the river bed to facilitate the approach to the lock of the United States canal immediately north of the bridge.

That the State of Iowa claims the right to tax all bridges across the river to the middle thereof, and does tax the Keokuk and Hamilton bridge to its middle between the east and west abutments thereof, that is, the west approach and abutment 200 feet and 1096 feet of the bridge proper, thereby treating, for convenience of taxation, the middle of the bridge between abutments as the middle of the river at that point, but which is in fact 225 feet less than one-half the distance across the main arm or body of the river at that point.

That the State of Illinois and its municipalities assess, and tax, as in that State, 716 feet of the bridge actually assessed and taxed in Iowa, and 225 feet of the bridge in addition thereto, located in Iowa but not taxed in that State.

That the Keokuk and Hamilton Bridge Company, owner of the Keokuk and Hamilton bridge, is a corporation of both of said States consolidated, and complains of such double taxation.

That litigation is now pending over such taxation, and is liable at any time to arise over the taxation of any of the other bridges across the river between the said States, now nine in number.

To the end, therefore, that the line between the States may be definitely fixed by the only court having jurisdiction to do so, the complainant prays that this court will take jurisdiction of this bill, and that the State of Illinois be summoned and

requested to answer it, waiving such answer being on oath, and that upon the final hearing this court will definitely settle the boundary between the States at the said several bridges.

To this bill the State of Illinois appeared by its attorney general and filed its answer, which denied that the boundary line between the States of Iowa and Illinois is the middle of the Mississippi River, and insisted that it is the middle of the steamboat channel, or channel commonly used by boats in carrying the commerce of the river, whether east or west of the middle of the river. It admitted that the State and its municipalities claimed the right to tax and did tax bridges and other structures in the river to the middle of the steamboat channel or channel of commerce, whether such channel was east or west of the middle of the main body or arm of the river, and did assess and tax the Keokuk and Hamilton bridge to its draw and west of the middle of the main body or arm of the river; and that the steamboat channel or channel of commerce is first near one shore and then near the other, and at other places nearly across the river. But it denied the right of the State of Iowa to tax the bridges mentioned crossing the Mississippi River to any point east of the middle of the steamboat channel, or channel of commerce of that river.

To the answer a replication was filed by the State of Iowa.

At the time of filing its answer the State of Illinois filed also its cross-bill, in which it alleges that there exist nine bridges across the Mississippi River between the States, the most southern of which is the Keokuk and Hamilton Railroad bridge and the most northern, the Dunlieth and Dubuque Bridge Company's railroad bridge.

That for the purposes of taxation the State of Illinois and its municipalities claim the right to assess and tax the respective bridges to the middle of the channel of commerce or steamboat channel, that is, the channel usually used by steamboats and other crafts navigating the river; and that on the part of the State of Iowa and its municipalities it is claimed that each State has the right to assess and tax to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel may be.

That the Supreme Court of Iowa, in the case of *The Dunlieth and Dubuque Bridge Company* v. *The County of Dubuque*, (55 Iowa, 558,) held that the authorities in Iowa have the right to tax such structures to the middle of the main arm or body of the stream and no further, though at the point where such structure is situated the channel or part of the river followed by steamboat men in navigating the river is far east of the middle of such main body of the stream.

That following the decision in that case, the authorities in Iowa assess and tax such structures to the middle of the main body of the river.

That at the point of the location of the Keokuk and Hamilton bridge the main body of the river, before the construction of the bridge, was between the Iowa shore at Keokuk, Lee County, Iowa, and the west shore of Island No. Four, located in the city of Hamilton, Hancock County, Illinois, a breadth of about 3042 feet; that in constructing the bridge a solid approach is extended from the shore at Keokuk into the river 200 feet, and from the shore on Island No. Four, in Illinois, about 700 feet, and the main body of the river confined between the abutments to the bridge 2192 feet apart, and the bridge consists of the east and west abutments, eleven piers, a draw next to the west or Iowa abutment of 380 feet, and ten spans, together 1812 feet.

That the middle of the steamboat channel, or that part of the river usually traversed by steamboat men in navigating the river, is at or near the east end of the draw or pivot span, about 380 feet from the west abutment and 1812 feet from the east abutment.

That the assessor in Illinois in assessing the bridge values the bridge to the east end of the draw and assesses the same against that part of the bridge in Illinois, and the authorities in Iowa value and assess the bridge to the middle thereof, 1096 feet east from the west abutment, as in the State of Iowa; that thereby 716 feet of the bridge are valued and assessed both in Illinois and Iowa; that litigation is now pending in the lower courts between the bridge company and the authorities over the assessments, and that the same

trouble and complications are liable to arise over the assessment of any other of the bridges.

To the end, therefore, that the boundary line between the States of Illinois and Iowa at said several bridges may be defined and settled, the State of Illinois prays that the State of Iowa be made defendant to this cross-bill, and required to answer it, and that upon the final hearing the court will define and establish at each of the bridges the boundary lines between the States of Illinois and Iowa, to which points the respective States may tax. To this cross-bill the defendant, the State of Iowa, answered, admitting the existence of nine bridges across the Mississippi River, where it forms the boundary between the States of Illinois and Iowa, and that the State of Illinois and its several municipalities bordering upon the river claim the right to tax said bridges from the Illinois shore of the river to the middle of the channel of commerce or steamboat channel, and that the State of Iowa and its municipalities bordering on the river claim the right to tax and do tax the several bridges to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel, that is, that part of the river usually traversed by steam or other vessels carrying the commerce of the river, may be. It therefore prays that upon the final hearing the boundary lines between the two States may be established, to which the respective States may tax.

By setting down the case for hearing on the bill, answer and replication, (without taking any testimony,) and on the cross-bill and the answer to it, all the facts alleged in the answer to the original bill, as well as those alleged in the cross-bill and not denied in the answer, are thereby admitted.

When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It

is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream," as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi. Thus Wheaton, in his Elements of International Law, (8th ed. § 192,) says:

"Where a navigable river forms the boundary of conterminous States, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river."

And in § 202, whilst thus stating the rule as to the boundary line of the Mississippi River being the middle of the channel, he states that the channel is remarkably winding, "crossing and recrossing perpetually from one side to the other of the general bed of the river."

Mr. Creasy, in his First Platform on International Law, § 231, p. 222, expresses the same doctrine. He says:

"It has been stated that, where a navigable river separates neighboring States, the *Thalweg*, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquæ*, was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some

channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

Mr. Creasy also refers to the language of Dr. Twiss on the same subject, who observes that "Grotius and Vattel speak of *the middle of the river* as the line of demarcation between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary of the navigable Midchannel. If there be more than one channel of a river, the deepest channel is the Midchannel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression in its bed. . . . The islands on either side of the Midchannel are regarded as appendages to either bank; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the Midchannel of the river will not operate to deprive that nation of its possession, although the water-frontier line will follow the change of the Midchannel."

Halleck in his Treatise on International Law, c. 6, § 23, is to the same effect. He says: "Where the river not only separates the conterminous States, but also their territorial jurisdictions, the *thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object."

Woolsey in his International Law, § 58, repeats the same doctrine and says: "Where a navigable river forms the boundary between two States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of the parties. If a river changes its bed, the line through the old channel continues, but the equitable right to the free

use of the stream seems to belong, as before, to the State whose territory the river has forsaken."

The middle of the channel of a navigable river between independent States is taken as the true boundary line from the obvious reason that the right of navigation is presumed to be common to both in the absence of a special convention between the neighboring States, or long use of a different line equivalent to such a convention.

Phillimore, in his Commentaries on International Law, in the chapter upon acquisitions, (c. xii,) speaks of decisions upon the law of property as incident to neighborhood proceeding upon the principle that "midchannel" is the line of demarcation between the neighbors. (Vol. 1, 239.)

The reason and necessity of the rule of international law as to the midchannel being the true boundary line of a navigable river separating independent States may not be as cogent in this country, where neighboring States are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law.

As we have stated, in international law and by the usage of European nations, the terms "middle of the stream" and "midchannel" of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 Stat. 428, c. 67,) under which Illinois adopted a constitution and became a State and was admitted into the Union, made *the middle of the Mississippi River* the western boundary of the State. The enabling act of March 6, 1820, (3 Stat. c. 22, § 2, p. 545,) under which Missouri became a State and was admitted into the Union, made the middle of *the main channel of the Mississippi River* the eastern boundary, so far as its boundary was conterminous with the western boundary of Illinois. The enabling act of August 6, 1846, (9 Stat. 56, c. 89,) under which Wisconsin adopted a constitution and became a State and was admitted into the Union, gives the western boundary of that State, after reaching the river St. Croix, as follows: "Thence down the main channel of said river to the Mississippi, thence down the centre of the main

channel of that" (Mississippi) "river to the northwest corner of the State of Illinois." The northwest corner of the State of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, "middle of the Mississippi River," and "middle of the main channel of the Mississippi River," and "the centre of the main channel of that river," as thus used, are synonymous. It is not at all likely that the Congress of the United States intended that those terms, as applied to the Mississippi River separating Illinois and Iowa, should have a different meaning when applied to the Mississippi River separating Illinois from Missouri or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing.

The question involved in this case has been elaborately considered, both by the Supreme Court of Iowa and the Supreme Court of Illinois, in cases relating to the assessment and taxation of bridges crossing the Mississippi River, as to the point to which the jurisdiction of each State for taxation extends, and they differed in their conclusions. In *Dunlieth and Dubuque Bridge Company* v. *County of Dubuque*, 55 Iowa, 558, 565, the Supreme Court of Iowa, after observing that the act of Congress admitting Iowa into the Union and the constitution of Iowa in its preamble declare that the eastern boundary of the State shall be "the middle of the main channel of Mississippi River," proceeds to inquire what line is understood by those words, "middle of the main channel." The defendant maintained that the deep water of the stream used in the navigation of the river was meant, while the plaintiff insisted that the words described the bed in which the stream of the river flows; that is, the bed over which the water flows from bank to bank. The court thought that the words, when applied to rivers generally, without the purpose of describing their currents or navigable characters, always bore the latter signification, observing that this was their primary meaning, and was of opinion that they were used in that sense in the act of Congress admitting the State into the

Union, and in the constitution of Iowa. In support of this view the court referred to the changing character of the currents of the river followed by vessels, caused by the shifting nature of the sand bars found in the river. "The course of navigation," it said, "which follows what boatmen call the channel, is extremely sinuous, and often changing, and is unknown except to experienced navigators. On the other hand, the bed of the main river, designated by the word channel, used in its primary sense, is the great body of water flowing down the stream; it is broad and well defined by islands or the main shore. It cannot be possible that Congress and the people of the State, in describing its boundary, used the word channel to describe the sinuous, obscure and changing line of navigation, rather than the broad and distinctly defined bed of the main river. The centre of this river bed channel may be readily determined, while the centre of the navigable channel often could not be known with certainty. The first is a fit boundary line of a State; the second cannot be."

In *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois, 535, 548, the Supreme Court of Illinois reached a different conclusion after an elaborate consideration of the same question. That was a case where an alleged over-estimate was made of a bridge crossing the Mississippi River at St. Louis, and the question discussed was, how far did the jurisdiction of Illinois extend over the river? After observing that when a river is a boundary between States, as is the Mississippi between Illinois and Missouri, it is the main — the permanent — river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at others, the court proceeds, treating the Mississippi River as a common boundary between the States of Illinois and Missouri, to inquire the meaning of the term, "middle of the Mississippi River," used in the enabling act of Congress and in the constitution, defining the boundaries of the State of Illinois. It answers the inquiry by observing that the word "channel" is used as indicating "the space within which ships can and usually do pass," and says: "It is apprehended it is in this sense the expressions 'middle

of the river,' 'middle of the main channel,' 'midchannel,' 'middle thread of the channel,' are used in enabling acts of Congress and in state constitutions establishing state boundaries. It is the free navigation of the river — when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway' — that States demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or States, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either State intended to surrender to the State or nation occupying the opposite shore the whole of the principal channel or highway for vessels and thus debar its own vessels the right of passing to and fro for purposes of defence or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value, to independent States or nations."

The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the "midchannel," and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

It is therefore ordered, adjudged and declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River. And, as the counsel of the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings — nine in number — cross the Mississippi River, it is further ordered

that a commission be appointed to ascertain and designate at said places the boundary line between the two States, such commission, consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make the proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action.

In re MORRISON, Petitioner.

In re MORRISON, Petitioner.[1]

ORIGINAL.

Nos. 8, 9. Original. Argued December 12, 13, 1892. — Decided January 3, 1893.

A collision occurred, in Vineyard Sound, between the steam yacht A., at anchor, owned by V. of New York, and the steamship D., owned by a Massachusetts corporation. The A. sank. The corporation filed a libel against V., to limit its liability, in the District Court for Massachusetts, under §§ 4283 and 4284 of the Revised Statutes, alleging that the D. was lying at Boston, and averring no negligence in the D., and negligence in the A., and praying for an appraisement of the value of the D. and her pending freight at the time of the collision, and offering to give a stipulation therefor. It was alleged that the A. was worth over $250,000, and that the value of the D. and her freight was less than $150,000. The court appointed three appraisers, who made the appraisement *ex parte*, and reported the value of the D. at $80,000 and of her freight at $2395.33, and a stipulation was given for those amounts. A monition was then issued for notice to V. and all persons concerned to prove their claims for loss by a day named. The monition was duly published but was not personally served on V. in the Massachusetts District. The court made an order enjoining V. and all other persons from suing the corporation

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[1] No. 8 is entitled in the opinion of the court "Henry Morrison, Petitioner, *v.* The District Court of the United States for the Southern District of New York, and the Honorable Addison Brown, Judge of the said Court. Petition for a writ of mandamus." No. 9 is entitled in the opinion "Henry Morrison, Petitioner, *v.* The District Court of the United States for the District of Massachusetts and the Honorable Thomas L. Nelson, Judge of the said Court. Petition for a writ of prohibition."

Syllabus.

or the D. in respect of any claims arising out of the collision "except in these proceedings." Afterwards, M., the master of the A. filed a libel in the District Court for the Southern District of New York, against the corporation, the D., V., and all persons claiming damages from the collision, for apportionment of limited liability, charging the fault wholly on the D., alleging that the loss of V. was $305,000, and that of M. over $1300; and that the value of the D. was over $200,000. Under process the D. was attached, and it was served on the corporation, and V. duly appeared. On motion of the D. and the corporation the District Court in New York, on a hearing of all parties made an order vacating the process issued on the libel of M., setting aside the service thereof on the corporation, releasing the D. from the attachment, and dismissing the libel. The court held that M. had notice, before he filed his libel, of the proceedings in Massachusetts, and of the injunction order issued there. On applications by M. to this court, for a mandamus to the District Court in New York, to vacate its order and reinstate the libel of M., and for a prohibition to the District Court in Massachusetts from proceeding further on the libel filed there; *Held*,

(1) The District Court in New York dismissed the libel of M. on a hearing on the merits;

(2) If the jurisdiction of that court was in issue before it, the remedy of M. was by a direct appeal to this court, on that question, under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827;

(3) If otherwise, the remedy of M., as against the order dismissing the libel, was by an appeal to the Circuit Court of Appeals, for the Second Circuit, under § 6 of the same act;

(4) The mandamus is refused;

(5) The District Court in Massachusetts acquired prior jurisdiction of the proceedings;

(6) That court did not lose its jurisdiction by the fact that the D. subsequently went to New York;

(7) In order to sustain the proceeding it was not necessary that M. or V. should have been personally served with notice thereof within the District of Massachusetts, or that the D. should have been taken and held by the Massachusetts Court;

(8) The filing of the libel by the corporation, with the offer of a stipulation, gave jurisdiction, and no subsequent irregularity in procedure could take it away;

(9) The *ex parte* appraisement was not void;

(10) The District Court in Massachusetts can order the giving of a new or further stipulation, and, on a failure to comply with such order, can stay the further proceedings of the corporation, deny it all relief, and dismiss its libel:

(11) The provision of Rule 54 in Admiralty, for the giving of a stipulation, instead of making a transfer to a trustee, is valid, and the value involved may be judicially ascertained primarily without a hearing of the persons interested adversely.

Citations for Petitioner.

On the 17th of October, 1892, two applications were made to the court on behalf of Henry Morrison; the first for leave to file a petition for a writ of mandamus directed to the District Court of the United States for the Southern District of New York; the second for leave to file a petition for a writ of prohibition directed to the District Court of Massachusetts. Leave being granted, these petitions were filed, argument was had, and the petitions were both denied. The case is stated in the opinion of the court.

Mr. Samuel B. Clarke and *Mr. Elihu Root*, (with whom was *Mr. Harrington Putnam* on the brief,) for the petitioner in each case cited: (1) on the petition for the writ of mandamus; *Windsor* v. *McVeigh*, 93 U. S. 274; *The J. W. French*, 13 Fed. Rep. 916; *The Benefactor*, 103 U. S. 239; *Ex parte Slayton*, 105 U. S. 451; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *Ex parte Peter Graham*, 3 Wash. C. C. 456; *Pennoyer* v. *Neff*, 95 U. S. 714; *Insurance Co.* v. *Bangs*, 103 U. S. 435; *Ex parte Russell*, 13 Wall. 664; *Ex parte United States*, 16 Wall. 699; *Ex parte Bradstreet*, 7 Pet. 634; *Ex parte Schollenberger*, 96 U. S. 369; *Ex parte Roberts*, 15 Wall. 384; *Ex parte Parker*, 120 U. S. 737; *In re Pennsylvania Co.*, 137 U. S. 451; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *United States* v. *Lee*, 106 U. S. 196; *Smith* v. *Adams*, 130 U. S. 167; *In re Pacific Railway Commission*, 32 Fed. Rep. 241; *Cohens* v. *Virginia*, 6 Wheat. 264; *Tennessee* v. *Davis*, 100 U. S. 257; *Alexandria* v. *Fairfax*, 95 U. S. 774; *Smith* v. *Woolfolk*, 115 U. S. 143; *Sabariego* v. *Maverick*, 124 U. S. 261; *Hassall* v. *Wilcox*, 130 U. S. 493; *Bradstreet* v. *Neptune Insurance Co.*, 3 Sumner, 600; *The Rio Grande*, 23 Wall. 458; *Toland* v. *Sprague*, 12 Pet. 300; *Picquet* v. *Swan*, 5 Mason, 35; *Manro* v. *Almeida*, 10 Wheat. 472; *Norwich Company* v. *Wright*, 13 Wall. 104; *Freeman* v. *Alderson*, 119 U. S. 185; *The Mamie*, 110 U. S. 742; *The City of Norwich*, 118 U. S. 468; *Ex parte Phœnix Insurance Co.*, 118 U. S. 610; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1: and, (2) on the petition for a writ of prohibition; Comyn's Dig. Tits. Prohibition, Admiralty; *Anony-*

mous, 2 Salk. 553; *Vaughan* v. *Evans*, 8 Mod. 374; *Johnson* v. *Lee*, 5 Mod. 238; *Robinson* v. *Godsalve*, 1 Ld. Raym. 123; *Doctor James's Case*, Hobart, 17; *Rowland* v. *Hockenhulle*, 1 Ld. Raym. 698; *Mendyke* v. *Stint*, 2 Mod. 272; *Ex parte Christy*, 3 How. 292; *Ex parte Easton*, 95 U. S. 68; *In re Fassett*, 142 U. S. 479; *Marbury* v. *Madison*, 1 Cranch, 137; *Ex parte Bradley*, 7 Wall. 364; *United States* v. *Peters*, 3 Dall. 121; *The St. Lawrence*, 1 Black, 522; *Ward* v. *Chamberlain*, 2 Black, 430; *Mayor &c. of London* v. *Cox*, L. R. 2 H. L. 239; *Serjeant* v. *Dale*, 2 Q. B. D. 558; *James* v. *London & Southwestern Railway*, L. R. 7 Ex. 187; *Norwich Company* v. *Wright*, 13 Wall. 104; *Providence & N. Y. Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578; *The Rio Grande*, 23 Wall. 458.

Mr. Robert D. Benedict, opposing the petition for a writ of mandamus, cited: *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Baltimore & Ohio Railroad*, 108 U. S. 566; *In re Pennsylvania Co.*, 137 U. S. 451; *Providence & N. Y. Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578; *The City of Norwich*, 118 U. S. 468; *Norwich Co.* v. *Wright*, 13 Wall. 104; *In re Garnett*, 141 U. S. 1; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527.

Mr. John Lowell, with whom was *Mr. William D. Sohier*, opposing the petition for a writ of prohibition, cited: *Ex parte Gordon*, 104 U. S. 515; *Ex parte Ferry Co.*, 104 U. S. 519; *Ex parte Slayton*, 105 U. S. 451; *Smith* v. *Whitney*, 116 U. S. 167; *In re Garnett*, 141 U. S. 1; *In re Cooper*, 143 U. S. 472; *New Lamp Chimney Co.* v. *Ansonia Brass and Copper Co.*, 91 U. S. 656; *Jennings* v. *Carson*, 4 Cranch, 2; *Brown* v. *Bridge*, 106 Mass. 563; *Norwich Co.* v. *Wright*, 13 Wall. 104; *The Lottawanna*, 21 Wall. 558; *The Benefactor*, 103 U. S. 239; *The Scotland*, 105 U. S. 24; *S. C.* 118 U. S. 507; *The City of Norwich*, 118 U. S. 468; *Providence & N. Y. Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527; *The Cargo ex Venus*, L. R. 1 Ad. & Ecc. 50; *The Thales*, 10 Blatchford,

203; *S. C.* 3 Ben. 327; *The Mellona*, 3 W. Rob. 16; *The Margaret*, 2 Hagg. 275, n; *The Hero*, Brown. & Lush. 447; *The Corner*, Brown. & Lush. 161; *The Virgo*, 13 Blatchford, 255; *The City of Hartford*, 11 Fed. Rep. 89; *The Fairport*, 8 P. D. 48; *The Freedom*, 3 Ad. & Ecc. 495; *The Flora*, 1 Ad. & Ecc. 45; *United States* v. *Ames*, 99 U. S. 35; *The Palmyra*, 12 Wheat. 1; *The Wanata*, 95 U. S. 600; *The Steamer Webb*, 14 Wall. 406; *The City of Norwich*, 118 U. S. 468.

Mr. Justice Blatchford delivered the opinion of the court.

On the 24th of July, 1892, between 8 and 9 o'clock A.M. a collision took place between the steam yacht Alva, at anchor on Nantucket Shoals, in Vineyard Sound, and owned by William K. Vanderbilt, of the city of New York, and the freight steamship H. F. Dimock, running regularly between Boston and the city of New York, and belonging to the Metropolitan Steamship Company, a Massachusetts corporation. The collision occurred during a thick fog, and, as a consequence of it, the Alva sank.

On the 16th of August, 1892, the steamship company filed a libel and petition in the District Court of the United States for the District of Massachusetts against Vanderbilt, as owner of the Alva, in a case of limitation of liability, civil and maritime. It set forth the particulars of the collision and the sinking of the Alva, denied that there was any want of care on the part of the Dimock, and averred that the collision, and the damage occasioned thereby, were caused by the carelessness and incompetence of those in charge of the Alva, and their negligence in anchoring where they did; that the Alva was claimed to be worth over $250,000, which was greatly in excess of the value of the Dimock and the latter's freight then pending, that being less than $150,000; that the petitioner denied and contested its liability, and that of the Dimock, for any loss or damage suffered by the Alva or her owner, or by any persons on board of her, but feared that suits or libels might be brought against the petitioner, or the Dimock, and damages be claimed in excess of the value of the

Dimock and her freight then pending; that the petitioner claimed the benefit of the limitation of liability provided for in §§ 4283 and 4284, chapter 6, title 48, of the Revised Statutes of the United States; and that, if the court decided that any damage was occasioned by the negligence of the Dimock, or those in charge of her, for which the Dimock was liable, the petitioner claimed that its liability as her owner should be limited to the value of the vessel and her freight pending at the time of the collision.

The prayer of the libel and petition was (1) that the court would cause due appraisement to be had of the value of the Dimock on the 24th of July, 1892, and of her freight then pending, and would make an order for the giving of a stipulation, with securities for the payment of the same into court whenever it should be ordered; (2) that the court would issue a monition against all persons claiming damages for loss occasioned by said collision, citing them to appear before the court and make due proof of their respective claims before a day to be named in the monition; (3) that the court would designate a commissioner, before whom such claims should be presented in pursuance of the monition, to make report thereof to the court; and that the petitioner might be at liberty to contest its liability, and the liability of the Dimock, for all such loss, independently of the limitation of liability claimed; (4) that the court would make an order restraining all persons from prosecuting suits against the petitioner and the Dimock, except before such commissioner and in the proceeding thus instituted, and that if, upon the coming in of the report of the commissioner and its confirmation, it should appear that the petitioner and the Dimock were not liable for such loss, it might be so decreed; (5) that if the court should decree that any person or persons were entitled to maintain claims against the petitioner or the Dimock, on account of any loss by the collision, it would also decree that the liability of the petitioner should in no event exceed the value of the Dimock and her freight pending at the time of the collision, and that the petitioner and the vessel should be forever exempt from all further liabilities in the premises, that the moneys secured to be paid

into court, after paying costs and expenses, should be divided *pro rata* among the several claimants in proportion to the amount of their respective claims, and that in the meantime, and until the final judgment of the court, it would make an order restraining the further prosecution of any suits against the petitioner or the Dimock in respect of any such claims; and (6) for other relief.

On the 25th of August, 1892, the libel and petition was amended by adding an averment that, at the time it was filed, the Dimock was, and ever since had been, lying in the port of Boston, and within the admiralty jurisdiction and process of the District Court.

On the 16th of August, 1892, the District Court for Massachusetts issued a warrant to the marshal of the district, directing him to cause the Dimock and her pending freight to be appraised on oath by three appraisers named in the warrant, to be duly sworn. The appraisers made oath before the clerk of the court that they would appraise the vessel and her pending freight according to their best skill and judgment. On the 17th of August, 1892, the three appraisers reported to the court that, after a strict examination and careful inquiry, they estimated and appraised the Dimock at $80,000, and her freight pending at the time of the collision at $2395.33.

On the latter day the court made an order setting forth that, whereas it appeared that "due appraisement" had been had of the amount or value of the interest of the petitioner in the Dimock and her pending freight at the time alleged in the petition, and the value thereof had been found to be as stated in the report, and ordering that the petitioner give proper stipulation, with sureties, for the payment into court of the sums named, whenever the same should be ordered. On the same day, a stipulation was filed, signed by the petitioner and by two sureties, each of whom justified in the sum of $200,000, which stipulation stated that the petitioner and the two sureties, "submitting themselves to the jurisdiction of this court," bound themselves, their heirs, executors and administrators, jointly and severally, in the sum of $82,395.33, unto William K. Vanderbilt, owner of the Alva, and all other per-

sons claiming damages in the proceedings, that the petitioner should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of its final decree, and all sums that the petitioner should be ordered to pay by such final decree, whether in the District Court, or any appellate court; and that, unless it should do so, the signers consented that execution should issue against them, their heirs, executors and administrators, jointly and severally, and their lands, goods and chattels, wherever found, to the value of the sum above mentioned, without further notice or delay.

On the same day, the District Court issued a monition to the marshal, commanding him to give notice to Vanderbilt and to all persons concerned, of the filing of the libel or petition, and of its substance; to cite Vanderbilt and all persons claiming damages for any loss occasioned by said collision to appear before the court, at Boston, on or before November 25, 1892, and make due proof of their respective claims in the premises; to serve a copy of the monition on Vanderbilt, if he should be found within that district; to give further notice by advertising the same in a specified newspaper published at Boston, at least sixty days before such return day; and to post a copy of the notice at the court house in Boston. The marshal made return, on September 2, 1892, that he had advertised the monition three times, on August 19 and 26, and September 2, in the designated newspaper, had posted a copy of it in the court house at Boston on August 19, and on the same day had given a further notice to Vanderbilt, by mailing to him an attested copy of the monition, by registered letter, to his house at Newport.

On the 17th of August, 1892, the District Court also made an order enjoining Vanderbilt and all persons claiming damages for any loss arising out of the matters and acts alleged in said libel and petition, from prosecuting any suit or suits against the libellant or petitioner, as owner of the Dimock, or against that vessel, in respect to any claim or claims arising out of said collision, "except in these proceedings." On the 20th of August, 1892, a deputy of the United States marshal for the District of Massachusetts mailed an attested copy of such

restraining order to Root & Clarke, attorneys for Vanderbilt, at New York.

On the 30th of September, 1892, Henry Morrison, who was the master of the Alva, and on board of her at the time of the collision, filed a libel in the District Court of the United States for the Southern District of New York, against the Metropolitan Steamship Company, the Dimock, Vanderbilt, and all persons claiming damages against that company or the Dimock by reason of said collision, in a cause civil and maritime, of apportionment of limited liability pursuant to § 4284 of the Revised Statutes. The libel set forth the particulars of the collision, and averred that it was not caused by any neglect or fault of the libellant, or of any of the persons on board of and having charge of the Alva, but was wholly due to the fault of those in charge of the Dimock, in seven specified particulars. It averred that by the collision the Alva and the personal effects of Vanderbilt on board of her were totally lost; that Vanderbilt had sold the wreck at public auction for $3500; that immediately prior to the collision the yacht was of the value, at least, of $300,000, and the personal effects of Vanderbilt so lost were of the value of more than $5000; that Vanderbilt had notified the steamship company that he would hold it responsible for the loss and damage so suffered by him; that at the time of the collision the libellant had on board of the Alva personal effects of his own, of which a list was given, amounting in value to over $1300, which were wholly lost; that divers other persons had suffered losses and destruction of property on board of the Alva by such collision; that all of such loss and damage was without the privity or knowledge of the steamship company, and by law its liability did not exceed the value of its interest in the Dimock and her freight then pending; that the whole value of the Dimock, and her freight for the voyage she was making, was not sufficient to make compensation to the persons who suffered loss by such collision, and they were by law entitled to receive compensation from the owner of the Dimock only in proportion to their respective losses; that the value of the Dimock at the time of the collision, and at the termination of the

voyage she was then making, exceeded $200,000, and her freight then pending exceeded $2300; that the amount to be apportioned among the several persons who so suffered loss by such collision exceeded $202,300; that the Dimock had not been libelled or arrested in any court to answer for such loss, and her owner had not theretofore been sued in that behalf; and that the Dimock was then within the Southern District of New York, and subject to the control of the court for the purposes of the proceeding.

The prayer of the libel was, that the court would proceed to establish the loss suffered in the premises by all persons who might make any claim of liability therefor against the Dimock or her owner, and would proceed in due course to ascertain the value of the Dimock and her freight then pending, and the proportionate amount of compensation for said matters which the libellant was entitled to receive from the owner of the Dimock, and to decree the payment thereof against either the Dimock or her owner, or both, as might be lawful and proper; and for further relief; that process might issue against the Dimock, and she be condemned and sold to pay said damages; and that the steamship company, Vanderbilt, and all persons claiming to have suffered loss by such collision might be cited in due form to appear and answer, and to prove their claims in that behalf.

Under process duly issued on that libel, the Dimock was attached by the marshal on September 30, 1892, in the Southern District of New York, and on the 1st of October, 1892, in that district, process of monition was duly served by him on the steamship company; and on the same day proctors for Vanderbilt duly entered their appearance for him in the suit.

On the 1st of October, 1892, on an affidavit, and on all the pleadings and proceedings, the District Court of the United States for the Southern District of New York made an order for Morrison to show cause why his libel should not be dismissed as to the Dimock and the steamship company, and the process issued against the Dimock be set aside, and the steamship company have such other or further relief as might be

just. The motion of the steamship company to that effect was heard on the papers mentioned, on additional affidavits on behalf of that company, on a copy of the record of the District Court in Massachusetts, and on affidavits on the part of the libellant; and on the 7th of October, 1892, the District Court, held by Judge Brown, made an order directing that the process issued on Morrison's libel be vacated; that the service thereof on the steamship company be set aside; that the Dimock be released and set free from the attachment; and that the libel be dismissed. The order further said: "This order is made upon the grounds and for the reasons stated in the opinion filed this day, to which reference is hereby made as a part hereof."

In the opinion of Judge Brown, so referred to, (*The H. F. Dimock*, 52 Fed. Rep. 598,) it was held that Morrison had notice, before his libel was filed, of the proceedings in the District Court in Massachusetts, and of the injunction order issued by that court on August 17, 1892. The opinion considered the contention of Morrison that the District Court in Massachusetts never acquired jurisdiction or authority to issue the restraining order, on the grounds that the Dimock had never been arrested by or surrendered to that court, nor had any stipulation been given for her proper value, as a substitution for her, under Rule 54 of this court in admiralty, and because the appraisement proceeding was *ex parte* and without any notice of it, or of the application for it, having been given, or attempted to be given, to Vanderbilt or any other creditor, and because the appraisement was for less than one-half of the value of the vessel, and that, therefore, the appraisement was not a "due appraisement," within Rule 54. The District Court in New York held that the original *ex parte* appraisement and stipulation were not a finality, incapable of subsequent inquiry or correction by the court on due application; that it was competent for the District Court in Massachusetts to order a reappraisement and further security, upon application by any creditor, showing that the previous appraisement was mistaken and inadequate, and that the duty of the appraisers had been performed inadequately; that the matter

fell within the domain of practice, to be regulated by that District Court, in the absence of any express rule of this court, as the interests of justice seemed to demand; that, as Rule 54 of this court did not in terms require any notice to creditors of the original appraisement and stipulation, the District Court was not prepared to hold that the "due appraisement," provided for by that rule, might not be, in the first instance, an *ex parte* one, to be supplemented thereafter, if unsatisfactory, by further inquiry on the application of a creditor; that the want of notice did not constitute a jurisdictional defect in the appraisement and stipulation, so as to render void the order for a monition and other subsequent steps in the cause, including the injunction against all other suits, provided for by Rule 54; that the prior proceeding in the District Court in Massachusetts was valid, and the libel of Morrison was improperly filed; and that it should be dismissed.

On the 17th of October, 1892, Morrison presented to this court a petition for a writ of mandamus directing the District Court for the Southern District of New York, and Judge Brown, notwithstanding the matters contained in the moving affidavits before that court, and notwithstanding the proceedings in the District Court of the United States in Massachusetts, to vacate the order of October 7, 1892, and to reinstate Morrison's libel and proceed thereon according to law. Accompanying the petition are copies of all the papers in the suit of Morrison and of all the papers constituting the record in the suit in the District Court in Massachusetts. Judge Brown has made return to the order to show cause, and the case has been orally argued here by the counsel for both parties, and full briefs have been submitted to this court.

The District Court in New York disposed of the question before it on the merits, and dismissed the libel. Although in its opinion the court said that Morrison's libel was "improperly filed," yet the court did not refuse jurisdiction of that libel. On the contrary, it said that the proceeding by Morrison to limit liability was in accordance with the provisions of § 4284 of the Revised Statutes. What it did was to hold that the libel must be dismissed on the ground that there was a

valid defence to it, in the prior proceedings instituted in the District Court for Massachusetts, which court had full jurisdiction of the cause. What it said was that Morrison's libel was improperly filed, because it was filed in violation of a valid restraining order, issued on the 17th of August, 1892, by the District Court for Massachusetts.

The District Court in New York having dismissed the libel out of court, on a hearing of the case on the merits, we are now asked to direct it to vacate its order of dismissal, and to reinstate the cause, and to proceed upon the libel. This is in effect asking us to direct the District Court to decide in a particular way the matter heard before it, which is never the office of a mandamus. *Ex parte Morgan*, 114 U. S. 174; *Ex parte Brown*, 116 U. S. 401.

Moreover, the present attempt is one to use a mandamus as a writ of error, which cannot be done. *Ex parte Railway Co.*, 103 U. S. 794, 796; *Ex parte Baltimore & Ohio Railroad*, 108 U. S. 566; *In re Pennsylvania Co.*, 137 U. S. 451, 453.

In addition to this, a mandamus is never granted where the party asking it has another remedy. *In re Pennsylvania Co.*, *supra*. In the present case, it is claimed by Morrison that the jurisdiction of the District Court in New York was in issue before that court. If so, the remedy of Morrison was by an appeal from the District Court directly to this court, on the question of jurisdiction, under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827. If the question of the jurisdiction of the District Court was not in issue before that court, then the remedy of Morrison, as against the order of the District Court dismissing his libel, was by an appeal to the Circuit Court of Appeals for the Second Circuit, under § 6 of the same act.

For the foregoing reasons, the prayer of the petition for a mandamus in No. 8, Original, must be denied.

In No. 9, Original, the question involved is as to the validity of the proceedings in the District Court for Massachusetts. Morrison applies to this court for a writ of prohibition to the District Court for Massachusetts, from proceeding further upon the libel and petition filed in that court by the Metropolitan Steamship Company. The District Judge has made a return

to the order to show cause, issued on the petition for prohibition, setting forth in full the proceedings before recited, and stating that due appraisement was made of the Dimock and her freight, "according to the usual course and practice of the said District Court in such cases, by three persons known to me to be persons of integrity, and of skill and experience in such matters; and such appraisement was duly made and returned."

It is urged for Morrison that, in the libel and petition filed by the Metropolitan Steamship Company in the District Court for Massachusetts, the company did not ask for the appointment of a trustee, or convey, or offer to convey, its interest in the Dimock and her pending freight to a trustee, pursuant to § 4285 of the Revised Statutes of the United States; that it did not allege, in its original libel and petition, that the vessel was within the District of Massachusetts, nor pray any process against her, nor in any way surrender her to the custody of the said District Court; that it did not offer, in case the court should adjudge the company to be liable to any extent for the collision, to pay the value of the vessel and freight into court for distribution; that it did not allege that any person except Vanderbilt suffered loss by the collision; that the order issued by the District Court in Massachusetts, on August 17, 1892, was not a mere temporary restraining order, to last only until a hearing could be had, but was an absolute injunction, which contained no provision for a hearing of the damage claimants on the matter thereof, and did not purport to be made on notice and an opportunity to be heard, given to any person interested adversely to the steamship company; that the amendment to the libel was not made until August 27, 1892; that the Dimock was never attached by any process issued out of the District Court for Massachusetts, and that court never took her into its custody or assumed control of her; that it appeared by affidavit that, after the libel in Massachusetts was amended, and before Morrison's libel was filed in the Southern District of New York, the Dimock departed from the District of Massachusetts and was no longer in that district or subject to the control of the court for that district, or within the reach of the process of that court, such departure being without any

obligation to return the vessel into that district, and without any leave of that court obtained or sought; that the only thing left within the Massachusetts district to be divided among damage claimants, and subject to be disposed of by the decree of the court for that district, in the proceeding there pending, was the stipulation so given; that no notice of the appraisement proceedings, or of the stipulation proceedings, or of the injunction proceedings, was required by the court to be given to any damage claimant, and neither Morrison nor any other damage claimant had in fact any notice thereof or any opportunity to be heard thereon; that neither Morrison, nor Vanderbilt nor any damage claimant had been served personally with process in the Massachusetts district, or had entered any appearance in the Massachusetts court; that Vanderbilt had received a copy of the monition and of the injunction order, but not within the district of Massachusetts, and not until after August 17, 1892; and that Morrison had not been served with any paper in the Massachusetts proceedings, either within or without the Massachusetts district.

It is further contended, that Morrison and Vanderbilt have been deprived of their remedy against the Dimock and her owners, and are confined to a proceeding to obtain a share of the amount mentioned in the stipulation; that no court has power to give relief beyond a share in that amount, because the Dimock departed from the jurisdiction of the District Court for Massachusetts, and her owners never submitted themselves to the jurisdiction of that court by any offer to pay any sum in excess of that amount; that that result had been accomplished by a proceeding wholly *ex parte*, without actual or constructive notice and without any opportunity for a hearing, on the part of Morrison, or Vanderbilt, or any other person adversely interested; that the appraisement, stipulation and injunction proceedings in the Massachusetts court, having been taken without any notice or opportunity to be heard given to the damage sufferers, were wholly without effect upon the rights of the latter, and did not destroy Morrison's capacity to sue, and did not discharge the steamship company or the Dimock from liability to be

sued; that Morrison acquired by the collision a right to recover damages to some extent against the company owning the Dimock, personally, in any District Court which could obtain personal jurisdiction of that company; that he acquired a right also to recover damages to some extent against the vessel, in any District Court which could obtain jurisdiction *in rem* against her; that his right against the vessel is not a right of action merely, but is a *jus in re* and a property interest in her, of which he cannot be deprived without due process of law; that the limited liability act did not take away or affect any such rights *ex proprio vigore*, as an exercise of the legislative power of the United States, but left such rights to be limited and qualified judicially by the courts; that after the collision, and before the company filed its libel in Massachusetts, Morrison, by virtue of that statute, had a right to prosecute an apportionment suit in any District Court which could acquire jurisdiction *in rem* of the Dimock, and *in personam* of her owner, and of all known damage claimants, and the further right to have any such court adjudicate upon the questions (1) whether the company and the Dimock were liable to any extent, that is to say, whether the collision was caused by fault on the part of the Dimock; (2) if so, how much was the value of the company's interest in the Dimock and her freight for the voyage; (3) whether the aggregate losses of all the damage sufferers exceeded that value; and (4) if they did, how, or in what proportions, the amount of that value ought to be divided among the sufferers; and that the only ways in which the Massachusetts proceedings could have affected such statutory right of Morrison were (1) by destroying his personal capacity to sue; (2) by releasing the company and the Dimock from liability to be sued; and (3) by conferring upon the court in Massachusetts exclusive jurisdiction to determine those four questions, which were presented alike by the company's libel and by Morrison's libel.

It is contended, also, that the "due process of law," guaranteed to every person by Article 5 of the Amendments to the Constitution of the United States, implies, with reference to proceedings under the judicial power of the United States,

notice of some kind, and opportunity to be heard, not only as a requisite, but as a prerequisite; that the rights of the damage claimants had never been submitted or subjected in any form to the Massachusetts Court; that proceedings in court, of which the persons whose rights purported to be affected thereby had no actual or constructive notice, and in which they had no opportunity to be heard, were ineffective and were not judicial proceedings; that it could not be said that an opportunity to be heard would necessarily, and as matter of law, have been of no advantage to the damage claimants, for they might have convinced the court (1) that the appraisement ought to have been made on sworn testimony, with an opportunity to both sides to produce and cross-examine witnesses; or (2) that the experts selected were not competent or were not impartial; or (3) that the appraisers' report ought to have been rejected, because it did not show the plans on which they proceeded, or as of what time the value of the Dimock was taken, or because the appraisers did not personally examine her; or (4) that the stipulation should have been broad enough to cover not merely what the appraisers estimated to be the value of the company's interest in the Dimock and her freight, but also what the damage claimants asserted the value of such interest to be, so that, if, on final hearing, the issue tendered in the company's libel and petition as to such value was determined in favor of the damage claimants, the court would have some means of compelling the company to pay the adjudicated value into court for distribution; or (5) that the sureties on the stipulation were insufficient; or (6) the court might have been convinced that, for the reasons above stated, no injunction ought to issue, or else, only on condition that the company bound itself with sureties, to pay into court the value of its vessel and freight, as finally adjudicated, or that the rights of the parties could be more conveniently and justly determined by permitting the damage claimants to assert their claims in their own way, and allowing the steamship company to set up the apportionment proceedings as a plea, or that no injunction ought to issue until the value of the vessel and freight had been adjudicated, and paid into court, or secured to be paid.

It is further urged, that the proceedings in Massachusetts were not, as matter of law, equivalent to a transfer of the Dimock and her freight by the company to a trustee under § 4285 of the Revised Statutes; that they were very far from being an equivalent in fact; that there is nothing in the statute which authorizes the owner of a vessel, at his option, either to transfer his interest in the vessel and freight to a trustee, or to pay into court the value thereof as determined by an *ex parte* appraisement, or which declares that it shall be a sufficient compliance with the statute on the part of the owner if he pays or secures to be paid into court the value so appraised, or which provides that, after such payment all suits and proceedings against the owner shall cease; and that the act leaves the creation of a substitute in lieu of a transfer to a trustee, to a court which proceeds judicially.

It is further contended, that the rights of the damage claimants against the company and the Dimock, arising out of the collision, remained precisely as they were before the company filed its libel and petition in Massachusetts; that those rights were never transferred from the company and the vessel to the fund represented by the stipulation; that said fund cannot be regarded as the fund to be apportioned among the damage claimants, as it had never been adjudicated or judicially established to be such; that, if Morrison's right to proceed against the company and the vessel in the Southern District of New York had been taken away or suspended by the proceeding in Massachusetts, it must be for some other reason than (1) that the court in Massachusetts had adjudicated that damage claimants ought to be enjoined from proceeding in any other court; or (2) that such claimants had been incapacitated or rendered personally incompetent to sue; or (3) that the company and the Dimock had been released and discharged from liability to be sued; and that the only other way in which Morrison's right to proceed in New York could have been affected was that the jurisdiction of the court in Massachusetts over the subject-matter had somehow become exclusive, so that Morrison could proceed against the company and the vessel only in that forum.

It is also contended, that the court in Massachusetts was not

competent to adjudicate the question whether or not the collision was caused by fault on the part of the Dimock, because it did not acquire personal jurisdiction of one or more of the damage claimants or jurisdiction *in rem* of the Dimock; that the fund represented by the stipulation had not been judicially substituted for the Dimock, and she had not been discharged from liability for the collision; that, as she still remained liable for it, nothing but possession and control of her would authorize any court to pronounce a judgment *in rem* as to her liability; that the court in Massachusetts had never actually assumed possession and control of her by the officers of the court, by seizure or otherwise, or jurisdiction of her; that, whatever jurisdiction that court acquired of her by her having been within the district when the company's libel and petition was filed, was lost, and all the rights of the company arising therefrom were abandoned by the company's having taken the Dimock, before the return day of the monition, out of the district, to the port of New York, without leave of the court or procuring any release or discharge of her, or entering into any obligation to bring her back; that the court in Massachusetts never acquired personal jurisdiction over Morrison or any other damage claimant; that, there having been no voluntary appearance of any damage claimant, service of process within the Massachusetts district was essential; and that no process had been served on Morrison or Vanderbilt within that district.

It is further contended, that the court in Massachusetts did not acquire jurisdiction to determine any of the other questions presented by the two libels; that what the steamship company ought to have done was to make in its libel an unconditional offer, substantially in the terms of the statute, to pay into court for partition among the damage sufferers whatever the court should determine was the value of the company's interest in the Dimock and her freight; that the only offer which could be implied from the libel was one to pay or secure to be paid the amount at which the court might cause the value of the vessel and her freight to be duly appraised; that such offer was insufficient, because it did not mean the amount which the court should adjudicate, after hearing the parties adversely

interested, to be such value; that such offer of the company having been complied with to the expressed satisfaction of the court, no power was left to that court to compel the company to pay anything more than the appraised amount, even if the court should find, on the proofs, that the value of the Dimock and her freight was greater; that, as the vessel had been taken out of the Massachusetts district, there was nothing left within the reach or control of the Massachusetts court, except the stipulation for an amount which Morrison and Vanderbilt allege was less than one-half the true amount; and that, even if they should appear in the Massachusetts court and establish by proof that the liability of the company was not less than $200,000, that court could do nothing against the will of the company.

We are of opinion that none of the views above stated are sufficient to show that this is a proper case for a writ of prohibition. The only question involved is that of the jurisdiction of the District Court of Massachusetts. *Ex parte Gordon*, 104 U. S. 515; *Ex parte Ferry Company*, 104 U. S. 519; *Ex parte Slayton*, 105 U. S. 451; *Smith* v. *Whitney*, 116 U. S. 167; *In re Garnett*, 141 U. S. 1; *In re Cooper*, 143 U. S. 472, 495.

Under Rule 57 in admiralty, prescribed by this court, (130 U. S. 705,) the Dimock not having been libelled to answer for the loss resulting from the collision, and no suit therefor having been commenced against her owner, the proceedings were instituted lawfully in the District Court in Massachusetts, that being the district in which the vessel was at the time the proceedings were instituted, and she being at that time subject to the control of that court for the purposes of the case, as provided by Rule 54, 137 U. S. 711, and Rules 55 and 56, 13 Wall. 13.

As to the contention that, in order to retain jurisdiction, the Massachusetts court should have kept possession of the Dimock until Morrison or Vanderbilt, or both of them, should have chosen to appear in the cause, and that, by allowing her to go to New York, in the ordinary course of her business, after the stipulation had been given, the District Court in

Massachusetts lost such jurisdiction as it had acquired, there are several sufficient answers:

(1) The proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee, but is an equitable action.

(2) It was not necessary, in order to sustain the proceeding for limiting liability, that Morrison or Vanderbilt should have been personally served with notice thereof within the district of Massachusetts, or that the Dimock should have been taken and held by the court. The decisions of this court have established the power of Congress to pass the statute, and of the courts of admiralty jurisdiction to enforce it; and its enforcement would be impracticable under the restrictions which Morrison seeks to impose. *Norwich Co.* v. *Wright*, 13 Wall. 104; *The Benefactor*, 103 U. S. 239; *Providence and New York Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *The City of Norwich*, 118 U. S. 468; *The Scotland*, 118 U. S. 507; *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527.

(3) The filing of the libel and petition of the steamship company, with the offer to give a stipulation, conferred jurisdiction upon the court, and no subsequent irregularity in procedure could take away such jurisdiction.

(4) Although some prior notice of the holding of the appraisement might very well have been served upon Vanderbilt, even if he was out of the jurisdiction of the Massachusetts court, he having been named in the libel and petition as a respondent, yet the appraisement *ex parte* was not void, because Rule 54 does not require prior notice of the appraisement to be given to any one, and only requires a monition to be issued after a stipulation has been given or a transfer has been made to a trustee.

(5) The making of the appraisement *ex parte*, and the taking of the stipulation thereupon, were, at most, an irregularity which the District Court could correct. *The Thales*, 3 Benedict, 327, 330, and 10 Blatchford, 203; *The Benefactor*, 103 U. S. 239, 247. The stipulation stands in the place of the vessel and her freight, leaving to the court its usual power to act, on proper application, in respect to giving a new or further

stipulation. *The Wanata*, 95 U. S. 600, 611; *United States* v. *Ames*, 99 U. S. 35, 36; *The City of Norwich*, 118 U. S. 468, 489. The District Court for Massachusetts has the whole matter within its control, for the steamship company, by its libel and petition, has submitted itself to the jurisdiction of that court; and if it should fail to comply with a future order of that court in respect to giving a new or further stipulation, on a further appraisement, that court could stay its further proceedings, deny it all relief, and dismiss its libel and petition.

Section 4285 of the Revised Statutes provides that it shall be deemed a sufficient compliance on the part of the owner of a vessel with the requirements of the statute relating to his liability for loss, if he shall transfer his interest in the vessel and freight for the benefit of the claimants to a trustee, and that, after such transfer, all claims and proceedings against the owner shall cease. Rule 54 of the rules in admiralty prescribed by this court provides that when a libel or petition is filed in the proper District Court, as provided by Rule 57, claiming a limitation of liability and praying proper relief in that behalf, the court, having caused due appraisement to be had, shall make an order for the payment of the amount into court, or for the giving of a stipulation, with sureties, to pay the same into court whenever ordered, or, if the owner so elects, make an order, without such appraisement, for the transfer by the owner of his interest in the vessel and freight to a trustee to be appointed by the court, and upon compliance with such order, issue a monition notifying all persons claiming damages to make proof of their claims, and also make an order restraining the further prosecution of all suits against the owner in respect of any such claims.

The validity of the provision for a stipulation has been upheld by this court in *Providence and New York Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 600, in which it said: "The operation of the act in this behalf cannot be regarded as confined to cases of actual 'transfer,' (which is merely allowed as a sufficient compliance with the law,) but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is re-

quired and done is tantamount to such transfer; as, where the value of the owners' interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested." To the same effect, see *The City of Norwich*, 118 U. S. 468, 502.

In fact, it is stated in the brief for Morrison, that his counsel do not doubt that the operation of the limited liability act cannot be regarded as confined to cases of actual transfer to a trustee, but must be regarded as extending to cases in which what is done is tantamount to such transfer; as, when the value of the owner's interest is paid into court, or secured by stipulation, and placed under its control for the benefit of the parties interested. But what they contend for is, that the value of such interest cannot be regarded as paid into court, or secured by stipulation, until such value has been judicially ascertained, after a hearing of the persons interested, and that only such a judicial ascertainment is equivalent to a transfer of the vessel and her freight to a trustee.

As the District Court for Massachusetts has jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition will be issued only in case of a want of jurisdiction either of the parties or of the subject-matter of the proceeding. *In re Fassett*, 142 U. S. 479, 486.

The foregoing views sufficiently dispose of the points urged in behalf of the writ.

Both writs denied.

STREETER *v.* JEFFERSON COUNTY BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 81. Argued December 7, 1892. — Decided January 3, 1893.

A creditor of a bankrupt caused execution to be levied, before the bankruptcy, on goods of the bankrupt to satisfy the debt. The levy was afterwards set aside, as an illegal preference within the purview of the bankrupt act in consequence of knowledge of the debtor's condition by the plaintiff's attorney. *Held*, that the creditor was not thereby precluded

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from proving his debt against the bankrupt; and that an endorser of the note of the bankrupt to the creditor, on which the judgment was founded, was not discharged from his liability as endorser by reason of the levy being declared in fraud of the provisions of the bankrupt law, Rev. Stat., § 5084, and § 5021 as amended by the act of June 22, 1874, 18 Stat. 178, 181.

On each of the dates, January 21 and February 7, and February 12, 1877, at the city of Watertown, Jefferson County, New York, Henry V. Cadwell, James C. Cadwell, and Lewis A. Cadwell, copartners doing business as such under the firm name of H. V. Cadwell & Co., executed their promissory note, payable one month from date, to the order of H. V. Cadwell & Co. at the Jefferson County National Bank of Watertown, New York, the first two notes being for the sum of $1000 each, and the third for $750. Each of said notes was endorsed by the firm in their firm name and by John C. Streeter, as accommodation endorser, and passed into the possession of the bank, the defendant in error.

The notes, at their maturity, were presented for payment where the same were payable, and payment thereof demanded, which was refused; whereupon the notes were duly protested for non-payment, and notice of such demand, refusal and protest, in each instance thereof, was then and there duly given to each of said endorsers.

On or about the 16th day of March, 1877, the bank commenced an action on the three notes in the Supreme Court of the State of New York against Henry V. Cadwell, James C. Cadwell and Lewis A. Cadwell, and such proceedings were had therein that the plaintiff, the said bank, recovered a judgment against the makers of the said notes for the full amount thereof. In this action the plaintiff in error, John C. Streeter, was impleaded as a defendant, but no service was made on him, and he did not appear. On the same day an execution on the judgment was issued and delivered to the sheriff of Jefferson County, who by virtue thereof levied upon the property of the defendants to an amount sufficient to satisfy the execution.

On the day the said levy was made a petition in bankruptcy

was filed in the District Court of the United States for the Northern District of New York against the said Henry V. Cadwell, James C. Cadwell, and Lewis A. Cadwell, upon which petition the said Cadwells were, on May 1, 1877, adjudged bankrupts, and an assignee of their property was appointed. By order of the court the sale, by virtue of the said execution, of the property so levied upon was enjoined, and the sheriff was appointed receiver of the estate of the said bankrupts, and directed to sell the property levied upon by him, and deposit the proceeds of such sale in the depository of the said court, subject to the further order of the court; which sale was made and the proceeds so deposited. The order also directed that the lien of the judgment creditors, if there should be such lien, should follow and attach to the moneys arising from the said sale.

In November, 1877, John C. Brown, the assignee, filed his bill in equity in the said District Court of the United States, charging that the said bank, being a creditor of the said Henry V. Cadwell, James C. Cadwell, and Lewis A. Cadwell, and having reason to believe that they, the said Cadwells, were insolvent, did, with the assent, connivance, and procurement of the said Cadwells, and knowing that a fraud on the act of Congress of March 2, 1867, and acts supplementary to and amendatory thereof, was intended, commenced an action in the Supreme Court of the State of New York against the said Cadwells, in which action the said bank obtained judgment as aforesaid upon the said notes against the makers thereof. This bill avers that before the filing thereof the assignee demanded of the defendant, the said bank, that it surrender its preference and all claims derived from the judgment to the property of the said Cadwells, and all liens it claimed to have by virtue of the said judgment and execution, which the bank refused, and persisted in refusing to do. The bill alleged that said judgment and execution were void as against the assignee by reason of these acts, and prayed that the said judgments be decreed to be in fraud of the said bankruptcy laws of the United States, and void as against the plaintiff and creditors of the insolvents aforesaid.

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The answer to this bill admits the refusal of the said bank to surrender its said preference and liens, but denies that it had knowledge of the insolvency of the said Cadwells at the time its said action was commenced against them, that said judgments were obtained with the consent, connivance and procurement of the makers of the said notes, and that any fraud was intended upon the bankruptcy laws of the United States. Other allegations appear in the bill and answer, but upon them there was no contention at the trial of the cause.

The court being of opinion, from the evidence before it, that the said bankrupts, in contemplation of insolvency, desiring to secure their endorsers and the said bank, had decided to do so by means of judgments and executions; and that as the attorneys who brought the actions were the bankrupts' attorneys, and as the attorneys were under no professional obligations not to disclose the circumstances and designs of clients who desired to assist their employer, the said bank should be charged with all the knowledge possessed by the said attorneys. The court therefore rendered a decree in the cause, adjudging the said judgment and execution void as against the complainant, the said assignee, and that the money which arose from the said sale by said receiver belonged to the said assignee.

The defendant, the said bank, took an appeal from this judgment and decree to the Circuit Court of the United States for the Northern District of New York, where the action of the said District Court was affirmed, and judgment of affirmation entered in the said Circuit Court on March 15, 1881. Subsequently, upon an order of the said court, the money so deposited as aforesaid was paid to the said assignee.

In September, 1881, the Jefferson County National Bank brought an action in the Supreme Court of the State of New York against John C. Streeter, as endorser on the said notes, for the respective amounts thereof, averring in its complaint the protest for non-payment of the said notes, and notice thereof duly given to the said endorser, and alleging liability on the part of the said endorser for their payment. The defendant, Streeter, in his answer to said complaint, alleges that by reason

of a fraudulent arrangement between the bank and the makers of the said notes, by which the bank became a preferred creditor of the same, and by reason of the decree aforesaid of the said Circuit Court of the United States adjudging such action of the bank to be void, the bank had, by reason of the provisions of the said statutes of the United States, precluded itself from all right or claim against the property of the makers of the said notes, and that all rights and remedies on the part of the bank and of himself, the said Streeter, were thereby lost: and that the defendant was thereby discharged from all liability to the plaintiff as endorser of said notes.

This case came for trial in the said Supreme Court of New York, and a jury being waived, was tried by the court and judgment given for the plaintiff; the court holding that the bank was not precluded from making a claim against the property of the makers of the said notes, or from proving its claim against them as bankrupts, and that the defendant, Streeter, had not been discharged from liability as endorser on said notes.

An appeal from this judgment was taken to the Court of Appeals of the State of New York, which affirmed the order of the said Supreme Court. 106 N. Y. 186. On *remittitur*, entered June 8, 1887, the judgment of the said Supreme Court of Appeals was made the order of the said Supreme Court of New York.

Thereupon the said John C. Streeter, defendant in the said action, sued out this writ of error.

Mr. Watson M. Rogers for plaintiff in error.

That the defendant in error in this action procured from the makers of the notes in suit, a fraudulent and preferential judgment, which was forbidden by law, cannot be disputed. That was the very issue tried in the United States District and Circuit Courts, and that was the fact that was adjudged in the suit between the defendant in error and the assignee of the makers. It must be accepted and treated as a fundamental

fact in the case. *Brown* v. *Jefferson County Bank*, 19 Blatchford, 333.

This fraudulent and unlawful preference has never been surrendered by the bank. On the contrary, it litigated the matter with the assignee, and was defeated, and then the fund was turned over to the assignee. Final judgment was entered against the bank, and the record does not show that anything further was done.

The word "surrender," as used in the statute, implies a voluntary giving up by the creditor to the assignee of the preference. Then he may prove his debt. But if he chooses to contest the title of the assignee and judgment is recovered against him, he cannot prove it. *In re Drummond*, 4 Bissell, 149; *In re Stephens*, 3 Bissell, 187.

The bank cannot, under the provisions of the Federal statute, prove the notes endorsed by the defendant, nor the judgment recovered upon them, against the estate of the makers.

It would seem, therefore, that the only contention that can possibly arise on that question is as to whether it can prove for a moiety or at all. For the purpose of the question involved in this case it is wholly immaterial whether the holder of the note by reason of its fraudulent act in obtaining a preference is prohibited from proving its *whole* debt or a moiety thereof.

The result is just the same in this case. If the holder has by its own acts and dealings precluded itself from proving against the estate of the makers one-half the debt, then it has released and discharged his property from all liability to pay that half; and if the endorser, by the holder's acts and dealings with the makers has lost his right to prove the note, (that is the whole note and not half of it,) against the estate of the maker of the note, then it is submitted that the endorser is discharged in law and in equity. The holder cannot impair the endorser's remedy over against the maker and at the same time hold him liable on the endorsement. *Phelps* v. *Borland*, 103 N. Y. 406. It is respectfully submitted, however, that the bank cannot prove the claim, or even a moiety. *In re Stein*, 16 Nat. Bank. Reg. 569. Under the first subdivision of Rev. Stat. § 5021, it has been held, that the acts and knowledge

of the creditor's attorney who procured the judgment constituting the fraudulent preference, were the acts and knowledge of the creditor himself. *Rogers* v. *Palmer*, 102 U. S. 263. In the case at bar, the attorneys employed by the bank to procure the judgments against the bankrupts were the bankrupts' attorneys. The attorneys knew the purpose of the judgments, to wit: to obtain a preference which was a fraud. The knowledge and acts of the attorneys being imputed to the bank, their knowledge and acts being the bank's knowledge and acts, the bank was guilty of actual fraud.

The plaintiff in error, the endorser of the notes, cannot prove them against the estate of the maker, as he is prohibited from proving on the same grounds, and for the same reason that the defendant in error is. To allow the plaintiff in error to prove a debt which the defendant in error is prohibited from proving would defeat the very object of the law. Therefore, in such case, it must be held that the endorser is discharged from all liability to the holder of the note. *Bartholow* v. *Bean*, 18 Wall. 635; *In re Ayer*, 6 Bissell, 48. The precise question involved in this case has been decided by the Court of Appeals of the State of Kentucky in accordance with the contention of the plaintiff in error in this case. *Northern Bank of Kentucky* v. *Cooke*, 13 Bush, 340. See also *In re Wilson*, 11 Ves. 410; *Brown* v. *Williams*, 4 Wend. 360; *Shutts* v. *Fingar*, 100 N. Y. 543.

It will be seen by the record in this case that the bank not only obtained a judgment against the makers of the notes, but had, through the sheriff, obtained a levy on their property which was sufficient to pay the debt; but, by its attorneys it appeared in court and consented to release the property from the levy of the sheriff, as such, and converted him into an officer of the Bankrupt Court, and discharged the lien of the execution. This was done without the consent of the endorser, and it is respectfully submitted that, irrespective of the question hereinbefore discussed, it discharged the endorser. Without the consent of the bank, the sheriff had no right to surrender the property upon which he had levied and remand the funds to another jurisdiction. *National Bank & Loan*

Co. of Watertown v. *Babbitt*, 17 Hun, 447; *Ansonia Brass & Copper Co.* v. *Babbitt*, 74 N. Y. 395; *O'Brien* v. *Weld*, 92 U. S. 81; *Marshall* v. *Knox*, 16 Wall. 551; *Smith* v. *Mason*, 14 Wall. 419; *Ducker* v. *Rapp*, 67 N. Y. 464; see also *Gardner* v. *Oliver Lee & Co.'s Bank*, 11 Barb. 558, and *Phelps* v. *Borland*, 103 N. Y. 406.

Aside from the questions of surrender and right of the bank to prove its claim against the bankrupt's estate, it is submitted the endorser is discharged by reason of the changed relations brought about by the acts of the holder of the notes.

(*a.*) The bank fraudulently procured judgment on the notes, and when requested so to do, refused to surrender its unlawful preference. While in this position, by its own wrongful act it disabled itself from proving its claim against the bankrupts' estate, because it could not hold on to its judgment and execution, and proceed in the bankruptcy court at the same time. Section 5084 bars the way. Nor could the endorser have taken up the notes and proved them against the bankrupts' estate. He could only be subrogated to the rights of the holder. The time of payment was thus extended, which, by the unquestioned rule of law as to commercial paper, discharges the endorser. *United States Bank* v. *Hatch*, 6 Pet. 250; *Ducker* v. *Rapp*, 67 N. Y. 464; *Pomeroy* v. *Tanner*, 70 N. Y. 547; *Martin* v. *Thomas*, 24 How. 315.

Any dealing with the principal by the creditor which amounts to a departure from the contract by which the surety (accommodation endorser) is bound, and which by possibility might vary or enlarge his liabilities, operates to discharge the surety. *Ludlow* v. *Simond*, 2 Caines' Cas. 1; *Miller* v. *Stewart*, 9 Wheat. 680; *United States* v. *Boecker*, 21 Wall. 652.

Mr. John Lansing for defendant in error.

Mr Justice Shiras delivered the opinion of the court.

John C. Streeter, the plaintiff in error, contends that the record discloses, as matter of fact, that the Jefferson County National Bank, being the holder of certain promissory notes

made by the firm of H. V. Cadwell & Co. entered into a collusive arrangement with said firm, who were insolvent at the time, and who were shortly afterwards adjudged bankrupts, whereby the bank was, by procuring judgment on said notes, to obtain an illegal preference over other creditors of the firm; that, by reason of this collusive arrangement, the bank disabled itself from proving its claim on these notes against the estate of the bankrupts, and thereby discharged Streeter, who was an accommodation endorser, from liability to the bank.

The assignee in bankruptcy brought an action in the District Court of the United States for the Northern District of New York, to test the validity of the bank's judgment, and it was adjudged by that court that the judgments were void as against the assignee, and, on appeal, this judgment was affirmed by the Circuit Court.

The case will be found reported as *Brown* v. *Jefferson County National Bank*, in 19 Blatchford, 315.

An examination of that case discloses that the judgment in favor of the bank was held an illegal preference, within the purview of the bankrupt law, because the attorneys employed to represent the bank in bringing the suit and obtaining the judgment had been the attorneys of H. V. Cadwell & Co., and, as such, had obtained knowledge of their insolvent condition and of their desire that the bank should obtain a preference.

The question that was presented to the New York Supreme Court and the New York Court of Appeals was, whether the fraud imputed to the bank, arising from the knowledge of its attorneys of the insolvent condition of H. V. Cadwell & Co. at the time the judgments were obtained, was such a case of fraud as to disable the bank from proving its claim in bankruptcy, and thus to effect a discharge of Streeter as endorser.

The provision of section 5084 of the Revised Statutes of the United States is as follows:

"Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given

by the debtor contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference."

Section 5021, as amended in 1874, (act of June 22, 1874, 18 Stat. 178, 181, c. 390, § 12,) is as follows:

"*Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

It is contended, on behalf of the plaintiff in error, that the bank did not, within the meaning of the law, surrender its preference, and hence could not prove its claim; and that the case was one of "actual fraud" on the part of the bank, which could not, therefore, in any event prove for more than a moiety of its debt.

To sustain the contention that the bank did not surrender its preference, it is urged that the bank did not at once, on demand of the assignee, turn over the goods levied on, but litigated the matter with the assignee in both the District and Circuit Courts, and that the proceeds of the executions were not relinquished until final judgment was entered against the bank.

It was the opinion of the state court that as the sheriff, having custody of the goods seized on execution was, with the consent of the bank's attorneys, appointed special receiver, and was ordered to sell the goods and pay the proceeds into court, to await the result of the litigation between the bank and the assignee in bankruptcy, and that as the proceeds were finally turned over to the assignee, and thus became subject to distribution as bankruptcy assets, the transaction amounted

to a surrender under section 5084. In so holding we think the state court was right.

As the bank did not, at any time, receive any money or property from the insolvent firm, but pursued only a lawful remedy in a lawful manner, it was not under any legal obligation to abandon its executions, and to turn over their fruits to the assignee immediately upon demand. We do not perceive that the course of the bank, in resisting the claim of the assignee by setting up a defence, is subject to just criticism, or thereby estopped itself from proving its claim after the assignee had prevailed in his suit.

The endeavor of the bank to maintain its executions would, if successful, have been for the benefit of the endorser, who would, in that event, have been the last to complain, and it is certainly not apparent why the endorser should be discharged from his liability by the effort of the bank to legally collect a debt in his exoneration.

The decision of the state court, that the facts did not make out a case of actual fraud on the part of the bank, so as to deprive it of a right to prove for more than a moiety of its debt, and thus relieve the endorser of liability, in whole or in part, seems to be well founded in reason. There was no actual knowledge by the bank or its officers that the insolvent firm had done anything whatever to facilitate the procurement of the judgments. There was no giving and accepting of any security. There was no finding in the District Court of the United States of actual fraud.

The state court cites with approval the case *In re Riorden*, 14 Nat. Bank. Reg. 332, in which it was held by Mr. Justice Blatchford, then sitting as District Judge, that a mere fraud on the bankrupt law, by the acceptance of a preference, was not, in itself, actual fraud; and, commenting on this decision, the court said: "Such conclusion seems just and equitable. The bringing of an action by a creditor in the ordinary mode of procedure in the state courts, and procuring a judgment, may be, as in this case, constructive fraud, for which the lien will be set aside. But even that will depend upon the further fact that bankrupt proceedings shall be instituted within the

limited time provided by law. If such proceedings are not so begun, the lien would be valid and effectual. How, then, can it be construed to be actual fraud to pursue a legal remedy which may be efficacious, and especially when no action of the bankrupt debtor gives the creditor the obnoxious preference?" [Record. This case is not reported. See 36 Hun, 640.]

It follows that, as the bank was not precluded from proving its claim, Streeter, the endorser, could, by paying and lifting the notes, have participated in the distribution of the bankrupt estate, and hence, has failed to show any defence to the suit of the bank. The judgment of the court below is therefore

Affirmed.

MONROE CATTLE COMPANY *v.* BECKER.

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

No. 87. Submitted December 9, 1892. — Decided January 3, 1893.

During the ninety days allowed by the statutes of Texas concerning the purchase of school lands to a purchaser to make his first payment, (Laws of 1879, special session, p. 23, Laws of 1881, p, 119,) it is not competent for the surveyor to permit a person who had filed an application for a designated tract to treat the application as withdrawn and abandoned, and to make another application for the same tract in the name of a different person.

During that period of ninety days the land is in the position of reserved lands under railroad grant acts, to which it is well settled that the grant does not attach if the land is in any way segregated from the public lands.

The issue of a patent of public land to a person who is not equitably entitled to it does not preclude the owner of the equitable title from enforcing it in a court of equity against claimants under the patent.

Where the defendant in a suit in equity answers under oath denying charges of fraud, and no other evidence is offered, the charges are not sustained.

Charges of fraud made upon information and belief and not sustained by proof must be treated as not sustained.

Under the laws of Texas regulating the sale of the school lands, a purchaser who makes the first payment called for, who executes the obliga-

Statement of the Case.

tions for subsequent payments as called for, and complies with those obligations as they mature, is protected against forfeiture.

The act of the legislature of Texas of April 14, 1883, concerning purchases of school lands, had no effect upon the vested rights of the plaintiff in this case.

It is bad pleading to describe a party by the initials only of his Christian name, but, when no advantage is taken of the defect in the court below, it will not be considered here.

THIS was a bill in equity to enjoin an action at law for the recovery of the possession of eleven sections of school lands in Shackleford County, Texas, and for the cancellation and annulment of certain patents for the same issued to the defendant Becker.

By an act of the legislature of Texas of July 8, 1879, Laws, 1879, Special Session, p. 23, as amended by a subsequent act of April 6, 1881, Gen. Laws, 1881, p. 119, provision was made for the sale of lands set apart for the benefit of the school fund, and for a method of bringing such lands into the market. This method is described in sections 6, 7, and 8 of the amended act, and sections 9, 10, and 15 of the original act, and is substantially as follows:

1. The purchaser applies to the surveyor of the county in which the land is situated, describing the land he proposes to purchase, which must not exceed seven sections, and pays the surveyor one dollar.

2. The surveyor records the application in a book kept for the purpose, and endorses such application, "recorded," giving the date, page and volume of the record, signs his name thereto, and delivers the application to the proposed purchaser.

3. The purchaser immediately forwards the application to the State Treasurer, together with one-twentieth of the appraised value of the land.

4. The treasurer enters a credit in his books for the amount received, giving a description of the land, and then issues his receipt for the money, and forwards it, with the application, to the Commissioner of the General Land Office.

5. The Commissioner of the General Land Office files the application and receipt in his office, and issues his own receipt

in lieu thereof, setting forth the amount paid to the treasurer and the quantity and valuation of the land applied for.

6. This certificate or receipt authorizes the surveyor to survey the land embraced in the original application.

7. The surveyor is then required to enter the same on his books as sold, and is forbidden to entertain another application for such land until notified of the forfeiture.

8. The applicant is required to make his first payment of one-twentieth, or the whole, as the case may be, of the value of the land, and present the receipt of the Commissioner of the General Land Office to the surveyor within nintey days from the date of the record of his application, and, if he fail to do this, the land is again treated as for sale, and the surveyor is authorized to receive applications for its purchase.

9. No person can renew his file, nor file on the same land more than once in twelve months, nor can he renew his file in the name of any other person. All applications for the purchase of lands are required to be made in the real name of the person intending to be the actual purchaser thereof.

10. Upon the receipt of the application by the surveyor, the purchaser is required to execute his promissory note payable to the governor, for the balance of the appraised value of the land, which note is forwarded to the Commissioner of the General Land Office and registered in a book, and then delivered to the treasurer of the State to be filed in his office.

Under the provisions of these acts no one person could purchase more than seven sections of land.

On November 25, 1882, one J. A. Rhomberg, (whose Christian name does not appear,) a resident of Iowa, but engaged in the construction and operation of a railroad in Texas, made application for the purchase of seven sections of the land in question on behalf of Maggie L. Rhomberg, and also made application for the remaining four sections on behalf of one Frank Robinson, and filed the same with the surveyor of the county pursuant to these acts. The surveyor received and recorded the applications, endorsed them as recorded, and returned them duly endorsed to Rhomberg, who was acting as agent of both of these applicants.

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Prior to this time, however, and as early as February 28 of the same year, Rhomberg had made application for the same land in the name of different persons; had allowed these applications to lapse by the non-payment of the twentieth of their value within ninety days; and on the 29th and 30th of May had made other applications in the name of other persons, and had also allowed these to lapse by non-payment; and, again, on the 28th of August had made other applications in still other names, and in this way had kept the lands out of the market, until November 25, when he made the final applications above stated.

Before any further action was taken upon the last applications, and on January 2, 1883, one F. B. Jacobs, and on January 8 one Malinda Fisher, filed their applications with the surveyor for the purchase of the same lands. The surveyor recorded these applications, endorsed upon them a memorandum of such record, and returned them duly endorsed to the applicant.

On January 9 these applications of Jacobs were delivered to the State Treasurer and first payments were made on each of the sections applied for in his name. The applications of Malinda Fisher were also delivered to the State Treasurer, the date of which does not exactly appear, but the first payments were also made upon these applications before January 18. The treasurer received the applications and first payments of Jacobs and Fisher, made the proper entries in his books, issued his receipts for the money, and forwarded the receipts and applications to the Commissioner of the General Land Office. The Commissioner received and filed the applications and receipts, made the proper entries upon his books, and delivered his certificates in lieu of said receipts, all within less than ninety days from the original applications of November 25.

On January 18, a few days after the applications of Jacobs and Fisher, but less than ninety days after his last application of November 25, Rhomberg presented his applications duly endorsed to the State Treasurer, and tendered to him the first payments required by the act to be made upon each of the

eleven sections. The treasurer refused to receive such applications, or to accept the money, giving as his reason for such refusal that previous payments had been made upon these sections in the names of Jacobs and Fisher.

Rhomberg did not abandon these applications, but continued to press them and made repeated tenders to the State Treasurer, who, after several refusals, finally, on February 17, 1885, received the applications, accepted the first payments, made all the entries required by law regarding the same, issued his receipts for the payments, and forwarded the applications with the receipts to the Commissioner of the General Land Office. The Commissioner of the General Land Office ruled at first that first payments could not be received from two different applicants for the same sections, but finally withdrew this ruling and accepted the tender made by Rhomberg on February 17, 1885.

The title of Maggie L. Rhomberg and Frank Robinson became subsequently vested by intermediate conveyances in the defendant Becker, who, in May and June, 1886, made full and final payments to the State Treasurer of the purchase money, and letters patent were subsequently, and in the years 1886 and 1887, issued to him by the proper officers of the State of Texas for the whole eleven sections.

On March 12, 1883, Jacobs and Fisher conveyed the sections for which they had applied to the Monroe Cattle Company, which enclosed the land in controversy in its pastures, used and occupied the same and paid taxes thereon, but made no further effort to perfect its claim to the land, nor made any further payments of purchase money, either of principal or of interest, although, under the acts of 1878 and 1881, payments of interest were required to be made on or before the first day of March of each year upon all purchases of school lands, the appraised value of which had not been fully paid.

On February 14, 1887, the defendant Becker began an action of ejectment against the Monroe Cattle Company, and on February 1, 1888, the latter filed this bill to restrain Becker from further prosecuting his action at law, to remove the cloud upon its title to the land, and for the cancellation of

the patents granted to the defendant. Upon a hearing on the pleadings and proofs, the court entered a decree dismissing the bill, and the plaintiff appealed to this court.

Mr. A. H. Garland and *Mr. H. J. May* for appellant.

Mr. William D. Williams for appellee.

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

This case involves the construction of the statutes of Texas with regard to the purchase of school lands, and depends upon the question whether, during the ninety days allowed to the proposed purchaser to make his first payment, it is competent for the surveyor to receive another application for the same land, or rather to permit a person, who had theretofore filed applications for two parties, to treat such applications as withdrawn and abandoned, and to make other applications in the name of different persons within the ninety days.

No one can examine critically the provisions of the statutes in question without noticing the solicitude of the legislature to prevent a monopoly of these lands by capitalists, or their withdrawal from the market by fictitious applications. To secure a measurably equal allotment to each purchaser it was provided:

1. That no one should purchase more than three sections within five miles of the centre of any county or upon any water front, nor more than seven sections in any case.

2. That he should make his first payment within ninety days of his application.

3. That applications should be made in the real name of the actual purchaser.

4. That no one should renew his application nor file on the same land more than once in twelve months.

5. That no one should renew his file in the name of another.

In this case there were circumstances calculated to arouse suspicion in the conduct of both parties. Upon the one hand,

Opinion of the Court.

Rhomberg made application on February 28, 1882, for the purchase of these eleven sections in the names of F. Becker, S. L. Rhomberg and Conrad Becker. These applications were suffered to lapse, and on the ninetieth day thereafter, namely, May 29, he made application for seven sections of the same lands in the name of J. M. Beechem, and on the following day for four sections in the name of M. B. Thompson. These applications were also suffered to lapse, and ninety-two days thereafter, namely, August 28, he applied for the same sections, except section 66, in the name of Margaretta Rhomberg and F. M. Robinson. He also seems to have intended that these should lapse, but as the ninetieth day, November 26, fell on Sunday, he wrote his attorneys on the 22d: "The old file expires on Sunday next. You will, therefore, probably have to refile on Saturday." A new application was, therefore, made on Saturday, November 25, in the name of Maggie L. Rhomberg and Frank Robinson. In this connection, the bill charged that Rhomberg made these applications in the names of other persons, who did not intend to be actual purchasers, for his own use and benefit, in order to acquire more than he was permitted to purchase directly from the State; that he further determined, in violation of the provision against renewing files in the names of other persons, to take advantage of the ninety-day limit, to allow the applications to be forfeited, and to make new applications in the names of other persons, not intending to be actual purchasers, and thus to hold the lands for a longer period than was permitted by the law; and, for the time being, to avoid the payment of any part of the purchase money and of the taxes, which would be assessed after the first payments had been made.

An answer under oath being required, the defendant denied the fraudulent purposes and designs charged against Rhomberg in the bill, and, in his testimony, Rhomberg swore that Margaretta and Maggie L. Rhomberg were different persons, as were also F. M. Robinson and Frank Robinson, and that they were each of them *bona fide* living persons, three of them living in Iowa, and one in Chicago; that Margaretta Rhomberg was his sister-in-law; that he was only distantly related

to the husband of Maggie L. Rhomberg, and that he was not related to either of the Robinsons; that he was not interested in any of the purchases himself; that he considered investments in Texas school lands good, and made his views known to many of his relatives and friends, and advised them to buy; that, as he was making his headquarters in Texas, many of them confided their interests to him; that he looked after them without demanding or expecting any pay for his services; and that the persons for whom he acted furnished the money to pay for the lands. He admitted making several applications to purchase the lands in question, and that these were abandoned without making the first payments; that the different applications were not renewals, but were for different persons; and that they were not intended to keep other persons from purchasing the lands. In short, that the applications were made *bona fide* for the benefit of the applicants, and that he had no personal interest in any of them. As there was no testimony contradictory of this, Rhomberg being the only witness examined on the subject the charges of fraud must be regarded as not sustained, if, indeed, the answer be not sufficient for that purpose without other testimony. *Hughes* v. *Blake*, 6 Wheat. 453; *Vigel* v. *Hopp*, 104 U. S. 441; *Beals* v. *Illinois, Missouri & Texas Railroad*, 133 U. S. 290.

Upon the other hand, the answer charges that one H. C. Jacobs was county surveyor, and J. L. Fisher was county judge of Shackleford County; that they were partners as real estate agents, transacting business under the name of Jacobs & Fisher; that the F. B. Jacobs, who made application in January, was a brother of H. C. Jacobs, and postmaster at Albany, the county seat of Shackleford County, and that Malinda Fisher, who applied for the remainder of the lands, was the wife of one John A. Fisher, deputy surveyor of the county, and brother of the other member of the firm of Jacobs & Fisher; that they entered into a conspiracy to levy a contribution upon all the purchasers of school lands in the county, and to control the same for their own benefit; that the firm of Jacobs & Fisher wrote letters to Rhomberg soliciting his business, promising to sell his lands at an advance,

and offered to make files of applications, promising special favors and attention to all who should employ them. It seems that Rhomberg did employ them in this connection, and had some correspondence with them. As these charges were made upon information and belief only, and as there is no evidence to support them, except the similarity of names, they must also be treated as not sustained.

I. The case resolves itself, then, into the simple question whether the surveyor was authorized to receive the applications of November 25, and whether the plaintiff is in a position to take advantage of his failure of jurisdiction in this particular. The language of the act is somewhat ambiguous, but the intent of the legislature that no application shall be entertained within the ninety days is entirely clear. It provides that the State Treasurer "shall then issue his receipt for said amount and forward it, with the above named application, to the Commissioner of the General Land Office, who shall file said application and receipt in his office, and issue his receipt in lieu thereof, . . . which certificate shall authorize the . . . surveyor to survey the land . . . and enter the same on his books as sold, and *shall not entertain another application* to purchase said land until notified of the forfeiture as hereinafter specified." Grammatically, the words "shall not entertain" refer to the Commissioner of the Land Office; but the proviso that "should the applicant fail to make his first payment . . . and present the certificate of the Commissioner of the General Land Office to the surveyor or his deputy within ninety days from the date of the record of his application, then and in that case the said lands shall be again for sale, and the surveyor shall be authorized to receive applications for the same," indicate that the words, "shall not entertain another application," refer to the surveyor and not to the commissioner. As more than ninety days had elapsed from May 29 and 30, the applications of August 28 are admitted to have been regular, and no other application could have been lawfully entertained within ninety days thereafter. As the ninetieth day fell on Sunday, the lands were not open to another application until Monday, the general rule being that,

when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. Endlich on Statutes, § 393; *Salter* v. *Burt*, 20 Wend. 205; *Hammond* v. *American Life Ins. Co.*, 10 Gray, 306. The defendant claims that, while the act prohibited the entertaining of a second application in less than ninety days from the prior application, Rhomberg in fact had the right to withdraw and abandon the application and make another at any time within the ninety days. As no record exists of its abandonment, and no allusion is made to it in Rhomberg's letter of November 22, such abandonment can only be presumed from the fact that the new application was made November 25. There is nothing, however, to distinguish this from the prior applications in that particular. A construction of the act, too, which would permit such an abandonment would defeat the very object of the legislature, which was to fix a time within which no other application should be entertained, so that parties desiring to purchase the land would be apprised of the day when it would be open to an application. Such persons, however, could never know when an application would be abandoned, and such proceedings would permit an applicant, by a simple change of name of the person he represents, to keep the lands out of the market for an indefinite period. It is true that in *Martin* v. *Brown*, 62 Texas, 467, it was held that a fictitious application to purchase would not have the effect of preventing another person from applying before the expiration of the ninety days, but it certainly does not lie in the mouth of the defendant to claim that Rhomberg's first application was fictitious, since his whole case depends upon the propriety and legality of his action. In *Martin* v. *Brown* the demurrer admitted that the first application was fictitious and made by an agent for his own benefit, for the purpose of withholding the lands from the market. In this case the defendant claims, and proves by the testimony of Rhomberg, that the application was made by him in good faith for the benefit of the applicants, and not for his own.

During the ninety days allowed by law for the first payment

the land is in the position of reserved lands under railroad grant acts. The grant does not attach to them, if, at the time, they are preëmpted or otherwise segregated from the public lands. This principle is established by a large number of cases in this court. *Wilcox* v. *Jackson*, 13 Pet. 498; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357; *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570.

Defendant's position that the subsequent issuing of a patent put an end to the equitable rights of the appellant, cannot be sustained either under the decisions of this court or that of the Supreme Court of Texas. In the case of *Garland* v. *Wynn*, 20 How. 6, 8, the general rule was stated to be "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate their conflicting claims." To the same effect are *Cunningham* v. *Ashley*, 14 How. 377; *Lytle* v. *Arkansas*, 22 How. 193, 203; *Berthold* v. *McDonald*, 22 How. 334; *Lindsey* v. *Hawes*, 2 Black, 554; *Shepley* v. *Cowan*, 91 U. S. 330; *Bohall* v. *Dilla*, 114 U. S. 47; *Sturr* v. *Beck*, 133 U. S. 541, 550. In the case of *Stark* v. *Starrs*, 6 Wall. 402, 419, these cases are said to be "only applications of the well-established doctrine, that where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title." And in *Silver* v. *Ladd*, 7 Wall. 219, it was held that the proper relief was not the annulment and cancellation of the patent wrongfully issued, but was one founded upon the theory that the title which had passed from the United States to the defendant enured in equity to the benefit of the plaintiff, and that the decree should compel him to convey to the plaintiff, or to have such conveyance made in his name by a commissioner appointed by the court for that purpose. See also *Johnson* v. *Towsley*, 13 Wall. 72. It seems

that this is also the law of Texas. *Todd* v. *Fisher*, 26 Texas, 239; *Mitchell* v. *Bass*, 26 Texas, 376; *League* v. *Rogan*, 59 Texas, 427; *Sherwood* v. *Flemming*, 25 Texas, 408, 427; *Wright* v. *Hawkins*, 28 Texas, 452.

II. It is no defence that plaintiff has not complied with the law as to making the final payments. It appears that Jacobs and Fisher executed their obligations, as required by the act, for the balance of the appraised value, and that such obligations as have matured have been discharged and paid off, as well as the matured interest thereon. In any event, the defendant is in no position to claim a forfeiture on this ground. *Canales* v. *Perez*, 65 Texas, 291; *S. C.* 69 Texas, 676.

III. The act of the legislature of Texas, approved April 14, 1883, for the appointment of a land board to investigate all purchases of state school lands held under the acts of 1879 and 1881, cuts no figure in this case. Such an act could operate only as between the State and the purchaser. It would be beyond the competency of the legislature to affect the vested rights of the plaintiff as between him and the defendant by the passage of the act in question.

IV. Section 66 was not included in the applications of August 28, but was included in one of those of November 25, and, therefore, as to this section the defendant has shown the better right.

V. Defendant was impleaded by the name of "A. W. Becker." Initials are no legal part of a name, the authorities holding the full Christian name to be essential. *Wilson* v. *Shannon*, 6 Arkansas, 196; *Norris* v. *Graves*, 4 Strob. (Law,) 32; *Seely* v. *Boon*, Coxe, N. J. (1 N. J. Law,) 138; *Chappell* v. *Proctor*, Harp. S. C. (Law,) 49; *Kinnersley* v. *Knott*, 7 C. B. 980; *Turner* v. *Fitt*, 3 C. B. 701; *Oakley* v. *Pegler*, 46 N. W. Rep. 920; *Knox* v. *Starks*, 4 Minnesota, 20; *Kenyon* v. *Semon*, 45 N. W. Rep. 10; *Beggs* v. *Wellman*, 82 Alabama, 391; *Nash* v. *Collier*, 5 Dowl. & L. 341; *Fewlass* v. *Abbott*, 28 Michigan, 270. This loose method of pleading is not one to be commended, but as no advantage was taken of it in the court below, it will not be considered here.

Statement of the Case.

The decree of the Circuit Court, except as to section 66, is, therefore,

Reversed, and the case remanded for further proceedings in conformity with this opinion.

LYTLE *v.* LANSING.

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

No. 79. Argued December 6, 7, 1892. — Decided January 3, 1893.

When negotiable bonds of a municipality, issued in aid of a railroad company, are void as between the railroad company and the municipality, the burden is upon the holder to show that he, or some one through whom he obtained title to them, was a *bona fide* purchaser for a valuable consideration.

The settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but also at the time of the payment of the purchase money, applies to the purchase of negotiable municipal bonds.

It is the duty of one who purchases municipal bonds, knowing that the municipality is contesting its liability on them, to make inquiries, and the failure to do so will be held to be a wilful closing of his ears to information.

The several holdings of the bonds which form the subject of this litigation since they passed out of the railroad company examined, and *held* to be either as collateral for a debt which has been paid, or as fictitious, for a real owner who is affected with notice of their invalidity.

This was an appeal from a decree requiring the appellant to surrender for cancellation seventy-five bonds of one thousand dollars each, purporting to have been executed by the town of Lansing, and dismissing a cross-bill filed by Lytle to compel the payment of the overdue coupons attached to such bonds.

By an act of the legislature of New York, passed in 1869, Laws of 1869, 2203, c. 907, it was provided that whenever a majority of the taxpayers of any municipal corporation, owning or representing a majority of the taxable property, should make application to the county judge, stating their desire that

such corporation should issue its bonds to an amount not exceeding 20 per cent of the taxable property, and invest the same in the stock or bonds of such railroad company as might be named in the petition, it became the duty of such county judge to order a notice of such petition to be published, and to take proof as to the number of taxpayers joining in the petition, and the amount of taxable property represented by the petitioners. In pursuance of this act, in December, 1870, petitions of certain taxpayers of the town of Lansing were presented to the county judge of Tompkins County, who caused the proper notice to be published, proceeded to take proofs, and on March 20, 1871, adjudged and determined that the petition was duly signed by a majority of the taxpayers of the town of Lansing; that the petitioners represented a majority of the taxable property; that the sum of $75,000, mentioned in the petition, did not exceed 20 per cent of the whole taxable property of the town; and that all the requirements of law respecting the issuing of town bonds, to the amount of $75,000, and for the investment of the same in the stock or bonds, or both, of the "Cayuga Lake Railroad Company," had been fully complied with. He thereupon appointed three freeholders and taxpayers of said town as commissioners, whose duty it would be to execute such bonds and to discharge all such other duties as should be required of them as such commissioners. On March 27, 1871, a writ of *certiorari* was sued out of the Supreme Court to review these proceedings, and in May, 1872, the general term of such court ordered and adjudged that all the proceedings in relation to the issuing of these bonds should be reversed, annulled and held for naught, for the reasons that the Cayuga Lake Railroad Company was not a legal corporation; that the articles of association failed to state the name of each county through or into which the road was intended to be made; that no valid charter was produced before the county judge; that the petition did not direct whether the money was to be invested in stock or bonds; and that it was not shown that a majority of the taxpayers had signed the petition. *People* v. *Van Valkenburgh*, 63 Barb. 105.

Statement of the Case.

In some way — though exactly how did not clearly appear — the railroad company induced the commissioners to issue and deliver to them these bonds, for which they received a certificate for an equivalent amount of railroad stock. The allegation of the bill in this connection was that the officers of the railroad company fraudulently and by false pretences procured the commissioners to deliver the bonds, by representing and inducing them to believe that their action would not in any way injure or affect the town, and also by presenting to them an undertaking of the company to indemnify and save them harmless from the consequences of their act. It was further alleged that the stock of the company received in exchange for these bonds was of no value; that the company had ceased to do business, and was insolvent; and that the town was ready to deliver up the stock in exchange for the cancellation of the bonds.

It appears that these bonds, when delivered to the railroad company, were pledged by it to Leonard, Sheldon & Foster, a banking firm in New York City, as collateral security for a loan of $50,000 to the railroad company; that this loan was afterwards transferred to Elliott, Collins & Co., bankers at Philadelphia, to whom the bonds were also turned over as collateral; that this latter company also had authority from the railroad company to sell them for the company at the price of from seventy to eighty cents on the dollar; and that in February, 1873, the firm sold them, deducted from the proceeds the amount of their loan, and left a balance of $4745.83 to the credit of the railroad company. It did not appear to whom Elliott, Collins & Co. sold the bonds; but subsequently an action was brought in the United States Circuit Court against the town upon these bonds by one John J. Stewart, in which action a verdict was rendered on December 19, 1878, for the defendant. The judgment in favor of the town was afterwards, and on June 30, 1882, affirmed by this court. *Stewart* v. *Lansing*, 104 U. S. 505. In February, 1882, the bonds appear to have been sold by Stewart to one Brackenridge, who afterwards, and in May, 1884, sold them to Lytle, the plaintiff in this suit, for an interest in a ranch.

Opinion of the Court.

This action was begun by the town of Lansing in the Supreme Court of the State of New York, in May, 1887, for the purpose of obtaining the annulment and cancellation of the bonds, compelling the defendant Lytle to deliver them up for cancellation, and also enjoining him from transferring them pending the suit. Lytle removed the action to the Circuit Court of the United States, and filed a cross-bill to compel the payment of the bonds. In March, 1889, the court rendered a decree in favor of the town of Lansing, 38 Fed. Rep. 204, from which Lytle took an appeal to this court.

Mr. Thomas G. Shearman, (with whom was *Mr. Everett P. Wheeler* on the brief,) for appellant.

Mr. H. V. Howland for appellee.

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

As the bonds in this case, though good upon their face, were undoubtedly void as between the railroad company and the town of Lansing, it is incumbent upon the defendant Lytle to show that he, or some one through whom he obtained title to them, was a *bona fide* purchaser for a valuable consideration. *Orleans* v. *Platt*, 99 U. S. 676.

The judgment of the Supreme Court of the State of New York, holding these bonds to be invalid, must be respected by this court, not only because it passed upon the validity of acts done in alleged pursuance of a statute, but because in a collateral proceeding of this kind its binding effect could only be avoided by showing a total lack of jurisdiction on the part of the court. When these bonds were before this court in the case of *Stewart* v. *Lansing*, 104 U. S. 505, it was held that the judgment of the Supreme Court reversing and annulling the order of the county judge invalidated them; that if they had not been delivered before, they could not be afterwards; and that the judgment of reversal was equivalent between those parties to a refusal by the county judge to make the original order. It was further held that, the actual illegality of the

paper being established, it was incumbent upon the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover. In such a case, however, the plaintiff fulfils all the requirements of the law by showing that either he, or some person through whom he derives title, was a *bona fide* purchaser for value without notice. *Douglas County Commissioners* v. *Bolles*, 94 U. S. 104; *Montclair* v. *Ramsdell*, 107 U. S. 147; *Scotland County* v. *Hill*, 132 U. S. 107.

We proceed to examine the title of the several holders of these bonds from the time they were delivered to the railroad company, which of course was not a *bona fide* holder, to the time they came into possession of the plaintiff.

1. *Leonard, Sheldon & Foster.* These were New York bankers, to whom the bonds were pledged as security for a loan of $50,000 to the railroad company; they also received them with power and instruction from the company to sell them. It is sufficient to say in this connection that this firm never purchased the bonds; that they continued to be the property of the railroad company while in their hands; and that while, doubtless, they would have been protected as *bona fide* holders to the amount of their advances, they never took title to the bonds, and when they transferred them to Elliott, Collins & Co., and received from them the amount of their advances, they transferred them as the property of the railroad company, and their interest in them from that time wholly ceased.

2. *Elliott, Collins & Co.* took up the loan of the prior firm upon the written order of the treasurer of the company, and stood in the same position they had occupied. They subsequently sold the bonds for the railroad company for $54,337.50, paid their loan to the amount of $49,591.67, and credited the company with a balance of $4745.83. It does not appear to whom they sold them, but it does appear that they never took title to themselves. It is significant in this connection that, in the suit of *Stewart* v. *Lansing*, Mr. Elliott, the senior member of the firm, stated: "We did not sell the bonds at all; . . . they were negotiated by Mr. Delafield," (the treasurer of the company,) "either personally or by letter."

3. *John J. Stewart* appears as the next holder of these bonds. There is no evidence whatever to show how Stewart, who lived in New Orleans, became possessed of them, or even that he paid value for them, or that he took them without notice of their original invalidity. It does appear, however, that a suit against the town was brought in his name to recover the amount of certain overdue coupons; that judgment went for the defendant; and that such judgment was affirmed by this court in *Stewart* v. *Lansing*, 104 U. S. 505. It was held by this court in that case that it was clearly shown that, although Elliott, Collins & Co. "parted with" the bonds, they did not sell them, nor was the sale negotiated by the firm, and that the bonds only passed through their hands upon terms which had been agreed upon by others; that Stewart, the plaintiff, was not known to any of the witnesses examined; that no one had ever seen him; and that the sale, if actually made, was at an enormous discount. Under these circumstances, it was held that there was no such evidence of *bona fide* ownership in the plaintiff as would require the case to be submitted to the jury.

The only additional testimony in this case with regard to the ownership of Stewart tends to show that he was an actual person, well known in New Orleans, and living there. Although he appears to have been living when the testimony was taken, no effort seems to have been made to secure his deposition. There is nothing tending to show that he was a *bona fide* purchaser for value.

4. *George W. Brackenridge*, president of the National Bank of San Antonio, Texas, claims to have purchased these bonds of John J. Stewart, giving him therefor a cheque for $50,000 on the Louisiana National Bank. It is somewhat singular that this cheque was payable to and endorsed by *James* J. Stewart, and no explanation is given why, if the sale were made by John, the consideration was paid to James. Nor was the cheque produced by the witness himself, but by the cashier of the bank upon which it was drawn. In the ordinary course of business cheques are returned by the bank to the drawer, but in this case the cheque was produced by the bank five or six years after it was drawn. Mr. Brackenridge says there was no

special agreement for the purchase of the bonds; that he understood they were for sale, and had been notified that he could purchase them; that at the time he gave the cheque the bonds were delivered to him in Stewart's office in New Orleans; that the conversation with Stewart made very little impression upon him at the time; and that he had not the slightest idea that the bonds were invalid, and believed "they were like some San Antonio bonds that were held void in the state courts, but when sued on in the Federal courts they were declared legal and valid." He further stated that he had dealt heavily in Texas bonds, but had never bought any municipal bonds from other States until he bought these; and that he was not acquainted in Tompkins County before he purchased them. He was not able to state even the year he bought them of Stewart. He swears he did not open the package in which they were delivered to him, even after he had returned with them to San Antonio, and that he supposes the coupons were attached to the bonds. He subsequently cut off some of the coupons, and two actions appear to have been brought by him upon them. Upon his examination in one of these prior cases, he stated that he purchased them upon the recommendation of Mr. Stillman of New York, and that, at the price at which they were offered, he thought they were a good purchase; that he did not know whether, in recommending the bonds, Stillman was serving himself or was serving him, and did not know whether they belonged to him or some one else; that his correspondence with Stillman was by letters, which he was unable to produce; that he gave $50,000 for the $75,000 of bonds with $26,000 of dishonored coupons attached; and that he thought he was buying a bond that was perfectly good in the Federal courts, but that recovery in the state courts would be doubtful. Upon this examination he stated that he left the bonds in the Louisiana National Bank for several months; then took them out personally, carried them to New York, took them to Mr. Stillman, who had recommended him to buy them, to know whether he bought them for his, Stillman's account, or for his own. "At the time I bought them I did not know whether it was for my account or whether he wanted some interest in

them." Stillman assured him the bonds were perfectly good, but would not say positively whether he should keep them for his own account or not. He says he wanted a definite understanding on the subject, but does not seem to have secured it. He subsequently put them in the hands of attorneys in New York to whom he had been recommended by Stillman.

The substance of this testimony is that Mr. Brackenridge went through the form of purchasing these bonds of Stewart, and gave him a check for $50,000 for them; but the testimony leaves but little doubt that the purchase was a mere form, and was made upon the advice of Stillman, and in pursuance of correspondence which was not produced. It is incredible that a man should purchase this large amount of bonds for half their face value without looking at them or even noticing whether they were signed or sealed, without making any inquiries with regard to the responsibility of the town, or the circumstances under which the bonds were issued, the non-payment of the overdue coupons, or the title of the person (to him an entire stranger) through whom he purchased them. His subsequently taking them to New York and asking Stillman whether he purchased them for his, Stillman's, account, or on his own, indicates very clearly that this was never intended as a *bona fide* investment by Brackenridge. If the bonds were valid at all, he must have known they were worth very nearly, if not quite, their face value, and the very fact that bonds to this large amount were offered for sale at this large discount, at a place two thousand miles from where they were issued, was of itself a circumstance calculated to arouse suspicion of their validity in the mind of any person of ordinary intelligence.

5. *John T. Lytle*, the plaintiff. Lytle purchased the bonds of Brackenridge. He is, and has been since 1860, a stock-raiser in Medina County, Texas, and prior to May, 1884, had acquired a tract of forty thousand acres of land on the Frio River, where he pastured some 2500 cattle. The tract was worth $4 per acre, and he owned a half interest with one McDaniel. He had been intimately acquainted with Brackenridge since 1871, and, in a conversation in 1884, agreed to sell

him one-third of his interest in the Frio property for these $75,000 of bonds. He made no inquiry with regard to the bonds, but was told by Mr. Brackenridge that they were good. The bonds were delivered to him at the San Antonio National Bank, and Lytle gave him a receipt for the one-third interest in the property. This was six or eight weeks after the agreement was made. He cut off the July coupons in time for presentation for payment, and the January coupons as they became due, and sent them to the attorneys in New York to whom Mr. Stillman had recommended Mr. Brackenridge. This was the last time he saw the bonds. The Frio property was subsequently conveyed to the San Antonio Ranch Company. It does not appear upon what day the deed was made, but as the company was not organized or chartered until January 29, 1885, it must be presumed that it was not before that time. One-third of the stock in this company was issued to Mr. Brackenridge, who was made president. Brackenridge, he says, retained no interest in the bonds.

Upon cross-examination, he says the bargain was consummated at the first interview; that ten or fifteen days thereafter he gave Brackenridge a receipt for the bonds in payment for the one-third interest in the ranch, and they were then transferred to his credit, though not actually produced. Upon the same day, and some two or three hours thereafter, he saw the bonds for the first time; there were coupons upon them, but none that were matured; he gave them to the cashier, and told him to take care of them for him, and he has not seen them since he cut off the coupons for transmission to his attorneys. In the summer or fall of 1884 he received a letter from his attorneys, informing him of some difficulty with regard to the bonds, when Mr. Brackenridge told him he had a suit pending about the coupons. He says he first learned that the town claimed to have a defence to these bonds at the time he cut off the coupons, which was about six weeks or two months after the bonds were delivered to him by Brackenridge; he further states that Brackenridge had an interest with him in another ranch, or rather cattle, worth $180,000, the title to which stood in the name of Lytle & Co., a partner-

ship. The Frio ranch cost Lytle and McDaniel $66,000, and was deeded to the San Antonio Ranch Company, a corporation with a capital stock of $500,000, of which Brackenridge took one-third, less $60,000, which was taken out in the matter of the purchase of the property that belonged to Lytle and McDaniel before the formation of this company, in which Brackenridge had no interest.

Mr. Brackenridge swears that he wanted an interest in the Frio ranch, as it was one of the best in the country, and told plaintiff it would be better for him to take a third interest, and offered to give him these bonds; that he considered them good and worth as much as the property. He finally accepted the proposition. He gave practically the same account of what took place at the time that the plaintiff did; that the property was subsequently turned over to the San Antonio Ranch Company, in which he received stock to the amount of $60,000. His testimony also indicates that, prior to the purchase of the Frio property, he had a third interest in cattle worth $180,000, having assisted Lytle and McDaniel to purchase the same by a contribution of $60,000. These cattle, as well as the Frio ranch, made up the capital of the Ranch Company, which was valued at $500,000.

In view of the fact that a prior suit was brought upon coupons of these bonds, which was unsuccessful, and that an effort has undoubtedly been made by some one who is or was interested in them to get them into the hands of a *bona fide* purchaser, it is natural that their alleged ownership should be looked upon with some suspicion, and the circumstances under which they came into the hands of the present holder should be critically examined, and all the testimony upon the subject of his *bona fides* carefully scanned. It is certainly an unusual proceeding for a stock farmer to trade the bulk of his property for bonds about which he knows nothing, and which he does not take the trouble to look at, upon the bare assurance of his vendor that they are good, though such vendor be his own banker, with whom he had been on intimate terms for years. According to his story, the sale was merely an off-hand affair, not preceded by any of the negotiations which usually accom-

pany purchases of large amounts of land — the whole thing being a mere suggestion on the part of Brackenridge that he would like an interest in the ranch, and an instant acceptance of the proposition by Lytle. In his own words: "He said he had so many bonds — he said he had $75,000 of bonds that he would give me for a third interest in my ranch — in the Frio ranch. He said the bonds were good. I told him all right; I would sell him the third interest. He said all right; consider it a trade." "That was all that was said."

It is significant of the carelessness with which the trade was conducted, that a receipt was given for "county bonds" as "part payment for a one-third interest in our Frio ranch and stock located on the Frio River," and was signed by "Lytle and McDaniels," when the bonds were not county bonds, the payment was in full, the sale did not include the stock, and the transaction was with Lytle alone. After he had cut the coupons off he returned the bonds to the bank, where he supposed they remained ever since, though, at the time he was sworn in New York, they were produced by his attorneys and identified by him.

Granting that all these peculiarities may be explained by the confidence which an inexperienced farmer might repose in a friend of long standing, his own testimony shows that, in the latter part of the summer or in the fall of 1884, he heard from his attorneys in New York that there was some difficulty about the bonds, and that he then talked the matter over with Mr. Brackenridge, who told him that he had a suit pending about some of the coupons. And again he says: "We have talked the matter over, as I have said, at different times. I expect he explained it all to me." While he does not state fully the scope of his information, he was undoubtedly apprised of the fact that the town claimed a defence to the bonds, and that a suit upon the coupons was being contested.

It is singular as matter of fact, and fatal to a recovery as matter of law, that the plaintiff did not act upon the information thus received, and at once repudiate the transaction, and refuse to consummate the sale by a deed of the property to the Ranch Company. Instead of that, he seems to have re-

ceived the announcement with the utmost unconcern, as if it were a matter in which he had no interest, and, some time subsequent to the 28th of January following, he made a deed of the property to the Ranch Company. He made no complaint of having been misled by Brackenridge, although no court, under the circumstances, would have enforced the contract of May 24, 1884, even if it were valid under the statute of frauds.

As early as 1823, it was held by this court in *Wormley* v. *Wormley*, 8 Wheat. 421, 449, to be "a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase money." Such is undoubtedly the law. *Swayze* v. *Burke*, 12 Pet. 11; *Tourville* v. *Naish*, 3 P. Wms. 306; *Paul* v. *Fulton*, 25 Missouri, 156; *Dugan* v. *Vattier*, 3 Blackford, 245; *Patten* v. *Moore*, 32 N. H. 382; *Blanchard* v. *Tyler*, 12 Michigan, 339; *Palmer* v. *Williams*, 24 Michigan, 328; *Jackson* v. *Cadwell*, 1 Cowen, 622. It is insisted, however, that this principle has no application to the purchase of negotiable instruments like the bonds in question. We know of no such distinction, however, and in the case of *Dresser* v. *Missouri & Iowa Railway Construction Co.*, 93 U. S. 92, the rule was expressly applied to a purchaser of negotiable paper. In that case the plaintiff purchased the notes in controversy, and paid $500 as part of the consideration before notice of any fraud in the contract; and it was held that if, after receiving notice of the fraud, he paid the balance due upon the notes, he was only protected *pro tanto;* that is, to the amount paid before he received notice; citing *Weaver* v. *Barden*, 49 N. Y. 286; *Crandall* v. *Vickery*, 45 Barb. 156; *Allaire* v. *Hartshorn*, 1 Zabr. (21 N. J. Law,) 665.

While the notice received by the plaintiff may not have gone to the extent of informing him of the particular facts showing the invalidity of the bonds, he was informed that the town was contesting its liability, and that Brackenridge himself was in litigation with it over the payment of the coupons. Receiving this information as he did, not only from his vendor,

but from his own attorneys, from whom he could have learned all the facts by inquiry, it is mere quibbling to say, that he had no notice that the bonds were invalid. While purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities, it has never been doubted, as was said in *Scotland County* v. *Hill*, 112 U. S. 183, 185, that those who buy such securities from litigating parties with actual notice of a suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. Under the circumstances, it was bad faith or wilful ignorance under the rule laid down in *Goodman* v. *Simonds*, 20 How. 343, and *Murray* v. *Lardner*, 2 Wall. 110, to forbear making further inquiries. No rule of law protects a purchaser who wilfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it.

Upon the whole, it is impossible to avoid the conclusion that the purchases of these bonds by Brackenridge and Lytle were never made in good faith, but were merely fictitious, and that their real ownership is still in some one, who is affected with notice of their invalidity, and has endeavored by feigned transfers to get them into the hands of some one who can pose before the court as a *bona fide* purchaser.

The judgment of the court below is therefore

Affirmed.

Syllabus.

THE CITY OF NEW YORK.[1]

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

No. 61. Argued November 30, December 1, 1892. — Decided January 3, 1893.

In construing the act of February 16, 1875, 18 Stat. 315, c. 77, so far as it relates to admiralty suits, it is settled:

(1) That the facts found by the court below are conclusive; that a bill of exceptions cannot be used to bring up the evidence for a review of the findings; that the only rulings upon which this court is authorized to pass are such as might be presented by a bill of exceptions prepared as in an action at law; and that the findings have practically the same effect as the special verdict of a jury;

(2) That it is only the ultimate facts which the court is bound to find; and that this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained;

(3) That if the court below neglects or refuses to make a finding one way or the other, as to the existence of a material fact which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular.

Applying these rules to the findings in the present case, *Held*

(1) That there was gross negligence on the part of the steamship in failing to run at moderate speed in a fog, and in failing to take the proper precautions when the proximity of the sailing vessel became known;

(2) That so far as the barque was concerned there was evidence to support the findings of the Circuit Court, and that these findings justify the conclusion that its change of course was made *in extremis*.

The probability that a steamer or a vessel sailing with a free wind will pursue the course customarily pursued in that vicinity by vessels bound from and to the same port, is so strong, that a deviation from that course without apparent cause will not be considered as established without a clear preponderance of testimony.

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[1] The docket title to this case is: John E. Alexandre, J. Joseph Alexandre, and J. Henry Alexandre, executors of Francis Alexandre, deceased, *et al.*, claimants of the American steamship City of New York, her engines, etc., Appellants *v.* John Machan, *et al.*, owners of the British barque Helen, etc.

Statement of the Case.

There is no such certainty of the exact position of a horn blown in a fog, as will justify a steamer in speculating upon the probability of avoiding it by a change of helm, without taking the additional precaution of stopping until its location is definitely ascertained.

Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel.

THIS was a libel by the owners of the British barque Helen against the American steamship City of New York for a collision, which occurred on the evening of June 28, 1879, off the New Jersey coast between Barnegat and Absecon, and resulted in the sinking of the Helen, and the total loss of the vessel and cargo. The District Court found both vessels to have been in fault, and decreed an apportionment of damages. 15 Fed. Rep. 624. Both parties appealed to the Circuit Court, by which the decree of the District Court was reversed, the City of New York found to have been solely in fault, and a final decree entered for the libellants for $60,223.12, including costs. 35 Fed. Rep. 604. From this decree the owners of the steamship appealed to this court. The following facts and conclusions of law were found by the Circuit Court:

"1. The British barque Helen, an iron vessel of 282 tons register, while on a voyage from Havana to New York City, loaded with sugar, was sunk by collision with the steamship City of New York, June 28, 1879, about 10.50 P.M. The captain and three of the seamen of the barque were drowned when the vessel sank.

"2. The collision took place at a point off the coast of New Jersey six and one-quarter miles from shore, in 10 fathoms of water, 12 and ½ miles from Barnegat light-house and 9½ miles from Tucker's Beach light-house.

"The city of New York was a wooden steamship 242 feet long and 1715 tons register, having a left-handed propeller, and was bound on a voyage from New York to Havana. Her full speed was about 12 knots an hour, and when going at full speed her headway could not be stopped by reversing her engines within a distance of an eighth of a mile.

"3. On the night in question the wind was blowing strong

from the south-west or the south-south-west. About half an hour preceding the collision the night became foggy; so much so that vessels could not discover one another at a distance of one-eighth of a mile. During this time and until within about three or four minutes before the collision the vessels had been approaching each other, the course of the steamer being about S. by W. $\frac{1}{2}$ W. and the course of the barque being about N.E. The steamship was going about 11 knots an hour, which was all the speed she could make against the wind. The barque was going about 4 knots an hour, and each vessel kept her respective course until she heard the fog signal of the other.

"4. During the half hour preceding the collision three seamen were on the deck of the barque besides the mate, one seaman being at the wheel and two on the lookout forward, alternately blowing the fog horn, and the barque's lights were properly set and burning. During the same time the navigation of the steamer was in charge of her second mate, her quarter-master was at the wheel, her engine was in charge of a competent engineer, she had a lookout on the forward deck, and her regulation lights were properly set and burning. The lookout on each vessel was vigilant. Each vessel observed the proper fog signals. The steamer maintained her full speed against the wind until her engines were reversed, just before she struck the barque.

"5. Before either vessel discovered the other those in charge of each heard the fog signals of the other. At about two minutes prior to the collision those in charge of the steamer first heard the fog horn of the barque, and from the apparent direction of the sound thought she was one point off the steamer's starboard bow. Immediately upon hearing the fog horn the mate ordered the wheel of the steamer put to starboard and hard-a-starboard. The order was promptly executed and the steamer proceeded on under full speed until those in charge discovered the sails of the barque. The steamer had run under hard-a-starboard helm at least a minute before the barque was seen. Those in charge of the steamer then discovered that the barque's course was eastward, across the steamer's bow. The steamer then sounded succes-

Names of Counsel.

sive whistles of alarm, and those in charge saw the barque luffing to the starboard. Thereupon the mate immediately ordered the steamer's engines reversed and her wheel ported, and this order was promptly executed, but she was then close to the barque, probably not to exceed 150 feet, and her headway could not be stopped in time to avoid a collision, and the steamer struck the barque on the barque's port side, her stem striking just forward of the barque's mizzen rigging, with such force that she penetrated the barque a distance of five feet, and the barque sank almost instantly.

"The whistle of the steamer first heard by those in charge of the barque indicated to them that the vessels were quite near to each other. They thought the steamer was approaching, bearing abeam on the barque's port side. Immediately after they saw her masthead light and then her green light, whereupon the mate told the wheelsman to port the wheel, and called to those below to save themselves. The man at the wheel had hardly got the wheel over when the steamer struck the barque. During the time the steamer was running under her hard-a-starboard wheel she changed her course to the eastward three or four points, and the barque after she luffed changed her course one or two points by the time the vessels came together."

The sixth finding relates only to the damages, and is immaterial.

"*Conclusions of Law.*

"1. The steamer was guilty of fault in violating the 21st rule, because she did not slacken her speed when she heard the fog signals of the barque, and also because she did not go at a moderate speed when in a fog, and also because she changed her course and kept on at great speed after she heard the barque's fog horn before seeing her.

"2. The barque's change of course was an error *in extremis*."

Mr. Robert D. Benedict, (with whom was *Mr. A. Oldrin Salter* on the brief,) for appellants.

Mr. George A. Black for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

Notwithstanding the ruling of this court in *The Abbotsford*, 98 U. S. 440, that the finding of facts by the Circuit Court is conclusive, and that the only rulings that can be reviewed by this court are those made upon questions of law, but few collision cases have been brought to this court since the act of February 16, 1875, 18 Stat. 315, c. 77, took effect, in which an effort has not been made, under one guise or another, to obtain a review of the findings of the Circuit Judge upon the testimony. If it were the duty of the court to review the testimony upon every finding of fact to which the defeated party chose to take an exception, and inquire whether such testimony authorized the finding, the title of the act "To facilitate the disposition of cases," was a misnomer, and the act itself might better never have been passed. In this case sixteen exceptions were taken to the findings of the court; twenty-one specifications of error are embodied in the seventeenth exception to the opinion of the court, which was incorporated in the bill of exceptions, and there are also thirty-five exceptions to the refusal of the court to find the facts and law as requested by the claimants.

In construing the act of 1875 the following propositions may be regarded as settled:

1. That the facts found by the court below are conclusive; that the bill of exceptions cannot be used to bring up the evidence for a review of these findings; that the only rulings, upon which we are authorized to pass, are such as might be presented by a bill of exceptions prepared as in actions at law; and that the findings have practically the same effect as the special verdict of a jury. *The Abbotsford*, 98 U. S. 440; *The Clara*, 102 U. S. 200; *The Benefactor*, 102 U. S. 214; *The Annie Lindsley*, 104 U. S. 185; *Collins* v. *Riley*, 104 U. S. 322; *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485; *Watts* v. *Camors*, 115 U. S. 353; *The Maggie J. Smith*, 123 U. S. 349; *The Gazelle*, 128 U. S. 474.

2. That it is only the ultimate facts which the court is bound to find; and that this court will not take notice of a refusal

to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained. *The Francis Wright*, 105 U. S. 381; *Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67, 71; *The John H. Pearson*, 121 U. S. 469.

3. If the court below neglects or refuses to make a finding, one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court. *The Francis Wright*, 105 U. S. 381, 387; *The E. A. Packer*, 140 U. S. 360.

In the case of *The Francis Wright* the court held that the bill of exceptions ought to show the grounds relied on to sustain the objections, so that it might appear that the court below was properly informed as to the point to be decided, and that the facts sought to be incorporated were conclusively proven by uncontradicted evidence; and if the exception were as to facts found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated in the bill of exceptions. In *The E. A. Packer*, 140 U. S. 360, the Circuit Court refused to find a specific fact which this court thought to be material, and to have been proven by uncontradicted testimony, and the case was remanded for a further finding in regard to this point.

This case, then, must turn upon the question whether the Circuit Court found any facts which were wholly unsupported by testimony, or refused to find any fact material to the issue, when such fact was proven by uncontradicted evidence.

The undisputed facts are that the night was foggy; and that the barque was bound from Havana to New York upon

a northerly and easterly course, and was sailing free under a strong southerly wind. The steamship was bound from New York to Havana upon a course S. by W. ½ W., and was proceeding at her usual full speed, which was from ten to eleven knots an hour. Each was making the fog signals required by law, which were heard upon each vessel before the other vessel came in sight. About two minutes prior to the collision the officers in charge of the steamer first heard the fog horn of the barque, and, from the apparent direction of the sound, thought she was one point off the steamer's starboard bow. Immediately upon hearing the fog horn the mate ordered the wheel of the steamer to starboard and hard-a-starboard. The order was promptly executed, and after the steamer had run at full speed under her hard-a-starboard helm about a minute, the sails of the barque were discovered crossing the steamer's bows to the eastward; the steamer immediately blew several alarm whistles, and the officer of the deck saw the barque luffing to starboard; the steamer's engines were thereupon immediately reversed, and her wheel ported; but, being then close to the barque, her headway could not be stopped in time to avoid a collision, and she struck the barque upon her port side between the main and mizzen rigging, with such force that she penetrated the barque a distance of five feet and sank her almost immediately. The captain and three of the crew were drowned.

1. Appellants' first exception is to the third finding of fact, that "the wind was blowing from the southwest or the south-southwest," because it does not find the direction in which the wind was blowing, and because the direction of the wind was neither S.W. nor S.S.W., but S. There was some conflict of testimony upon this point between the crews of the respective vessels and the observers at the signal stations and light-houses between Sandy Hook and Cape May; but as the District Judge was also of the opinion that the wind was somewhere from S.W. to S.S.W. it is impossible for us to say that there was no testimony to support this finding. If it were impossible to ascertain definitely from the testimony whether it was from the S.W. or S.S.W., there was clearly no

obligation to find the exact point from which it was blowing. As observed by the District Judge, this finding "confirms the previous conclusion that the barque up to the time of the collision had been sailing on a northeast course, since that would bring such a wind about a point on her starboard quarter, as all her witnesses testify."

2. The finding that the vessels could not discover one another at a distance of one-eighth of a mile is substantially confirmed by all the testimony and by the opinion of the District Judge, who makes a similar statement three or four times in his opinion.

3. Appellants also except to the finding that the course of the barque was "about N. E." instead of about N. E. by N. ½ N.; but as the vessel had a free wind, and the usual course at this point between Absecon and Barnegat on the New Jersey coast, where the collision occurred, was N. E. or N. E. by N. for vessels bound to New York from Cape Henlopen, a departure from that course will not be presumed in the absence of some controlling reason. Indeed, the probability that a steamer or a vessel sailing with a free wind will pursue the course customarily pursued in that vicinity, by vessels bound from and to the same port, is so strong, that a deviation from that course without apparent cause will not be considered as established without a clear preponderance of testimony. The District Judge also found that the general course of the vessel was N. E. until her wheel was put to port, just before the collision. Exception was also taken to the finding that "the steamship was going about eleven knots an hour." As the appellants claim in their brief she was making eleven knots an hour, and both courts agree in this opinion, it is difficult to see why an exception was taken to this finding.

4. The fourth, fifth, and seventh exceptions are dependent upon the construction to be given to the several findings made by the court, and are not to the findings themselves, and hence are impertinent. The sixth exception is unimportant.

5. The remaining ten exceptions to the findings of fact are taken to the several clauses of the last paragraph of the fifth finding. There were also twenty-one specifications of objec-

tions to the opinion of the Circuit Court, embodied in a single exception — the seventeenth; and thirty-five exceptions to the refusal of the court to find the facts and conclusions of law as requested by the claimants. But the substance of all these objections to the findings and opinion of the Circuit Court turn upon those contained in the paragraph above cited, which indicate that the change of course made by the barque just prior to the collision was an error *in extremis*, for which the barque was not responsible. This was the point upon which the Circuit and District Courts chiefly differed, and upon which the stress of the case was laid. The finding in question was as follows: "The whistle of the steamer first heard by those in charge of the barque indicated to them that the vessels were quite near to each other. They thought the steamer was approaching bearing abeam on the barque's port side. Immediately after they saw her masthead-light and then her green light, whereupon the mate told the wheelsman to port the wheel, and called to those below to save themselves. The man at the wheel had hardly got the wheel over when the steamer struck the barque. During the time the steamer was running under her hard-a-starboard wheel she changed her course to the eastward three or four points, and the barque, after she luffed, changed her course one or two points by the time the vessels came together."

In this connection the allegation of the original libel was that "the wind at the time was W.S.W., and the said barque was heading E. by N. ½ N., running free, and going at the rate of about three knots an hour. . . . That when the said steamer was close upon the said barque, and the impending collision inevitable, and in the effort to escape the same, order was given to port the barque's helm, which order was obeyed, but did not alter the course of said barque more than a point, and in a direction away from the said approaching steamer." The answer denied "that such order was given when the collision was inevitable, or that it did not alter the course of the barque more than a point, or that such alteration was in a direction away from the approaching steamer;" and averred "that at about ten o'clock and fifty minutes the

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second mate in the pilot house heard the blast of a fog horn about a point or so on the starboard bow of the steamer, whereupon he ordered the wheel of said steamer to be put hard-a-starboard, which order was obeyed, and was the proper order, and would have been efficient for the avoiding of the collision but for the change of course on the part of the barque, hereafter spoken of. . . . That when, or almost immediately after, the helm of the said steamer was starboarded, the helm of said barque was ported, and her head began to come up towards the course of the said steamship; that said change of course of said barque was at once seen and reported by the lookout on the steamer and seen by her second mate in the pilot-house, and that as soon as such change was seen, and when the head of the steamer had been changed about a point under her starboard helm, her helm was put hard-a-port, and her engine was stopped and reversed. . . . And these respondents allege that the said barque changed her course under her port wheel four or five points before the collision, and that at the time of the collision she was heading about east and said steamer was heading about S. or S. by W., and that such change of course on the part of the barque carried her across the bow of the said steamship, which had taken the proper measures to avoid her, and, but for the said change of course on the part of said barque, would have succeeded in doing so."

The case was tried upon these allegations, and the District Judge found that all the witnesses agreed that, at the time of the collision, the barque "was heading about E. or E. by N., or about four points to the eastward of the usual course for vessels bound for New York;" that the testimony of the mate and wheelsman of the barque, who were the officers of the deck, that her course prior to the collision was E. by N. ½ N., was untrue and wholly irreconcilable with the admitted facts, and with the other accredited testimony; and inferentially, at least, that their testimony was fabricated for the purpose of demonstrating that the change of course from E. by N. ½ N. to E. or E. by N. (from half a point to a point and a half) was so slight that it must have been made *in extremis*,

while, if the course of the barque had been N.E., the change would have been from three to four points. The District Court found the course to have been N.E.; that this course was continued until the helm was ported; and that the "change of three to four points was too great and was commenced too early and too far off from the steamer to be regarded as a change *in extremis*, and as this change of course evidently contributed to the collision the barque must also be held chargeable with fault." A decree was thereupon rendered apportioning the damages, and both parties appealed to the Circuit Court.

Pending that appeal, the libel was amended by averring that "the wind at the time appeared to be by said barque's compasses W.S.W., and the said barque was heading, as it appeared by said compasses, E. by N. ½ N., running free, and going at the rate of about three knots an hour. . . . That the said barque was an iron vessel and had a list to starboard, and her compasses were affected by those facts, and she had a deviation card on board, by means of which corrections in the readings of said compasses were made, which said deviation card was lost with said vessel, and, the master being drowned, libellants were unable to more accurately state the said deviation than that it was between one and three points on different courses."

Exceptions were filed to this libel for indefiniteness and insufficiency, and a second amended libel was filed, averring "that the wind at the time appeared to be, by said barque's compasses, W.S.W. Libellants believe that the true direction of the wind was S.W.; that the compasses of the barque indicated it to be W.S.W. for the reasons hereinafter stated. The said barque was heading, as it appeared by said compasses, E. by N. ½ N., and libellants believe her true heading was N.E. ½ E., and that the said heading appeared to be E. by N. ½ N., by said barque's compasses, for the reasons hereinafter stated." The previous allegation with regard to deviation was repeated with the addition that "libellants believe that such deviation on a true N.E. ½ E. course was two points, so that the course appeared by said barque's compasses to be E.

by N. ½ N." To this amended libel an answer was filed and the case went to trial in the Circuit Court. The Circuit Court was of opinion that if the barque changed her course four or five points to the starboard, as claimed by the steamship, such change could not have been made when the vessels were within two or three hundred feet of each other; that, if it could be demonstrated that, at the time of the collision, the barque was headed about east, and that her course previous to the change was N.E., the argument for the steamer would be convincing; but that this could not be demonstrated unless the testimony of the wheelsman of the steamer, who gave the course on which the steamer was headed when the barque's change of course took place, and also when the collision took place, was accepted as correct. "It is highly improbable," said the court, "that in the excitement and confusion of the moment the helmsman of the steamer looked at his compass so carefully as to accurately note the steamer's course when he was ordered to put his wheel hard-a-port, and again when the collision took place. Equally improbable is his testimony, that while the steamer was under a hard-a-starboard helm her course was only changed about three-quarters of a point, although she was running at full speed for a minute under that helm, and, that while she was under her helm hard-a-port, at the time she was reversing her engines, her course was changed a point and three-quarters to starboard."

The court conceded that the mate of the barque, who was the only witness who attempted to give her course by the compass, was not entitled to any credit, but that the testimony of the wheelsman, the lookout, and the engineer of the steamer so strongly confirmed the testimony of the witnesses for the barque, to the effect that her change of course was not made until the vessels were so close together that a collision was unavoidable, that it was not necessary to devote any time to the attempt to ascertain what the course of the barque was previously to the time this change was made. "All the witnesses for the steamer agree that the barque's change of course took place under their observation, and that the steamer sounded an alarm of successive blasts of her steam whistle and

reversed her engines." The court evidently was not satisfied with the testimony that the barque was headed east, or nearly so, at the moment of impact, and gave weight to the testimony of a diver who visited the wreck a few days after the collision, and testified that she was lying at the bottom of the ocean headed about N.N.E. on a line parallel with the shore. It thought this testimony more persuasive in fixing her heading approximately than the conjectural opinions of witnesses formed in the excitement and confusion of the moment, who thought she was headed about east. In short, it came to the conclusion that the change of course which brought the two vessels together was made by the steamer, while running a minute under her hard-a-starboard helm, rather than by the barque, and that, upon this assumption, if the course of the barque were changed only one or two points, the vessels would have come together at the angle shown in the diagrams of the witnesses upon both sides. It was evidently of the opinion that the testimony that the barque was headed east, or nearly so, at the moment of collision, indicating, as it did, a change of course of three or four points, was outweighed by the testimony of the witnesses that, whatever change of course was made, took place when the vessels were in plain sight of each other, and so close together that a collision was unavoidable.

Upon the findings of the Circuit Court there can be no question of the gross negligence of the steamship. She was not only not running at the moderate speed required by rule 21, but she failed to take the proper precautions when the proximity of the sailing vessel became known to her. Upon hearing the fog horn of the barque only one point on her starboard bow, the officer in charge should at once have checked her speed, and, if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other. Indeed, upon the testimony in this case, it is open to doubt whether, if the engine had been at once stopped, the steamer would have come to a standstill before she had crossed the course of the barque. There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in

speculating upon the probability of avoiding it by a change of the helm, without taking the additional precaution of stopping until its location is definitely ascertained. *The Hypodame*, 6 Wall. 216; *The Kirby Hall*, 8 P. D. 71; *The Sea Gull*, 23 Wall. 165, 177; *The Ceto*, 6 Asp. Mar. Law Cases, 479; *S. C.* 14 App. Cas. 670.

So far as the case of the barque is concerned, there was evidently testimony to support the findings of the Circuit Court, and if these findings are consistent, and justify its conclusion of law that the barque's change of course was an error *in extremis*, we cannot do otherwise than affirm the decree. In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor. Taking the finding of the Circuit Court, that the course of the barque was about N.E., in connection with the fact that after she luffed she changed her course but one or two points by the time the vessels came together, it is evident that that court did not agree with the District Court that she was headed E. or E. by N. at the time of the collision. Nor is this finding inconsistent with his further finding that when the barque was first seen the officers of the steamer discovered that her course was *eastward*, since that may be construed as any point east of north. The evident gist of the steamer's complaint is the refusal of the Circuit Court to find the heading of the barque at the moment of collision. Had it found such course to be E. or E. by N., as the answer averred, and as much of the testimony indicated, it would necessarily follow that she must have changed her course from three to four points under her hard-a-port helm — a change scarcely consistent with an error *in extremis*. But the testimony upon this

point was that of the mate and the wheelsman of the barque, and is a mere inference from their thoroughly discredited testimony that the course of the barque was E. by N.$\frac{1}{2}$N., and that she swung only a point to starboard. Having once found that this was not the course of the barque, and that such course was N.E., this testimony falls to the ground. The testimony of the mate and wheelsman of the steamer, that the barque was heading E. by N. or E. by N. $\frac{1}{2}$ N. at the moment of collision, was evidently nothing but a mere guess. Indeed, it is very improbable that, in the excitement and consternation occasioned by the immediate presence of such a peril, the wheelsman of either vessel would stop to look at the compass or notice the bearing, even of his own vessel, much less that of the other. While the testimony of the diver, that her heading after she was sunk was N.N.E., may not have been entitled to great weight, it was a circumstance tending to support the theory that she was not heading E. by N. It is evident that if her general course were N.E., and her helm were put hard-a-port, as all agree it was, she could not have been heading N.N.E. at the time of the collision. It is evident that the Circuit Court was dissatisfied with all the testimony upon the subject of the barque's heading at the time of the collision, and rested its conclusion upon the finding that, during the time the steamer was running under her hard-a-starboard wheel, she changed her course to the eastward two or three points, and the barque, after she luffed, changed her course but one or two points by the time the vessels came together. Taken in connection with the further finding that the mate told the wheelsman to port the wheel *after* he saw the mast headlight and the green light of the steamer, it justified the conclusion that this order was given *in extremis*.

The court evidently thought that more satisfactory evidence of the heading of the two vessels at the time of the collision was derived from the fact that the steamer while running at 11 miles an hour put her helm hard-a-starboard from one to two minutes prior to the collision. At this rate of speed it is by no means improbable that she swung three or four points before the collision took place, while the other testimony left

it at least doubtful whether the barque swung more than one. This inference is strengthened by the fact that the steamer's screw was left handed, and that a reversal of the engine would have a tendency to throw her head still more rapidly to port. Evidently the order to port the steamer was given when the vessels were so near together that it could have had but slight effect upon her course.

Upon the whole, it is impossible for us to say that these findings, while inconsistent with the theory of both parties, were not supported by the testimony, or that they did not justify the conclusion that the change of course of the barque was made *in extremis*. The decree of the court below is therefore

Affirmed.

ALBUQUERQUE BANK *v.* PEREA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 710. Submitted December 14, 1892. — Decided January 3, 1893.

When a statute requires property to be assessed for taxation at its cash value, a bill to enjoin the collection of a tax, solely on the ground that the property of other persons is assessed below its cash value cannot be maintained by a person whose property is also assessed below that value.

In order to procure an injunction restraining the collection of a tax, it is necessary to pay, or offer to pay, such parts of the sum assessed as is not disputed.

On November 3, 1888, appellant, as plaintiff, filed its bill in the District Court of the Second Judicial District of the Territory of New Mexico, to restrain the defendant, sheriff and *ex officio* collector of Bernalillo County, from the collection of the regular territorial, county, and city taxes assessed and levied upon its property for the year 1888. The ground upon which the injunction was sought was, generally speaking, inequality and discrimination in the assessment. The bill al-

leged that the plaintiff made a return of its property for taxation to the assessor, protesting at the time that its property should not be assessed at any greater rate than other property; that, disregarding the protest, the assessor assessed the property at its par and full value; that thereupon it appealed to the board of equalization, which reduced the assessment to 85 per cent; "that all other property in the county and Territory is not assessed at near so high a valuation upon its actual value;" and that the average valuation of such other property does not exceed seventy per cent of its actual value. At first there were also allegations to the effect that the assessor and board of equalization systematically discriminated in the valuation and assessment of complainant's property and other property in the Territory, but they were voluntarily stricken out by the plaintiff. It further alleged "that the amount of its taxes upon the assessment as made by the board of equalization is the sum of two thousand one hundred and eighty-nine ($2189) dollars, and that the amount of the assessment which your orator should justly pay for its said property, if lawfully, equitably and justly assessed, would be the sum of fifteen hundred and thirty-two dollars and thirty cents, which said sum your orator brings into court and hereby tenders and offers to pay to the said defendant, José L. Perea, *ex officio* collector of said county of Bernalillo."

Subsequently, and on November 29, 1889, it filed a supplemental bill, the purpose of which was to restrain the collection of the taxes for the year 1889. That bill, on its face, failed to allege the amount of taxes levied upon the property of the plaintiff for that year; though by reference to one of the exhibits attached, the assessment roll for the county, it appears that it was $3713.76. There was an allegation that the amount admitted in the original bill to be justly due for the taxes of 1888 had been paid; and then follow these averments, which are all there is, in respect to an admission of an amount due, payment, or tender:

"And your orator further alleges that, having paid all the taxes for which it was liable for the year 1888, it now comes into court and offers to pay all the taxes which can justly and

lawfully be assessed against it, and for which it may be justly and lawfully liable for the year 1889, and now tenders the same into court. . . .

"And your orator further alleges that the said assessment and said tax roll are so made out that it is impossible to separate the property upon which your orator is justly and lawfully taxed, and the taxes upon which *is* just and lawfully levied, from the balance of the taxes assessed against your orator, but whatever sum may be ascertained by the court to be so justly due from your orator on account of taxes for the year 1889, your orator is ready and willing *and* bring the same into court and is ready to pay the same."

A demurrer to these bills, original and supplemental, was sustained by the District Court, and the bills dismissed; and on appeal to the Supreme Court of the Territory this decree was affirmed. From the decision of the Supreme Court of the Territory complainant has brought this appeal.

Mr. William B. Childers for appellant.

Mr. Edward L. Bartlett for appellee.

Mr. Justice Brewer delivered the opinion of the court.

The decree dismissing the original and supplemental bills must be sustained. As to the tax of 1888, the case stands upon the allegation that plaintiff's property was originally assessed at its full value, while other property was assessed seventy per cent thereof; that it appealed to the board of equalization for a reduction; and that such tribunal reduced the valuation, but only to eighty-five instead of seventy per cent. It would seem that the mere statement of this was sufficient. The law of New Mexico requires property to be assessed at its cash value. Confessedly, this plaintiff's property was assessed at fifteen per cent below that value. Surely, upon the mere fact that other property happened to be assessed at thirty per cent below the value, when this did not come from any design or systematic effort on the part of the county officials, and when the plaintiff has had a hearing as to

the correct valuation, on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction, or have that decision of the board of equalization reviewed in this collateral way. *Stanley* v. *Supervisors of Albany*, 121 U. S. 535.

With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes; an allegation which is manifestly untrue, in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was made in a similar way; and in view of the further fact that it must have known what property it had which was subject to taxation as well as its value, and, therefore, the rate of taxation being fixed by law, it could, of course, have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In *State Railroad Tax Cases*, 92 U. S. 575, 616, it was fully considered. In that case it was said by Mr. Justice Miller, speaking for the court: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed." Many other cases to like effect might be cited.

The decree will be *Affirmed.*

KNOX COUNTY *v.* NINTH NATIONAL BANK.

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

No. 78. Argued December 2, 5, 1892. — Decided January 3, 1893.

The question under what statute of Missouri the bonds were issued which form the subject of this controversy was properly determinable in a suit on the bonds.

An order of court, directing a notice of an election which was to take place in thirty-four days to be given by publication in a designated newspaper for five weeks, must be construed to mean a publication in each of the five weeks.

Where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act.

Decisions of state courts upon the requirements of state statutes for validating issues of municipal bonds in the State, when made subsequent to an issue of such bonds, are not controlling in litigations in Federal courts, involving the validity of such issue.

When the matter in dispute is whether a particular issue of municipal bonds was made under one statute of the State in which the municipality is situated or under another, the whole conduct of the municipality, both before, at the time and after the issue of the bonds, may be shown to aid in determining the question.

In a subscription by a municipal corporation to aid in the construction of a railroad, it is sufficient if the route is designated, leaving to the municipal authorities to designate the particular corporation to be the recipient of the subscription.

The bonds issued by Knox County, Missouri, to the Missouri and Mississippi Railroad Company, were issued in pursuance of the general laws of the State, and not under the act of the legislature of Missouri, of February 20, 1865, to incorporate that company, and the county powers of taxation are not limited by the provisions of section 13 of the act incorporating the company.

On February 20, 1865, the legislature of the State of Missouri passed an act to incorporate the Missouri and Mississippi Railroad Company. (Session Acts 1865, p. 86.) Section 7, prescribing the route of said road, reads:

"Sec. 7. Said board of directors shall have full power and

authority to survey, mark out, locate and construct a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, in said State, and thence to or near the northeast corner of said State, in the direction of Keokuk, in Iowa, or Alexandria, Missouri."

By section 13 it was provided:

"SEC. 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company and may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent upon assessed value of taxable property for each year."

Chapter 63 of the General Statutes of Missouri of 1866, is a general statute in reference to railroad companies. Section 17 of that chapter is as follows:

"SEC. 17. It shall be lawful for the county court of any county, the council of any city or the trustees of any incorporated town, to take stock for such county, city or town in or loan the credit thereof, to any railroad company duly organized under this or any other law of the State: *Provided*, that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription." Gen. Stats. of Missouri, 1866, page 338; 1 Wagner's Stats. 1870, page 305.

On October 1, 1867, and on February 1, 1868, the county of Knox issued $100,000 in ten-year bonds to the Missouri and Mississippi Railroad Company. The body of the bond is in these words:

"Know all men by these presents: The county of Knox, State of Missouri, acknowledges itself indebted to the Missouri and Mississippi Railroad Company, (organized by an act of the general assembly of the State of Missouri,) or bearer, in the sum of $500.00 which said sum the said county promises to pay at the National Bank of Commerce, in the city of New York, . . . with interest at 7 per cent per annum, which interest shall be payable annually on presentation of the coupon hereto annexed at said National Bank of Commerce,

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in the city of New York, this bond being issued under and pursuant to order of the county court of Knox County for subscription to the stock of the Missouri and Mississippi Railroad Company as authorized by an act of the general assembly of the State of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865."

On June 14, 1884, the defendant in error claiming to be the owner of certain of these bonds, brought suit in the Circuit Court of the United States for the Eastern District of Missouri. In the petition it was alleged that "all of said bonds and coupons were authorized, issued and negotiated by said defendant county under and by authority of orders of the county court of said county, duly entered on the records of said court, and under and by the authority of a special election of the qualified voters of said Knox County, duly ordered and held, under and according to the laws of Missouri, in said county on the 12th day of March, 1867, at which election five hundred and ten votes were duly and legally cast in favor of making the subscription to the said company and of issuing therefor the bonds herein described, and only ninety-eight votes were cast against the said subscription and issue of bonds." The answer admitted the issue of the bonds, but alleged that they were issued under the authority conferred upon the County Court of Knox County by the thirteenth section of the act incorporating the Missouri and Mississippi Railroad Company, and expressly denied that they were "issued to said Missouri and Mississippi Railroad Company in payment of said subscription in compliance with a vote of the people of said county, as alleged in said petition." Upon these pleadings the case went to trial before a jury which resulted in a verdict and judgment on March 7, 1888, in favor of the plaintiff for the amount due on the bonds, and coupons and an adjudication "that the bonds and coupons sued upon by plaintiff were duly issued by the defendant county under and by authority of [*an*] order of the county court for that purpose and under and by authority of a special election of the qualified voters of said county duly ordered and held in said county for that purpose, at which

more than two-thirds of such qualified voters voting at said election voted for the subscription of stock and issue of said bonds and coupons, as charged in plaintiff's petition; and further, said bonds and coupons, together with the subscription aforesaid, were duly authorized by a vote of the qualified voters of said county, taken according to the laws of the State of Missouri." To reverse which judgment the county sued out this writ of error.

Mr. B. R. Dysart, (with whom was *Mr. R. G. Mitchell* on the brief,) for plaintiff in error.

Mr. J. B. Henderson for defendant in error.

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

No question arises in this case as to the amount of the judgment, or as to the validity of the bonds as obligations of Knox County. The answer in terms admitted the indebtedness, and the only question which was litigated was whether the bonds were issued solely under and by virtue of section 13 of the act incorporating the Missouri and Mississippi Railroad Company, or were supported by a vote of the people under the general railroad law. The difference between the two consists in this: If the bonds were issued under the general statute and in pursuance of the vote of the people, they are payable without restriction as they fall due, and mandamus will lie to compel a levy sufficient to pay the judgment; if issued only under section 13 of the Missouri and Mississippi Railroad Company act, a special levy of not exceeding one-twentieth of one per cent of the assessed valuation for each year is all that can be enforced. *United States* v. *County of Macon*, 99 U. S. 582.

That this was a matter properly determinable in a suit on the bonds, and one to be finally settled by the judgment therein, is clear from the case of *Harshman* v. *Knox County*, 122 U. S. 306.

While the bonds on their face recite that they are "issued under and pursuant to order of the county court of Knox

County, for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the general assembly of the State of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865," and while such a recital may be invoked by the holder of the bonds as an estoppel against the county, it is not conclusive in its favor as to the act under which the bonds were in fact issued. *Commissioners* v. *January*, 94 U. S. 202. The questions, therefore, to be considered are those which arise in respect to the admission of testimony, its sufficiency, and the instructions of the court. In reference to the former, it may be remarked that several witnesses were called, among them two who were county judges at the time the bonds were issued; that all were asked as to the talk which took place at the time the bonds were issued, and the county judges, as to which act they relied upon in the issue of the bonds, and what they thought and intended in the matter. It is unnecessary to express an opinion as to the competency of this testimony, for no exceptions were taken to that which was offered by the plaintiff, and of course the defendant cannot allege error in the admission of that which it offered.

The record evidence consisted, among other things, of these matters: An order of the county court of Knox County, on February 6, 1867, upon a petition therefor, directing a special election to be held on the question of subscribing $100,000 to the stock of a railroad company constructing a road through Knox County, (no particular company was mentioned in the order, and three different lines of road were described, one of them similar to that named in the charter of the Missouri and Mississippi Railroad Company;) a record of the canvass of the votes at such election, showing 510 votes for and 98 votes against the subscription; and an order of the county court of May 13, 1867, authorizing the presiding justice of the court to subscribe in the name of the county of Knox for a hundred thousand dollars of the capital stock of the Missouri and Mississippi Railroad Company. The terms of this subscription, as prescribed in this order, were the same as those in the order for an election, to wit, that the bonds should be used for work

actually done on the road within the limits of Knox County. The plaintiff also introduced the orders of the county court with respect to the levy of taxes to pay the interest on these bonds for the years from 1868 to 1875, inclusive, which ranged from thirty to seventy-five cents on the hundred dollars, until the year 1875, when it was only five cents, or one-twentieth of one per cent. It was admitted that in May, 1874, a decision of the Supreme Court of the State of Missouri was announced, *State* v. *Shortridge*, 56 Missouri, 126, by which the power of county courts to levy taxes for the payment of bonds issued to the Missouri and Mississippi Railroad Company was limited to one-twentieth of one per cent, as prescribed in section 13 of its charter, and that the order made by the county court of Knox County, on the 23d of April of that year, levying seventy-five cents on the hundred dollars, was on the 1st day of June set aside, and a levy of five cents ordered. There was also offered in evidence a certified copy of certain leaves of the bond register of Knox County, showing a statement of the bonded debt outstanding January 1, 1874, on which is a minute that $100,000 of the bonds issued to the Missouri and Mississippi Railroad Company were "ordered by an election held 12th of March, 1867;" also a statement of the financial condition of the county published in a county newspaper by order of the county court, in which was a substantially similar statement.

Upon this we notice two or three of the principal points made by counsel for plaintiff in error: The order for the election directed that notice thereof "be given through the *Missouri Watchman*, for five weeks, and by printed handbills publicly exposed throughout the county." It also named the second Monday in March as the day for the election. No evidence was offered of any printed handbills, or of the publication of notice in the *Missouri Watchman*. It is insisted that in the absence of evidence there can be no presumption that notice was given either by handbills or in the newspaper; and, secondly, that between the date of the order, February 6, and the date of the election, March 12, it was not possible to make the prescribed publication, because, excluding the day of the order

and including the day of the election, there would be only thirty-four days, or one day lacking the five full weeks. The statutes of Missouri, at that time in force, provided, in accordance with the general rule in respect to such matters, that "the time within which an act is to be done shall be computed by excluding the first day and including the last." Gen. Stats. Missouri, 1866, p. 84, § 6. But the notice required for this election was not prescribed by statute. It was fixed by order of the county court, and there being but thirty-four days between the day of the order and that named for the election, it must be presumed that what was intended was not a publication for five full weeks of seven days each, but a publication in each of the five weeks, which could easily be made in the thirty-four days. It cannot be supposed that the county court directed a notice which it was impossible to give, or that it was putting the people to the annoyance and the county to the expense of an election which was necessarily void by reason of an inability to comply with the terms of the order. The order must be construed so as to make possible a valid election, and that is accomplished by construing it, and in a reasonable way, as requiring advertisement in five successive weekly issues of the paper named.

Again, the election was held, the votes cast at that election were canvassed by the proper officers, and an order made by the county court for a subscription in accordance with the terms of the order for the election. From these facts it may be presumed that proper notices of the election were given; for it is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act. In *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, 70, it was said: "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. . . . If officers of the corporation openly exercise a power

which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. . . . In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty."

But further, the validity of the bonds is admitted by the answer, and, therefore, it is unnecessary to prove every separate step which otherwise might be required in order to show the legality of this issue. The inquiry here is, under what act and by what authority the county court issued them; and in determining that question, any statement on the records of the county may be competent evidence, and from all the acts and circumstances it is to be determined under which act the county was proceeding. Suppose the bonds contained no recitals, but simply an acknowledgment of indebtedness, and in a suit on them their validity was admitted, and there were two statutes, under either of which the bonds might have been issued, a single entry on the records of the county might be sufficient, in the absence of all other testimony, to support a finding that the bonds were issued under one rather than the other statute. All that can be said from the omission to introduce in evidence a full recital of all the steps necessary to make a perfect proceeding under the general statute is, that such omission detracts from the force of the testimony from the records and proceedings actually produced. In this respect it will be noticed that there is a marked difference between an omission to prove one step in a prescribed course of proceeding, and evidence that such step was not taken, for if it were established that one essential step in a course of proceeding required by one statute was not taken, it might well be held that the bonds admitted to be valid were in fact issued under the other statute.

This brings us to notice a point made in reference to the instructions: There was testimony tending to prove that a

registration had been made of the qualified voters of the county, and that it showed over 1000 such voters. The vote cast at the election was, for the subscription, 510, and against, 98; that is, more than two-thirds of those who actually voted assented to the subscription; but not two-thirds of the qualified voters, as shown by the registration. Several decisions of the Supreme Court of Missouri are cited, the latest being that of *State* v. *Harris*, 96 Missouri 29, in which that court has held that two-thirds of those actually voting is not sufficient; and that it must appear that two-thirds of the qualified voters, as ascertained by the registration, assented to the subscription, and it is said that this court follows the settled construction placed upon its statutes by the Supreme Court of a State. This question has been thoroughly discussed in this court, and it is unnecessary to enter into any reëxamination of it. These decisions were made after the issue of the bonds, and cannot be deemed controlling. *Cass County* v. *Johnston*, 95 U. S. 360; *Daviess County* v. *Huidekoper*, 98 U. S. 98; *Douglass* v. *Pike County*, 101 U. S. 677; *Carroll County* v. *Smith*, 111 U. S. 556.

Another matter is this: It will be remembered that the court permitted the plaintiff to offer in evidence the tax levies for several years after the issue of the bonds; a copy of the entries made on the bond register of the county in 1874, showing the bonded indebtedness of the county; and a financial statement of the county, published by direction of the county court. It also instructed the jury that they might consider these matters in determining what was the intent of the county court in issuing the bonds, "that is to say, whether they intended to act exclusively under the railroad charter, or under authority conferred by a popular vote, or under both powers." It was not said by the court that these matters created an estoppel upon the county, or concluded it as to the question, but simply that they were matters to be considered. It is a familiar rule that the interpretation given to a contract by the parties themselves is competent, and oftentimes very weighty, evidence in determining its meaning and force. So in a matter of this kind, the whole conduct of the county, both before,

at the time, and after the issue of the bonds, may be shown to aid in determining under what statute and by what authority the county proceeded in the issue of these bonds. *Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Steinbach* v. *Stewart*, 11 Wall. 566, 576; *Canal Company* v. *Hill*, 15 Wall. 94; *Merriam* v. *United States*, 107 U. S. 437; *United States* v. *Gibbons*, 109 U. S. 200.

Again, it is urged that the order for the election was invalid, inasmuch as no corporation was named as the proposed recipient of the subscription, but it has been held to the contrary, and that it is sufficient if the route is designated, leaving to the county authorities the selection of the particular corporation to be the recipient of the subscription. *Commissioners* v. *Thayer*, 94 U. S. 631; *Scipio* v. *Wright*, 101 U. S. 665.

Another matter requires notice, and it is of great significance: The constitution of the State of Missouri, adopted July 4, 1865, article II, section 14, provided that "the general assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto." At the October term, 1867, of the Supreme Court of Missouri, the case of *State* v. *Macon County Court*, 41 Missouri, 453, was decided, in which it was held that the constitution had no retroactive effect upon statutes passed before its adoption, and that, therefore, under the Missouri and Mississippi Railroad Company act, passed February 20, 1865, a few months before the adoption of the constitution, there was power in the county authorities to subscribe without the assent of the voters. It may well be believed as asserted by counsel for defendant in error, that, until that decision was announced, the understanding that the prohibition in the constitution superseded all unexecuted authority given by prior charters was so general, that no county court would have dared to subscribe stock and issue bonds without the assent of two-thirds of the qualified voters. This subscription was made, some of the bonds issued, as well as the vote held, before the decision in the Macon County case, and it is difficult to believe that the county court did not issue

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these bonds in reliance upon the authority given them by the vote of the people, in pursuance of the general laws of the State, although referring on the face of the bonds to the Missouri and Mississippi Railroad Company act, which specially authorized the company to receive and the counties through which it ran to make subscriptions. It is very likely that the county court had in mind the special act creating the Missouri and Mississippi Railroad Company, as well as the general law, and the vote of the people under it, and that it meant to exercise all the authority conferred by both. It is enough for this case that the vote of the people authorizing this issue of bonds was given, and that the county court acted in reliance thereon, for, by assent, through their vote, to such issue of bonds the people, in the way prescribed by the statutes of the State, in effect consented that a levy beyond the meagre one provided for by the Missouri and Mississippi Railroad Company act might be resorted to for the payment of these bonds.

These are the substantial matters involved in this litigation. We find no error in the proceedings of the Circuit Court, and its judgment is

Affirmed.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *v.* PRENTICE.

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

No. 58. Argued November 23, 1892. — Decided January 3, 1893.

A railroad corporation is not liable to exemplary or punitive damages for an illegal, wanton and oppressive arrest of a passenger by the conductor of one of its trains, which it has in no way authorized or ratified.

THIS was an action of trespass on the case, brought October 19, 1886, in the Circuit Court of the United States for the Northern District of Illinois, by Prentice, a citizen of Ohio,

against the Lake Shore and Michigan Southern Railway Company, a corporation of Illinois, to recover damages for the wrongful acts of the defendant's servants.

The declaration alleged, and the evidence introduced at the trial tended to prove, the following facts: The plaintiff was a physician. The defendant was engaged in operating a railroad, and conducting the business of a common carrier of passengers and freight, through Ohio, Indiana, Illinois and other States. On October 12, 1886, the plaintiff, his wife and a number of other persons were passengers, holding excursion tickets, on a regular passenger train of the defendant's railroad, from Norwalk in Ohio to Chicago in Illinois. During the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train, learning this, and knowing that the plaintiff had been guilty of no offence for which he was liable to arrest, telegraphed for a police officer, an employé of the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff and rudely searched him for weapons in the presence of the other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating him with his fellow-passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where's your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and, in the presence of the passengers and others, ordered him to be taken to the station-house, and he was forcibly taken there, and detained until the conductor arrived and, knowing that the plaintiff had been guilty of no offence, entered a false charge against him of disorderly conduct, upon which he gave bail and was

released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged.

The declaration alleged that all these acts were done by the defendant's agents in the line of their employment, and that the defendant was legally responsible therefor; and that the plaintiff had been thereby put to expense, and greatly injured in mind, body and reputation.

At the trial, and before the introduction of any evidence, the defendant, by its counsel, admitted "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor;" but afterwards excepted to each of the following instructions given by the Circuit Judge to the jury:

"If you believe the statements which have been made by the plaintiff and the witnesses who testified in his behalf (and they are not denied) then he is entitled to a verdict which will fully compensate him for the injuries which he sustained, and in compensating him you are authorized to go beyond the amount that he has actually expended in employing counsel; you may go beyond the actual outlay in money which he has made. He was arrested publicly, without a warrant, and without cause; and if such conduct as has been detailed before you occurred, such as the remark that was addressed by the conductor to the wife in the plaintiff's presence, in compensating him you have a right to consider the humiliation of feeling to which he was thus publicly subjected. If the company, without reason, by its unlawful and oppressive act, subjected him to this public humiliation, and thereby outraged his feelings, he is entitled to compensation for that injury and mental anguish.

"I am not able to give you any rule by which you can determine that; but bear in mind, it is strictly on the line of compensation. The plaintiff is entitled to compensation in money for humiliation of feeling and spirit, as well as the actual outlay which he has made in and about this suit.

"And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feel-

ings, you may add something by way of punitive damages against the defendant, which is sometimes called smart money, if you are satisfied that the conductor's conduct was illegal (and it was illegal), wanton and oppressive. How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant.

"If a public corporation, like an individual, acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power."

The jury returned a verdict for the plaintiff in the sum of $10,000. The defendant moved for a new trial, for error in law, and for excessive damages. The plaintiff thereupon, by leave of court, remitted the sum of $4000, and asked that judgment be entered for $6000. The court then denied the motion for a new trial, and gave judgment for the plaintiff for $6000. The defendant sued out this writ of error.

Mr. George C. Greene for plaintiff in error.

Mr. W. A. Foster for defendant in error.

I. But one question arises upon the record, and that is, under the facts, is plaintiff in error liable for punitive damages?

That a master is liable for the trespass of his servant in the line of his employment, although wilful on the part of the servant, we assume is no longer an open question under the decisions in this country and in England.

That the liability of corporations for the acts of servants is the same as that of natural persons, may be conceded, and has received the sanction of this court in *National Bank* v. *Graham*, 100 U. S. 699, 702; and in *Denver & Rio Grande Railway* v. *Harris*, 122 U. S. 597. See also *Salt Lake City* v. *Hollister*, 118 U. S. 256, 260; *New Jersey Steamboat Company* v. *Brockett*, 121 U. S. 637; *State* v. *Morris & Essex Railroad*, 3 Zabriskie, (23 N. J. Law,) 360.

Argument for Defendant in Error.

II. Authority by the principal is implied when the servant is acting within the scope of his employment. It is not necessary to show express authority by the corporation. Was the act done in the interest of the company? This is the only question. *Denver & Rio Grande Railway* v. *Harris*, 122 U. S. 597.

III. Punitive damages were properly allowed in the case at bar. The authorities cited by counsel for plaintiff in error denying punitive damages are either distinguishable from the case at bar upon the facts, or are from exceptional States that have adopted a different rule of damages from the great majority of courts, and from the rule adopted by this court. See *Craker* v. *Chicago & Northwestern Railway*, 36 Wisconsin, 657; *Milwaukee & St. Paul Railway* v. *Arms*, 91 U. S. 489; *Galena* v. *Hot Springs Railroad*, 13 Fed. Rep. 116.

The plaintiff was a passenger without a question as to his right to be carried and protected from insult or indignity. There was no question with reference to his ticket, he had violated no rule of the company, was guilty of no crime, nor had he demeaned himself in any improper manner, nor was he in any way obnoxious to his fellow-passengers. The treatment that he received was worse than that bestowed upon the ordinary felon. He was publicly pointed out, and a command for his arrest given in tones which called attention to him from all occupants of the car. He was searched for weapons publicly, as if he were a desperado. He was pushed through cars like a thief, separated from his wife, as if to prevent a conspiracy to escape, guarded like a murderer and carried to the station in the rain without leave to obtain his overcoat, as one who had forfeited all right to considerations of humanity.

IV. These acts of the conductor were within the scope of his employment. *Ramsden* v. *Boston & Albany Railroad*, 104 Mass. 117; *Howe* v. *Newmarch*, 12 Allen, 49; *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526; *Seymour* v. *Greenwood*, 6 H. & N. 359; *Garretsen* v. *Duenckel*, 50 Missouri, 104; *Campbell* v. *Pullman Palace Car Co.*, 42 Fed. Rep. 484; *Chamberlain* v. *Chandler*, 3 Mason, 242; *Craker* v. *Chicago & Northwestern Railway*, 36 Wisconsin, 657;

Denver & Rio Grande Railway v. *Harris*, 122 U. S. 597; *Milwaukee & St. Paul Railway* v. *Arms*, 91 U. S. 489; *Krulevitz* v. *Eastern Railroad*, 140 Mass. 573.

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

The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers — such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment — is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 368; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 443; *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102, 109; *Hough* v. *Railway Co.*, 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the King's messengers for trespass and imprisonment under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the Chief Justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue

of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes* v. *Wood*, Lofft, 1, 18, 19; *S. C.* 19 Howell's State Trials, 1153, 1167. See also *Huckle* v. *Money*, 2 Wilson, 205, 207; *S. C.*, Sayer on Damages, 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. *The Amiable Nancy*, 3 Wheat. 546, 558, 559; *Day* v. *Woodworth*, 13 How. 363, 371; *Philadelphia &c. Railroad* v. *Quigley*, 21 How. 202, 213, 214; *Milwaukee & St. Paul Railway* v. *Arms*, 91 U. S. 489, 493, 495; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 521; *Barry* v. *Edmunds*, 116 U. S. 550, 562, 563; *Denver & Rio Grande Railway* v. *Harris*, 122 U. S. 597, 609, 610; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26, 36.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the

judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546.

In that case, upon a libel in admiralty by the owner, master, supercargo and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story, speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. *Boston Manuf. Co.* v. *Fiske*, 2

Mason, 119, 121. In *Keene* v. *Lizardi*, 8 Louisiana, 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are: *The State Rights*, Crabbe, 22, 47, 48; *The Golden Gate*, McAllister, 104; *Wardrobe* v. *California Stage Co.*, 7 California, 118; *Boulard* v. *Calhoun*, 13 La. Ann. 445; *Detroit Post* v. *McArthur*, 16 Michigan, 447; *Grund* v. *Van Vleck*, 69 Illinois, 478, 481; *Becker* v. *Dupree*, 75 Illinois, 167; *Rosenkrans* v. *Barker*, 115 Illinois, 331; *Kirksey* v. *Jones*, 7 Alabama, 622, 629; *Pollock* v. *Gantt*, 69 Alabama, 373, 379; *Eviston* v. *Cramer*, 57 Wisconsin, 570; *Haines* v. *Schultz*, 21 Vroom, (50 N. J. Law,) 481; *McCarty* v. *De Armit*, 99 Penn. St. 63, 72; *Clark* v. *Newsam*, 1 Exch. 131, 140; *Clissold* v. *Machell*, 26 Upper Canada Q. B. 422.

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances. *Philadelphia &c. Railroad* v. *Quigley*, 21 How. 202, 210; *National Bank* v. *Graham*, 100 U. S. 699, 702; *Salt Lake City* v. *Hollister*, 118 U. S. 256, 261; *Denver & Rio Grande Railway* v. *Harris*, 122 U. S. 597, 608.

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468; *New Jersey Steamboat Co.* v. *Brockett*, 121 U. S. 637; *Howe* v. *Newmarch*, 12 Allen, 49; *Ramsden* v. *Boston & Albany Railroad*, 104 Mass. 117. A corporation may even be held liable

for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. *Philadelphia &c. Railroad* v. *Quigley*, 21 How. 202, 211; *Salt Lake City* v. *Hollister*, 118 U. S. 256, 262; *Reed* v. *Home Savings Bank*, 130 Mass. 443, 445, and cases cited; *Krulevitz* v. *Eastern Railroad*, 140 Mass. 573; *McDermott* v. *Evening Journal*, 14 Vroom, (43 N. J. Law,) 488, and 15 Vroom, (44 N. J. Law,) 430; *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." *Lothrop* v. *Adams*, 133 Mass. 471, 480, 481.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In *Detroit Post* v. *McArthur*, in *Eviston* v. *Cramer*, and in *Haines* v. *Schultz*, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in *Haines* v. *Schultz* the Supreme Court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground — wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive — cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine *respon-*

deat superior." 21 Vroom, (50 N. J. Law,) 484, 485. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and where it has been held that he can, it is admitted to be an anomaly in the criminal law. *Commonwealth* v. *Morgan*, 107 Mass. 199, 203; *Regina* v. *Holbrook*, 3 Q. B. D. 60, 63, 64, 70, and 4 Q. B. D. 42, 51, 60.

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. *Philadelphia &c. Railroad* v. *Quigley*, *Milwaukee & St. Paul Railway* v. *Arms*, and *Denver & Rio Grande Railway* v. *Harris*, above cited; *Caldwell* v. *New Jersey Steamboat Co.*, 47 N. Y. 282; *Bell* v. *Midland Railway*, 10 C. B. (N. S.) 287; *S. C.* 4 Law Times (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. *Kennon* v. *Gilmer*, 131 U. S. 22; *Meagher* v. *Driscoll*, 99 Mass. 281, 285; *Smith* v. *Holcomb*, 99 Mass. 552; *Hawes* v. *Knowles*, 114 Mass. 518; *Campbell* v. *Pullman Car Co.*, 42 Fed. Rep. 484.

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor," the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the

jury that "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called smart money," if they were "satisfied that the conductor's conduct was illegal, wanton and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well considered precedents.

In *Philadelphia & Reading Railroad* v. *Derby*, which was an action by a passenger against a railroad corporation for a personal injury suffered through the negligence of its servants, the jury were instructed that "the damages, if any were recoverable, are to be confined to the direct and immediate consequences of the injury sustained;" and no exception was taken to this instruction. 14 How. 470, 471.

In *Philadelphia &c. Railroad* v. *Quigley*, which was an action against a railroad corporation for a libel published by its agents, the jury returned a verdict for the plaintiff under an instruction that "they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to the plaintiff, and act as an adequate punishment to the defendant." This court set aside the verdict, because the instruction given to the jury did not accurately define the measure of the defendant's liability; and, speaking by Mr. Justice Campbell, stated the rules applicable to the case in these words: "For acts done by the agents of the corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of

contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants." 21 How. 210, 213, 214.

In *Milwaukee & St. Paul Railway* v. *Arms*, which was an action against a railroad corporation, by a passenger injured in a collision caused by the negligence of the servants of the corporation, the jury were instructed thus: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." This court, speaking by Mr. Justice Davis, and approving and applying the rule of exemplary damages, as stated in *Quigley's case*, held that this was a misdirection, and that the failure of the employés to use the care that was required to avoid the accident, "whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury." 91 U. S. 495.

In *Denver & Rio Grande Railway* v. *Harris*, the railroad company, as the record showed, by an armed force of several hundred men, acting as its agents and employés, and organized and commanded by its vice-president and assistant general manager, attacked with deadly weapons the agents and employés of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury "were not limited to compensatory damages, but could give punitive or exemplary damages, if it

was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff." This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in *Quigley's case*, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610.

The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. But the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where puni-

tive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough, that he shall be liable in compensatory damages, for the injury sustained in consequence of the wrongful act of a person acting as his servant." *Hagan* v. *Providence & Worcester Railroad*, 3 Rhode Island, 88, 91.

The like view was expressed by the Court of Appeals of New York, in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company, having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages; but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury "such sum for exemplary damages as the case calls for, depending in a great measure of course upon the conduct of the defendant," entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the mas-

ter, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." *Cleghorn* v. *New York Central Railroad*, 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern States. But of the three leading cases on that side of the question, *Hopkins* v. *Atlantic & St. Lawrence Railroad*, 36 N. H. 9, can hardly be reconciled

with the later decisions in *Fay* v. *Parker*, 53 N. H. 342, and *Bixby* v. *Dunlap*, 56 N. H. 456; and in *Goddard* v. *Grand Trunk Railway*, 57 Maine, 202, 228, and *Atlantic & Great Western Railway* v. *Dunn*, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedgwick on Damages, (8th ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages. But the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the

Judgment must be reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict, and to order a new trial.

Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Lamar took no part in this decision.

ANKENEY *v.* HANNON.

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

No. 91. Argued and submitted December 12, 1892. — Decided January 3, 1893.

In Ohio the separate property of a married woman is not charged, either in law or in equity, by her contracts executed previous to its existence. The cases in Ohio, in New York, and in England on this subject, examined.

THIS was a suit in equity to charge the separate estate of a married woman with the payment of certain notes of which her husband was one of the makers, such estate having been acquired subsequently to their execution. It arose out of the following facts: On the 25th of March, 1880, Joseph E. Hannon, Clara M. Hannon, and William H. Hannon executed their three promissory notes, aggregating $14,969.31, dated at Xenia, Ohio, and payable to the order of Joseph E. Hannon, one of the makers. They were subsequently transferred to the complainants before maturity for a valuable consideration. Clara M. Hannon is the wife of Joseph E. Hannon, and at the time the notes were signed she possessed a small separate estate; and in each of the notes she inserted the following provision: "Mrs. Clara M. Hannon signs this note with the intention of charging her separate estate both real and personal." As appears from the statement of counsel, a general demurrer was filed to the original bill, and in disposing of it the court expressed an opinion that the complainants could charge the separate estate in existence when the notes were given, but intimated that the after-acquired property could not be thus charged. The separate estate existing at the time of the execution of the notes was of small value, and the complainants desired to present the question of the liability of the after-acquired estate of the wife for the payment of the notes. They, therefore, amended their bill so as to show that Mrs. Hannon was not, at its filing, or thereafter, possessed of any

of the property which she owned at the time of the execution of the notes, but that she had subsequently acquired by inheritance from the estate of her father, who died in 1882, property of the value of more than two hundred thousand dollars. The amended bill also alleged, that Clara M. Hannon signed the notes with the intention to bind her separate estate, whether then in possession or thereafter acquired. To the bill as thus amended a general demurrer was also filed and sustained by the court, and a decree entered that the bill be dismissed. From this decree the appeal was taken.

The case thus presented the single question, whether the separate estate of the wife, Mrs. Clara M. Hannon, acquired by her by inheritance from her father, in 1882, was chargeable with the payment of the notes described, executed and delivered by her and others in March, 1880.

Mr. A. B. Cummins for appellants, submitted on his brief.

I. The appeal presents a single question of law. It will be conceded that, under the laws of Ohio as construed by its Supreme Court, when a married woman signs a note containing the provision already quoted, whether as principal debtor or as surety, she charges her separate property with its payment. The sole inquiry arising upon this record is: Under the laws of Ohio existing in 1880, had a married woman the power to make the payment of a debt a charge upon a separate estate acquired after the creation of the indebtedness?

II. The legislation of Ohio respecting married women, their separate estate, their power to enter into contracts, and the remedies to be employed in enforcing their obligations, as it existed in 1880, will be found in sections 3108, 3109, 4496 and 5319 of the code as it then was. [These sections will be found in the opinion of the court, *infra.*]

III. As to the effect of these statutes upon the obligation of a married woman, with respect to her separate property, and upon the procedure to enforce the obligation: it is sufficient now to state (1) that in the absence of legislation the estate is created by contract, conveyance or devise, and is

therefore always conditioned by the terms of the instrument under which it arises; (2) that whatever remedy is sought against it is administered by a court of equity; (3) that all contracts of married women are, at law, nullities.

As we view it, these sections of the code effect three changes.

(1) The separate estate is created by law, not by individual act, and is held by legal, not equitable title. All the property, real or personal, owned at marriage or thereafter acquired, by conveyance, gift, devise, inheritance, purchase or labor, becomes at once separate estate, without limitation or restriction.

(2) A limited power to make contracts is conferred. It will be observed that the enumeration of the instances in which the married woman is given the right to bind herself personally is an enlargement of her contractual power, and not a limitation upon her right to deal with her separate estate. *Levi* v. *Earl*, 30 Ohio St. 147.

(3) All that a woman has at marriage, or acquires thereafter, is her separate property. She may make certain valid personal contracts (not material here) upon which she stands before the law precisely as a *feme sole*. She may charge her separate property with the payment of a debt, and the charge is made effective by ordinary proceedings at law, terminating in a general execution, leviable upon all her separate property.

IV. We do not question the rule that the practice of the courts of the United States in chancery cannot be changed by state legislation. We, however, affirm that rights, privileges and obligations may be created or imposed by the States which will be recognized and enforced through the appropriate procedure in the courts of the United States. *Bank of Hamilton* v. *Dudley*, 2 Pet. 492; *Clark* v. *Smith*, 13 Pet. 195; *Ex parte McNiel*, 13 Wall. 236; *Case of Broderick's Will*, 21 Wall. 503, 520; *Holland* v. *Challen*, 110 U. S. 15; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405. And we maintain that, from the propositions above laid down it follows: (1) That whatever may have been the rule in equity, under the legislation of Ohio, we are entitled to reach all the separate property Mrs. Hannon may have at the time the decree is entered, *Patrick* v. *Littell*, 36 Ohio St. 79; and (2) that

assuming that the statutes of Ohio have modified the doctrine of the courts of chancery no further than to create and define the separate estate, an intent to charge property thereafter acquired is as effective as an intent to charge existing property.

Under the common law, prior to the expansion of the court of chancery, separate property of women, during coverture, was unknown. The law did not recognize any dominion whatsoever in property on the part of married women. The obvious injustice of the results of this doctrine at length secured a remedy, not in the common law nor from the legislative branch of the government, but from the courts of equity. To accomplish the reform, the chancellors invoked the well known principles of trust, and held that, through the intervention of a trustee, property might be held to the sole and separate use of the wife as a *cestui que trust.* It will be observed that this trust estate was one necessarily created by contract or devise, as distinguished from mere operation of the law, and the courts of equity did no more than give effect to the expressed desire of the parties. When such separate estate was thus brought into existence the power of the wife over it was, with a few exceptions not important here, as absolute and extensive as though she were an unmarried woman. She might sell, or mortgage, or otherwise incumber it, subject always of course, to such restraint upon her power as was enjoined in the instrument creating the estate.

The recognition of the separate estate necessarily involved the recognition of a contractual power on the part of a married woman. The separate estate was created that the married woman might enjoy its fruits. This was impossible, unless she were given the right to deal with it, to use it, to sell and incumber it. To these things contracts were necessary; and it was equally necessary that she should be bound by agreements concerning the property with which she had a right to deal. Courts of equity, for the purpose of effecting the object of the separate estate, enforced her contracts relating to that separate estate unless they were forbidden by the instrument creating it. Speedily there arose other questions. It is sufficient to say that the cases exhibit the same variety of opinion

observable during the growth of any new doctrine. The principal questions in dispute have been, first, the theory upon which the estate is to be charged; second, how the intent to charge it must be evidenced; and third, the construction and effect of the instrument creating it. See *Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; *Johnson* v. *Gallagher*, 3 De G. F. & J. 494, 519; *Hulme* v. *Tenant*, 1 Bro. Ch. 16; *Owens* v. *Dickenson*, Cr. & Ph. 48; *Murray* v. *Barlee*, 3 Myln. & K. 209; *Yale* v. *Dederer*, 22 N. Y. 450; *S. C.* 78 Am. Dec. 216; *Todd* v. *Lee*, 15 Wisconsin, 365; *Maxon* v. *Scott*, 55 N. Y. 247.

Whatever divergence from the line of English opinions may exist in America, it is to be noted that it relates, not to the general doctrine, viz.: that the intention to charge the separate estate is the foundation of enforcing the obligation, but to the character or form of contract which does thus evidence an intent to create a charge. The question has been met in all its phases by the Supreme Court of Ohio, and the rule of that State has long been, that general engagements furnish sufficient evidence of an intent to charge, and that the obligation of a surety does not differ in this respect from promises made for her own advantage, provided (as claimed by some of the cases) an intent to charge be affirmatively shown. *Avery* v. *Vansickle*, 35 Ohio St. 270; *Williams* v. *Urmston*, 35 Ohio St. 296; *Rice* v. *Railroad Co.*, 32 Ohio St. 380; *Levi* v. *Earl*, 30 Ohio St. 147; *Phillips* v. *Graves*, 20 Ohio St. 371; *Patrick* v. *Littell*, 36 Ohio St. 79; *Fallis* v. *Keys*, 35 Ohio St. 265; *Swasey* v. *Antram*, 24 Ohio St. 87; *Jenz* v. *Gugel*, 26 Ohio St. 527; *Meiley* v. *Butler*, 26 Ohio St. 535; *Westerman* v. *Westerman*, 25 Ohio St. 500.

Concerning the construction which shall be given to the instrument creating the separate estate, we do not deem it material to determine which view is supported by the greater authority of reason or adjudication. In Ohio the difficulty has been entirely eliminated by the legislation which makes all the property of a married woman separate estate, and qualifies her to hold the legal title to whatever she may own. *Levi* v. *Earl*, 30 Ohio St. 147; *Patrick* v. *Littell*, 36 Ohio St. 79.

Opinion of the Court.

We are aware that there is an English case that may seem, upon casual reading, to hold a contrary view. It is *Pike* v. *Fitzgibbon*, 17 Ch. D. 454. It is not difficult however to show that it is not an authority against our position.

First. The separate estate was created by an instrument that expressly forbade anticipation; it was the intent of the donor that under no circumstances should the donee have the right to use more than the current income from the property. Under such terms it was legally impossible for the married woman to charge it with a debt created prior to the existence of the separate estate.

Second. There was neither allegation nor proof that there was an intent to charge after acquired property. The sole evidence of any intent was the execution of a general engagement to pay a sum of money.

It will not be forgotten that in the case at bar the estate is statutory, unfettered by conditions or restrictions. The legal title is in Mrs. Hannon. The averments of the bill are, that this is the property which she especially intended to charge.

The American authorities upon the point are few, but they are with us. *Todd* v. *Lee*, 16 Wisconsin, 365; *Maxon* v. *Scott*, 55 N. Y. 247; *Todd* v. *Ames*, 60 Barb. 454, 462; *Van Metre* v. *Wolf*, 27 Iowa, 341; *Fallis* v. *Keys*, 35 Ohio St. 265.

Mr. Lawrence Maxwell, Jr., (with whom was *Mr. William M. Ramsey* on the brief,) for appellees.

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

At common law, a married woman is disabled from executing any promissory notes, either alone or in conjunction with her husband. A note or other contract signed by both is the obligation of the husband alone. And in the absence of legislation a separate estate to her can only be created by conveyance, devise or contract, and remedies against such estate can be enforced only in equity. At the time Mrs. Hannon signed the notes in controversy, married women in Ohio were subject

to their common law disabilities, except with respect to certain statutory contracts, and had power to charge their separate estates only in accordance with the ordinary rules of equity. Subsequently, in 1884, the laws of Ohio were amended, authorizing married women, during coverture, to contract to the same extent and in the same manner as if they were unmarried. (Amendatory sections Rev. Stats. 3108, 3109, 3110 and 3111.) And in March, 1887, it was further provided that "a husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other." But at the time the notes in question were signed by Mrs. Hannon the rights and liabilities of married women in Ohio, so far as they differed from the doctrine of the common law, were determined by the following sections of the Revised Statutes, which embodied the provisions of the act known as the Keys act, passed in April, 1861. These sections are as follows:

"SEC. 3108. An estate or interest, legal or equitable, in real property belonging to a woman at her marriage, or which may have come to her during coverture, by conveyance, gift, devise or inheritance, or by purchase with her separate means or money, shall, together with all rents and issues thereof, be and remain her separate property, and under her control; and she may, in her own name, during coverture, make contracts for labor and materials for improving, repairing and cultivating the same, and also lease the same for any period not exceeding three years. This section shall not affect the estate by the curtesy of a husband in the real property of his wife after her decease; but during the life of such wife, or any heir of her body, such estate shall not be taken by any process of law for the payment of his debts, or be conveyed or incumbered by him, unless she join therein with him in the manner prescribed by law in regard to her own estate.

"SEC. 3109. The personal property, including rights in action belonging to a woman at her marriage, or coming to her during coverture, by gift, bequest or inheritance, or by

purchase with her separate money or means, or due as the wages of her separate labor, or growing out of any violation of her personal rights, shall, together with all income, increase and profit thereof, be and remain her separate property and under her sole control; and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of a husband to personal property reduced to his possession with the express assent of his wife; but personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless, by the terms of said assent, full authority is given by the wife to the husband to sell, incumber or otherwise dispose of the same for his own use and benefit.

"Sec. 3110. The separate property of the wife shall be liable to be taken for any judgment rendered in an action against husband and wife upon a cause existing against her at their marriage, or for a tort committed by her during coverture, or upon a contract made by her concerning her separate property, as provided in section thirty-one hundred and eight.

"Sec. 3111. A married woman, whose husband deserts her, or from intemperance or other cause becomes incapacitated, or neglects to provide for his family, may, in her own name, make contracts for her own labor, and the labor of her minor children, and in her own name sue for and collect her own or their earnings; and she may file a petition against her husband, in the Court of Common Pleas of the county in which she resides, alleging such desertion, incapacity or neglect, and upon proof thereof the court may enter a judgment vesting her with the rights, privileges and liabilities of a *feme sole*, as to acquiring, possessing and disposing of property, real and personal, making contracts, and being liable thereon, and suing and being sued in her own name; but after such judgment the husband shall not be liable upon any contract so made by her in her own name, or for any tort thereafter committed by her."

Sections 4996 and 5319 should also be quoted, as they are supposed by the appellants to have some bearing upon the questions presented.

Section 4996 is as follows:

"A married woman cannot prosecute or defend by next friend, but her husband must be joined with her, unless the action concerns her separate property, is upon her written obligation, concerns business in which she is a partner, is brought to set aside a deed or will, or to collect a legacy, or is between her and her husband."

Section 5319 is as follows:

"When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced as if she were unmarried, and her separate property and estate shall be liable for the judgment against her, but she shall be entitled to the benefit of all exemptions to heads of families."

These last two sections originally were parts of an act passed in 1874.

It has been held by the Supreme Court of Ohio that the legislation contained in these provisions, considered either by itself or in connection with the act of March 30, 1874, the provisions of which are embraced in sections 4996 and 5319 of the Revised Statutes, does not enlarge the capacity of married women to make contracts except in the instances specifically mentioned. The case of *Levi* v. *Earl*, 30 Ohio St. 147, maintains this position, after an elaborate analysis and consideration of the legislation on the powers and disabilities of married women in the State. That case was decided, it is true, by the Supreme Court commission of Ohio and not by the Supreme Court of the State, but that commission was appointed by the Governor of the State, under an amendment of the constitution adopted to dispose of such part of the business on the docket of the Supreme Court as should by arrangement between the commission and the court be transferred to the commission. The amendment declares that the commission shall have like jurisdiction and power in respect to such business as may be vested in the court. A decision of the commission upon a question properly presented to it in a judicial proceeding is, therefore, entitled to the like consideration and weight as a decision upon the same question by the court itself, and is equally authoritative.

Opinion of the Court.

The case cited, among other things, adjudges and declares (1) that by the provisions of law quoted the wife is authorized to make contracts in her own name for labor and materials for improving, repairing and cultivating her separate estate as defined by them, and for leasing the same for a term not exceeding three years, and that upon such contracts the wife is liable to an action at law and to a judgment and execution as a *feme sole*, but that all her other engagements, debts or obligations are void at common law the same as before the adoption of the provisions mentioned; (2) that by those provisions the marital rights of the husband were divested as to the wife's general estate, and the wife was invested with the control of the same, and could bind it not only by the contracts which she was authorized to make in her own name, but to the same extent as she could charge her separate estate in equity before the provisions were adopted; (3) that the power of a court of equity to charge the separate estate of a married woman as existing and exercised before those provisions were adopted still existed not only as to such separate property but also as to her separate property as defined by those provisions, except as to such contracts as she was authorized to make in her own name, upon which a remedy at law was given by the statute.

It has also been held by the Supreme Court of Ohio that sections 4996 and 5319 of the Revised Statutes, which embody the provisions of the act of March 30, 1874, were intended simply as an amendment to the Code of Civil Procedure, and did not affect or enlarge the rights or liabilities of married women, but related merely to the remedy. *Jenz* v. *Gugel*, 26 Ohio St. 527; *Allison* v. *Porter*, 29 Ohio St. 136; *Avery* v. *Vansickle*, 35 Ohio St. 270.

The powers and liabilities of married women not being affected in any particulars, except those mentioned, by the legislation of Ohio previous to the execution of the notes in controversy, the defendant, Mrs. Hannon, did not charge her subsequently acquired estate at law for their payment when she signed them in connection with her husband. Even if under the legislation in question she would, by the decision in *Williams* v. *Urmston*, 35 Ohio St. 296, which is said to qual-

ify, in some respects, the decisions in *Levi* v. *Earl*, have charged at law her separate estate existing at the time of the execution of the notes in the absence of the express statement in them that she intended thus to charge it, there is nothing in the legislative provisions adopted which enlarges her power at law to charge any future-acquired estate. The question then remains to be considered whether her after-acquired estate is chargeable in equity. That is to be determined by the ordinary rules of equity, and we think it is clear that the contracts of married women are not chargeable in equity upon their subsequently acquired estates.

The separate estate of a married woman, as we have stated, is, in the absence of legislation on the subject, created by conveyance, devise or contract. Its creation gives to her the beneficial use of the property which otherwise would not be brought under her control. As to such property she is regarded in equity as a *feme sole* and it was, therefore, formerly held that her general engagements, though not personally binding upon her, could be enforced against the property. This doctrine, however, has been modified in modern times. It is now held that to charge her separate estate with her engagement, it must have been made with an intention on her part to create a charge upon such estate; that is, with reference to the property, either for its improvement or for her benefit upon its credit. There has been much divergency of opinion and some conflict both in the courts of England and of this country as to what is necessary to establish such intention on the part of the wife to charge her separate estate for her contract. It is conceded that there must have been an intention on her part to effect such a charge, otherwise her engagement will not have that effect.

The numerous decisions in the High Court of Chancery of England have shown this divergency and conflict in a marked degree. Lord Thurlow placed the right of the wife to charge the property upon her right as owner to dispose of it without other authority. *Hulme* v. *Tenant*, 1 Bro. C. C. 16; *Fettiplace* v. *Gorges*, 3 Bro. C. C. 8. But this theory was afterwards rejected by Lord Loughborough, who denied the

liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground that the securities which the wife had executed operated as appointments of her separate property. *Bolton* v. *Williams*, 2 Ves. Jun. 138.

This doctrine proceeded upon the assumption that the wife's separate estate was not liable for her general engagements, but only for such as were specifically charged in writing upon it. This theory Lord Brougham rejected, holding that there was no valid distinction between a written security, which the married woman was incapable of executing, and a promise by parol, and that mere parol engagement of the wife was equally effective to create a charge as her bond or note. *Murray* v. *Barlee*, 3 Myln. & K. 209.

The reasoning of Lord Brougham to establish his views was afterwards met and rejected by Lord Cottenham. *Owens* v. *Dickenson*, 1 Craig & Ph. 48.

The Court of Appeals of New York in the case of *Yale* v. *Dederer*, 22 N. Y. 450, considered very fully the evidence which would be required to charge the separate estate of the wife upon her contract, and in its examination reviewed the various decisions of the English Court of Chancery, pointing out their many differences and conflicts, and placed its decision upon this ground, that such estate could not be charged by contract unless the intention to charge it was stated in the contract itself or the consideration was one going to the direct benefit of the estate. In that case a married woman signed a promissory note as a surety for her husband, and it was held, though it was her intention to charge such estate, that such intention did not take effect, as it was not expressed in the contract itself.

In the case of *Willard* v. *Eastham*, 15 Gray, 328, 335, the same question was elaborately considered by the Supreme Judicial Court of Massachusetts. In that case a debt was contracted by a married woman for the accommodation of another person without consideration received by her, and it was held that the contract could not be enforced in equity against her separate estate unless made a charge upon it by an express

instrument. And the court concludes, after a full consideration of the subject, by observing that the whole doctrine of the liability of a married woman's separate estate to discharge her general engagements rests upon grounds which are artificial and which depend upon implications too subtle and refined; and that "the true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well-reasoned opinions of the Court of Appeals of New York in the case of *Yale* v. *Dederer*," which we have cited and says: "Our conclusion is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit or when the consideration goes to the benefit of such estate or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

We concur in these views as to the limitation on the authority of a court of equity in relation to the subject. In this case the amended bill avers that the defendant, Mrs. Hannon, executed the notes in question with the intention of charging her after-acquired property; but inasmuch as her contract is in writing, the averment can be regarded only as the pleader's conclusion, which must be determined by the application of the law to the undertaking itself. There is nothing in the written agreement which makes any reference to an after-acquired estate.

In *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, 460, the question as to the power of a married woman to bind her subsequently acquired estate was considered. In that case Lord Justice James said: "Another point also has been raised, of which we must dispose, and which has arisen, as it seems to me, from a misapprehension of some of the cases. It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but,

having a separate estate, has acquired a sort of equitable *status* of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. It is contended that because equity enables her, having estate settled to her separate use, to charge that estate and to contract debts payable out of it, therefore she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a court of equity to contract debts to be paid and satisfied out of any estate settled to her separate use which she may afterwards acquire, or, to carry the argument to its logical consequences, out of any property which may afterwards come to her. In my opinion there is no authority for that contention, which appears to arise entirely from a misapprehension of the case of *Picard* v. *Hine*, L. R. 5 Ch. 274, and one or two other cases which follow it, in which this point was never suggested. . . . I desire to have it distinctly understood as my opinion and the opinion of my colleagues, and, therefore, as the decision of this court, that in any future case the proper inquiry to be inserted is what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the court. That is all that the court can apply in payment of the debt." Lord Justice Brett in his concurring opinion said: "The decisions appear to me to come to this: that certain promises (I use the word 'promises' in order to show that in my opinion they are not contracts) made by a married woman, and acted upon by the persons to whom they are made, on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered, whether such judgment be recovered during or after the cessation of the coverture. That proposition so stated does not apply to separate estate coming into existence after the promise which it is sought to enforce." p. 462.

It is true that in that case, (*Pike* v. *Fitzgibbon*,) as stated

by Lord Justice James, it did not appear that the appellant had, since the date of her engagement, acquired any property settled to her separate use, and had not asked by the appeal to vary the judgment as regards subsequently acquired property. "It is therefore sufficient," said the Lord Justice, "to state, as a warning in any future case, that the only separate property which can be reached is the separate property, or the residue of the separate property, that a married woman had at the time of contracting the engagements which it is sought to enforce." But in *King* v. *Lucas*, 23 Ch. D. 712, 724, in the Court of Appeal, the question, whether the engagements of a married woman could be charged upon her subsequently acquired estate, was actually involved, and the decision in *Pike* v. *Fitzgibbon* was held conclusive. Said Cotton, L. J.: "With respect to her separate estate she is treated as a *feme sole*, but it has been decided that it must be separate estate which belonged to her at the time of the making of the contract, and is still remaining at the time when the contract is enforced and judgment obtained. In *Pike* v. *Fitzgibbon* it was held by a learned judge that all separate property could be charged which belonged to the married woman at the time when the contract was enforced, but that was held to be erroneous by the Court of Appeal, and the rule was laid down that the contract could be enforced only against the separate estate existing at the date of the contract. In the present case, therefore, there is no question as to any principle; the only question is whether certain property was the separate property of the lady when she made the contract."

In view of the considerations stated and the decisions mentioned, and numerous others which might be cited, we are of opinion that in Ohio the separate property of a married woman could not be charged in equity by contracts executed previous to its existence, for the obvious reason that in reference to such property the contracts could not be made. The after-acquired estate was not at the time available in a court of equity to meet the contracts, for at their date it had no existence.

The English Married Woman's Property Act of 1882 provided that "every contract entered into by a married woman

Syllabus.

shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." And in section 1, (sub. sec. 4,) it was declared that "every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of contract, but also all separate property which she may thereafter acquire." And yet in *Deakin* v. *Lakin*, 30 Ch. D. 169, 171, it was held that this act did not enable a married woman, who had no existing separate property, to bind by a contract separate property afterwards acquired, and Pearson J., said: "In my opinion, according to the true construction of the act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it. If she afterwards commits a breach of the contract, and proceedings are taken against her for the breach of contract, any separate property which she has acquired since the date of the contract and which she has at the time when judgment is recovered against her, will be liable for the breach of contract. But the act does not enable her, by means of a contract entered into at a time when she has no existing separate property, to bind any possible contingent separate property."

It follows that the decree must be affirmed, and it is so ordered.

FISHER *v.* SHROPSHIRE.

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

No. 54. Argued November 22, 1892. — Decided January 3, 1893.

The courts of the United States enforce grantor's and vendor's liens, if in harmony with the jurisprudence of the State in which the action is brought.

The doctrine of a vendor's lien, arising by implication, seems to have been generally recognized in the State of Iowa.

Statement of the Case.

If a suit to enforce a vendor's lien upon land in Iowa is pending at the time when the vendee conveys the land to a third party, no presumption can arise that that lien has been waived, as against the grantee of the vendee, whatever may be the general rule in that State as to the presumption of the waiver of a vendor's lien, in case of a conveyance of the tract by the vendee.

The filing of the petition in this case to assert and enforce a vendor's lien was notice of its assertion and prevented third parties from acquiring an interest in the subject-matter against and superior to the lien.

It does not appear to be necessary in Iowa to exhaust the remedy at law before proceeding to enforce a vendor's lien.

Under the circumstances of this case, as detailed in the opinion; *held*,

(1) That a vendor's lien existed on the property for the complainants' benefit which could be enforced by them for the balance due them on the purchase money;

(2) That George Lyle was not a necessary party to the proceedings to enforce it;

(3) That there was an error in the master's computation, which made it necessary to remand the case.

In 1876, Mrs. Loretta Shropshire owned in her own right five hundred and forty acres of land in Iowa, derived from the estate of a former husband, forty acres of which constituted her homestead. May 1, 1877, she borrowed from the German Savings Bank of Davenport, Iowa, $10,000 for three years, with interest at the rate of ten per cent per annum, payable semi-annually, and she and her husband, Alexander C. Shropshire, executed a mortgage on the five hundred and forty acres. Judgments were rendered against her for various sums, and her brother, Alexander Rhinehart, became her surety upon a bond for a stay of execution. The stay having expired, all the real estate of Mrs. Shropshire, except her homestead, was held for sale, subject to the prior mortgage of the bank.

The statute of Iowa provides that "in no action where the defendant has . . . stayed execution on the judgment, shall he be entitled to redeem." McClain's Ann. Code, § 4331. In February, 1878, Mrs. Shropshire applied for assistance to John Lyle, and it was arranged between her brothers, Alexander K. and Jehu Rhinehart, and herself, that Jehu Rhinehart should bid in the property at the sheriff's sale, and, if she

succeeded in raising the amount of the judgment, that he should deed the land to her or to whomsoever she might direct. Lyle thereupon advanced to Mrs. Shropshire $4250, and Jehu Rhinehart executed to him a quitclaim deed, dated March 28, 1878, for five hundred acres of the land purchased at the sheriff's sale, for the expressed consideration of forty-two hundred and fifty dollars, and Mrs. Shropshire and her husband executed to Lyle a quitclaim deed for the forty acres of land constituting the homestead tract, dated March 20, 1878, and expressing a consideration of one thousand dollars.

May 1, 1878, Mrs. Shropshire and her husband executed to Lyle a quitclaim deed of the entire tract, the consideration named being fourteen thousand two hundred and fifty dollars. May 1, 1879, Lyle purchased, and took an assignment of the German Savings Bank mortgage. Mr. and Mrs. Shropshire continued in the possession of all the lands deeded to Lyle until January 1, 1881, when the property was surrendered to him, and he and those claiming under him have continued in possession from thence hitherto.

The original bill in this case was filed by Mrs. Shropshire, February 26, 1883, in the District Court of Jasper County, Iowa, in which county the lands were situated, against John Lyle as sole defendant. On March 1, 1883, Lyle conveyed the lands to his grandson, George Lyle, and he took possession on the next day. The cause was then removed to the Circuit Court of the United States for the Southern District of Iowa, on September 14, 1883, on the application of John Lyle, upon the ground that he was a citizen of the State of Illinois, and the plaintiff, Mrs. Shropshire, was a citizen of Iowa. The bill was amended January 15, 1886, by making A. C. Shropshire, the husband, a party complainant, and on August 27 of that year, the bill was further amended. The bill as amended in substance alleged that the advancement by John Lyle of $4250 was a loan; that the quitclaim deeds of Rhinehart, Mrs. Shropshire and her husband were intended simply as mortgages to secure the amount of the loan; that upon that loan and the German Savings Bank mortgage various payments had been made; that John Lyle, being the holder of the quit-

claim deeds and the savings bank mortgage, bought the lands in question of Mrs. Shropshire at the price of $42.50 per acre, and took possession of the same about January 1, 1881; and that there was a large amount of the purchase price still due, which defendant had neglected and refused to pay. The bill prayed that an account be taken of the amount due complainants; that the defendant be decreed to pay the balance due upon the purchase price of the land; and that a vendor's lien be established therefor; and for general relief.

The defendant answered under oath, denying all the material averments of the bill, and insisting upon the deeds as absolute conveyances, and alleged that in 1882 he sold, and in 1883 conveyed, the lands in question to one George Lyle, and that the deed was delivered and recorded before this suit was brought. Defendant also averred that Mrs. Shropshire was largely indebted to him, and that upon a final settlement, January 27, 1880, a balance of $7900 had been found due to him from her; he further declared it to be wholly false and without color of truth that he purchased the farm from Mrs. Shropshire, January 1, 1881, at $42.50 per acre, or at any other sum or price; and that the alleged sale was "without any basis of fact whatever."

Defendant also moved the court to dismiss the bill for defect of parties, in that George Lyle had not been made a party defendant, which motion was overruled.

An interlocutory decree was entered November 11, 1886, determining that the deeds from the complainants to the defendant were mortgages, and that on or about January 1, 1881, defendant John Lyle had agreed to take the lands and pay therefor $21,600. A special master was appointed to take and state all the accounts between the parties, and in December, 1886, he filed his report, showing a balance due Mrs. Shropshire upon the purchase of the land in the sum of $7807.31, or in another view, of $2028.51, with interest from January 1, 1881. The accounts thus stated in the alternative were arrived at by charging Lyle with the $21,600 and crediting him with an alleged individual indebtedness of Mrs. Shropshire as well as the joint indebtedness of husband and wife, amount-

ing together to $18,687.13, and deducting $4894.44 payments, leaving $7807.31; but the master reported that if the court should be of opinion that certain sums, which he enumerated and described as "individual indebtedness" of A. C. Shropshire, amounting in the aggregate to $5778.80, should also be deducted, then the balance due was but $2028.51.

May 28, 1887, a final decree was entered confirming the master's report and decreeing the payment of the sum of $10,810.46 with interest at six per cent from that date, establishing a vendor's lien against all the lands above referred to, and directing a sale on default of payment. From this decree the pending appeal was prosecuted. The opinion of the Circuit Court is reported in 31 Fed. Rep. 694.

Mr. A. H. McVey, (with whom was *Mr. C. C. Cole* on the brief,) for appellants.

Early cases in Iowa under our statute recognize the status of the vendor's lien. The cases, however, were not satisfactory, and the legislature amended the law and greatly modified the same. Since the adoption of section 1940 of the Code, the doctrine has been greatly modified, and the courts have so held. In this state of the law we beg leave to submit that no vendor's lien should be allowed in this case because the amount claimed was an unliquidated claim. It is settled by the courts that a lien does not exist as a security for an unliquidated and uncertain demand. *Payne* v. *Avery*, 21 Michigan, 524; *Patterson* v. *Edwards*, 29 Mississippi, 67; *Sears* v. *Smith*, 2 Michigan, 243; *Vandoren* v. *Todd*, 2 Green, (3 N. J. Eq.) 397.

That the demand of plaintiff was an uncertain demand there can be no question, because it was not determined until after several days' trial what the demand of plaintiff was, and it involved an inquiry concerning a large number of accounts. Consequently the rule that we have stated above fully applies in this case.

There is no vendor's lien in this case because the deeds from the complainant to the defendant do not reserve any lien.

They are absolute in terms, and no lien whatever is even hinted at. Sec. 1940 of the code provides as follows: "No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee unless such lien is reserved by conveyance, mortgage or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee, is made after suit brought by the vendor, his executor or assigns to enforce such lien." Before this section was enacted the rule was that there was no lien as to an innocent purchaser, unless he purchased after suit. The statute changed this rule. Now, where there is an absolute deed from the vendor to the vendee, without reservation of a lien, no lien can attach. *Rotch* v. *Hussey*, 52 Iowa, 694; *Reed* v. *Chubb*, 9 Iowa, 178; *Hagan* v. *Birch*, 8 Iowa, 309; *Elliott* v. *Stevens*, 10 Iowa, 418. As George Lyle had no notice of a lien, as to him there is none. He is clearly within the protection of the statute.

A bill in equity to enforce the vendor's lien, must show that the complainant has exhausted his remedy at law against the personal estate, or must aver such facts as show that the complainant cannot have a full, complete and adequate remedy at law. And this, complainant has not done. *Eyler* v. *Crabbs*, 2 Maryland, 137; *S. C.* 56 Am. Dec. 711; *Stevens* v. *Hurt*, 17 Indiana, 141; *Ridgeway* v. *Toram*, 2 Maryland, Ch. 303; *Hall* v. *McCubbin*, 6 Gill & J. 107; *Scott* v. *Crawford*, 12 Indiana, 410; *Richardson* v. *Stillinger*, 12 Gill & J. 477.

There is a fatal defect of parties. George Lyle should have been made a party. *Shields* v. *Barrow*, 17 How. 129; *Mallow* v. *Hinde*, 12 Wheat. 193; *Wolfe* v. *Lewis*, 19 How. 280; *Lenox* v. *Reed*, 12 Kansas, 223; *Merritt* v. *Phenix*, 48 Alabama, 87; *Goodenow* v. *Ewer*, 16 California, 961; *S. C.* 76 Am. Dec. 540; *Boogs* v. *Hargrave*, 16 California, 560; *Noyes* v. *Hall*, 97 U. S. 34.

Mr. James G. Day, (with whom was *Mr. William Phillips* on the brief,) for appellees.

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

Opinion of the Court.

No complaint is made of the interlocutory decree adjudging the deeds to be mortgages, and that John Lyle, on or about January 1, 1881, agreed to pay for the lands the sum of $21,600.

The errors assigned question the action of the court in overruling exceptions to the master's report in respect of various particulars forming the basis of the amount found due, and to the finding that there was no settlement between the parties January 27, 1880; in approving the report as a whole; in finding that anything was due; in holding that complainants were entitled to a vendor's lien; in decreeing a sale; and in refusing to require George Lyle to be made a party to the action.

The deed of Rhinehart to John Lyle was dated March 28, 1878, and those of Mr. and Mrs. Shropshire, March 20, 1878, and May 1, 1878, respectively. The mortgage of the German Savings Bank was assigned to Lyle, May 2, 1879. The purchase by Lyle for $21,600 was made on or about January 1, 1881. This, therefore, is not the case of a conveyance presently made in consideration of the promise to pay the stipulated price, but of a sale of the equity of redemption, and the bill is in effect one to enforce payment of the difference between the total purchase price and the amount which it would have been necessary for the vendors to pay in order to redeem from the mortgages, if they had not sold.

The transaction took the shape of a purchase for a specified sum to be paid within a reasonable time, as no time for payment was definitely fixed, and presumably as soon as the indebtedness to the vendee could be ascertained and applied. The decree is for the balance of the purchase money alone, although under the circumstances an accounting was necessary in arriving at that balance.

The courts of the United States enforce grantor's and vendor's liens if in harmony with the jurisprudence of the State in which the action is brought, and the principle upon which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. *Chil-*

ton v. *Braiden's Administratrix*, 2 Black, 458; Story's Eq. Jur. § 1219.

Although there is some contrariety of expression, the doctrine of a vendor's lien arising by implication seems to have been generally recognized in the State of Iowa.

In *Porter* v. *City of Dubuque*, 20 Iowa, 440, 442, the Supreme Court said: "The right to a lien in favor of a vendor upon the real estate sold to a vendee is not based upon contract; nor is it properly an equitable mortgage; neither can it be regarded as a trust resulting to the vendor by reason of the vendee holding the estate with the purchase money unpaid. It is a simple equity raised and administered by courts of chancery. It is not measured by any fixed rules, nor does it depend upon any particular fact or facts. Each case rests upon its own peculiar circumstances, and the vendor's lien is given or denied according to its rightfulness and equity, in the judgment of the court, upon the facts developed in the particular case." It was stated, however, that whether the doctrine should obtain in Iowa might be regarded as still an open question, although it had been declared in *Pierson* v. *David*, 1 Iowa, 23, that the lien was firmly established. This case is cited with approbation in *Johnson* v. *McGrew*, 42 Iowa, 555, 560, but it is added that whatever might be the view of the question under the general doctrines of equity, there could be no doubt respecting it under the provisions of the statute, and reference is then made to sections 3671 and 3672 of the Iowa Revision of 1860, which were sections 2094 and 2095 of the Code of 1851. These sections provided that the vendor of real estate, when all or part of the purchase money remained unpaid after the day fixed for the payment, might file his petition asking the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property, and that the vendee should in such case, for the purpose of foreclosure, be treated as a mortgagor of the property purchased, and his rights be foreclosed in a similar manner. And it was held that the sections applied as well where a deed had been made as where it had not.

In *McDole* v. *Purdy*, 23 Iowa, 277, a vendor's lien was

allowed and enforced for a deficiency in value of lands taken in exchange, on account of the false representations of the other party; and to the same purport see *Brown* v. *Byam*, 65 Iowa, 374.

In *Huff* v. *Olmstead*, 67 Iowa, 598, the plaintiff conveyed to the defendant, in consideration of a partial cash payment and a promise by defendant to execute a mortgage back to secure the payment of the balance of the purchase money, unless he should sooner convey to plaintiff a good title to certain other lands in payment of the balance. Defendant did not convey the other lands, but he executed a mortgage and had it placed on record, differing in its terms, however, from the one agreed on. The plaintiff did not accept the mortgage, and it was held that he had a vendor's lien on the land conveyed to the defendant.

In *Devin* v. *Eagleson*, 79 Iowa, 269, where land had been purchased and partly paid for and had passed into the possession of the purchaser under an agreement that he would as soon as possible execute a mortgage thereon to the vendor to secure the residue of the purchase money, and the mortgage was prepared but not executed, it was decided that the vendor had a lien, according to the terms of the prepared mortgage, for the residue of the purchase price, and that the agreement to execute the mortgage was excepted from the statute of frauds by section 3665 of the code. In that case, the language above given from *Porter* v. *City of Dubuque*, as to the character of a vendor's lien, was quoted, though it was stated that plaintiff's lien was not such a lien, but one based upon a contract which a court of equity would enforce.

Sections 2094 and 2095 of the code of 1851 were carried forward into the code of 1873, but changed to cases where the vendor had "given a bond or other writing to convey," and section 1940 was enacted, which provided: "No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by

the vendor, his executor or assigns to enforce such lien." McClain's Ann. Code, (1888,) § 3111, p. 776.

Under this section it has been decided that, after the execution of a conveyance by the vendee, the lien ceases to exist, even though the grantee knew that the purchase money had not been paid. This is because the grantee has the right to assume that a vendor's lien as against him is waived; *Cutler* v. *Ammon*, 65 Iowa, 281, 283; *Prouty* v. *Clark*, 73 Iowa, 55; *Rotch* v. *Hussey*, 52 Iowa, 694; a presumption which cannot be indulged in where suit to enforce such lien is pending.

It is argued that the second branch of the section should be construed to mean that no vendor's lien shall be recognized or enforced after a conveyance, not only unless the lien is reserved, but also unless the conveyance is made after suit brought. It appears to us that this would disregard both language and obvious intention, and that where the conveyance is after suit brought the grantee takes subject to the maintenance of the lien.

Section 2628 of the code provides: "When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title, if the real estate affected be situated in the county where the petition is filed." 2 McClain's Ann. Code, § 3834, p. 1037.

The Circuit Court held that, as the petition in this case was filed February 26, 1883, in the county wherein the land was situated, and as the conveyance to George Lyle was made March 1, 1883, that conveyance did not affect the rights and equities of complainants; that it was the filing of the petition and not service of notice that created notice to third parties of the pendency of the action; and that even though there was a verbal contract in regard to the alleged purchase by George Lyle, made in December, 1882, yet that did not defeat a vendor's lien under section 1940 of the code. These conclusions we understand to be in accord with the decisions of the Supreme Court of Iowa. *Noyes* v. *Kramer*, 54 Iowa, 22; *Haverly* v. *Alcott*, 57 Iowa, 171.

It is said that this cannot be so, because the effect of *lis pendens* is merely to give constructive notice to any purchaser after the filing of the petition, and that if actual notice would not protect the vendor's lien, then, *a fortiori*, a constructive notice would not. But the notice given by filing the petition is notice of the assertion of the lien and not merely of the fact that the purchase money has not been paid. The reservation of the lien by recorded instrument or its assertion by suit for its enforcement alike avoid the objection that it is a secret lien and prevent the acquisition of superior equities by third parties.

Appellant further insists that no suit can be held to be "brought," under section 1940, although the petition be previously filed, until the delivery of the process notice to the sheriff, with intent that it be served immediately, and that this (or this and service) alone constitutes the commencement of the action, (Code §§ 2599, 2532;) that the first publication of notice of suit in this case was not until March 22, 1883, and the publication was not completed until April 12, 1883, (§§ 2619, 2620;) and that hence the conveyance to George Lyle had priority. Section 2532 relates simply to the bar of the statute of limitations, and section 2599 to the general rule in respect of the manner of commencing actions; but, as already said, it is the filing of the petition, and not the delivery or service of process, that creates notice to third parties of the pendency of the action, and prevents them from acquiring an interest in the subject-matter thereof as against the lien so asserted.

Undoubtedly, a lien of the character we are considering may be defeated if the grantor or vendor do any act manifesting an intention not to rely on the land for security; but this must be an act substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance. We find no sufficient evidence of a waiver here, and we do not regard the lapse of time between the surrender of possession in January, 1881, upon the purchase being made, and the filing of the bill in Feb-

ruary, 1883, as justifying a conclusion to that effect. The position is also taken that the remedy at law must first be exhausted or shown not to exist before a bill in equity can be filed to enforce such a lien. But our attention has been called to no decision by the courts of Iowa laying down that rule, and although we are aware that it obtains in some jurisdictions, and under some circumstances, it is inapplicable here, and need not be discussed as an independent proposition.

We are of opinion, in view of all the facts and circumstances disclosed by the record, and of the concession that the deeds were mortgages and that John Lyle agreed, on January 1, 1881, to pay the Shropshires $21,600 for the land, subject, of course, to the reduction of that amount by the indebtedness of the Shropshires to him, complainants were entitled to maintain a lien upon the property for the balance due them, which the conveyance to George Lyle could not in itself destroy.

In this connection it should be observed further that George Lyle had not paid the entire alleged consideration for the land before the bill was filed. The evidence of George Lyle and his grandfather is in many particulars directly in conflict. George testified that he made a verbal contract for the purchase of the farm, about December 1, 1882, for $22,000, which he paid in cash; that he traded for it six hundred and forty acres of land in Union County, Iowa, at $30 per acre, and $3800 in cash. This would be $23,000. He also said that he gave a note of $1600 for the stock on the place. John testified that George turned over to him on the purchase price sale notes to the amount of about $4000, and gave his note for $6000, and that a half section in Union County was part of the consideration, and was to be deeded as he might direct; that the agreed price for the three hundred and twenty acres was $8000. The deed for this land conveyed three hundred and twenty acres for the expressed consideration of $8000, and bore date September 20, 1883. Payments made after this bill was filed were made by George Lyle in his own wrong, so far as complainants' rights were concerned, and treating the doctrine that all the purchase money must be

paid before notice of a prior lien, in order that a subsequent purchaser may be protected, as so far qualified that protection may be accorded for the amount actually paid before notice, (*Kitteridge* v. *Chapman*, 36 Iowa, 348,) it is quite apparent that George Lyle was not deprived against his will of that protection by the relief awarded.

The motion to dismiss the suit for defect of parties was properly overruled. By equity rule 47 it is provided that in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction as to the parties before it, the court may in its discretion proceed in the cause without making such persons parties, and in such case the decree shall be without prejudice to the rights of the absent parties. When this bill was filed the conveyance to George Lyle had not been made. What rights may have accrued to him prior to that date are not affected by the decree. The suit was removed into the Circuit Court of the United States by the defendant John Lyle, and having done that, he then contended that the court had no jurisdiction, because George Lyle was an indispensable party defendant, and he was a citizen of the same State as complainants. We do not think this will do. If George Lyle, who was fully aware of the pendency of the suit and gave his testimony therein, desired to set up equities which he claimed arose from the payment of part of the purchase price of the property before the suit was brought, he might, as pointed out by the Circuit Court, have intervened in the cause, for the protection of his rights, without ousting the jurisdiction. This he did not do, and we are not prepared to hold the Circuit Court should be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it.

Undoubtedly, George Lyle would have been a proper party to the proceeding, but we do not regard the case as one in which his interest in the subject-matter and in the relief sought was so bound up with John Lyle that his legal presence as a

party was an absolute necessity without which the court could not proceed. *Traders' Bank* v. *Campbell*, 14 Wall. 87, 95.

This brings us to the examination of the matters complained of in regard to the master's report. The rule in relation to the findings and conclusions of a master, concurred in by the Circuit Court, is that they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Crawford* v. *Neal*, 144 U. S. 585, 596; *Furrer* v. *Ferris*, 145 U. S. 132.

We have carefully examined the evidence, and are satisfied that the findings of the master (including that rejecting the alleged settlement in January, 1880) ought not to be disturbed under a proper application of the rule just stated, except in one particular, in respect of which we hold a serious and important error has been committed. The report of the master states certain items, amounting to $5778.80, as the "individual indebtedness" of A. C. Shropshire to John Lyle on January 1, 1881, including interest. In the summary of the account stated between the parties, the report puts the balance due in the alternative. If the $5778.80 were rejected as a credit in Lyle's favor, the balance found was $7807.31 and if it were allowed, the balance was $2028.51. The Circuit Court entered a decree for the larger amount, with interest thereon. We cannot concur in this conclusion. Lyle's advances were made for the benefit of both the Shropshires. The husband had charge of the farm, and the stock that was procured from time to time and placed upon it through the business transacted with Lyle was for the benefit of both. Lyle gave credit to the farm and its operations, and not to A. C. Shropshire, as contradistinguished from his wife. Some of the credits allowed to the Shropshires in the $4894.44 appear to have been realized out of items thrown into the alleged individual indebtedness of A. C. Shropshire. The course of dealing between the parties, their correspondence, the whole evidence taken together, seem to us wholly inconsistent with the idea that Lyle was trusting A. C. Shropshire to the extent indicated, and looked to

him for repayment, or that Shropshire and his wife so understood. The indebtedness was joint and not several. There is, however, included in this amount of $5778.80 a note of $1000 of Augustus and Alexander C. Shropshire, with interest from December 1, 1877, to January 1, 1881, amounting to $327.83, which should be excluded as individual indebtedness of A. C. Shropshire and not properly chargeable in this account. All equitable considerations are open in such a suit, and we think that the equities require that John Lyle should receive an additional credit of $4450.97. The balance due upon the account stated, corrected in this particular, would be $3356.34.

The decree is reversed and the cause remanded, with a direction to enter a decree for the amount of $3356.34 with interest from January 1, 1881.

JENNINGS *v.* COAL RIDGE IMPROVEMENT AND COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 98. Argued December 21, 1892. — Decided January 3, 1893.

Bell's Gap Railroad Co. v. *Pennsylvania*, 134 U. S. 232, affirmed to the point that a provision in a state law for the assessment of a state tax upon the face value of bonds instead of upon their nominal value violates no provision of the Constitution of the United States.

THE brief of the plaintiff in error stated his case as follows:

"W. W. Jennings is the owner of $20,000 of the registered mortgage bonds of the Coal Ridge Improvement and Coal Company, a Pennsylvania corporation, upon which bonds by the terms thereof, there was due him on the first day of December, 1887, six months' interest amounting to $600. The total issue of bonds secured by the mortgage is $200,000. The company being financially embarrassed was not in funds

to pay the interest maturing December 1, 1887. It made an arrangement with most of its bondholders for an extension of two years. Jennings was asked to agree to this arrangement, but refused, threatening foreclosure unless the interest due him were fully and promptly paid. The company thereupon tendered him $570, being the interest due, less $30, which the treasurer of the company proposed to deduct for state tax alleged to be due, at the rate of three mills per annum upon the nominal or par value of the bond. Jennings agreed to submit to the deduction of a tax based upon the actual value of the bonds, which did not exceed 75 per centum of par, but the treasurer of the company insisting that he was compelled by law to assess them at par, regardless of actual value, refused to make any concession."

"The decision of the trial court being in favor of Jennings, the Coal Ridge Company carried the case to the Supreme Court of Pennsylvania, assigning as error the affirmance of the above and other points by the trial court. The Supreme Court of Pennsylvania reversed the ruling of the trial court and, allowing the tax, reduced the judgment to $570, to correct which action this writ of error was taken."

Mr. M. E. Olmsted for plaintiff in error. A brief was also filed in his behalf in *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, decided at October Term, 1889.

Mr. S. P. Wolverton for defendant in error.

THE CHIEF JUSTICE: The judgment is affirmed on the authority of *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232.

UNITED STATES *ex rel.* TRASK *v.* WANAMAKER.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1232. Argued and submitted December 20, 21, 1892. — Decided January 3, 1893.

A writ of error does not lie to a judgment of the Supreme Court of the District of Columbia, denying a writ of mandamus to the Postmaster General to compel him to readjust the salary of a postmaster when the additional amount to become due him would be less than $5000; and this is not affected by the fact that many similar claims for relief exist, in which the aggregate amount involved is over $100,000.

THE case is stated in the opinion.

Mr. Harvey Spalding for plaintiff in error.

Mr. Assistant Attorney General Maury filed a brief for defendant in error, but the court declined to hear him.

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

The relator applied for the writ of error herein to one of the justices of this court by a petition, setting up the alleged errors relied on, and stating that the questions of law involved "concern the interest of more than one thousand persons, ex-postmasters, who reside in many different States and Territories, and are in like case with herself and who have presented claims for like relief before the Postmaster-General, and that all of such claims amount to more than one hundred thousand dollars;" and praying that the writ be allowed "under section 706 of the Revised Statutes." The order was thereupon granted.

Upon an almost identical petition, a writ of error was allowed in *United States* v. *Vilas*, 124 U. S. 86, but no question as to the pecuniary amount involved in its relation to jurisdiction, or as to the repeal of section 706, was suggested by counsel or considered by the court.

Syllabus.

Section 706 of the Revised Statutes and section 847 of the Revised Statutes of the District of Columbia, which provided for the allowance of appeals and writs of error by the justices of this court under special circumstances, are no longer in force. Act of February 25, 1879, c. 99, 20 Stat. 320, c. 99; *Railroad Co.* v. *Grant*, 98 U. S. 398; *Dennison* v. *Alexander*, 103 U. S. 522; Act of March 3, 1885, 23 Stat. 443, c. 355; *Cross* v. *Burke*, 146 U. S. 82, 87.

The sum in dispute on this record, exclusive of costs, is more than one thousand and less than five thousand dollars. It is well settled that our appellate jurisdiction, when dependent upon the sum or value really in dispute between the parties, is to be tested without regard to the collateral effect of the judgment in another suit between the same or other parties. It is the direct effect of the judgment that can alone be considered. *New England Mortgage Co.* v. *Gay*, 145 U. S. 123; *Washington and Georgetown Railroad Co.* v. *District of Columbia*, 146 U. S. 227.

This case does not come within either of the sections of the act of March 3, 1885, regulating appeals and writs of error from the Supreme Court of the District of Columbia, and the writ of error must, therefore, be

Dismissed.

HOLMES *v.* GOLDSMITH.

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

No. 93. Argued December 14, 15, 1892. — Decided January 9, 1893.

The maker of a promissory note signed it entirely for the benefit of the payee, who was really the party for whose use it was made. The maker and the payee were citizens of the same State. A citizen of another State discounted the note, and paid full consideration for it to the payee, who endorsed it to him. The note not being paid at maturity, the endorsee, who had not parted with it, brought suit upon it against the maker in the Circuit Court of the United States. *Held*, that the court had jurisdiction, notwithstanding the provision in the act of August 13,

Statement of the Case.

1888, 25 Stat. 433, 434, c. 866, that such court shall not have cognizance of a suit to recover the contents of a promissory note in favor of an assignee or subsequent holder, unless such suit might have been prosecuted in such court if no assignment had been made.

When the genuineness of a paper sued on is put in issue, papers not otherwise competent may be introduced in Oregon for the purpose of enabling the jury to make a comparison of handwritings.

A witness who has sworn to the genuineness of a disputed signature to a note, may be further asked if he would act upon it if it came to him in an ordinary business transaction.

The admission of evidence of a collateral fact, which might have been rejected by the trial court without committing error, does not constitute error which will of itself justify reversal of the judgment below, if the case of the plaintiff in error was not injured by it.

THIS was an action brought by L. Goldsmith and Max Goldsmith, doing business as partners under the name of L. Goldsmith & Co., citizens of the State of New York, against M. B. Holmes, John Dillard and R. Phipps, citizens of the State of Oregon, as makers of a promissory note, in the words and figures following:

"$10,000. PORTLAND, OREGON, Aug. 9, 1886.

"Six months after date, without grace, we, or either of us, promise to pay to the order of W. F. Owens ten thousand dollars, for value received, with interest from date at the rate of ten per cent per annum until paid, principal and interest payable in U. S. gold coin, at the first National Bank in Portland, Oregon, and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

"M. B. HOLMES,
"JOHN DILLARD,
"R. PHIPPS."

On the day of its date, W. F. Owens endorsed the note, waived, in writing, demand, notice and protest, delivered the note, so endorsed, to the agent of the plaintiffs, and received the sum of ten thousand dollars.

Argument for Plaintiffs in Error.

The complaint alleged that the transaction was a loan by plaintiffs to W. F. Owens; that the defendants executed the note for the accommodation of Owens, to enable him to procure the loan thereon; and that Owens was, in fact, a maker of said note to the plaintiffs, and never himself had any cause of action thereon against the defendants.

To this complaint the defendants demurred, on the ground that it did not bring the case within the jurisdiction of the Circuit Court, and did not state facts sufficient to constitute a cause of action.

Upon argument this demurrer was overruled. 36 Fed. Rep. 484.

The defendants answered, denying the execution of the note, and knowledge of the other facts alleged in the complaint. At the trial a verdict was given in favor of the plaintiffs for the amount of the note, with interest from date, and on June 19, 1889, judgment was entered on the verdict, in favor of the plaintiffs and against the defendants, for the amount of the note with interest and with costs and disbursements.

A writ of error was duly sued out and allowed, and the case brought into this court for review.

Mr. John H. Mitchell for plaintiffs in error.

The first and second assignments of error relate to the jurisdiction of the court: whether the note sued upon comes within the prohibitory provision of the act of August 13, 1888, 25 Stat. 433, c. 866. That provision is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer . . . unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

It is scarcely necessary to state the familiar rule that all facts essential to confer jurisdiction on a Federal court must be made to appear affirmatively by material allegations, and

in determining the question of jurisdiction every immaterial averment in a complaint, if any, must be eliminated in its consideration. In other words, as stated by Chief Justice Ellsworth in this court so long ago as *Turner* v. *Bank of North America*, 4 Dall. 8, 11, "The fair presumption is (not as with regard to a court of general jurisdiction that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears." *Turner* v. *Bank of North America*, 4 Dall. 84. See also *Scott* v. *Sandford*, 19 How. 393; *Ex parte Smith*, 94 U. S. 455; *King Iron Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Hancock* v. *Holbrook*, 112 U. S. 229.

This suit is on a contract or agreement, if such terms may with propriety be applied to a promissory note, in writing, namely a negotiable promissory note, the defendants being the makers; W. F. Owens, the payee and endorser; and the plaintiffs endorsees or assignees. Whatever rights might attach to the defendants and the payee to show by parol proof under certain circumstances the relations they bore severally to each other, it is submitted that the plaintiffs are not at liberty for any purpose, much less for the purpose of making a case conferring jurisdiction on the Circuit Court, to either aver in their complaint or prove by parol a state of case different from that presented by the writings. In other words, this is a suit brought in a Circuit Court to recover the contents of a promissory note, by the assignee thereof, which suit, it is manifest, could not have been prosecuted in such court to recover the said contents if no assignment had been made.

While the act of 1888 is more restrictive in its provisions than the judiciary act of September 24, 1789, 1 Stat. 73, 79, c. 20, § 11, the two are substantially similar, so far as they relate to promissory notes other than those payable to bearer. Therefore the judicial construction placed by this court on the act of 1789 is applicable to the act of 1888. *Fisk* v. *Henarie*, 142 U. S. 459.

This clause of the judiciary act of 1789 was interpreted by this court — first by an opinion delivered by Chief Justice Marshall in the case of *Young* v. *Brian*, 6 Wheat. 146, and

the construction then placed upon it was subsequently cited and approved in the following cases: *Mullen* v. *Torrance*, 9 Wheat. 537; *Evans* v. *Gee*, 11 Pet. 80; *Phillips* v. *Preston*, 5 How. 278; *Bank of the United States* v. *Moss*, 6 How. 31; *Coffee* v. *Planters' Bank of Tennessee*, 13 How. 183; *Keary* v. *Farmers' and Mechanics' Bank of Memphis*, 16 Pet. 88. See also *Turner* v. *Bank of North America*, 4 Dall. 8; *Montalet* v. *Murray*, 4 Cranch, 46.

These authorities, and they do not seem to have been overruled, lay down very clearly and without qualification the two following propositions:

1. That under this clause of the judiciary act of 1789, an endorsee of a promissory note may bring a suit in the Circuit Court to recover the contents thereof against the immediate endorser and a citizen of a different State, whether a suit could be brought in such court by such endorser against the maker or not. That in such a case the endorsee does not claim through an assignment. It is a new contract entered into by the endorser and endorsee upon which the suit is brought; and

2. That in a suit brought in a Circuit Court to recover the contents of a promissory note by the endorsee against either the maker or a remote endorser, it is necessary, in order to confer jurisdiction, to aver in the complaint the fact that the payee or promisee named in such note is a citizen of a State other than that of which the maker of the note is a citizen.

The same doctrine is approved in *Morgan's Executor* v. *Gay*, 19 Wall. 81; *King Iron Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Newgass* v. *New Orleans*, 33 Fed. Rep. 196; *Ambler* v. *Eppinger*, 137 U. S. 480; *Metcalf* v. *Watertown*, 128 U. S. 586; *Denny* v. *Pironi*, 141 U. S. 121.

The case at bar, the court will bear in mind, is a suit brought by the endorsees, not against an endorser, either immediate or remote, but against the makers of the note, the payee or endorser not being joined as a party.

In view of the foregoing authorities, this clearly being a suit to recover the contents of a promissory note by the assignees thereof against the makers, and the complaint so far from

averring that the payee in such note was a citizen of a different State from that of the defendant, avers what in law amounts to an averment that he was a citizen of the same State, it is clear that the complaint does not state facts sufficient to confer jurisdiction, and defendants' demurrer should have been sustained.

Owens, the payee in the note, cannot be eliminated from the case by averment and evidence showing him to be a maker of the note and not an endorser. Parol evidence is not admissible to vary the contract of endorsement, or the agreement of the parties as fixed under the law by the fact of endorsement. The same rule which excludes parol evidence to vary the terms or obligations of a written agreement is applicable to the contract of endorsement in blank on a negotiable promissory note where the terms of contract are implied by law. *United States Bank* v. *Dunn*, 6 Pet. U. S. 51; *Specht* v. *Howard*, 16 Wall. 564; *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Martin* v. *Cole*, 104 U. S. 30.

While it is true that makers and endorsers of promissory notes are permitted under certain circumstances to show by parol the nature of the arrangement as between themselves, to the end that the liability as between themselves may be properly adjusted, either in a suit against some or all of them by the subsequent assignee, it is respectfully submitted that such assignee or last endorsee is not permitted for any purpose to show by parol testimony that the relation that the makers and endorsers of a note hold toward each other or toward him, is other or different from that shown by the writings; and especially must this be so when the sole purpose of such oral showing is to make a case cognizable in a Federal court which in the absence of such showing would have no standing in such a court.

The cases which hold that, as between the parties who execute or endorse the bill, the true relationship may be shown, do not trench in the slightest degree upon the rule that an endorsement cannot be varied by parol evidence at the instance of the endorsee. The right of such parties may be tried between themselves, but the right of the holders cannot

be thereby affected, either at the instance of the endorsee or that of the makers or endorsers. The rights of the former cannot be enlarged in any respect by any parol showing, nor can they be diminished, restricted, or in any manner modified by any showing that the makers or endorsers may be permitted to make for the purpose of establishing the rights respectively as between themselves, which it is conceded they may properly do. *Houston* v. *Bruner*, 39 Indiana, 376; *Stack* v. *Beach*, 74 Indiana, 571; *De Witt* v. *Berry*, 134 U. S. 306, 315.

The proposition of the plaintiff is, to vary the terms of the contract of endorsement. Although the paper is on its face a promissory note in due form, Owens being the payee and subsequent endorser, the plaintiffs, the assignees, propose to show by parol proof that this note when executed by the defendants and as alleged delivered to Owens the payee, gave no rights to the payee, and was to all intents and purposes vain, futile and of no force or effect whatever. This cannot be done. *Burnes* v. *Scott*, 117 U. S. 582.

Mr. L. B. Cox for defendants in error.

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

The complaint alleges the ownership in the plaintiffs of a chose in action; as to the character, a promissory note; as to amount, ten thousand dollars; as to parties, the plaintiffs, citizens of the State of New York, and the defendants, citizens of the State of Oregon; thus bringing the case within the jurisdiction of a Circuit Court of the United States, as defined in the Constitution.

By the demurrer to the complaint the defendants invoked the provision of the act of August 13, 1888, 25 Stat. 433, 434, c. 866, which is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such

instrument be payable to bearer, . . . unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

Upon the face of the complaint, the jurisdiction of the Circuit Court was duly made to appear, so far as the requisitions of the Constitution apply. But it has been held, in a series of cases beginning with *Turner* v. *Bank of North America*, 4 Dall. 8, that it is competent for Congress, in creating a Circuit Court and prescribing the extent of its jurisdiction, to withhold jurisdiction in the case of a particular controversy.

In pursuance of this view it has been frequently held by this court that, in an action in a Circuit Court of the United States, by an assignee of a chose in action, the record must affirmatively show, by apt allegations, that the assignor could have maintained the action. Thus, Mr. Justice Strong, in delivering the opinion of the court, in the case of *Morgan's Executor* v. *Gay*, 19 Wall. 81, 83, said:

"In *Turner* v. *Bank of North America*, 4 Dall. 8, it was distinctly ruled that when an action upon a promissory note is brought in a Federal court by an endorser against the maker, not only the parties to the suit, but also the citizenship of the payee and the endorser, must be averred in the record to be such as to give the court jurisdiction."

In *Sheldon* v. *Sill*, 8 How. 441, 448, it was contended, in favor of the jurisdiction of the Circuit Court, that the provision in the Judiciary Act of 1789, inhibiting a suit by an assignee of a chose in action, in cases where the assignor could not have sued, if no assignment had been made, was invalid, because it attempted to deprive the courts of the United States of the judicial power with which the Constitution had invested them; but this court, speaking through Mr. Justice Grier, said:

"The eleventh section of the Judiciary Act, which defines the jurisdiction of the Circuit Courts, restrains them from taking 'cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange.'

"The third article of the Constitution declares that 'the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may, from time to time, ordain and establish.' The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies 'controversies between citizens of different States.'

"It has been alleged that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the Constitution, and therefore void.

"It must be admitted that, if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But, as it has made no such distribution, one of two consequences must result — either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and, if not, the latter would seem to follow as a necessary consequence. And it would seem to follow also that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

"The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction cannot be in conflict with the Constitution, unless it confers powers not enumerated therein."

This doctrine has remained unchallenged, and has been assumed for law in numerous cases, which it is unnecessary to cite, and a similar provision has been inserted in the various

acts defining the jurisdiction of the Circuit Courts, including, as we have seen, the act of August 13, 1888, under which the present action was brought.

Nor are we asked by the defendant in error to disregard those cases, but he contends that, consistently with their doctrine and the provision of the Judiciary Act, he can maintain his action by alleging and proving that the nominal endorser was not really such, but that the note was made by the makers for his accommodation and as his sureties; that he was, in legal effect, a maker of the note; that he received the proceeds of the loan effected through the note, and had no right of action against the nominal makers of the note; and, hence, that he cannot be regarded as an assignor of a right of action against the makers, within the true meaning of the Judiciary Act.

The learned judge who tried the case below adopted the view that where it is necessary, to maintain the jurisdiction of the Circuit Court in an action on a promissory note, to show that the plaintiff, who appears to be an endorsee or assignee, is in point of fact the payee of the note, it may be done, and therefore overruled the demurrer.

Against this view of the case, the plaintiffs in error urge two propositions: first, that it was not competent for the holders of the note to show, by allegation and evidence, that the relation of the parties to the note, as makers and payees, was otherwise than as it appeared to be in the phraseology of the note itself; and, second, that, assuming the plaintiffs' evidence to truly present the facts of the case, yet the plaintiffs were not thereby relieved from the operation of that provision of the law which forbids assignees from maintaining actions to recover the contents of promissory notes. To sustain their first objection, plaintiffs in error cite numerous cases going to show that parol evidence is not admissible to vary the contract of endorsement, or the agreement of the parties as fixed under the law by the fact of endorsement.

Certainly, as against a third party who has become, in good faith, the holder of a promissory note, a defendant, whether a maker or an endorser, will not be permitted to escape from the legal import of his formal contract by an offer of parol evi-

dence. But, as between themselves, it has always been held that evidence showing the real relation of the parties is admissible, because it does not change or vary the contract, but shows what it really was. The defendants' engagement, as to amount and date and place of payment, and every other circumstance connected with it, is left by the evidence just what it appears to be on the face of the note.

In *Brooks* v. *Thacher*, 52 Vermont, 559, where there was a question as to whether a party to a note was principal or surety, Redfield, J., said: "But the real relation of the parties to a written instrument, whether as principal or sureties, may always be shown by parol evidence."

Harris v. *Brooks*, 21 Pick. 195, 197, was a suit wherein one of two makers of a note was permitted to show that, though a joint maker in form, he was, in fact, surety for the other maker, and had been released by an agreement of the holder that he would look to the principal; and Shaw, C. J., said: "The fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption."

If, then, it was satisfactorily shown that Owens, the nominal endorser, was really the party for whose use the note was made, and that the plaintiffs below were the first and only holders of the note for value, the next question is whether, upon that state of facts, they were prevented, by the terms of the Judiciary Act, from maintaining an action in the Circuit Court.

It is quite plain that the plaintiffs' action did not offend the spirit and purpose of this section of the act. The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal court.

Bank of Kentucky v. *Wister*, 2 Pet. 318, 326, was the case of a suit in a Circuit Court of the United States by a holder of a bank bill payable to individuals or bearer, concerning which individuals there was no averment of citizenship, and which, therefore, may have been payable, in the first instance, to parties not competent to sue in the courts of the United

States. But the court held, "this is a question which has been considered and disposed of in our previous decisions. This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."

In *Bushnell* v. *Kennedy*, 9 Wall. 387, 391, Chief Justice Chase, in delivering the opinion of the court, said: "It may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee; though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a *chose in action* may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors."

We do not overlook the fact that, since the foregoing cases were determined, Congress has, in the more recent Judiciary acts, still further restricted the jurisdiction of the Circuit Courts by including in the prohibitory clause the case of promissory notes payable to bearer.

But the reasoning remains applicable in so far as they hold that the language of the statute is to be interpreted by the purpose to be effected and the mischief to be prevented.

We think that the jurisdiction of the Circuit Court, in the case before us, was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his endorsement, assign or transfer any right of action held by him against the accommodation makers.

The jurisdiction of the court having been established, and

an issue having been made as to the execution of the note, several questions arose during the progress of the trial, which are brought up for our consideration by bills of exceptions.

The second, third, fourth and fifth assignments allege error in the action of the court in permitting one H. Abraham to testify as to what were the relations between the defendants and W. F. Owens, and as to what Owens wanted to do with the money he borrowed on the note in suit.

It was not claimed by the plaintiffs that the evidence objected to was needed to create an obligation on the part of the defendants to pay the note. That obligation arose directly from the terms of the note, and, if the execution of the note had not been denied, the testimony of Abraham would not have been necessary.

But in view of the nature of the controversy before the jury, putting in issue the execution of the note sued on, we agree with the trial court in regarding the evidence as admissible. While each one of the facts so elicited was, when regarded singly, of small importance, yet, taken together, they were worthy of consideration, and we do not perceive that any rule of evidence was violated in submitting them to the jury.

It is argued that there was error in admitting statements by the witness Abraham, as to the contents of the letters that had passed between him and Owens, without producing the letters, or accounting for their absence. But the record does not disclose that any specific objection was made to the evidence for that reason, though objection was made generally to the admission of any conversation between the witness and Owens, which was not had in the presence of the defendants, as incompetent and irrelevant. But the force of this is broken by the observation that what passed between the witness and Owens, whether in conversation or in letters, was of matters that happened prior to the making of the note, and was admitted only to show the relations of the parties and the circumstances in which the note was made.

In view of the fact, disclosed by the record, of the death of Owens before the trial, and the consequent necessity of resorting to circumstantial evidence, we think the rules on this sub-

ject were not unduly relaxed in permitting a full disclosure of the *res gestæ*.

There are several additional assignments of error, which involve the action of the court in admitting evidence bearing on the question of the execution of the note in suit.

So far as such assignments present the vexed subject of the introduction into a cause of papers, not otherwise competent, for the purpose of enabling the jury to make a comparison of handwriting, we are relieved from discussion by the existence of an Oregon statute, which provides that "evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." 1 Hill's Ann. Laws of Oregon, § 765. We regard this statute as constituting the law of the case, and as warranting the action of the court in the particulars complained of.

The seventh assignment avers error in permitting several witnesses to testify as to whether they would act upon the signatures of the defendants attached to the note sued on if they came to them in an ordinary business transaction. Such a question standing alone might be objectionable, but the record discloses that each of these witnesses had testified to his acquaintance with the handwriting of one or more of the defendants, and to his belief of the genuineness of the signatures of the parties with whose handwriting he was acquainted; and, as a means of showing the strength and value of the witnesses' opinions, the question put was allowable.

We have more difficulty in disposing of the errors assigned in the ninth, tenth, eleventh and twelfth specifications. Two letters of Owens, the nominal payee of the note, who was not a party to the suit, were admitted in evidence, and Edward Failing, an expert witness, was asked to state whether, judging from the letters produced, he believed that Owens could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers. Certain stub certificates were admitted in evidence, and George W. Jones testified that his name thereon written was his sig-

nature, and thereupon the expert was asked whether or not, in his opinion, the name of Jones so written would be an easier name to counterfeit than that of M. B. Holmes. That the ordinary handwriting of Owens, as shown in his letters, was such as to convince an expert that he was not able to successfully imitate the signatures of other persons, may have been entitled to some weight. That Owens could, in the opinion of the expert, have as readily counterfeited the handwriting of Jones as that of the defendant Holmes, seems to be fanciful and entitled to little or no weight. If these offers had been rejected by the court, such rejection could not have been successfully assigned as error. Still we cannot perceive that the case of the defendants was injured by the admission of this trifling evidence. As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." *Stevenson* v. *Stewart*, 11 Penn. St. 307.

The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.

These observations seem to sufficiently dispose of the errors assigned, and the judgment of the court below is accordingly

Affirmed.

NOBLE v. UNION RIVER LOGGING RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1157. Argued December 20, 1892. — Decided January 9, 1893.

A decision of the Secretary of the Interior, in exercise of the powers conferred upon him by the act of March 3, 1875, c. 152, 18 Stat. 482, that a designated railroad company is entitled to a right of way over public land, cannot be revoked by his successor in office.

Whether a railroad company applying for such a grant is a company which the statute authorizes to receive a grant of a right of way is a quasi judicial question, which, when once determined by the Secretary, is finally determined so far as the executive is concerned.

THIS was a bill in equity by the Union River Logging Railroad Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an act of Congress.

The bill averred in substance that the Union River Logging Railroad Company was organized March 20, 1883, under chapter 185 of the Territorial Code of Washington authorizing the formation of "corporations for . . . the purpose of building, equipping and running railroads," etc. The articles declared the business and objects of the corporation to be "the building, equipping, running, maintaining and operating of a railroad for the transportation of saw-logs, piles and other timber, and wood and lumber, and to charge and receive compensation and tolls therefor . . . from tide water in Lynch's Cove, at the head of Hood's Canal, in said Mason County, and running thence in a general northeasterly direction, by the most practicable route, a distance of about ten miles, more or less," etc. The capital stock of the company being subscribed, the company proceeded by degrees to con-

struct and equip a road extending from tide water in Lynch's Cove, about four miles along the line above mentioned, to transport saw-logs and other lumber and timber. On August 17, 1888, amended articles of incorporation were filed, "to construct and equip a railroad and telegraph line" over a much longer route, with branches, and "to maintain and operate said railroad and branches, and carry freight and passengers thereon and receive tolls therefor." Also "to engage and carry on a general logging business and provide for the cutting, hauling, transportation, buying, owning, acquiring and selling of all kinds of logs, piles, poles, lumber and timber."

In the spring of 1889, plaintiff proceeded to extend its line of road for three miles beyond the point to which it had previously extended it. It located at intervals a better line of road; made and ballasted a new roadbed of standard gauge; and substituted steel rails and another locomotive in place of those rails and equipments which had been sufficient for its limited purposes, as specified in the original articles. In January, 1889, the company, desiring to avail itself of an act of Congress of March 3, 1875, (18 Stat. 482,) granting to railroads a right of way through the public lands of the United States, filed with the register of the land office at Seattle a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys. These papers were transmitted to the Commissioner of the Land Office, and by him to the Secretary of the Interior, by whom they were approved in writing, and ordered to be filed. They were accordingly filed at once and the plaintiff notified thereof.

On June 13, 1890, a copy of an order by the appellant, successor in office to the Secretary of Interior by whom the maps were approved, was served upon the plaintiff, requiring it to show cause why said approval should not be revoked and annulled.

This was followed by an order of the acting Secretary of

the Interior, annulling and cancelling such maps, and directing the Commissioner of the Land Office to carry out the order.

The answer admitted all the allegations of fact in the bill, and averred that it became known to the defendants that the plaintiff was not engaged in the business of a common carrier of passengers and freight at the time of its application, but in the transportation of logs for the private use and benefit of the several persons composing the said company, and that, being advised that a railroad company carrying on a merely private business was not such a railroad company as was contemplated by the act of Congress, deemed it their duty to vacate and annul the action of Mr. Vilas, then Secretary of the Interior, approving plaintiff's maps of definite location, and to that end caused the notice complained of in the bill to be served. They further claimed it to be their duty to revoke and annul the action of the former Secretary of the Interior as having been made improvidently and on false suggestions, and without authority under the statute.

Upon a hearing upon the bill, answer and accompanying exhibits, the court ordered a decree for the plaintiff, and an injunction as prayed for in the bill. Defendants appealed to this court.

Mr. Assistant Attorney General Maury for appellants.

From the pleadings it is to be taken as true that complainant was not at the time of its application to be allowed to enjoy the privileges extended by the act of March 3, 1875, engaged in the business of a common carrier of passengers and freight, but was engaged at that time in the transportation of logs for the private use and benefit of the persons composing said complainant company, and that the action of the Secretary of the Interior on complainant's application was induced by complainant's false suggestions.

The bill does not contain a single allegation that complainant was exercising the public duty of a common carrier of passengers and freight at the time the order of January 29,

1889, was entered by the Secretary of the Interior. Nor is it denied that the railroad companies contemplated by the act of March 3, 1875, are such as exercise the public office of carriers for the general public. The foundation on which the whole case of complainant rests is the contention that the right of complainant to enjoy the privileges of the act of March 3, 1875, is *res judicata* by the said order of January 29, 1889, and that this order cannot be assailed collaterally by the defendants, and can only be impeached by a direct proceeding instituted for that purpose in the name of the United States.

It results, therefore, that the bill presents the bald case, that, although it has come to the knowledge of Secretary Noble that complainant was not exercising the office of a common carrier at the time the order of January 29, 1889, was entered, and so was not entitled to the benefits of the act of March 3, 1875, the Secretary cannot remove from the maps of the Land Department the line of definite location which was put there by means of complainant's false suggestions. Why, then, it may be asked, should the government be driven to the circuitous proceeding of a suit in chancery in order to get rid of this intruder on its domain? This question seems to be answered satisfactorily by the Attorney General in an opinion on this case, 19 Opin. Attorneys Gen'l, 551, 552, where he says: "It follows, then, that the application to the Department was for a purpose not authorized by law, and that the action taken in granting the application was void, it being perfectly clear that no disposition can be made of any part of the public domain without the authority of Congress. . . . To hold that the Department cannot in this case cancel its approval and erase the line of the railroad from the public plats, but that the United States must go into a court of equity for that purpose, would seem to urge the conclusiveness of executive action to an unreasonable extent. The principle of *res judicata*, while to some extent applicable to the action of executive officers, has never been held to prevent an officer from reopening a matter in which he acted on a mistake of fact, or where new and additional evidence, which would justify a

new trial or a rehearing, has been adduced. . . . In the case before me it is entirely practicable for the Department to remove the line of railroad from the public plats, both here and in the local land office, and thus, effectually, cancel the approval improvidently given. It is not necessary, in order to undo what has been done, to compel the company to surrender any paper for cancellation, because it is the public plats alone that need to be changed, and these are under the entire control of the Department of the Interior. . . . It would seem to be a useless circuity to have recourse to judicial proceedings to correct executive action in a case like the one in hand, where there is a concurrence of mistake of fact and want of power in the Department, and where the void proceeding is an obstacle in the way of the Land Office."

I do not deny that the acts of the Land Department, when within its powers, may be controlling; and, when not controlling, may be protected against collateral attack. Yet there are vital conditions to the jurisdiction of that Department, the absence of which may always be shown collaterally. *Smelting Company* v. *Kemp*, 104 U. S. 636; *Wilcox* v. *Jackson*, 13 Pet. 498; *Seymour* v. *Osborne*, 11 Wall. 516.

Where the law creates a tribunal of special, stinted jurisdiction, dependent on the existence of a certain fact or certain facts, and is silent as to whether the decision of the tribunal shall be conclusive as to the existence of such fact or facts, it must be determined, from the whole law, what was the legislative intent in this particular.

Why should the Secretary of the Interior, with his limited power under the act, be held to be able to make jurisdiction for himself by his own finding, when he possesses no such power in administering other land laws? Is it not more agreeable to reason to hold that Congress, in making this law, must have had in view the restrictive interpretation which this court had placed on previous laws investing the Secretary of the Interior with judicial authority over the public lands, and must have intended to adopt that interpretation?

There is a class of courts whose jurisdiction turns on the existence of some fact or facts, and whose judgments may be

assailed collaterally by proving that in a given case, such fact or facts did not exist, whether the court expressly found the contrary or not, and it is not perceived that there is any good reason why the Secretary of the Interior should not likewise be forbidden to give himself jurisdiction by his own findings of fact. See *Griffith* v. *Frazier*, 8 Cranch, 9; *Kane* v. *Paul*, 14 Pet. 33; *Rose* v. *Himely*, 4 Cranch, 241; *Thompson* v. *Whitman*, 18 Wall. 457; *Bowman* v. *Russ*, 6 Cowen, 234; *Terry* v. *Huntington*, Hardres, 480; *Wise* v. *Withers*, 3 Cranch, 331; *Mills* v. *Martin*, 19 Johns. 7; *Rathbun* v. *Martin*, 20 Johns. 343; *Sears* v. *Terry*, 26 Connecticut, 273; *Britain* v. *Kinnaird*, 1 Brod. & Bing. 432; *Wanzer* v. *Howland*, 10 Wisconsin, 8; *Broadhead* v. *McConnell*, 3 Barb. 176; *Damp* v. *Town of Dane*, 29 Wisconsin, 419; *Mulligan* v. *Smith*, 59 California, 206; *Peters* v. *Peters*, 8 Cush. 529; *Jenks* v. *Howland*, 3 Gray, 536; *Williamson* v. *Berry*, 8 How. 495; *Allen* v. *Dundas*, 3 T. R. 125.

To make a thing adjudged there must be a contentious proceeding with plaintiff and defendant. But the application of the complainant for privileges under the act of March 3, 1875, was essentially *ex parte*. His case is on all fours with the case of *United States* v. *Minor*, 114 U. S. 233, where it was held that the United States are not bound, in cases like the present by the action of land officers in granting public lands.

Schurz's Case, 102 U. S. 378, was a case of jurisdiction, exhausted by the sheer force of its exercise, and when the Secretary attempted to recall his act he was already *functus officio*. But in the case at bar the Department never had jurisdiction. What Secretary Vilas did was a nullity. What Secretary Noble proposes to do is to deal with it as a nullity.

Mr. Frederic D. McKenney, (with whom was *Mr. S. F. Phillips* on the brief,) for appellee.

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

This case involves not only the power of this court to enjoin the Head of a Department, but the power of a Secretary of

the Interior to annul the action of his predecessor, when such action operates to give effect to a grant of public lands to a railroad corporation.

1. With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of *Marbury* v. *Madison*, 1 Cranch, 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the courts. The principle of this case was applied in *Kendall* v. *Stokes*, 12 Pet. 524, and the action of the Circuit Court sustained in a proceeding where it had commanded the Postmaster General to credit the relator with a certain sum awarded to him by the Solicitor of the Treasury under an act of Congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. In *Decatur* v. *Paulding*, 14 Pet. 497, a *mandamus* was refused upon the same principle, to compel the Secretary of the Navy to allow to the widow of Commodore Decatur a certain pension and arrearages. Indeed, the reports of this court abound with authorities to the same effect. *Kendall* v. *Stokes*, 3 How. 87; *Brashear* v. *Mason*, 6 How. 92; *Reeside* v. *Walker*, 11 How. 272; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522; *United States* v. *Seaman*, 17 How. 224, 231; *United States* v. *Guthrie*, 17 How. 284; *United States* v. *The Commissioner*, 5 Wall. 563; *Gaines* v. *Thompson*, 7 Wall. 347; *The Secretary* v. *McGarrahan*, 9 Wall. 298; *United States* v. *Schurz*, 102 U. S. 378; *Butterworth* v. *Hoe*, 112 U. S. 50; *United States* v. *Black*, 128 U. S. 40. In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.

We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the

scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541: "But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other."

2. At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road. *Frasher* v. *O'Connor*, 115 U. S. 102.

The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the Secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defence to this suit.

Opinion of the Court.

It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common law action, *D'Arcy* v. *Ketchum*, 11 How. 165; *Webster* v. *Reid*, 11 How. 437; *Harris* v. *Hardeman*, 14 How. 334; *Pennoyer* v. *Neff*, 95 U. S. 714; *Borden* v. *Fitch*, 15 Johns. 121; the seizure and possession of the *res* within the bailiwick in a proceeding *in rem*, *Rose* v. *Himely*, 4 Cranch, 241; *Thompson* v. *Whitman*, 18 Wall. 457; a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged, *Galpin* v. *Page*, 18 Wall. 350; *Guaranty Trust Co.* v. *Green Cove Railroad*, 139 U. S. 137. So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, *Griffith* v. *Frazier*, 8 Cranch, 9; or condemns as lawful prize a vessel that was never captured, *Rose* v. *Himely*, 4 Cranch, 241, 269; or a court-martial proceeds and sentences a person not in the military or naval service, *Wise* v. *Withers*, 3 Cranch, 331; or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal court, which, when found by such court, cannot be questioned collaterally; *Des*

Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S. 552; *In re Sawyer*, 124 U. S. 200, 220; the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy; *Michaels* v. *Post*, 21 Wall. 398; *Betts* v. *Bagley*, 12 Pick. 572; the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate; *Comstock* v. *Crawford*, 3 Wall. 396; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Florentine* v. *Barton*, 2 Wall. 210; the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors; *Thompson* v. *Tolmie*, 2 Pet. 157; and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are, *Hudson* v. *Guestier*, 6 Cranch, 281; *Ex parte Watkins*, 3 Pet. 193; *United States* v. *Arredondo*, 6 Pet. 691, 709; *Dyckman* v. *New York City*, 5 N. Y. 434; *Jackson* v. *Crawfords*, 12 Wend. 533; *Jackson* v. *Robinson*, 4 Wend. 434; *Fisher* v. *Bassett*, 9 Leigh, 119, 131; *Wright* v. *Douglass*, 10 Barb. 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon, by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. *Simms* v. *Slacum*, 3 Cranch, 300.

This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held that if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. *Polk's Lessee* v. *Wen-*

dall, 9 Cranch, 87; *Patterson* v. *Winn*, 11 Wheat. 380; *Jackson* v. *Lawton*, 10 Johns. 23; *Minter* v. *Crommelin*, 18 How. 87; *Reichart* v. *Felps*, 6 Wall. 160; *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570.

Upon the other hand, if the patent be for lands which the Land Department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640: "In that respect they" (the officers of the Land Department) "exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment." In *French* v. *Fyan*, 93 U. S. 169, it was held that the action of the Secretary of the Interior identifying swamp lands, making lists thereof and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Quinby* v. *Conlan*, 104 U. S. 420; *Vance* v. *Burbank*, 101 U. S. 514; *Hoofnagle* v. *Anderson*, 7 Wheat. 212; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67. In *Moore* v. *Robbins*, 96 U. S. 530, 533, it was said directly that it is a part of the daily business of officers of the Land Department to decide when a party has by purchase, by preëmption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary of the Interior, if taken in time; "but if no such appeal be taken, and the patent issued under the

seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . The functions of that department necessarily cease when the title has passed from the government."

We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is "that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory," etc. The uniform rule of this court has been that such an act was a grant *in præsenti* of lands to be thereafter identified. *Railway Company* v. *Alling*, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *Minor*, 114 U. S. 233. A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice Grier, in *United States* v. *Stone*, 2 Wall. 525, 535: "One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court." *Moore* v. *Robbins*, 96 U. S. 530. The case of *United States* v. *Schurz*, 102 U. S. 378, 402, is full authority for the position assumed by the plaintiff in the case at bar.

Syllabus.

In this case the relator had been adjudged to be entitled to 160 acres of the public lands; the patent had been regularly signed, sealed, countersigned and recorded; and it was held that a *mandamus* to the Secretary of the Interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice Miller: "Whenever this takes place" (that is, when a patent is duly executed) "the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away."

It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the court below must, therefore, be *Affirmed.*

MILES *v.* CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

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

No. 92. Submitted December 14, 1892. — Decided January 9, 1893.

A policy of life insurance was issued, insuring the life of a husband for the benefit of his wife, for $5000, for life, a premium named to be paid annually, and, if not paid, the policy to cease. It was made at the instance of the husband, he paid with his own money all the premiums which were paid, being nine, the policy remained always in his possession, and the wife had nothing to do with it. Before the tenth premium became due, the husband advised the company that he could not pay that premium, and wished to take out a paid-up policy, under a provision therefor. The company advised him not to do so but to have so much of the $5000 released as would enable him, with the sum allowed for such release, to pay what would be due as a premium on the remainder. He agreed to do so, and presented to the company what purported to be a receipt signed by his wife for $82.39, as a consideration for the release of $700 of the $5000, the $82.39 being applied towards the premium on the $4300 policy. Thereupon the husband received a policy for $4300 insurance on his life for his wife's benefit, bearing the same number as the $5000 policy, with a less annual premium. A year later he advised the company that he

could not pay the premium on the $4300 policy, and took a paid-up policy for $1195 on his life for the benefit of his wife, having first given the company what purported to be a receipt signed by his wife for $583.24 as a consideration for all claims on account of "policy No." so and so, released, the $583.24 being applied in payment of a premium on a participating paid-up policy for $1195. The wife's name on both receipts was written by the husband without her assent. In a suit on the $5000 policy brought by the wife, the company set up the non-payment of any premium on it after the date of the $4300 policy. *Held*, that that was a good defence, and that there was nothing to justify the failure to pay the premiums.

The cases of *Manhattan Life Ins. Co.* v. *Smith*, 44 Ohio St. 156; *Whitehead* v. *New York Life Ins. Co.*, 102 N. Y. 143; and *Garner* v. *Germania Life Ins. Co.*, 110 N. Y. 266; distinguished.

This was an action to recover on a policy of life insurance. Trial, verdict for the defendant, and judgment on the verdict; to review which this writ of error was sued out. The case is stated in the opinion.

Mr. Richard P. White and *Mr. James Aylward Develin* for plaintiff in error.

Mr. Hunn Hanson for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought by Sarah G. Miles against the Connecticut Mutual Life Insurance Company, in the Court of Common Pleas No. 3, for the county of Philadelphia, State of Pennsylvania, and removed by the defendant, a Connecticut corporation, into the Circuit Court of the United States for the Eastern District of Pennsylvania.

The suit was brought to recover $5000, with interest, on a policy of insurance issued by the defendant on June 20, 1877. The policy set forth that, in consideration of the representations and declarations made to the corporation in the application for the insurance, and the annual premium of $140.20, to be paid to it on or before June 20 in every year, it insured the life of John S. Miles (the insured) for the term of his natural life, in the sum of $5000, for the sole use and benefit of Sarah

G. Miles, (the assured,) the wife of the insured. It was provided in the policy that if any premium thereon, subsequent to the first, was not paid when due, "then this policy shall cease and determine."

All of the premiums paid on the policy were paid by John S. Miles, with his own money. The policy was made at his instance. It remained continuously in his possession, and during the entire time it was in force his wife had nothing to do with it.

The sixth condition in the policy, being one of the express conditions and agreements upon which it was issued and accepted, was as follows: "6th. That if, after the payment of two or more annual premiums upon this policy, the same shall cease and determine by default in the payment of any subsequent premium when due, then this company will grant a paid-up policy, payable as above, for such amount as the then present value of this policy will purchase, as a single premium: *Provided*, That this policy shall be transmitted to and received by this company, and application made for such paid-up policy, during the lifetime of the said insured, and within one year after default in the payment of premium hereon shall first be made."

In June, 1886, John S. Miles called at the office of the company in Philadelphia, where all the preceding premiums had been paid, and said that he was unable to pay the premium then coming due, and on that account desired to give up the policy for $5000 and take a paid-up policy under the sixth condition above set forth. He was told by the company the disadvantages of doing so, and was advised by it that a plan more beneficial would be to have so much of the $5000 released as would enable him, with the sum allowed by the company for such release, to pay what would be due as a premium on the remaining sum under the policy. The clerk of the company calculated the amount, and finding that if $700 were released an allowance would be made by the company of $82.39, which was very nearly what would then be due as premium on the $4300 remaining, Mr. Miles decided to adopt that course. He procured from the company the

requisite papers for the signature of his wife, and afterwards delivered such papers to the company with her name purporting to be signed to a receipt, dated June 20, 1886, for $82.39, "as a full consideration and satisfaction for all claims and demands" on account of $700 of the amount of the $5000 policy, "released, quitclaimed, surrendered and discharged to said company," the $82.39 "having been applied as follows: In part payment of 1886 premium on the remaining $4300 of said policy." Thereupon, Mr. Miles received from the company its policy for $4300 upon his life for his wife's benefit. That policy was executed and dated June 28, 1886, and stipulated for an annual premium of $120.57. It bore the same number as the $5000 policy.

In June, 1887, Mr. Miles again visited the office of the company at Philadelphia, and said that he could not pay the premium on the $4300 policy, and insisted upon taking out a paid-up policy, though again advised by the defendant against doing so. He was given the requisite receipt to procure the signature of his wife to it, and returned it to the company with what purported to be her signature. This receipt was dated June 20, 1887, and set forth that she had received from the company $583.24 "as a full consideration and satisfaction for all claims and demands" on account of policy No. 145,756, "released, quitclaimed, surrendered and discharged to said company, said amount having been applied as follows: In payment of a premium on a participating paid-up policy" for $1195. Mr. Miles received from the company on July 9, 1887, a policy of that date for $1195, on his life, payable to his wife.

Mrs. Miles testified that her name on both receipts had been written by her husband without her assent; but it also appeared that her name to the application for the $5000 policy was written by him, and that in his dealings with two other insurance companies he had signed her name.

Mr. Miles died in February, 1888, of pulmonary consumption, and his wife testified that a year before his death he was in very poor health. He was able, however, to attend to his business affairs within three months of his death, and there

was no evidence that in June, 1886, he was otherwise than in good health.

In the affidavit of defence put in by the defendant in the state court, there were set forth the issuing of the policy for $4300 and of the policy for $1195, the discharge of the company from all liability on the policies for $5000 and $4300, and the fact that no premium had been paid on the $5000 policy after June 28, 1886. The defendant pleaded *non assumpsit.*

The case was tried before Judge Butler and a jury, in April, 1889. At the trial, the plaintiff asked the court to charge the jury: "1. That if the company united with the agent and accepted the surrender of the policy in suit from him when he had no authority to make such surrender, and did this without notice to or knowledge of the plaintiff, they cannot complain of the non-payment of premium after such surrender and acceptance." To that point, the court answered: "The futile attempt to surrender the policy — and the transaction referred to was nothing more in legal contemplation — had no effect whatever on the rights or obligations of either party. The defendants were not required to notify the plaintiff of the transaction, but they were fully justified in believing, by the conduct and representations of her agent and husband in presenting the paper, which purported to be signed by her, that she knew and authorized the transaction. There is nothing in what is stated in the point sufficient to excuse her failure to pay the premium when it became due."

The plaintiff also asked the court to charge the jury: "2. If the surrender was made without authority, it was a wrongful act on the part of both the company and the agent, and the non-payment of the premium is not a bar to the recovery." The court disaffirmed that point.

The plaintiff also asked the court to charge the jury: "3. The jury are the sole judges of the credibility of the statement of the witnesses as to what took place at the time of the surrender." To that point, the court answered: "It is true, as a general proposition, that the jury are the judges of the credibility of the witnesses, but the jury are not at liberty to disbelieve the witnesses without finding something in their

conduct or statements, or in other evidence in the cause, tending to discredit them, and such finding, under the circumstances, would be unjustifiable. Furthermore, if these witnesses were disbelieved and disregarded, the result would not be varied. No conclusion that would justify the non-payment of the premiums would be permissible under the evidence, even in the absence of their testimony."

The plaintiff also asked the court to charge the jury: "4. If the company accepted the surrender without taking due steps to ascertain whether Mrs. Miles had authorized it, this was such negligence as amounts to evidence of collusion." The court disaffirmed that point.

The court, in respect to the defence that the $5000 policy was annulled by surrender, charged the jury that that defence was not sustained; that the policy was not annulled; and that the transaction between the plaintiff's husband, who was her agent, and the defendant, respecting it, was not authorized by the plaintiff, and, therefore, had no effect on her rights or obligations under the contract.

As to the defence that the premiums due on the $5000 policy were not paid, the court charged the jury that that defence was sustained and was fatal to the plaintiff's claim; and the court further charged the jury as follows: "The premiums, the payment of which was necessary to keep the policy alive, were not paid, and nothing has been shown, in the judgment of the court, which excuses or tends to excuse the failure to pay them. Whether the failure resulted from the agent's inability to pay or his unwillingness to pay is unimportant. He did not pay, and the principal must bear the consequences of his failure. It was her duty to have the payments made, and failing in this she cannot recover." The court also charged the jury as follows: "As I have already charged you, gentlemen, there is nothing here to justify a failure to pay the premiums, and in consequence of that failure the plaintiff cannot recover, and your verdict must be for the defendant."

The plaintiff excepted to the direction to find a verdict for the defendant, to the refusal of the court to affirm the plaintiff's points 1, 2, 3 and 4, to the answer to each of those points,

and to the instruction of the court that, as the evidence showed that the premiums were not paid, and nothing had been shown to excuse such non-payment, the plaintiff could not recover.

The plaintiff moved the court for a new trial, which was denied, the court holding that, as the papers purporting to be signed by the plaintiff were forged, the act of the defendant in accepting the attempted surrender of the $5000 policy was procured by fraud, and was no more binding on it than the husband's dishonest act was binding on the plaintiff; that there was no justification in the evidence for the position that the act of the defendant seduced the husband from his duty as her agent and created an interest or motive in him hostile to its discharge, or for the contention that, if the company had not allowed the husband to do what he did, he would have paid the premium on the $5000 policy, or would have informed his wife that he had not done so; that the defendant was not required to notify the plaintiff of the situation; that it believed, and was justified in believing, that she knew all about it; that she could justly demand no more than that the transaction (of the surrender) should be treated as if it had not occurred, leaving her rights unaffected; that if she was injured, it was by the faithlessness of her agent and her own failure to supervise his acts, and without any fault of the defendant; that the cases cited by the plaintiff did not rule this case; that *Whitehead* v. *New York Life Insurance Co.*, 102 N. Y. 143, was readily distinguishable; and that, if it were identical, it could not be followed, because it would not be a sound exposition of the law. The jury having found a verdict for the defendant, a judgment for it was entered thereon, and the plaintiff has brought the case here by a writ of error.

The Circuit Court held that the $5000 policy was not surrendered or cancelled by the transaction between the defendant and Mr. Miles, but it further held that, although the surrender was void, the policy was forfeited, because no premium was paid on it after the attempted surrender.

It is contended that the court erred in not charging the jury in accordance with the plaintiff's requests numbered 1, 2, 3 and 4; that it erred also in making the charges to which the

plaintiff excepted, as before stated; that the defendant, having been guilty of a wrongful act in cancelling the $5000 policy, and having thus declared its intention not to be bound by such policy, cannot take advantage of a failure on the part of the plaintiff to make a tender of a premium which, by its own act, it gave notice it would not receive; that, as Mr. Miles was the messenger of his wife to pay the premiums on the $5000 policy, the defendant, when it dealt with him in another character and for another purpose, made him its agent and acted upon his report at its peril; that the declaration by the defendant that the $5000 policy was at an end, before there had been any default on the part of the plaintiff, was a distinct breach of contract, for which it thereupon became liable and from which it can take no advantage; that the defendant put into the hands of Mr. Miles the means by which he could evade the performance of his duty, and it cannot now set up as a defence his failure to perform that duty; that the $5000 policy was cancelled before the day when the premium was due on it in 1886 had ended, so that the plaintiff was in no default when the defendant annulled its contract; that the plaintiff is entitled to the presumption that, if the defendant had not cancelled the $5000 policy, Mr. Miles would either have paid the premium himself or would have notified the plaintiff of his inability to do so, and she would have paid it; that there was nothing in the transaction but the act of the defendant in unlawfully annulling the $5000 policy; that the case, therefore, is the ordinary one of the rescision of a contract by one party, relieving the other party from performance or tender of performance; and that the plaintiff was entitled to go to the jury upon the question whether the action of the defendant in accepting a surrender of the $5000 policy was in good faith.

The plaintiff relies on three cases in particular, namely: *Manhattan Life Ins. Co.* v. *Smith*, 44 Ohio St. 156; *Whitehead* v. *New York Life Ins. Co.*, 102 N. Y. 143; and *Garner* v. *Germania Ins. Co.*, 110 N. Y. 266. But we think those cases are distinguishable from the one before us.

In *Manhattan Life Ins. Co.* v. *Smith*, a policy had been

issued by the company upon the life of Smith, in favor of his wife. She was entitled by the policy to participate in the profits, a portion of which, in the form of dividends, was to be applied each year to reduce the premium. It had been the uniform practice of the company to give timely notice of the amount of premium, the amount of dividends and the balance to be paid in cash. The company neglected to give such notice, although having knowledge of the residence of the wife, and by reason thereof a premium was not paid at the time specified in the policy. It was held that the company could not set up the failure to pay the premium as a defence to a recovery upon the policy, although by the terms thereof it was to be forfeited in case of failure to pay a premium on any of the dates stipulated therein. The company had uniformly sent such notices to the husband, and he had made payment of the premiums from year to year; but it appeared that the company was informed by the husband that he and his wife had separated, she having commenced a proceeding against him for alimony, and that he was desirous of having the policy changed and made payable to his estate; and it was held that, after that, the company was not justified in treating him as her agent for the purpose either of receiving notice for her of the amount of premium, the amount of dividends and the balance payable in cash, or of making a surrender of the policy. It was further held, that, under those circumstances, an attempt by the husband, without the knowledge of the wife, to surrender the policy to the company, was inoperative, and the rights of the wife were not thereby impaired. It was manifestly held in that case that the wife was entitled to know what amount of premium was due, and when it was due, and that a notice thereof to the husband was not sufficient, because the company knew that the husband was not acting as agent for the wife, but in hostility to her interests and against her. Moreover, in that case it does not appear that the husband informed the company that he could not pay the premium, whereas in the present case Mr. Miles did so inform the defendant, before attempting any surrender.

In *Whitehead* v. *New York Life Ins. Co.*, a husband insured

his life for the benefit of his wife, upon three policies, the money being payable, in the event of the death of the wife, to her children. She died before the husband, and he without the knowledge of the children, surrendered the policies to the company and received the surrender value of them. At the time of the surrender, the premium upon one of the policies was past due, while the other two policies were in full force. Suit being brought by the children upon the three policies, the court held that there could be no recovery on the policy on which the premium was due and unpaid; but that upon the other two policies there should be a recovery, on the ground that, by cancelling the policies, the company placed itself in a position of giving no notice of premiums due, and that, if such notice had been given, it might have resulted in payment. In that case, the amount of the premium was fixed. It does not appear that the father was able to pay the premiums on the two policies; but he did not inform the company that he was not able. In the present case, Mr. Miles informed the defendant that he was not able to pay the premium; and that statement was not discredited at the trial. In view of the distinction between the two cases, we do not feel called upon to express an opinion as to the soundness of the decision in the New York case.

In *Garner* v. *Germania Life Ins. Co.*, the insured was a father who was made by the policy trustee for the beneficiaries, who were his children. A premium fell due on September 24. It was not paid; and four days later, the father surrendered the policy and received a new one for the benefit of his second wife, who was not the mother of the beneficiaries in the first policy. The new policy was for the same amount as the first one, and stipulated for the payment of a like annual premium. In a suit by the children upon the first policy, the defence was taken that it was determined by the failure to pay the premium; but the court held that the new policy was only a continuation or renewal of the one surrendered, and that, therefore, the company waived any failure to pay the premium due September 24. It is manifest that the decision in that case has no application to the case before us.

The case of *Hight* v. *Continental Life Ins. Co.*, 10 Insurance Law Journal, 223, cited by the plaintiff, was a case where the company deliberately violated its contract, by refusing to accept a note in part payment of the premium, as it had done before, in accordance with the terms of the policy, and by requiring the payment of the full premium in cash. In *Pitcher* v. *New York Life Ins. Co.*, 33 La. Ann. 322, also cited by the plaintiff, the company, for the purpose of defeating the right of the beneficiary, became a party to an agreement by which the policy lapsed. The case of *Schneider* v. *United States Life Ins. Co.*, 52 Hun, 130, was decided on the authority of *Whitehead* v. *New York Life Ins. Co.* before referred to.

In the present case, the husband went to the office of the defendant, when the premium was coming due in 1886, and stated to it his inability to pay that premium, before he offered to surrender the $5000 policy, or the defendant agreed to accept the same. There is nothing to show that the defendant connived at the non-payment of the premium, or that Mr. Miles had been furnished with or had money to pay it. The Circuit Court was correct in charging the jury that nothing had been shown which excused or tended to excuse the failure to pay the premiums; and it is entirely manifest that Mr. Miles assured the defendant that he could not pay the premium, before he offered to surrender the $5000 policy, or the defendant accepted a release of it. In June, 1886, the defendant induced Mr. Miles to abandon his purpose of taking a paid-up policy, and in 1887 urged him in vain not to take one. The law imposed no duty on the defendant to inquire into the ability of the plaintiff to procure money to pay the premiums. It had a right to rely on the statement of Mr. Miles, who, in that respect, under the circumstances of the case, was acting within his authority. It had a right to rely upon the assurance of Mr. Miles that he could not pay the premium in 1886, and upon the fact that he did not pay it; and it afterwards acted upon that statement by inducing him not to take up a paid-up policy, and by giving him a reduced policy in exchange for the $5000 policy. It acted with entire good faith, and with good sense and kindness and justice.

We see no error in the action of the Circuit Court, and its judgment is *Affirmed.*

Mr. Justice Brown dissenting.

I am compelled to dissent from the opinion of the court in this case. I think the company is estopped by its own act to set up the non-payment of the premium as a defence. At the time the original policy was surrendered and the new ones taken out, there had been no failure to pay the premiums as they became due. The surrender was made without the authority or knowledge of the plaintiff, and it is admitted that it was not binding upon her, but it was made by one who did have authority to pay her premiums upon the original policy, and was accepted by the company, and, for the time being, the reduced policies were treated as the only contracts between the parties. In such case the plaintiff was at liberty to ratify the act of her agent or to repudiate it. She took the latter course and brought suit upon the original policy. Under these circumstances she ought not to be prejudiced by the fact that the agent whom she had authorized to pay the premiums betrayed his trust, and attempted to cancel her contract, unless she in some way adopted or confirmed his act. So far as the surrender was concerned, the defendant dealt with the insured at its peril, and was bound to ascertain whether his act was authorized or not, and is in no position to claim that the plaintiff should have paid the premium upon the original policy when it had itself treated it as cancelled. Having elected to treat the original contract as at an end, it is estopped now to claim that the plaintiff had not performed it. "It is a principle of law that he who prevents a thing from being done shall not avail himself of the non-performance which he has himself occasioned." 3 Addison on Contracts, 798.

I think the case of *Whitehead* v. *New York Life Insurance Co.*, 102 N. Y. 143, is indistinguishable in principle from this, and is a sound enunciation of the law upon the point involved. In that case the Court of Appeals of New York held that where a policy in full force was surrendered by the husband,

without the assent of the assured, the subsequent failure to pay the accruing premiums did not alone warrant a forfeiture; that by the agreement of surrender the insurance company did an act the tendency and purpose of which was to prevent future payments by the parties interested, and the company could not defend upon a default to which its own wrongful act contributed, and but for which a lapse might not have occurred. It is true that it did not appear directly in that case that the insured stated that he was unable to pay the premium, but it does not appear that he was able to pay it, and it is safe to infer that he was not, or he would not have taken a policy for a reduced amount. In neither case was there an actual forfeiture by reason of non-payment of premium before the new arrangement was entered into, though in both cases a forfeiture was probable.

The other authorities cited, though not directly in point, all indicate that where the original policy is surrenderd without authority, and a new one taken out, there can be no forfeiture of the original policy for non-payment of premiums, so long as the new policy is outstanding. *Manhattan Life Insurance Co.* v. *Smith*, 44 Ohio St. 146; *Garner* v. *Germania Company*, 110 N. Y. 266; *Pitcher* v. *New York Life Insurance Co.*, 33 La. Ann. 322; *Schneider* v. *United States Life Insurance Co.*, 52 Hun, 130.

Inasmuch as no cases are cited of a contrary purport, it seems to me that these authorities settle a principle of law which ought not now to be disturbed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* DECATUR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 56. Argued November 22, 23, 1892. — Decided January 9, 1893.

The provisions in Section 22 of the act incorporating the Illinois Central Railroad Company, (Private Laws, Ill. 1851, 61, 72,) exempting it from taxation, do not exempt it from the payment of a municipal assessment upon its land within a municipality in the State, laid for the purpose of grading and paving a street therein.

An exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay special assessments, imposed to pay the cost of local improvements, and charged upon contiguous property upon the theory that it is benefited thereby.

On February 10, 1851, an act was passed by the general assembly of Illinois, incorporating the Illinois Central Railroad Company. Private Laws, Ill. 1851, 61. By it the company was made the beneficiary of the land grant from Congress to the State of September 20, 1850. 9 Stat. 466. The 22d section (page 72) was in these words:

"Sec. 22. The lands selected under said act of Congress, and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this State until sold and conveyed by said corporation or trustees, and the other stock, property and effects of said company shall be in like manner exempt from taxation for the term of six years from the passage of this act. After the expiration of six years, the stock, property and assets belonging to said company shall be listed by the president, secretary or other proper officer, with the Auditor of State, and an annual tax for state purposes shall be assessed by the auditor upon all the property and assets of every name, kind and description belonging to said corporation. Whenever the taxes levied for state purposes shall exceed three-fourths of one per centum per annum, such excess shall be deducted from the gross proceeds or income

herein required to be paid by said corporation to the State, and the said corporation is hereby exempted from all taxation of every kind except as herein provided for. The revenue arising from said taxation, and the said five per cent of gross or total proceeds, receipts or income aforesaid, shall be paid into the State Treasury, in money, and applied to the payment of interest-paying state indebtedness, until the extinction thereof: *Provided*, In case the five per cent provided to be paid into the state treasury, and the state taxes to be paid by the corporation, do not amount to seven per cent of the gross or total proceeds, receipts or income, then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent of the gross receipts of said corporation."

By section 27 it was provided that "this act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed and declared in all courts and places whatsoever."

In 1887, proceedings were had in the county court of Macon County, to defray the cost of grading and paving a certain street in the city of Decatur. Under those proceedings two separate parcels of land belonging to the Illinois Central Railroad Company, and forming part of its right of way, were assessed to the amount of $262.70. The company objected to this assessment on the ground that by its charter it was exempted from all taxation of every kind except as therein provided for, and that there was no provision permitting such an assessment. This objection was overruled, and a judgment entered by the county court against the two parcels of land. Exception was taken, and an appeal allowed to the Supreme Court of the State. In that court the ruling of the county court was sustained, and the judgment affirmed, and the case is now brought here for review by writ of error.

Mr. Benjamin F. Ayer for plaintiff in error.

The terms of the contract between the State and the railroad company are explicit. Immunity from taxation was not

granted to the company; but a certain rate and method of taxation, in the nature of a commutation, was agreed upon, and the revenues thus accruing to the State were to be received in lieu of all other taxes. The words are: "And the said corporation is hereby exempted from all taxation of every kind, except as herein provided for." The stipulation has all the elements of a legal contract. There is not only consent on the part of the State, but the consideration to be received by the State was largely in excess of the customary taxes, and therefore more than a fair equivalent for the exemption promised to the company.

The constitutional power of the legislature to make the contract is undoubted. That was authoritatively settled by the Supreme Court of the State in 1855, and the decision was affirmed in 1863. *Ill. Cent. Railroad* v. *McLean County*, 17 Illinois, 291; *Neustadt* v. *Ill. Cent. Railroad*, 31 Illinois, 484.

The taxes in question were assessed upon portions of the right of way of the company, that is, upon component parts of the railroad itself. It is not pretended that they are taxes provided for in the charter. If not, how can they be enforced without a plain violation of the contract?

The decision of the state court did not proceed upon any denial of the binding force of the contract, but upon an interpretation of the contract, which, it is respectfully submitted, is manifestly contrary to its plain import, and upon certain assumptions, which, with due deference, we say are wholly gratuitous. The taxes in question, it is said, are special taxes, levied on contiguous property for a local improvement, and cannot be regarded as burdens, because the property is supposed to receive benefits equal to the amount of the tax. Therefore, the court said, this is not an ordinary tax, and is not within the exemption clause of the charter.

It is quite clear, however, that the power to levy such local taxes is referable to and can be sustained only as an exercise of the power of taxation inherent in the State. It matters not how they are called — whether we style them "ordinary" taxes or extraordinary, general or special — or whether they are levied for one public purpose or another; they are not

the less taxes; and if they are taxes not provided for in the charter, it is respectfully submitted that they cannot be enforced without impairing the obligation of the contract.

The exemption guaranteed in the charter, is not an exemption from ordinary taxes only, but from "all taxation of every kind except as herein provided for." There is this saving clause — "except as herein provided for," — and there is no other. These words necessarily exclude all other exceptions. The right to impose any other tax than those thus specially provided for is renounced and inhibited.

It is, no doubt, an established rule, that legislative contracts for exemption from taxation shall be construed with strictness, or, in other words, that they shall not be enlarged by construction. But this is a contract for commutation, based on full consideration, and it is accompanied by an express declaration, that the act which creates the contract "shall be favorably construed for all purposes therein expressed or declared, in all courts and places whatsoever."

It may well be doubted whether the rule of strict construction should be applied with the same severity to such a contract as to ordinary legislative grants.

Be that as it may, it is an inflexible rule in the construction of all statutes, both private and public, that the legislature must be understood to have intended what is plainly expressed. The same rule applies to the interpretation of contracts; and in this respect there is no difference between the contract of a State and the contract of a natural person. *Tennessee* v. *Whitworth*, 117 U. S. 129; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Farrington* v. *Tennessee*, 95 U.S. 679.

It is assumed in the opinion of the state court, that the property of the plaintiff in error is not protected by the contract from "special assessments" for street improvements; and this is followed by the further assumption, that special taxes for street improvements are in all essential respects the same as "special assessments."

The constitution of Illinois in force from 1848 to 1870, contained the following clause in relation to municipal taxation: "The corporate authorities of counties, townships, school dis-

tricts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Constitution of 1848, Art. IX, Sec. 5.

Special assessments in proportion to benefits, had been sustained by the courts on the theory that they were not taxes, and therefore not within the purview of the provisions of the constitution limiting the exercise of the taxing power. Taxes, it was said, are burdens put upon persons or property for public uses. Assessments laid on real estate for a local improvement precisely in the ratio of the advantages accruing to the property, are not burdens, but only a compensation or equivalent for the increased value of the property derived from the improvement. They had, it was held, none of the distinctive features of a tax, and were not therefore within the operation of the constitutional provision above mentioned, which required that taxes levied for corporate purposes should be uniform in respect to persons and property within the jurisdiction of the body imposing the same. *Canal Trustees* v. *Chicago*, 12 Illinois, 403; *Peoria* v. *Kidder*, 26 Illinois, 351.

Assessments levied under the act of 1863 were not apportioned according to benefits, and the question whether they could be discriminated from taxes, or reconciled in any way with the restrictions of the constitution, came before the Supreme Court for decision soon after the passage of the act. It was regarded by the court "as a very plain case," and the decision was against their validity. *City of Chicago* v. *Larned*, 34 Illinois, 203.

There has been no decision of the Illinois Court at variance with the doctrine in *City of Chicago* v. *Larned*. On the contrary the rulings there made have been approved and followed in all the subsequent cases relating to the same subject. We mention only a few of them. *Ottawa* v. *Spencer*, 40 Illinois, 211; *Chicago* v. *Baer*, 41 Illinois, 306; *Wright* v. *Chicago*, 46 Illinois, 44; *St. John* v. *East St. Louis*, 50 Illinois, 92.

The decisions in the very cases referred to in the judgment of the state court now under review, as establishing the doc-

trine that "exemption from taxation does not exempt from special assessments," proceed upon the theory that special assessments are not taxes, because they are laid in proportion to benefits. Not one of them lends the faintest color to the idea that a special assessment can be anything but a tax, unless there has been an apportionment of benefits to the burden.

The corporate authorities of the city of Decatur, for reasons satisfactory to themselves, determined to adopt in this case the method of special taxation. In the ordinance directing the improvement to be made, it was expressly provided that the costs should be defrayed "by the special taxation of the lots, parts of lots and parcels of land abutting upon said street on both sides thereof along the line of said improvement."

The taxes were assessed as directed by the ordinance, and no inquiry was made in regard to benefits, or even contemplated. Indeed, it is thoroughly settled by the decisions of the Supreme Court of Illinois that no such inquiry is necessary, or even permissible. *White* v. *People ex rel.*, 94 Illinois, 604; *Enos* v. *Springfield*, 113 Illinois, 65; *Galesburg* v. *Searles*, 114 Illinois, 217; *Sterling* v. *Galt*, 117 Illinois, 11; *Springfield* v. *Green*, 120 Illinois, 269.

These references will suffice to show the nature of the assessments attempted to be levied in this case upon the property of the plaintiff in error. They are plainly taxes. They admit of no other classification. They have been levied without reference to any actual benefits which the property taxed will derive from the proposed improvement, and therefore lack the essential and indispensable element which distinguishes a "special assessment" from a tax, as those terms are understood in the laws of Illinois.

To say that the imposition of such taxes is not taxation, is simply a contradiction in terms. The constitution of the State calls it taxation. The statute under which this proceeding is prosecuted calls it taxation. The Supreme Court of Illinois, in numerous decisions, calls it the same; and the opinion of the same court in the present case admits it to be a kind of

taxation, which is conceded not to be provided for in the railroad company's charter.

In several well considered cases in other jurisdictions, where assessments on property specially benefited have been authorized by statute for a street improvement, it has been held as matter of law, that the roadbed or "right of way" of a railroad company derives no special benefit from the paving of a street which crosses it, and for that reason is not subject to assessment. *Philadelphia* v. *Phil. Wilm. & Balt. Railroad Co.*, 33 Penn. St. 41; *Junction Railroad Co.* v. *Philadelphia*, 88 Penn. St. 424; *New York & New Haven Railroad Co.* v. *New Haven*, 42 Connecticut, 279; *State of New Jersey* v. *Elizabeth*, 8 Vroom, (37 N. J. Law,) 330.

There is no warrant for the assumption that special taxes, assessed under the constitution and laws of Illinois, are not burdens. Whether the property on which they are imposed is specially benefited or not is held to be a wholly immaterial question. They differ, therefore, from other taxes only in the purpose for which they are levied. There is nothing in this distinguishing feature which will enable the State, or its agencies, to evade the plain language of the contract.

Many of the reported cases relate to exemptions found in a tax law for the raising of revenue for general purposes; and it has been properly held that an exemption clause in such a law, expressed in general terms has reference, like all the other provisions of the act, only to taxes of a general public character. No different conclusion could be reached without violating one of the most familiar rules of statutory construction.

There is another class of cases in which a distinction has been made between ordinary taxation in the usual mode for general purposes, and special assessments for local improvements apportioned upon property specially benefited in proportion to, and not in excess of, the special benefits received. It has been held in some jurisdictions, that the latter are not burdens, and therefore not taxes, within the meaning of that word as sometimes used in a state constitution or statute. But these cases afford no sanction to the anomalous proposi-

tion, that taxes assessed arbitrarily on property without regard to special benefits, do not constitute taxation. There is perhaps no case which better illustrates the position we take on the point than *McGee* v. *Mathis*, 4 Wall. 143.

And the general principle which underlies the whole question is that when the legislature, acting on a subject entirely within its competency, has granted a complete exemption like the one in this case, it is not within the province of the courts to limit it. *Harvard College* v. *Boston*, 104 Mass. 470; *Brightman* v. *Kirner*, 22 Wisconsin, 54; *Southern Railroad Co.* v. *Jackson*, 38 Mississippi, 334; *New Jersey* v. *Newark*, 3 Dutcher, (27 N. J. Law,) 185; *Erie* v. *First Universalist Church*, 105 Penn. St. 278; *Olive Cemetery Co.* v. *Philadelphia*, 93 Penn. St. 129; *Richmond* v. *Richmond and Danville Railroad*, 21 Gratt. 604.

Mr. Hugh Crea and *Mr. E. S. McDonald* for defendant in error.

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

The single question in this case is, whether this special tax for a local improvement is within the exemption from taxation granted to the railroad company by section 22 of the act of 1851.

Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence

of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. "The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder." Montesq. Spirit of the Laws, book 13, c. 1; *Loan Association* v. *Topeka*, 20 Wall. 655, 664; Opinions of Judges, 58 Maine, 591; *Hanson* v. *Vernon*, 27 Iowa, 28, 47; *Judd* v. *Driver*, 1 Kansas, 455, 462; *Philadelphia Association* v. *Wood*, 39 Penn. St. 73, 82; *Exchange Bank* v. *Hines*, 3 Ohio St. 1, 10.

On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. In *Wright* v. *Boston*, 9 Cush. 233, 241, Chief Justice Shaw said: "When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden." In *McGonigle* v. *Allegheny City*, 44 Penn. St. 118, 121, is this declaration: "All these municipal taxes for improvement of streets, rest, for their final reason, upon the enhancement of private properties." In *Litchfield* v. *Vernon*, 41 N. Y. 123, 133, it was stated that the principle is, "that the territory subjected thereto would be benefited by the work and change in question." In Cooley on Taxation (page 416, c. 20, § 1) the matter is thus discussed by the author: "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises

nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made; and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax; but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice."

These distinctions have been recognized and stated by the courts of almost every State in the Union, and a collection of the cases may be found in any of the leading text-books on taxation. Founded on this distinction is a rule of very general acceptance — that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments. Thus in an early case, *In the Matter of the Mayor &c. of New York*, 11 Johns. 77, 80, under a statute which provided that no church or place of public worship "should be taxed by any law of this State," the court observed: "The word '*taxes*' means burdens, charges or impositions put or set upon persons or property for public uses,

and this is the definition which Lord *Coke* gives to the word *talliage*, (2 Inst. 532,) and Lord *Holt*, in Carth. 438, gives the same definition, in substance, of the word *tax*. The legislature intended, by that exemption, to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value fifteen hundred dollars. But to pay for the opening of a street, in a *ratio* to the 'benefit or advantage' derived from it, is no burden. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister, as well as of other persons, pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of law that *qui sentit commodum debet sentire onus*, is perfectly consistent with the interests and dictates of science and religion."

This rule of exemption has been applied in cases where the language granting the exemption has been broad and comprehensive. Thus in *Baltimore* v. *Greenmount Cemetery*, 7 Maryland, 517, the exemption was from "any tax or public imposition whatever," and it was held not to relieve from the obligation to pay for the paving of the street in front. In *Buffalo City Cemetery* v. *Buffalo*, 46 N. Y. 506, the exemption was from "all public taxes, rates and assessments," and it was held not to discharge from liability for a paving assessment. A like rule was held in *Patterson* v. *Society for Manufactures*, 24 N. J. Law. (4 Zabr.) 385, where the exemption was from "taxes, charges and impositions." And in *Bridgeport* v. *New York & New Haven Railroad*, 36 Connecticut, 255, the railroad company was held liable for a street assessment, although it paid a sum of money to the State which, by its charter, was to be "in lieu of all other taxes."

Indeed, the rule has been so frequently enforced that, as a general proposition, it may be considered as thoroughly established in this country. It is unnecessary to refer to the cases generally. It may be well, however, to notice those from Illinois. In *Canal Trustees* v. *Chicago*, 12 Illinois, 403, 406, decided in the lower court at May term, 1849, and before the

passage of the act creating the contract relied upon, and by the Supreme Court at the June term, 1851, the exemption was "from taxation of every description by and under the laws of this State," and it was held that that did not include an assessment made to defray the expense of opening a street. It was observed: "In our opinion the exemption must be held to apply only to taxes levied for State, county and municipal purposes. A tax is imposed for some general or public object. . . . The assessment in question has none of the distinctive features of a tax. It is imposed for a special purpose, and not for a general or public object." See also *Chicago* v. *Colby*, 20 Illinois, 614; *Peoria* v. *Kidder*, 26 Illinois, 351; *Pleasant* v. *Kost*, 29 Illinois, 490, 494; *Illinois Central Railroad* v. *East Lake Fork Drainage District*, 129 Illinois, 417. Nor is this a mere arbitrary distinction created by the courts, but one resting on strong and obvious reasons. A grant of exemption is never to be considered as a mere gratuity — a simple gift from the legislature. No such intent to throw away the revenues of the State, or to create arbitrary discriminations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the State would otherwise be under obligations to do. A college, or an academy, furnishes education to the young, which it is a part of the State's duty to furnish. The State is bound to provide highways for its citizens, and a railroad company in part discharges that obligation. Or the recipient may be doing a work which adds to the material prosperity or elevates the moral character of the people; manufactories have been exempted, but only in the belief that thereby large industries will be created and the material prosperity increased; churches and charitable institutions, because they tend to a better order of society. Or it may be that a sum, in gross or annual instalments, is received in lieu of taxes. But in every case there is the implied fact of some consideration passing for the grant of exemption. But those considerations as a rule pass to the public generally, and do not work the enhancement of the value of any particular area of property. So when the con-

sideration is received by the public as a whole, the exemption should be and is of that which otherwise would pass to such public, to wit, general taxes.

Another matter is this: In a general way it may be said that the probable amount of future taxes can be estimated. While of course no mathematical certainty exists, yet there is a reasonable uniformity in the expenses of the government, so that there can be in advance an approximation of what is given when an exemption from taxation is granted, if only taxes proper are within the grant. But when you enter the domain of special assessments there is no basis for estimating in advance what may be the amount of such assessments. Who can tell what the growth of the population will be in the vicinity of the exempted property? Will there be only a little village or a large city? Will the local improvements which the business interests of that vicinity demand be trifling in amount, or very large? What may be the improvements which the necessities of the case demand? Nothing can be more indefinite and uncertain than these matters; and it is not to be expected that the legislature would grant an exemption of such unknown magnitude with no corresponding return of consideration therefor.

And, again, as special assessments proceed upon the theory that the property charged therewith is enhanced in value by the improvement, the enhancement of value being the consideration for the charge, upon what principles of justice can one tract within the area of the property enhanced in value be released from sharing in the expense of such improvement? Is there any way in which it returns to the balance of the property within that area any equivalent for a release from a share in the burden? Whatever may be the supposed consideration to the public for an exemption from general taxation, does it return to the property within the area any larger equivalent with the improvement than without it? If it confers a benefit upon the public, whether the general public or that near at hand, a benefit which justifies an exemption from taxation, does it confer any additional benefit upon the limited area by reason of sharing in the enhanced value springing

from the improvement? Obviously not. The local improvement has no relation to or effect upon that which the exempted property gives to the public as consideration for its exemption; hence, there is manifest inequity in relieving it from a share of the cost of the improvement. So when the rule is laid down that the exemption from taxation only applies to taxes proper it is not a mere arbitrary rule, but one founded upon principles of natural justice.

But it is said that it is within the competency of the legislature, having full control over the matter of general taxation and special assessments, to exempt any particular property from the burden of both, and that it is not the province of the courts, when such entire exemption has been made, to attempt to limit or qualify it upon their own ideas of natural justice. Thus in the case of *Harvard College* v. *Boston*, 104 Mass. 470, an assessment for altering a street was held within the language of the college charter exempting the property "from all civil impositions, taxes and rates." See also the following authorities: *Brightman* v. *Kirner*, 22 Wisconsin, 54; *Southern Railroad* v. *Jackson*, 38 Mississippi, 334; *New Jersey* v. *Newark*, 3 Dutcher, (27 N. J. Law,) 185; *Erie* v. *First Universalist Church*, 105 Penn. St. 278; *Olive Cemetery Co.* v. *Philadelphia*, 93 Penn. St. 129; *Richmond* v. *Richmond & Danville Railroad*, 21 Gratt. 604. This is undoubtedly true. So we turn to the language employed in granting this exemption to see what the legislature intended, and we notice that, by the charter certain sums are to be paid into the state treasury, in money, and applied to the payment of interest-paying state indebtedness until the extinction thereof, and it is in consideration of this payment that the corporation is exempted from all taxation of every kind. Inasmuch as the payment by the corporation is to be always made into the state treasury, and for a time to be applied only to a single state purpose, a very plausible argument might be made to the effect that all that was intended to be granted was an exemption from state taxes, leaving the property like other property, still subject to municipal taxation. That question, however, is not before us; and it has been held by the Supreme Court of Illinois, in

Neustadt v. *Illinois Central Railroad*, 31 Illinois, 484, and properly so in view of the provision in section 27 that the act "shall be favorably construed for all purposes therein expressed and declared," that the charter exemption extends to all general municipal taxation.

But can any intent be derived from the language of these exempting clauses to include within them special assessments? Obviously not; for out of the state treasury seldom, if ever, is money appropriated for merely local improvements. The rule is to charge them upon the property in the vicinity, and when the transaction between the parties, the State and the corporation, contemplates the payment into the state treasury of a sum in lieu of taxation, it must be held to contemplate a release, only as to such charges as would ordinarily find their way into the state treasury for legislative appropriation. So that, independently of the use of the word "taxation," which has under such circumstances received almost a uniform construction, the terms of the agreement between the State and corporation excluded special assessments, and included only those matters which are the ordinary equivalent of State taxation.

But, again, it is urged that whatever may be the rule obtaining in the courts of the States, this court has given a broader and more extended meaning to clauses exempting from taxation, and the case of *McGee* v. *Mathis*, 4 Wall. 143, is cited. But the case does not warrant the contention. The facts in that case were these: In 1850 the United States granted to the State of Arkansas all the swamp and overflowed government lands within its limits, on condition that the proceeds of the lands, or the lands themselves, should be applied as far as possible for reclaiming them by means of levees and drains. The State accepted the grant, and by an act of the legislature in 1851 provided for the sale of the lands. In the 14th section of this act it was provided that, "To encourage, by all just means, the progress and the completing of the reclaiming such lands, by offering inducements to purchasers and contractors to take up said lands, all said swamp and overflowed lands shall be exempt from taxation for the term of ten years,

or until they shall be reclaimed." In 1855 this section was repealed, but prior thereto McGee had become the owner of certain of these lands lying in Chicot County. In 1857 an act of the legislature, local in its nature, provided for the making of levees and drains in Chicot County, and authorized a special tax to meet the cost. This special tax was assessed upon the unreclaimed swamp lands of McGee as well as other lands, and the question was, whether this special tax impaired the contract of exemption provided by the 14th section of the act of 1851, and it was held that it did. The argument is thus stated by the Chief Justice, in delivering the opinion of the court, on page 157: "It was strenuously urged for the defendant that the exemption contemplated by the statute was exemption from general taxation, and not from special taxation for local improvements benefiting the land, such as the making of levees, and many authorities were cited in support of this view. The argument would have great force if the provision for exemption had been contained in a general tax law, or in a law in framing which the legislature might reasonably be supposed to have in view general taxation only. But the provision under consideration is found in a law providing for the construction of levees and drains, and devoting to that object funds supposed to be more than adequate, derived from the very lands exempted, and the exemption is for ten years or until reclaimed, and is offered as an inducement to take up the lands and thus furnish those funds. It is impossible to say that this exemption was not from taxation for the purpose of making these levees and drains as well as from taxation in general. Any other construction would ascribe to the legislature an intention to take the whole land for the purposes of the improvement, and then to load it with taxation for the same object in the hands of purchasers whom it had led to expect exemption from all taxation, at least until the land should be reclaimed."

In other words, the general rule which we have been considering was recognized, but its applicability was denied by the court, and properly so. In order to create a fund to reclaim these lands from overflow, the State sold them exempted

from taxation. To turn around after such sale and charge the cost of reclamation upon the same lands would nullify the purpose for which they were sold. It is precisely as though the State had sold a body of lands for the specific purpose of raising funds to build a state house, and, then, after the sale and receipt of the money, had turned around and charged the cost of building such state house upon the very lands sold. By the sale the land was once appropriated to a given purpose, and could not be burdened a second time for the same purpose. It would be practically a second appropriation, which nullified that created by the sale. There is nothing in this case, therefore, which announces a doctrine in conflict with that we have been considering, and which has been recognized in all the States.

But, finally, it is urged that if this exemption does not include special assessments, the constitution of Illinois of 1870 recognizes a distinction between special taxes and special assessments, and that in this case the charges are special taxes rather than special assessments, and therefore to be included within the exemption of the charter. Section 2 of article 9 of the constitution of 1848, which was in force at the time of the charter of the railroad company, is as follows: "The general assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to his or her property." Section 5 of the same article contained this as to local taxation: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same"; while in section 11 of article 3 was the ordinary provision that no property should be taken or applied to public use without just compensation. And under that constitution it was ruled, in the case of *Chicago* v. *Larned*, 34 Illinois, 203, that "an assessment for improvements made on the basis of the frontage of lots upon the street to be improved is invalid, containing neither the element of equality nor uniformity if assessed under the taxing powers,

and equally invalid if in the exercise of the right of eminent domain, no compensation being provided." In quite an elaborate opinion the court held substantially that special assessments could only be imposed in proportion to the benefits actually received by the property upon which they were charged, and that in the absence of an ascertainment of such special benefits the expense must be borne by the entire property of the city. This decision was reaffirmed in *Ottawa* v. *Spencer*, 40 Illinois, 211. Subsequently, and in 1870, a new constitution was adopted, section 9 of article 9 of which is as follows: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform, in respect to persons and property, within the jurisdiction of the body imposing the same." And this came before the Supreme Court in the case of *White* v. *The People ex rel.*, 94 Illinois, 604, and it was held that the city council had power to charge the cost of a sidewalk upon the lots touching it, in proportion to their frontage thereon; that whether or not the special tax exceeded the actual benefit to the lots taxed, was not material; that it may be supposed to be based upon a presumed equivalent; and that where the proper authorities determine the frontage to be the proper measure of benefits, this determination could be neither disputed nor disproved, and the cases in 34 and 40 Illinois, *supra*, were held to be inapplicable. This decision has been reaffirmed in *Craw* v. *Tolono*, 96 Illinois, 255; *Enos* v. *Springfield*, 113 Illinois, 65; *Sterling* v. *Galt*, 117 Illinois, 11; *Springfield* v. *Green*, 120 Illinois, 269.

But the difference between the two constitutions is simply in the mode of ascertaining the benefits, and does not change the essential fact that a charge like the one here in controversy is for the cost of a local improvement, and is charged upon the contiguous property upon the theory that it is benefited thereby. This is the interpretation put upon the matter by

the Supreme Court of Illinois. In *White* v. *People*, 94 Illinois, 604, 613, it was said: "Whether or not the special tax exceeds the actual benefit to the lot, is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement." So also in *Craw* v. *Tolono*, 96 Illinois, 255, it is said: "Special taxation as spoken of in our constitution is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited, or confined in their effect, to contiguous property, that no serious injustice will be done by imposing the whole expense upon such property." And in *Sterling* v. *Galt*, 117 Illinois, 11, in which the difference between special assessment and special taxation was noticed, it was held that the whole of the burden in case of special taxation was imposed upon the contiguous property upon the hypothesis that the benefits will be equal to the burden.

We do not suppose that the company had by its charter any contract with the State that the matter of special benefit resulting from a local improvement should be ascertained and determined only in the then existing way. There was nothing in the terms of that contract to prevent the State from committing the final determination of the question of benefits to the city council rather than leaving the matter of ascertainment to a jury. And whether the charges are called special taxes or special assessments, and by whatever tribunal or by whatever mode the question of benefits may be determined, the fact remains that the charges are for a local improvement, and cast upon the contiguous property, upon the assumption that it has received a benefit from such improvement, which benefit justifies the charge. The charges here are not taxes

proper, are not contributions to the State or to the city for the purpose of enabling either to carry on its general administration of affairs, but are a charge only and specially for the cost for a local improvement, supposed to have resulted in an enhancement of the value of the railroad company's property. It is not in lieu of such charges that the company pays annually the stipulated per cent of its gross revenues into the state treasury.

We see no error in the rulings of the Supreme Court of Illinois, and its judgment is *Affirmed.*

MR. JUSTICE BLATCHFORD took no part in the decision of this case.

DE LA VERGNE REFRIGERATING MACHINE COMPANY *v.* FEATHERSTONE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1099. Argued November 16, 17, 1892. — Decided January 9, 1893.

A patent for an invention issued to the inventor, "his heirs or assigns," after his death, is a valid patent, and should be construed in the alternative as a grant to him, or his heirs or assigns.

Such a construction would include a grantee or grantees in being, capable of taking the patent and to whose benefit the grant would enure.

In such case an executor *de son tort* may, in Texas, make an assignment of an interest in the patent which will convey a valid title to the assignee, if not repudiated by the executor or administrator of the inventor when duly appointed, or by his children.

An inventor agreed with an associate to give him an interest in a patent for the invention when issued, and the associate agreed to procure its issue. The patent was issued after the inventor's death to the inventor by name, "his heirs or assigns." His administratrix conveyed to the associate the promised interest, and subsequently the remaining interest, and all persons interested in the estate acquiesced in the conveyances. *Held*, that the patent should be construed as a grant to the associate as assignee, and should be held to have been obtained by the authority of the administratrix as well as of the associate.

Failure, in such case, to record title papers in the Patent Office, it appearing that the administratrix and the in-part equitable owner had obtained the patent, cannot make the patent void.

Statement of the Case.

When an inventor makes oath to an application for a patent, filed in his lifetime, an amendment to it within the scope of the original oath and of the invention described in the original specification, made after his death without filing a new oath or a new power of attorney, is valid, and does not render the patent void.

This was a bill in equity charging appellees with infringement of letters patent of the United States No. 175,020, issued to "James Boyle, his heirs or assigns," March 21, 1876, for an improvement in gas-liquefying pumps.

The bill set forth, among other things, a full history of the proceedings before the Patent Office, and alleged that, shortly after filing his application for the patent, James Boyle died, and that thereafter his administrator, who was also an assignee of a half interest, prosecuted the application, paid the final fee, and took out the patent, it being issued in the name of "James Boyle, his heirs or assigns."

Appellees demurred generally to the bill, and, the cause having been heard by the Circuit Court thereon, a decision was announced sustaining appellees' demurrer, on the ground that Boyle, having previously died, there was no grantee in being capable of taking at the time the patent was issued, and hence that the patent never had any validity. The opinion will be found reported in 49 Fed. Rep. 916.

A decree was thereupon entered dismissing the bill for want of equity, and complainant appealed to the Circuit Court of Appeals for the Seventh Circuit, which entered an order certifying several questions or propositions of law upon which it desired the instruction of this court for their proper decision. These questions or propositions of law are as follows:

"I.

"On October 29, 1875, James Boyle, of Houston, Texas, having made an invention in refrigerating machines, executed an application for a patent therefor in due form and verified by the proper oath, and appointed Alexander & Mason his attorneys to prosecute the same, which application was filed in the Patent Office November 24, 1875.

"Thereafter and on the 27th day of November, 1875, and

while said application was still pending in the Patent Office, James Boyle died, leaving him surviving a widow and four children.

"Thereafter the said application was prosecuted by the said attorneys under the direction of Thomas L. Rankin, who had been appointed temporary administrator of the estate of James Boyle, deceased March 9, 1876, and who obtained the said patent and paid all the Patent Office and solicitors' fees therefor. The patent issued March 21, 1876, and the grantees therein expressed were 'James Boyle, his heirs or assigns.'

"On these facts the instruction of the court is desired upon the question —

"1. Whether the grant to James Boyle, his heirs or assigns, was void because of the death of Boyle before the patent was issued or whether such grant was valid on the ground that it should be construed in the alternative as a grant to James Boyle or his heirs or assigns, the words 'heirs or assigns,' including a grantee or grantees in being capable of taking the patent, and the grant enuring to his or their benefit.

"II.

"Prior to the aforesaid application of James Boyle for a patent he made a contract with said Thomas L. Rankin by which Rankin agreed to advance money to apply for and obtain the patent, and Boyle agreed to assign to Rankin one-half interest in the invention and patent.

"On December 2, 1875, after the death of James Boyle and while the application for the patent was pending in the Patent Office, Rankin made an agreement with Theresa Boyle, the widow of James Boyle, then acting as executrix *de son tort*, in the words and figures following:

"'HOUSTON, TEXAS, *December* 2, 1875.

"'*Article of Agreement Between T. L. Rankin and Mrs. James Boyle.*

"'T. L. Rankin of the first part, agrees to complete the ice machine commenced by himself and James Boyle and to pro-

vide for Mrs. Boyle while said machine is under construction until next spring, say May first, and also to press the application for patents on the part of said machine claimed by James Boyle and in case said machine is a success, and said patents are obtained, is to use his best efforts to introduce the same, and to divide with Mrs. Boyle the profits of said business until she shall have received five thousand dollars for her share; after which, Mrs. James Boyle agrees to release any further interest in said patents to be obtained and the machines then in use, and from this date, agrees that the said T. L. Rankin shall operate and control any interest James Boyle had pertaining to ice machines, together with his interest in the Arctic Ice Company. Stock to vote, proxy of same.

"'T. L. Rankin.

"'Theresa Boyle.

"'Witness: W. T. Scott.'

"After the grant of the patent as above stated, and on the 18th day of July, 1876, the issue of temporary letters of administration to Rankin were superseded by the appointment of the said Theresa Boyle as permanent administratrix. She thereafter filed an inventory of her husband's estate, in which she included the patent in question as held and owned jointly with Thomas L. Rankin.

"Neither Theresa Boyle, nor her children nor Thomas L. Rankin ever repudiated the proceedings whereby said patent was obtained, but enjoyed the beneficial ownership thereof, and sold their interests therein for a valuable consideration.

"On these facts the instruction of the court is desired as to the following questions:

"2. Whether the above-quoted instrument should, under the above facts, be construed as an assignment to Thomas L. Rankin.

"3. Whether the patent should be construed as a grant to Thomas L. Rankin as assignee.

"4. Whether, under the above-recited facts, the patent should be held to be obtained by the authority of Theresa Boyle as administratrix as well as of Thomas L. Rankin.

"III.

"During the proceedings in the Patent Office, and after the death of James Boyle, the specification originally filed with said application for a patent was amended within the scope of the original oath and the invention described in said original specification and by way of limitation of the claims, but without the filing of any new oath or power of attorney.

"5. Did such amendment render the patent void?

"6. Is the patent void because no oath was filed after Boyle's death?

"It also appearing that the cause of action below was disposed of upon a demurrer filed to appellant's bill and exhibits, which demurrer the court below sustained and dismissed the bill, and no witnesses being examined in said cause, it is further ordered that the record as printed in this cause be also certified up as a full statement of facts upon which the questions and propositions stated for the instruction desired from the Supreme Court of the United States are based, and the clerk of this court is hereby directed to transmit to the clerk of the Supreme Court of the United States a certified copy of said record, together with this certificate."

Sections 4884, 4886, 4895 and 4896 of the Revised Statutes are as follows:

"SEC. 4884. Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States, and the Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof."

"SEC. 4886. Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in

public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

"SEC. 4895. Patents may be granted and issued or reissued to the assignee of the inventor or discoverer; but the assignment must first be entered of record in the Patent Office. And in all cases of an application by an assignee for the issue of a patent, the application shall be made and the specification sworn to by the inventor or discoverer; and in all cases of an application for a reissue of any patent, the application must be made and the corrected specification signed by the inventor or discoverer, if he is living, unless the patent was issued and the assignment made before the eighth day of July, eighteen hundred and seventy.

"SEC. 4896. When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the heirs at law of the deceased, in case he shall have died intestate; or if he shall have left a will, disposing of the same, then in trust for his devisees, in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime; and when the application is made by such legal representatives, the oath or affirmation required to be made shall be so varied in form that it can be made by them."

Mr. Ephraim Banning and *Mr. Edmund Wetmore* for appellant. (*Mr. Hubert A. Banning* was with them on the brief.)

Mr. Solicitor General also filed a brief for appellant.

Mr. L. L. Bond, (with whom was *Mr. C. E. Pickard* on the brief,) for appellees.

I. The patent in question is void because it issued in the usual form to James Boyle, who was dead at the time of the

granting of said letters patent, and the Circuit Court was right in sustaining the demurrer.

All rights and remedies of inventors are based upon the constitution and statutes, which must be followed in order to obtain a valid patent. *Gayler* v. *Wilder*, 10 How. 477, 493; *Wilson* v. *Rousseau*, 4 How. 646, 674.

The statutes of the United States recognize only three classes of persons to whom letters patent for an invention may issue: (1) the inventor himself, Rev. Stat. § 4886; (2) an assignee of the inventor, where an assignment is made before the issuing of the letters patent, Rev. Stat. § 4895; and (3) the personal representatives of the inventor, Rev. Stat. § 4896.

It may be claimed that this grant to "James Boyle, his heirs or assigns," should be construed as a grant to the personal representative of James Boyle, James Boyle having died pending the application. This cannot be. *Eagleton Manufacturing Co.* v. *West*, 111 U. S. 490, 499. One cannot obtain by a so-called equitable construction of a grant what he could not legally obtain by direct grant.

Letters patent for an invention are a grant from the sovereign power, creating a monopoly for a limited period. The word was originally used in England to describe written instruments, emanating from the king, whereby lands, honors or franchises were conferred upon individuals. In this respect the grant of letters patent for inventions are not distinguished from other grants under the royal prerogative. To be sure, the property in such letters patent is regarded as personal property. But it is an "incorporeal" property, and differs from most other personal property in that it "lies in grant and not in livery" — it is created by grant, under the great seal of state, and can be created in no other way, as is the case with all grants under the royal prerogative.

When created, this property can be transferred only by grant, *i.e.*, by deed of assignment, and not by delivery of possession, as is the case with other personal property. While, therefore, the property right is "personal property" rather than "real estate," under one of which two heads all property

is somewhat artificially classed, yet this property more nearly resembles the so-called "incorporeal hereditaments" of the law than the tangible things generally classed as personal property; the great difference being that one is incorporeal, the other corporeal; the one can be created and transferred only by deed or grant in writing, the other can be transferred by mere delivery of possession. Indeed, it was because of the fact that personal property could be transferred by mere delivery of possession and carried away by the grantee, whose person it followed, that the old rules of common law as to the word "heirs" became inapplicable to the transfer of corporeal personal property. But in the case of property in a patent, which can be created and transferred only by grant and deed of assignment, a kind of property is found which comes in its nature really between "land" or "real estate" and corporeal personal property, and which more closely resembles, as we have said, the "incorporeal hereditaments" of the common law than it does the tangible things of which personal property was originally made up.

Coming back, then, to a consideration of this proposition, we insist that a patent for an invention is a grant by the State of the exclusive privilege of making, using and vending it, and authorizing others to make, use and vend it. It differs from other letters patent only in the nature of the subject-matter of the grant. See *Marbury* v. *Madison*, 1 Cranch, 137, 141, and *Butterworth* v. *Hoe*, 112 U. S. 50, where the court considered letters patent for inventions and letters patent for lands together, as being grants of similar nature, and subject to the same rules and laws.

Now it is, and always has been, requisite to a grant *in præsenti* (which letters patent for inventions are) that there should be a grantee *in esse*, to take at the time of the grant. It is absolutely essential to the validity of a grant or deed that there should be a grantor and a grantee — a person capable of granting and a person capable of taking. A grant *in præsenti* must be to a person *in esse* at the time of the grant.

Following this old rule of law, the Supreme Court of

the United States, in the case of *Galloway* v. *Finley*, 12 Pet. 264, held that a patent of land to a dead man and his heirs was void. In the case of *Galt* v. *Galloway*, 4 Pet. 332, the Supreme Court of the United States, pp. 344, 345, held that under the laws of the United States the location of land in the name of a man deceased at the time of the location was absolutely void. The same ruling was made in the case of *McDonald* v. *Smalley*, 6 Pet. 261. Under the principles which we contend for, if a grant of land to a person not *in esse* at the time of the grant is void, the grant of letters patent to a man not *in esse* at the time of their issue is void.

It appears from the bill that James Boyle was dead at the time of the grant of the letters patent in question; he was therefore not *in esse*, and under the decisions we submit that if the letters patent are to be considered a grant to James Boyle, there can be no possible doubt but that the patent in question is absolutely void *ab initio*. Indeed this does not seem to be seriously questioned.

The controversy in this case, so far as this point goes, then turns upon the word "heirs" in the statute and in the letters patent. What does the word "heirs" mean? Is it descriptive of a class of persons to whom in the alternative the right shall go, or is it a word which defines the nature of the estate which the grantee shall take? Is it a word of "purchase" or a word in "limitation (*i.e.*, definition) of the estate?" If the first position be the correct one, then the patent might be, were it not for the statutes above considered, valid; if the second, then it is void because the word adds no new class to take as a "purchaser," or grantee. We maintain that the second is the true construction to place upon the statute and upon the letters patent; that the words "his heirs" name no new class to take as grantees in case of the inability, from death or otherwise, of the patentee to take; that they are words of "limitation of the estate and not words of purchase." See *Wilson* v. *Rousseau*, 4 How. 646, 675.

The sole purpose of using the word "heirs" in the statute and the letters patent is, to prevent the grant from being

determined by the death of the patentee. Upon no other construction of the statute can the word "heirs" be given any meaning, and it is a settled principle of statutory construction that a statute must be construed so as to give effect to every word, if possible.

Again, that the word "heirs," as used in the Revised Statutes, § 4884, and in letters patent themselves, is a word of "limitation of an estate" and not a word of "purchase," is evident from the long line of decisions which hold that upon the death of the patentee the title to the patent goes not to the heirs themselves, but to the personal representative of the deceased, in trust for his heirs or devisees. If the word "heirs" were to be construed as a word of purchase, then, being "purchasers," they would be the ones who would take the title; and yet it has been universally held by all the courts that the title goes to the personal representative in trust for the heirs, and not to the heirs directly. *Shaw Relief Valve Co.* v. *New Bedford*, 19 Fed. Rep. 753; *Bradley* v. *Dull*, 19 Fed. Rep. 913; *Hodge* v. *North Missouri Railroad*, 4 Fish. 161.

It seems clear, therefore, that the patent must be construed as reading to "James Boyle *and* his heirs or assigns" — to "James Boyle and his heirs," if he dies without assigning, or to his assigns when he shall assign it.

II. The certificate recites an agreement between T. L. Rankin and Theresa Boyle, dated December 2, 1875. James Boyle died November 27, 1875, and at the date of this contract there was no administrator. Rankin was appointed temporary administrator March 9, 1876, and Mrs. Boyle full administratrix July 5, 1876. The second question upon which instruction is desired is, "Whether the above quoted instrument should, under the above facts, be construed as an assignment to Thomas L. Rankin."

This does not appear to be a difficult question, if the court is called to pass upon the contract alone. But it was contended, and doubtless will be again, that under this paper Rankin was entitled to the patent when it issued, as the assignee of James Boyle. We do not see how this contract

can be made available by appellant, because if Rankin was the assignee, the patent should have issued under section 4895, which is special to assignees, instead of under the general clause, section 4884, as it was.

There is no sense in which this paper can be classed or treated as an assignment, and there is no allegation in the bill that Rankin ever paid Mrs. Boyle five thousand dollars; and therefore, upon the showing of the bill itself, this paper is null and void; and has never been so far operative as to enable Rankin to demand an assignment of the patent under it. *Railroad Co.* v. *Trimble*, 10 Wall. 367, 382.

As to what constitutes an assignment see *Waterman* v. *Mackenzie*, 138 U. S. 255. That the Rankin agreement is not an assignment of that kind is fully supported by that case and by *Rice* v. *Boss*, 46 Fed. Rep. 195.

III. The patent sued on is void, because the application was amended in the Patent Office, pending allowance, after the death of James Boyle, without authority, and without any new application or oath by his personal representatives.

We contend that the patent so issued is void, for the following reasons: (1) Because it was not issued upon any petition or oath of the personal representative. *Eagleton Manufacturing Co.* v. *West Manufacturing Co.*, 111 U. S. 490; (2) Because the application was changed without authority after the death of the applicant. *Ibid.;* (3) Because Alexander & Mason acted as attorneys in the application without right or authority. *Hunt* v. *Rousmanier*, 8 Wheat. 174 to 232; (4) Because acting as attorneys for a dead man is a manifest absurdity. *Ibid.* p. 203; (5) Because it does not change matters by reason of the fact that Alexander & Mason signed their own names instead of Boyle's to the amendment, as their act, however signed, must be the act of the principal, and having no principal, the act was void. *Ibid.* p. 204; (6) Because a changed or varied specification cannot be related back to the original specification. *Railroad Co.* v. *Sayles*, 97 U. S. 554, 563; (7) An application file is a public record which every one is bound to know. *Loom Co.* v. *Higgins*, 105 U. S. 580, 594; (8) Because the appellant is as much bound by the record as

the appellees are, and both parties are presumed to have acted with full knowledge that they were dealing with or operating under a void patent; (9) Because equity does not relieve against mistake of law except in cases where some legal right is ignorantly surrendered, which rule cannot apply here, as the statute provides a remedy and clearly points out the manner of procedure; (10) Because all rights to a patent are purely statutory, and no common law rights attach until the patent itself is actually issued.

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

The grant was to "James Boyle, his heirs or assigns," and in this followed the language of section 4884 of the Revised Statutes. But although Boyle made the application, he was dead at the time the patent issued, and it was therefore held by the Circuit Court that the patent was utterly void for want of a grantee.

The reasoning of the court was that all the rights and remedies of inventors to the exclusive property in their inventions come from the statute, and that under sections 4886, 4895 and 4896 only three classes of persons are recognized to whom a patent for an invention can issue, namely: The inventor himself; the assignee of the inventor, when the assignment is made before the issue of the patent; and the executor or administrator of the inventor if he dies before the patent is granted; that a patent for an invention is a grant for the exclusive privilege of making, using and vending, and authorizing others to make, use and vend, an invention; and that just as the term was originally used in England, to describe written instruments emanating from the King, sealed with the great seal, whereby lands, honors or franchises were conferred upon individuals, so it is used in this country as descriptive of an instrument whereby some exclusive right is granted by the sovereign power to the person named therein. Hence, continued the court, a patent for an invention is a grant and must have a grantor and a grantee. It must grant the franchise

or monopoly to a person named and who is capable of taking, and in this respect a patent does not differ from a patent or deed for lands. And as a deed to a person not then living and his heirs would be void, since, the word heirs being one of limitation and not of purchase, there is no person to take under it, so a patent for an invention to a dead man is wholly inoperative, and such must be the construction of a patent issued under section 4884 to the patentee, his heirs or assigns, when the patentee thus named is dead at the date of the grant.

The conclusion reached rests upon the assumption that the form of grant specified in section 4884 can only be pursued when the inventor is living, and that the intention of Congress was that the personal representatives of the inventor could not be treated as grantees under that section.

We are to remember that it is to be assumed that James Boyle had made a useful invention and taken all the necessary steps to secure the benefits to be derived therefrom, and that in view of the policy of the government to encourage genius and promote the progress of the useful arts, by securing to the inventor a fair and reasonable remuneration, a liberal construction in favor of those who claim under him must be adopted in the solution of the principal question before us.

It is also to be observed that, under the practice of the Patent Office, a considerable time necessarily elapses after a patent for an invention is allowed before it actually issues; that the applicants often reside at a great distance; that the cases when an inventor dies between the date of the application and the allowance, and the allowance and the issue, must be of frequent occurrence; and that this may happen when neither the office nor the inventor's solicitors are aware of the death. The reflection is a natural one that Congress, which, in framing the provisions of the patent laws, must be presumed to have had these possible occurrences in mind, did not contemplate that all patents issued under such circumstances should be invalidated by the death of the inventor.

What, then, was the intention of Congress in providing for a grant to the "patentee, his heirs or assigns?" Must it be

construed as merely a personal grant to the individual, or may his personal representatives be treated as grantees?

"The words 'heirs,' and 'heirs of his body,'" says Mr. Williams, "are quite inapplicable to personal estate; the heir, as heir, has nothing to do with the personal property of his ancestor. Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A. simply, without more, is sufficient to vest in him the absolute interest. Whilst, under the very same words, he would acquire a life interest only in real estate, he will become absolutely entitled to personal property." Williams' Pers. Prop. 297.

The privileges granted by letters patent are plainly an instance of an incorporeal kind of personal property, which, as personalty, in the absence of context to the contrary, would go to the executor or administrator in trust for the next of kin. Williams' Executors, 817; Schouler's Executors, § 200; Williams' Pers. Prop. 271; *Patterson* v. *Kentucky*, 97 U. S. 501; *Millar* v. *Taylor*, 4 Burrow, 2303; *Shaw Relief Valve Co.* v. *New Bedford*, 19 Fed. Rep. 753.

The rule in *Shelley's Case* was that when an estate of freehold is limited to a person for life, and the same instrument contains a limitation either mediate or immediate to his heirs or the heirs of his body, the word heirs is a word of limitation, and the grantee takes the whole estate either in fee tail or fee simple. This is a rule of law, and not a rule of construction. *Evans* v. *Evans*, [1892], 2 Ch. 173, 184, 188. It applies to nothing but real estate, and if resorted to in connection with personal estate, it is only by way of analogy, and as a rule of construction in order to promote the intention.

We do not perceive any sound reason for holding that the word "heirs" in a patent for an invention should be regarded as a definition of the extent of the patentee's own interest in the patent. There is nothing technical in the word as used. It indicates persons who are to have the benefit in the event of death, but the absolute character of the interest of the patentee is not attributable to it. The words in the statute, "the patentee, his heirs or assigns," whether construed accord-

ing to the rules of grammar, or to the evident intent of Congress, mean "the patentee or his heirs or assigns." They comprehend the legal representatives, assignees in law and assignees in fact, and the phraseology raises no limitation in the sense of the strict common-law rule applied to realty.

It is said that if the word "heirs" were not used in the grant, the patent would end with the life of the patentee, and would have no descendible or inheritable quality, but we are not persuaded that this would be so, any more than that the omission of the word from any transfer of personal property would have that effect. The exercise of the right vested is not in its nature dependent upon the continued existence of the person whose merit earned the reward. The statute has long been that "the patentee" may obtain an extension in certain cases, without adding that his executors or administrators may do this, (Act 1836, 5 Stat. 117, 124, c. 357, § 18; Act 1870, 16 Stat. 198, 208, c. 230, § 63; Rev. Stat. § 4924;) yet it was decided that an executor or administrator can obtain an extension, *Wilson* v. *Rousseau*, 4 How. 646; and that the extended term is assignable, although not expressly so provided. *Nicolson Pavement Co.* v. *Jenkins*, 14 Wall. 452; *Railroad Co.* v. *Trimble*, 10 Wall. 367. And so, that a patent issued to an inventor after an assignment of his entire interest has been entered of record, immediately and by operation of law enures to the benefit of his assignee. *Gayler* v. *Wilder*, 10 How. 477.

If the patent had issued to Boyle when living, although an assignment of his entire interest had been recorded before, the patent would have enured to the benefit of the assignee, and it is difficult to see why, if Boyle died prior to the issue of the patent and after he had made the application and assigned his interest, the assignee should lose the benefit of the assignment because of the death.

Under section 4896, when the inventor dies before the patent is granted, the right of applying for and obtaining the patent devolves upon his executor or administrator in trust for his heirs at law or legatees, and doubt has been suggested as to the applicability of the section when the death transpires

after the application has been filed, but the rulings and practice of the Patent Office are to the effect that in the latter contingency no new application need be made or new fee be paid, but the executor or administrator may file his letters and the case be disposed of as if the applicant had not died. *Rice* v. *Burt*, Dec. Com. Pat. 1879, p. 291; *Ex parte Smith*, Dec. Com. Pat. 1888, p. 24.

Neither this section nor section 4895, providing that patents may be granted and issued, or reissued, to the assignee of the inventor or discoverer, prescribe any form of grant, which is alone to be found in section 4884. The statute does not require the patent to issue under section 4896 to the executor or administrator, and inasmuch as a patent is personal property, and as such goes to the executor or administrator, in trust for the next of kin, it would appear that this result would follow where the grant is to the patentee, his heirs or assigns.

Sections 4895 and 4896 cover cases where the application is made by the legal representatives or assignees, but where the application is made by the inventor, and he dies, a grant in the terms stated apparently accomplishes all the objects aimed at by both these sections.

Section 1 of the act of 1790 provided for a grant to "the petitioner or petitioners, his, her or their heirs, administrators or assigns," (1 Stat. 109, 110,) and the act of February 21, 1793, was in the same language. (1 Stat. 318, 321.) Section 5 of the act of 1836 read that the patent should "in its terms grant to the applicant or applicants, his or their heirs, administrators, executors, or assigns," etc. (5 Stat. 117, 119.) The statute of 1870 required the patent to contain "a grant to the patentee, his heirs or assigns," (16 Stat. 198, 201,) which is carried forward into section 4884 of the Revised Statutes.

As remarked by Judge Lowell in *Shaw Relief Valve Co.* v. *New Bedford*, *ubi supra*, the omission of the word "executors" prior to 1836 did not affect the title of the executors, nor did the omission of "administrators and executors" from the act of 1870 make any difference. "The law was not changed by it." Taking the sections together, the legislative intent seems to have been that a grant to the patentee, his

heirs or assigns, should vest title in the executor or administrator where the death occurred pending the application. If there be no executor or administrator, or letters of such are not recorded, still the general form of grant prescribed in section 4884 is applicable, and the patent may run to "the patentee, his heirs or assigns." The statute does not make it imperative that the patent shall issue in the name of the executor or administrator, the grant under section 4884 being sufficient to vest title in the patentee's legal representative, whether he be administrator, executor or assignee. If there are adverse claims of heirs and legatees, they may be left to be determined by the courts in whose jurisdiction they arise, rather than by the Patent Office. It is enough if it is found that the patent is proper to be granted, and it is so granted to the personal representatives of the deceased.

Sections 4895 and 4896 designate who should make the oath in case of death or assignment, but where the application has been made in the lifetime of the inventor, and remains in effect unchanged, there is no necessity for a new application or oath, except, of course, in the case of a reissue; and, as we have seen, a grant to the patentee, his heirs or assigns, sufficiently designates in whom the title to the patent shall vest in case of assignment or death.

In view of these considerations, as the language of the statute admits of a construction which, in sustaining the grant, effectuates the settled policy of the government in favor of inventors, our judgment is that that construction should be adopted, and that the statute should be read in the alternative, and the grant be treated as made to the patentee or his heirs or assigns. This conclusion is supported by the practice advisedly adopted in the Land Office, (another branch of the Executive department known as that of the Interior,) of using disjunctive terms for the purpose of preventing the defeat of grants by the death of the original grantee. In *Hogan* v. *Page*, 2 Wall. 605, 607, the court, speaking through Mr. Justice Nelson, said:

"A difficulty had occurred at the Land Office, at an early day, in respect to the form of patent certificates and of

patents, arising out of applications to have them issued in the name of the assignee, or present claimant, thereby imposing upon the office the burden of inquiring into the derivative title presented by the applicant. This difficulty, also, existed in respect to the boards of commissioners under the acts of Congress for the settlement of French and Spanish claims. The result seems to have been, after consulting the Attorney General, that the Commissioner of the Land Office recommended a formula that has since been very generally observed, namely, the issuing of the patent certificate, and even the patent, to the original grantee, or *his legal representatives*, and the same has been adopted by the several boards of commissioners. This formula, 'or his legal representatives,' embraces representatives of the original grantee in the land, by contract, such as assignees or grantees, as well as by operation of law, and leaves the question open to inquiry in a court of justice as to the party to whom the certificate, patent or confirmation should enure."

And see *Carpenter* v. *Rannels*, 19 Wall. 138; *Bowman* v. *Long*, 89 Illinois, 19; *Warnecke* v. *Lembca*, 71 Illinois, 91; *Read* v. *Kearsley*, 14 Michigan, 215, 225; *Grand Gulf Railroad* v. *Bryan*, 8 Sm. & Marsh. 234.

The action spoken of by Mr. Justice Nelson was evidently taken in order to prevent hardships occurring under the old form of land grants, as indicated in *Galloway* v. *Finley*, 12 Pet. 264, and other cases; but no such action was considered necessary in reference to invention patents, although the same reason might have existed if the same form had originally been prescribed.

It appears from the certificate that James Boyle died on November 27, 1875, and that the application was thereafter prosecuted by the attorneys who had been previously appointed by him for that purpose, under the direction of Thomas L. Rankin, who had been appointed temporary administrator of Boyle's estate, March 9, 1876, and who obtained the patent and paid all the Patent Office and solicitors' fees therefor. It is also stated that prior to Boyle's application he had made a contract with Rankin, by which it was agreed

that the latter should advance the money to apply for and obtain the patent, and Boyle should assign to Rankin a one-half interest in the invention and patent; and that on December 2, 1875, Rankin made an agreement with Theresa Boyle, the widow of James Boyle, "then acting as executrix *de son tort*," by virtue of which Rankin was to acquire the right to the whole patent. Under the statutes of Texas a temporary administrator possesses the rights and powers of a general administrator so far as expressly confided to him by the order of appointment. 1 Sayles' Tex. Civ. Stat. 584.

The failure to record the title papers in the Patent Office, it appearing that the administrator and equitable owner in part obtained the patent, cannot, in the view we take of the case, make the patent void. The identity of the grantee might be determined by extrinsic testimony. If the grant be construed as made directly to the heirs, executors, administrators or assigns of Boyle, there can be no doubt as to its validity, even though when the patent issued it was not made to appear who they were.

The case of *Eagleton Manufacturing Co.* v. *West*, 111 U. S. 490, is cited to the proposition that, where the inventor dies, a patent is invalid when not issued upon the application and oath of his personal representative, but in that case the application was so amended after the inventor's death that it was equivalent to a new application, yet none such had been made, nor had the administratrix made the oath rendered necessary under such circumstances. In the case at bar the application remained in substance unchanged and no new application or oath was essential to jurisdiction.

We ought, perhaps, to add that in our opinion the patent would not be absolutely void, even if the objections taken by appellees were better founded than we hold they are. If the proceedings in the Patent Office may be considered as analogous to the condition of a pending suit at law upon the death of the plaintiff, the great weight of authority in this country is to the effect that where the court has acquired jurisdiction of the subject-matter and the person during the lifetime of a party, a judgment for or against a dead man is not wholly

void or open to collateral attack. It is very rarely that proceedings are wholly void and without force or effect as to all persons and for all purposes, and therefore incapable of being or being made otherwise; and we are entirely clear that this patent cannot be treated as falling within that class.

The record shows, as we have said, the existence of a contract between Rankin and Boyle, by which the latter was to advance the money to apply for and obtain the patent for a half interest, and that Rankin carried out the contract on his part. The agreement between Rankin and the widow, then acting as having a colorable right to administer, is also set out, under which Mrs. Boyle agreed that as soon as she should receive five thousand dollars in the way specified she would "release any further interest in said patents to be obtained and the machines then in use." Rankin was appointed temporary administrator, March 9, 1876, and on July 18, 1876, the temporary letters of administration issued to Rankin "were superseded by the appointment of the said Theresa Boyle as permanent administratrix. She thereafter filed an inventory of her husband's estate, in which she included the patent in question as held and owned jointly with Thomas L. Rankin. Neither Theresa Boyle, nor her children, nor Thomas L. Rankin ever repudiated the proceedings whereby said patent was obtained, but enjoyed the beneficial ownership thereof, and sold their interest therein for a valuable consideration."

When Mrs. Boyle took out the letters of administration, her prior acts, presumably upon this record beneficial to the estate and certainly not such as appellees have any right to complain of, should be viewed in the same light as though she had been made administratrix upon the death of her husband. And upon the facts stated, without discussing the particular nature of the instrument of December 2, 1875, we conclude that Rankin acquired under the two contracts the equitable title to the patent; and the circumstance that there was no record evidence of the transaction in the Patent Office made no difference, in the absence of question as to the rights of third parties. The patent, therefore, enured to his benefit. *Hartshorn* v. *Day*, 19 How. 211; *Day* v. *Union*

India Rubber Co., 20 How. 216; *Gayler* v. *Wilder*, 10 How. 477.

Boyle made the oath to the application filed in his lifetime in accordance with section 4892 of the Revised Statutes, and the certificate states that after his death "the specification originally filed with said application for a patent was amended within the scope of the original oath and the invention described in said original specification, and by way of limitation of the claims, but without the filing of any new oath or power of attorney." In *Eagleton Manufacturing Co.* v. *West Manufacturing Co.*, 111 U. S. 490, 498, before referred to, the patent was held invalid because the authority given to Eagleton's attorneys ended at his death, and the patent was granted upon amendments made by the attorneys without any new oath by the administratrix. And Mr. Justice Blatchford, speaking for the court, said that the file wrapper showed, "beyond doubt, that there was no suggestion, in the specification signed and sworn to by Eagleton, of the invention described in the amendment," and that "in view of the entire change in the specification, as to the invention described, the patent, to be valid, should have been granted on an application made and sworn to by the administratrix. The specification, as issued, bears the signature of Eagleton and not of the administratrix, and it is sufficiently shown that the patent was granted on the application and oath of Eagleton, and for an invention which he never made."

In the case at bar, there was not only no amplification of the original application by the amendment, but it was within the scope of the original specification and a limitation and narrowing of the original claim, so that it was the identical invention sworn to by Boyle, and there was no more reason for requiring a new oath from his administratrix than there would have been for requiring it from Boyle himself. The attorneys who had acted for Boyle continued to act under Rankin's direction, and although it is not shown that their authority was conferred in writing by a power of attorney executed and filed in accordance with the rules of the office, that is not a fatal objection, since the attorneys had authority

in fact, and their acts were subsequently ratified by Rankin and by Mrs. Boyle.

We are of opinion that the grant was not void because of the death of Boyle before the patent was issued, and that it should be construed in the alternative as a grant to James Boyle, or his heirs, or assigns, which would include a grantee or grantees in being, capable of taking the patent and to whose benefit the grant would enure; that the patent should be construed as a grant to Thomas L. Rankin as assignee, and held to have been obtained by the authority of Mrs. Boyle as administratrix, as well as of Rankin; and that the amendment did not render the patent absolutely void, nor did the fact that no oath was filed after Boyle's death.

These conclusions answer the questions propounded, and will be certified accordingly.

SUTLIFF *v.* LAKE COUNTY COMMISSIONERS.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 1085. Submitted December 12, 1892. — Decided January 9, 1893.

Where the constitution and a statute of a State forbid any county to issue bonds to such an amount as will make its aggregate indebtedness exceed a certain proportion of the assessed valuation of taxable property in the county; and the statute requires the county commissioners to publish, and to enter on the public records of the county, semi-annual statements showing the whole amount of the county debt; a purchaser, for value and before maturity, of a bond issued in excess of the constitutional and statutory limit, is charged with the duty of examining the record of indebtedness; and the county is not estopped, by a recital in the bond that all the provisions of the statute have been complied with, to prove, by the record of the assessment and the indebtedness, that the bonds were issued in violation of the constitution.

THIS was an action brought in the Circuit Court of the United States for the District of Colorado by a citizen of

Statement of the Case.

Connecticut against the county of Lake, a municipal corporation of Colorado, upon coupons for interest of six bonds for $500 each, part of a series of ten bonds, issued by the county on July 1, 1881, payable to bearer in twenty years, and redeemable at the pleasure of the county after ten years, and containing this recital:

"This bond is one of a series of five thousand dollars, which the board of county commissioners of said county have issued for the purpose of constructing roads and bridges, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A.D. 1879, and under and by virtue of and in compliance with an act of the general assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A.D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

One defence was that the bonds were illegal and void, because they increased the indebtedness of the county to an amount in excess of the limit prescribed by art. 11, sect. 6, of the constitution of Colorado, which is copied in the margin.[1]

On March 24, 1877, the legislature of Colorado passed an act, entitled "An act concerning counties, county officers and county government, and repealing laws on these subjects,"

[1] 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

(General Laws of 1877, p. 218,) the material provisions of which are also copied in the margin.[1]

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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.

[1] SEC. 21. When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record, specifying the amount required and the object for which such debt is created, submit the question to a vote of the people at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election; and all persons voting on that question shall vote by separate ballot, whereon is placed the words "for county indebtedness," or "against county indebtedness;" such ballots to be deposited in a box provided by the county commissioners for that purpose, and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding; and if, upon canvassing the vote, (which shall be canvassed in the same manner as the vote for county officers,) it shall appear that a majority of all the votes cast are for county indebtedness, then the county commissioners shall be authorized to contract the debt in the name of the county: Provided, that the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions and exceed one million of dollars, twelve dollars on each thousand dollars thereof.

SEC. 30. It shall be the duty of the board of county commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statements published in some weekly newspaper published in the county, if there be such published; and if there be no newspaper published in the county, such commissioners shall cause such statement to be posted in three conspicuous places in said county, one of which shall be the court-house door; and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall

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The Circuit Court gave judgment for the defendant; and the plaintiff took the case by writ of error to the Circuit Court of Appeals for the Eighth Circuit, before which the following facts were made to appear: At and before the issue and sale of said bonds, the county was in fact indebted to an amount greater than that permitted by the limitation contained in the constitution and statute of Colorado, above cited; and therefore, as a matter of fact, the issue of said series of bonds, and the issue of each one thereof created an indebtedness on the part of the county in excess of the constitutional and statutory limitation applicable to said county at the date of the issue of said bonds. The plaintiff bought six of said series of bonds, paying full value therefor, relying upon the recitals in the bonds contained, and without making any examination into the facts that might appear upon the records of the county, and without any actual knowledge of the facts other than such knowledge with which he might be held chargeable from the statements in the bonds and the constitution and statutes of Colorado.

Upon the case as above stated, the Circuit Court of Appeals certified to this court the following questions and propositions of law:

"1. In view of the provisions of the act of the legislature of Colorado, approved March 24, 1877, providing for the making of a public record of the indebtedness and financial condition of the several counties in said State, was the said John Sutliff, plaintiff herein, when about to purchase the bonds sued on and issued under the provisions of said act of March 24, 1877, charged with the duty of examining the record of indebtedness provided for in said act, in order to ascertain whether the bonds he proposed to purchase were lawfully issued or whether

be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts, and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any; and the statement thus made, in addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times.

the issuance thereof did not increase the indebtedness of the county beyond the constitutional limit?

"2. Do the recitals found in said bonds estop the county of Lake, as against a purchaser thereof for value before maturity, from proving as a defence thereto that when said series of bonds were issued the indebtedness of the county already equalled or exceeded the amount of indebtedness which the county could legally incur under the provisions of the constitutional limitation already cited?"

Mr. John McClure for plaintiff in error.

Mr. H. B. Johnson for defendants in error.

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

The constitution, as well as the statute, of Colorado absolutely forbade a county to issue bonds, under any circumstances, to such an amount as would make the aggregate amount of the indebtedness of the county more than six dollars on each thousand if the assessed valuation of the taxable property in the county was more than five millions of dollars, or twelve dollars if such valuation was less than five and more than one million; and limited the right to issue bonds, without a previous vote of the qualified electors of the county, to half of such rates.

The statute, moreover, required the county commissioners, in submitting the question to a vote of the electors, to enter of record an order specifying the amount required and the object of the debt; and also made it their duty to publish, and to cause to be entered on their records, open to the inspection of the public at all times, semi-annual statements, exhibiting in detail the debts, expenditures and receipts of the county for the preceding six months, and striking the balance so as to show the amount of any deficit and the balance in the treasury.

It is stated in the certificate upon which this case comes

before us that at the time of the issue of the bonds in question the defendant county was in fact indebted beyond the constitutional and statutory limit, and the issue of each bond therefore created a debt in excess of that limit; and that the plaintiff bought the bonds, upon the faith of the recitals therein, and without making any examination into the facts appearing on the records of the county.

Upon these facts, in the light of the previous decisions of this court, it is clear that the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the duty of examining the record of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the constitution.

In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the State, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *Marcy* v. *Oswego*, 92 U. S. 637; *Humboldt* v. *Long*, 92 U. S. 642; *Dixon County* v. *Field*, 111 U. S. 83; *Lake County* v. *Graham*, 130 U. S. 674, 682; *Chaffee County* v. *Potter*, 142 U. S. 355, 363.

But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

Accordingly, in *Dixon County* v. *Field*, above cited, which arose under an article of the constitution of Nebraska, limiting the power of a county to issue bonds to ten per cent of the assessed valuation of the county, it was adjudged that a county

issuing bonds, each reciting that it was one of a series of $87,000 issued under and by virtue of this article of the constitution and the statutes of Nebraska upon the subject, was not estopped to show by the assessed valuation on the books of public record of the county that the bonds were in excess of the constitutional limit; and Mr. Justice Matthews, delivering the unanimous judgment of the court, fully stated the grounds of the decision, which sufficiently appear by the following extracts:

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to the proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument." 111 U. S. 93.

"In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors: the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. 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. Nothing in the way of inquiry, ascertainment or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." 111 U. S. 95.

That decision and the grounds upon which it rests were approved and affirmed in *Lake County* v. *Graham* and *Chaffee County* v. *Potter*, above cited, each of which arose under the article of the constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. In *Lake County* v. *Graham*, each bond showed on its face the whole amount of bonds issued, and the recorded valuation of property showed that amount to be in excess of the constitutional limit; and for this reason, as well as because the bonds contained no recital upon that point, the county was held not to be estopped to plead that limit. 130 U. S. 682, 683. In *Chaffee County* v. *Potter*, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit, and did not show on their face the amount of the issue, and the county records showed only the valuation of property, so that, as observed by Mr. Justice Lamar in delivering judgment: "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." 142 U. S. 363.

The case at bar does not fall within *Chaffee County* v. *Potter*, and cannot be distinguished in principle from *Dixon County* v. *Field* or from *Lake County* v. *Graham*. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown, the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds.

It follows that the first question certified must be answered in the affirmative, and the second in the negative. Ordered accordingly.

KOHN *v.* McNULTA.

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

No. 105. Submitted January 4, 1893. — Decided January 16, 1893.

The verdict of a jury upon an issue submitted to it by order of a Court of Chancery is advisory only, and is binding upon the court only so far as it chooses to adopt it.

A servant of a railroad company, employed in coupling freight cars together, who is well acquainted with the structure of the freight cars of his employer, and also with those of other companies sending freight cars over his employer's road differing from his employer's cars in structure and in the risk run in coupling them, assumes, by entering upon the service, all ordinary risks run from coupling all such cars.

On April 29, 1887, appellant entered into the employ of the defendant, the receiver of the Wabash, St. Louis and Pacific Railway Company, as a switchman in the yards of the company at Toledo, Ohio. He continued in such employ until the 11th of July, 1887, on which day, in attempting to couple two

freight cars, his arm was caught between the deadwoods and crushed. Thereafter, he filed his petition of intervention in the Circuit Court of the United States for the Northern District of Ohio, the court which had appointed McNulta receiver, and in which the foreclosure proceedings were still pending. At first his intervening petition was referred to a master, but afterwards, on his motion, the order of reference was set aside and a jury called and empanelled. The testimony having all been received, the court left to the jury the single question of the amount of damages which the intervenor should recover, if entitled to recover anything, and the jury in response thereto found that his damages were $10,000. The court, however, on an examination of the testimony held that no cause of action was made out against the receiver, set aside the verdict of the jury, and dismissed the petition. From which decision the intervenor brought his appeal to this court.

Mr. J. K. Hamilton for appellant.

I. Whether the court can or cannot take a case from the jury and direct a nonsuit, especially under the Federal practice, is a question with which, no doubt, this court is more familiar than counsel and we shall not discuss it. The rule laid down in Moak's Underhill on Torts, page 317, is doubtless correct, which is, "whether there is *reasonable* evidence to be left to the jury of negligence occasioning the injury complained of is a question for the judge. It is for the jury to say whether and how far the evidence is to be believed." To this should be added what appears in another rule on page 318 of the same work: "If the facts depend upon the credibility of witnesses or upon inferences to be drawn from the circumstances proved, then it is the right of the plaintiff to have the question submitted to the jury."

II. It is the duty of a railroad company to make such regulations or provisions for the safety of its employés as will afford them reasonable protection against the danger incident to the performance of their respective duties. If there exist facts known to the employer, and unknown to the employé,

increasing the risk of such employment beyond its ordinary hazards, the employer is bound to disclose such facts to his employé, otherwise he will be liable as for negligence in case of injury resulting to the latter by reason of such unusual risks. *Smith* v. *St. Louis &c. Railway*, 69 Missouri, 32; *Porter* v. *Hannibal & St. Jos. Railroad*, 71 Missouri, 66; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Dorsey* v. *Phillips & Colby Cons. Co.*, 42 Wisconsin, 583; *Lawless* v. *Conn. River Railroad*, 136 Mass. 1; *Forsyth* v. *Hooper*, 11 Allen, 419; *Cayzer* v. *Taylor*, 10 Gray, 274; *S. C.* 69 Am. Dec. 317; *Clarke* v. *Holmes*, 7 H. & N. 937; *Baxter* v. *Roberts*, 44 California, 187; *Williams* v. *Clough*, 3 H. & N. 258; *Hill* v. *Gust*, 55 Indiana, 45; *O'Connor* v. *Adams*, 120 Mass. 427; *Walsh* v. *Peete Valve Co.*, 110 Mass. 23; *Keegan* v. *Kavanaugh*, 62 Missouri, 230; *Hough* v. *Railway Co.*, 100 U. S. 213; *Northern Pacific Railroad* v. *Mares*, 123 U. S. 710.

Mr. Wells H. Blodgett for appellee.

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

So far as the mere matter of procedure is concerned, there was obviously no error. The intervention was a proceeding in a court of equity, and that court may direct a verdict by a jury upon any single fact, or upon all the matters in dispute; but such verdict is not binding upon the judgment of the court. It is advisory simply, and the court may disregard it entirely, or adopt it either partially or *in toto*. *Barton* v. *Barbour*, 104 U. S. 126; 2 Daniell's Chancery Pl. and Pr., 5 ed. 1148, and cases cited in note; *Idaho & Oregon Land Improvement Co.* v. *Bradbury*, 132 U. S. 509, 516, and cases cited.

With respect to the merits of the case, the decision of the court was also clearly correct. The intervenor was twenty-six years of age; he had been working as a blacksmith for about six years before entering into the employ of the defendant; he had been engaged in this work of coupling cars in the company's yard for over two months before the accident, and was

therefore familiar with the tracks and condition of the yard, and not inexperienced in the business. He claims that the Wabash freight cars, which constituted by far the larger number of cars which passed through that yard, had none of those deadwoods or bumpers; but inasmuch as he had in fact seen and coupled cars like the ones that caused the accident, and that more than once, and as the deadwoods were obvious to any one attempting to make the coupling, and the danger from them apparent, it must be held that it was one of the risks which he assumed in entering upon the service. A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those it itself owns and uses. *Baldwin* v. *Railroad Co.*, 50 Iowa, 680; *Indianapolis & Bloomington Railroad* v. *Flanigan*, 77 Illinois, 365; *Michigan Central Railroad* v. *Smithson*, 45 Michigan, 212; *Hathaway* v. *Michigan Central Railroad*, 51 Michigan, 253; *Thomas* v. *Missouri Pacific Railway*, 18 S. W. Rep. 980, (Missouri Supreme Court.)

It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer. *Tuttle* v. *Detroit, Grand Haven &c. Railway*, 122 U. S. 189; *Ladd* v. *New Bedford Railroad*, 119 Mass. 412.

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

Affirmed.

BERNIER *v.* BERNIER.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 102. Argued January 3, 4, 1893. — Decided January 16, 1893.

When a person makes a homestead entry of a tract of public land, and enters into occupation of it with his family, and dies a widower, and without acquiring a patent, the right to complete the proofs and acquire the patent passes, under Rev. Stat. § 2291, to all his children equally, as well those who are adults as those who are infants; and not, under Rev. Stat. § 2292, to such children only as are minors at the time of his death, to the exclusion of those who had then attained their majority.

Section 2292 of the Revised Statutes was only intended to give to infant children the benefit of the homestead entry and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in § 2291, and to allow a sale of the land within a prescribed period for their benefit.

THIS was a suit in equity to determine the respective rights of the adult and minor heirs of Edward Bernier, at the time of his death, to certain real property in Michigan, held by him under a homestead entry, and to compel the conveyance from the minor heirs, and the defendant who has acquired an interest from one of them, of an undivided half of the premises, to the complainants. It arose out of the following facts:

On the 24th of May, 1875, Edward Bernier made a homestead entry on the lands in controversy under the provisions of the homestead law of the United States. At the time he was a widower, his wife having died in April, 1872. He occupied the premises as a homestead until his death, June 17, 1876. He left ten children surviving him, five of whom were, at the time, over twenty-one years of age, and they are the complainants in this case, and five were, at the time, under twenty-one years of age, and they, with one John H. Goff, who acquired, in 1885, by a quitclaim deed the interest of one of them, are the defendants. One of the defendants and minor heirs, Joseph Bernier, before suit, conveyed his interest to his sister and co-

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defendant, and filed a disclaimer. She, representing both his and her own share, was willing to divide the property on the basis claimed by the complainants, and has permitted a decree to pass against her by default. In October, 1876, some months after the death of Edward Bernier, Samuel F. Bernier, one of the adult heirs, on behalf of all the ten heirs, made the required proof for commuting the homestead entry, paid the minimum price for the land, and received a certificate entitling him to a patent therefor. This certificate was never cancelled, nor was any proceeding taken for its cancellation, nor was any notice given of a contest respecting it, nor was any irregularity in its issue alleged. The only proof of occupation and improvement was made by Samuel F. Bernier, and the only sums paid for the land were advanced by him, on behalf of all the heirs. But notwithstanding these facts, some time in April, 1877, a second certificate was issued to the minor heirs of Edward Bernier, which was made upon the commutation proofs presented by Samuel F. Bernier, as above stated, and on the 25th of the same month a patent was issued to them. The bill alleged that this was issued to them by mistake, that it should have been issued to the heirs of Edward Bernier, and that it was issued to the minors without the knowledge, consent or procurement of the complainants, and in violation of their legal and equitable rights in the premises, and that by its terms the title in fee simple of the premises was in them, but it claimed that they held the same subject to the rights of the complainants therein.

The bill further alleged that all the steps to change the filing on the lands from a preëmption claim to a homestead entry, and in commuting the homestead entry and securing a patent for the lands, were taken through an attorney at law, who was acting for the said Edward Bernier's heirs; that when he received the patent he supposed the same ran to those heirs, and, without examining it or discovering his mistake, he placed the same on record, and the mistake was only recently discovered; that for many years previous to such discovery all the heirs, including the minors, treated the lands as their joint property, but that since the discovery of the mistake, and only since, the

minor heirs pretended to claim that they were the sole and only heirs, and that the complainants had no interest, right or title in the lands, which claim and pretence the complainants charged were a fraud upon their rights, and worked a manifest wrong and injury to them; hence the institution of this suit.

The Circuit Court in Michigan which heard the case decided in favor of the complainants, and adjudged that the defendants execute, acknowledge and deliver to them a sufficient deed or deeds to convey and vest in each one an undivided tenth part of the lands and premises. On appeal, the Supreme Court of the State reversed the decree and ordered the bill to be dismissed. From the latter decree the case was brought by writ of error to this court.

Mr. John C. Donnelly for plaintiffs in error.

Mr. John H. Goff for defendants in error.

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

It would seem that the patent to the minor heirs was issued without the knowledge or consent of any of the heirs; and that their attention was first brought to it when the defendant Goff obtained the interest of one of the defendants in 1886. The property was always treated as a part of the estate of Edward Bernier, deceased. It was assessed as such from his death until 1885, and George E. Bernier, one of the heirs, took charge of the whole estate, including the land in controversy, paid taxes thereon, and took care of the minors. He remained in possession of the premises in controversy until this suit was brought. All the parties, of course, claim through a common source, and the question for decision is whether all the heirs of the deceased took this land jointly and are equally entitled to it, or whether the whole of the land went to the minor heirs of the deceased. And this question depends for its solution upon the construction given to the provisions of the Homestead Act, contained in sections 2291 and 2292 of the Revised Stat-

utes of the United States, which embody the provisions of the act of Congress, on that subject, of May 20, 1862, and of subsequent acts which have any bearing upon the question. After providing for the entry of lands, which under other provisions of law might be afterwards commuted into a homestead, section 2291 declares that "no certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section 2288, and that he, she or they will bear true allegiance to the government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." Section 2292 provides that "in case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall enure to the benefit of such infant child or children; and the executor, administrator or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicil, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified."

The contention of the complainants is that under section 2291 the whole premises which the deceased, Edward Bernier, died claiming as his homestead, upon the completion of the proofs required, passed equally to the ten children, as his heirs. On the other hand, it is insisted by the defendants that, under

section 2292, when the father and mother both died, the fee of the land enured to the minor children to the exclusion of those who had attained their majority, and that they alone were entitled to the certificate and patent.

We are of opinion that the construction claimed by the complainants is the true one. Section 2291 provides that the certificate and patent, in case of the death of father and mother, shall, upon the proofs required being made, be issued to the heirs of the deceased party making the entry, a provision which embraces children that are minors as well as adults. Section 2292, in providing only for minor heirs, must be construed not as repealing the provisions of section 2291, but as in harmony with them, and as only intended to give the fee of the land to the minor children exclusively when there are no other heirs. This construction will give effect to both sections; and it is a general rule, without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act. The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claim may be perfected and a patent obtained; and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death. If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased. In the one case the proof is to extend to that of residence upon the property, or its cultivation for the term of five years, and show that no part of the land has been alien-

ated except in the instances specified, and the applicant's citizenship and loyalty to the government of the United States; but in the other case, where there are no adult heirs and only minor heirs, and both parents are deceased, the requirements exacted in the first case are omitted, and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants. The fact of their being infant children and the death of their parents is all that is required to establish their right and title to the premises and to a patent.

Section 2292 was, in our judgment, only intended to give to infant children the benefit of the homestead entry and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in the previous section, and to allow a sale of the land within a prescribed period for their benefit.

We are of opinion, therefore, that the right to the premises in controversy, covered by the homestead entry, vested in all the heirs of Edward Bernier at his death, the adult as well as the minor heirs, and that the subsequent patent issued to the latter should have been issued to them all jointly, or a separate patent should have been issued for an undivided tenth to each heir. The minor heirs holding under the patent issued, and the defendant Goff, who received a quitclaim for an interest from one of them should, therefore, be required to execute proper conveyances to the complainants, so as to transfer to them an undivided half-interest in the whole, or to each complainant an undivided tenth interest in such lands. This is in conformity with the well-settled law that where a patent for land is issued by mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him. *Stark* v. *Starrs*, 6 Wall. 402, 419.

The decree of the Supreme Court of Michigan must, therefore, be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

OSBORNE *v.* MISSOURI PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 95. Argued December 16, 19, 1892. — Decided January 16, 1893.

A bill was filed against a railroad company in Missouri by the owner of a building on a public street in St. Louis, on which the company was about, under competent municipal authority, to lay down tracks at grade for use in running cars drawn by steam power. The bill prayed to restrain and enjoin the company from commencing or carrying out the proposed construction, or from taking possession of the street for that purpose. The injuries to result to the complainant's building from the proposed construction were set forth, but without any demand for compensation other than that contained in the prayer for general relief. The statutes of Missouri provide for the assessment of compensation for the taking of property for public use, but not for such assessment where property is merely damaged. *Held*, that the complainant had an adequate remedy at law for the injuries complained of, and was not entitled to the relief prayed for.

This was a bill filed by D. M. Osborne & Company, a corporation of the State of New York, in the Circuit Court of the United States for the Eastern District of Missouri, against the Missouri Pacific Railway Company, February 16, 1887, alleging that the defendant was about to construct a track along Gratiot street, in the city of St. Louis, from its main tracks near Twenty-third street to the property of the St. Louis Wire Mill Company, near the corner of Twenty-first street, in front of a building on Gratiot and Twenty-second streets, owned and occupied by complainant, and of a vacant lot adjoining this building, which was also owned by complainant, and on which it intended to erect a building similar to the one then occupied by it; and that the track would be a permanent obstruction, and was to be laid for the private use and gain of the Wire Mill. It was further averred that Gratiot street was but twenty-four feet in width from curb to curb; that when the proposed building was completed accord-

ing to the original plan, there would be no entrance to the same on any street but Gratiot street; that by reason of the railroad tracks and the operation of the same, complainant and the public would be prevented from using the street as allowed by law; that travel would be diverted and turned away; that it would be impossible for a wagon and team to remain on Gratiot street in front of complainant's property, while cars were being moved or might be standing on the same; and that it would not be safe to use the street by teams and wagons; "to the great, unascertainable and irreparable damage of your orator's business." It was also alleged that the noise, smoke and danger from fire, and from the shaking and vibration of complainant's buildings, caused and occasioned by the passage of cars and locomotives in front of complainant's premises, would render them less desirable and valuable as a place of business to complainant; that all the damage threatened to be done complainant was irreparable in its nature, and it could not be fully compensated therefor in an action at law; and that the construction and operation of the railroad track would reduce the market value of the property and damage the same in a sum in excess of $30,000.

The prayer for relief was that the defendant "be restrained and enjoined from commencing or carrying out the proposed construction of any railroad track or switch, or from taking possession of said Gratiot street for said purpose, or from using said Gratiot street to the exclusion of your orator and the public; and for all such other and further relief as may be necessary and proper."

On October 8, 1887, the defendant filed its amended answer, specifically denying the allegations of complainant's bill, and averred that the track was laid, before the filing of the bill, in pursuance and by authority of an ordinance of the city of St. Louis, approved February 18, 1887, which ordinance was set out in full in the answer. Exceptions and demurrer were filed by the complainant to this answer and overruled. The opinion of the Circuit Court thereon will be found in 35 Fed. Rep. 84. The court held, upon the pleadings as they stood, that the complainant should be left to its remedy at law.

A replication was then filed and the cause came on for hearing January 31, 1889. It was stipulated that the track was laid March 20, 1887, some days after the bill was filed. Evidence was given on behalf of the complainant tending to show that the existence of the railroad track on Gratiot street lessened the value of complainant's property. The court declined to go into the question of the amount of the damages, and counsel for complainant disclaimed asking in this proceeding that the court should ascertain the amount and direct its payment.

The ordinance of the city council authorizing the construction of the track provided that the privilege of using it should be extended to other railroads by connecting their tracks with the switch, and that the track might be used to transport cars to and from the property of any other person or company owning property on Gratiot street and desiring such connection, if municipal authority and power were granted for the laying and operation of spur tracks thereto.

There was no evidence that the track was constructed in any other than the ordinary manner upon the surface of the street, without change of grade or other disturbance, but it did not appear to have been laid for the full distance in the centre of the street, but inclined to the north and made a curved line at the west boundary of complainant's premises. There was no evidence of improper or unskilful construction or operation of the railroad, and there was evidence that, before and after the construction, complainant used continuously for receiving goods the Twenty-second street entrance to its building. It was also shown that the track was used by the defendant in a reasonable and proper manner and at reasonable hours, and there was a conflict of testimony as to whether the value of complainant's property had been enhanced or lessened by reason of the construction of the track. The court directed the bill to be dismissed without prejudice to complainant's right to sue at law for the damages which it claimed to have suffered, and a decree to that effect was accordingly entered, from which an appeal was prosecuted to this court. The opinion is reported in 37 Fed. Rep. 830.

Argument for Appellant.

Section 21 of Article II of the Missouri constitution of 1875 provides: "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof, shall remain in such owner, subject to the use for which it is taken."

Section 765 of the Revised Statutes of Missouri of 1879, being one of the sections of Article II of chapter 21, relating to railroad companies, reads: "Every corporation formed under this article shall, in addition to the powers hereinbefore conferred, have power . . . to construct its road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal which the route of its road shall intersect or touch; but the company shall restore the stream, water course, street, highway, plank road and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness. Nothing herein contained shall be construed to authorize the . . . construction of any railroad not already located in, upon or across any street in a city or road of any county, without the assent of the corporate authorities of said city, or the county court of such county."

By subdivision 11 of section 4417 of the Revised Statutes of 1879, in Article II of chapter 89 in relation to cities, towns and villages, it is provided that cities shall have "sole power and authority to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter or repeal any such grant, in whole or in part."

Mr. P. R. Flitcraft, (with whom were *Mr. J. E. McKeighan* and *Mr. H. E. Mills* on the brief,) for appellant.

I. The constitution of Missouri requires compensation to be paid in advance to owners for such damages to property as

were previously considered consequential, and included therein damages to property caused by construction of steam railroads in streets. *Rude* v. *St. Louis*, 93 Missouri, 408; *Chicago* v. *Taylor*, 125 U. S. 161; *Chicago &c. Railroad* v. *Ayres*, 106 Illinois, 511; followed in many cases, the last of which is *Lake Erie & Western Railroad* v. *Scott*, 132 Illinois, 429; *Johnson* v. *Parkersburg*, 16 West Virginia, 402; *Spencer* v. *Point Pleasant Railroad*, 23 West Virginia, 406; *Reading* v. *Althouse*, 93 Penn. St. 400; *Pusey* v. *Allegheny*, 98 Penn. St. 522; *Pittsburgh &c. Railway* v. *Vance*, 115 Penn. St. 325; *Auman* v. *Philadelphia &c. Railroad*, 133 Penn. St. 93; *Hot Springs Railroad* v. *Williamson*, 45 Arkansas, 429; *Columbus & Western Railway* v. *Witherow*, 82 Alabama, 195; *Gottschalk* v. *Chicago, Burlington & Quincy Railroad*, 14 Nebraska, 550; *Julia Building Association* v. *Bell Telephone Co.*, 88 Missouri, 258; *Story* v. *New York Elevated Railroad*, 90 N. Y. 122; *Abendroth* v. *Manhattan Railway*, 122 N. Y. 1; *Kane* v. *New York Elevated Railroad*, 125 N. Y. 164; *Mollandin* v. *Union Pacific Railway*, 14 Fed. Rep. 394; *Frankle* v. *Jackson*, 30 Fed. Rep. 398; *Gulf, Colorado &c. Railway* v. *Fuller*, 63 Texas, 467; *Atlanta* v. *Green*, 67 Georgia, 386; *Weyl* v. *Sonoma Valley Railroad*, 69 California, 202.

II. The owner of an abutting lot has a special interest in the street, distinct in kind, and in addition to that enjoyed by the public in general. Interference with the right of ingress and egress, light, air, access by customers, by teams and vehicles, and the use of the enjoyment of the street, is a damage peculiar to the owner, and protected by the Constitution. *Rude* v. *St. Louis*, 93 Missouri, 408; *Pittsburgh &c. Railway* v. *Vance*, 115 Penn. St. 325; *Lackland* v. *North Missouri Railroad*, 31 Missouri, 180; *S. C.* 34 Missouri, 259.

III. Where buildings have been erected, adapted to a particular purpose, and a public improvement is made, which injuriously affects the property and reduces its market value, such a damage is for public use, and requires compensation to be made. *Chicago* v. *Taylor*, 125 U. S. 161; *Calumet River Railway* v. *Moore*, 124 Illinois, 329; *Chicago, Burlington & Northern Railroad* v. *Bowman*, 122 Illinois, 595; *Dupuis* v.

Chicago &c. Railway, 115 Illinois, 97; *Atchinson Railroad* v. *Schneider*, 127 Illinois, 144; *Pittsburgh &c. Railway* v. *Vance*, 115 Penn. St. 325.

IV. Damage caused by dust, smoke, etc. are elements of damage to be considered. *Gainesville &c. Railway* v. *Hall*, 78 Texas, 169; *Chicago &c. Railroad* v. *Loeb*, 118 Illinois, 208.

V. The proper remedy is an injunction. *Carpenter* v. *Grishan*, 59 Missouri, 247; *McPike* v. *West*, 71 Missouri, 199; *McElroy* v. *Kansas City*, 21 Fed. Rep. 257; *Columbus & Western Railway* v. *Witherow*, 82 Alabama, 190; *Weyl* v. *Sonoma Valley Railroad*, 69 California, 202; *Macon* v. *Harris*, 75 Georgia, 761; *Terre Haute &c. Railroad* v. *Rodel*, 89 Indiana, 128; *Harrington* v. *St. Paul &c. Railroad*, 17 Minnesota, 215; *Wagner* v. *Railway Co.*, 38 Ohio St. 32; *Appeal of the Borough of Verona*, 108 Penn. St. 83; *Pennsylvania Railroad* v. *Angel*, 41 N. J. Eq. (14 Stewart,) 316; *Chicago, St. Louis &c. Railroad* v. *Gates*, 120 Illinois, 86.

Mr. John F. Dillon, (with whom was *Mr. Winslow F. Pierce* on the brief,) for appellee.

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

We assume upon this record that the complainant was an abutting owner merely, and that the fee of the street was in the municipality for the public, or in the public; that the construction of the tracks was duly authorized; that they were laid with due care and skill and in strict accordance with the authority granted; and that the road was properly operated. And the terms of the ordinance were such in relation to other persons and companies than the Mill Company, and to other railroads than this, that it is not open to the objection that it empowered a construction exclusively for private use.

The contention of complainant is that it was entitled, under section 21, Article II of the state constitution, to compensation for the damage it alleged it had sustained, and that the com-

pany should have been enjoined from the operation of its road because such compensation had not been paid.

In *Chicago* v. *Taylor*, 125 U. S. 161, which was an action in trespass on the case, the provision of the constitution of the State of Illinois, adopted in 1870, that "private property shall not be taken or damaged for public use without just compensation," came under consideration in this court, and it was ruled, in concurrence with the interpretation placed upon that language by the Supreme Court of the State, that a recovery might be had wherever private property had sustained a substantial injury from the making and use of an improvement that was public in its character, whether the damage was the direct result of a physical invasion of the thing owned, or of the injurious disturbance of its user and enjoyment, as in a diminution of its market value. The same conclusion was reached in *Rigney* v. *City of Chicago*, 102 Illinois, 64, where, among other things, it was said: "In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." Many decisions under similar constitutional provisions are to the same effect. *Reading* v. *Althouse*, 93 Penn. St. 400; *Pittsburgh &c. Railway* v. *Vance*, 115 Penn. St. 325; *Auman* v. *Philadelphia &c. Railroad*, 133 Penn. St. 93; *Hot Springs Railroad* v. *Williamson*, 45 Arkansas, 429; *Columbus & Western Railway* v. *Witherow*, 82 Alabama, 195; *Gottschalk* v. *Chicago, Burlington &c. Railroad*, 14 Nebraska, 550; *Spencer* v. *Point Pleasant Railroad*, 23 W. Va. 406.

It is insisted, however, that the settled rule of decision of the highest tribunal of Missouri is that the construction and operation of a steam railroad track in the ordinary way upon the streets of a municipality is a legitimate use of the street, and does not impose a new burden or servitude, and that the injury which owners of abutting property may suffer, by reason of such construction and operation, is not of a nature for which

compensation is demandable under the constitutional provision in question.

In *Julia Building Association* v. *Bell Telephone Co.*, 88 Missouri, 258, a bill for an injunction was filed by an abutting land owner to restrain the erection and maintenance of telephone poles and wires on the sidewalk. The bill was dismissed and the judgment affirmed at October term, 1885, of the Supreme Court, the court holding that when the public acquires a street in a city, either by condemnation, grant or dedication, it may be applied to all purposes consistent with the proper use of a street; that it is only when the street is subjected to a new servitude, inconsistent with and subversive of its proper use, that the abutting land owner can complain; that the erection and maintenance of defendants' poles were a proper use of the street; that it seemed that the owner of adjoining premises could not claim compensation for damages resulting from such use; and in no event would compensation be allowed for speculative or contingent damages, although recovery could be had for injuries resulting from the unskilful and negligent conduct of the work. And it was observed in the prevailing opinion that "railroads operated by steam, are permissible, because such methods of transportation and travel are among those to which the street may be properly applied, as not being inconsistent with its free and unrestricted use."

The court was not unanimous, and it is said by counsel that the dissenting opinion is the better law, and that the allusion to railroads in streets was an *obiter dictum;* but in the recent case of *Henry Gauss & Sons Manuf'g Co.* v. *St. Louis, Keokuk & Northwestern Railway*, decided December 13, 1892, 20 S. W. Rep. 658, the precise question was passed upon. This was a suit to enjoin the defendant from laying a track and operating a railroad laterally along Main Street, in the city of St. Louis, in front of plaintiff's property, until compensation for damage thereto should be ascertained and paid. A preliminary injunction, which was granted at the commencement of the suit, was dissolved, and the road had been built and was in use when the cause was tried. The petition charged

that the plaintiff owned an entire block fronting on Main Street, and had thereon a two-story and basement factory, erected for the special purpose and adapted by its construction for use as a planing mill, sash, door and box factory, and was used as such; that the building fronted on Main Street, and was so constructed that the only front that was adapted for receiving and shipping lumber from the street was the Main Street front; that the defendant threatened and was about to occupy the street by laying and operating by steam a railway with double tracks, thereby permanently obstructing the street, and not leaving space between the tracks and the building sufficient to permit of the standing of wagons and other vehicles, without constant danger of collision with engines and cars passing to and fro over the tracks, and wholly destroying the use of the street as a thoroughfare. The damage to the property as charged consisted of the prevention of the free ingress and egress to and from the street; noise and smoke; damage from fires; shaking and vibration of the building; all caused by the passage of engines and cars over the street in proximity to the premises.

The court was satisfied that the plaintiff's property had been depreciated somewhat in value by reason of the construction and operation of the railroad, and the inquiry was whether the damages thus inflicted were such as were contemplated by section 21 of Article II of the state constitution. It was not claimed by plaintiff that there was any physical injury done to its property or that its possession was disturbed; and it was shown that the street was dedicated without restriction to general use as a highway; that the defendant was authorized by the charter and ordinance of the city to lay its tracks along the street and to operate thereon; and that the track was laid on the established grade of the street, and constructed in a careful and skilful manner, and in strict compliance with the requirements of the ordinance. It was conceded by the court that every owner of a lot abutting on a public street, besides the ownership of the property itself, had rights appurtenant thereto, which formed a part of the estate, among which might be named an easement for the free admis-

sion of light and pure air, and the right of ingress and egress to and from the property; that the interest of the lot owner in the adjacent street was a peculiar interest, which neither the local nor the general public could pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to the contiguous ground; an incidental title to certain facilities and franchises which was in the nature of property, and which could no more be appropriated against the owner's will than any tangible property of which he might be the owner. And it was held that depriving the owner of these incorporeal hereditaments by interfering with their full enjoyment in the appropriation of the street to a new and different public use than that originally contemplated, would undoubtedly be a damage within the constitutional provision; but the court was of opinion that the laying of a railroad track in the street, on grade, and operating the road in the usual manner, was not applying the street to a new public use which required the payment of compensation for damage to the property; that when land is dedicated generally, and without restrictions, or condemned for a public street in a town or city, the owner of the abutting lots who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street could be lawfully subjected by the public; and after quoting with approval from the majority opinion in *Julia Building Company* v. *Telephone Company*, the court said: "There has been great diversity of opinion among the courts of this country as to whether, though under proper legislative authority, laying a track on the established grade, and operating a steam railroad thereon, in the transaction of commercial business, along a street, is subjecting the street to a public use not contemplated in a general grant or dedication. Whatever the rule may be elsewhere, this court has been uniform in holding that such a use is not a perversion of the highway from its original purposes. *Lackland* v. *Railroad*, 31 Missouri, 180; *Porter* v. *Railway*, 33 Missouri, 128; *Cross* v. *Railway*, 77 Missouri, 321; *Julia Bldg. Association case, supra; Smith* v. *Railway*, 98

Missouri, 24; *Railway* v. *Railway*, 97 Missouri, 469; *Rude* v. *St. Louis*, 93 Missouri, 414. . . . It appears from the evidence that the only substantial damage which was special to plaintiff and not common to the public, shown by it, consisted in the interference with its free access from the street to its factory; the obstruction of the light and air across the open street; smoke, cinders and dust from engine and cars; noise and jarring of the ground; all caused by the movement of trains. These may cause damage to and depreciation of the value of the property, but the damage results from a legitimate use of the street, and which might have been anticipated by plaintiff as a probable use when it bought its property and erected its improvements." And it was concluded that, while for any damages that might be caused by the unlawful or negligent maintenance of the tracks in the street, or by negligent use of engines or movement of trains, defendant would be liable in an action to recover them, plaintiff had shown no ground for injunction. This decision, although rendered some years after the entry of the decree under review, must be regarded as an authoritative exposition of the previous judgments of that court upon the same subject.

As a general rule, this court follows the decisions of the highest tribunals of a State, upon the construction of its constitution and laws, if they do not conflict with or impair the efficacy of some provision of the Federal Constitution, or of a Federal statute; but we are not required to express an opinion as to the applicability of that rule in this case, as the decree must be affirmed on other grounds.

Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition.

Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of

private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ.*

But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere.

In *McElroy* v. *Kansas City*, 21 Fed. Rep. 257, which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. Justice Brewer, then Circuit Judge, considered under what circumstances a chancellor could grant such relief. It was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer large inconvenience, if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages. If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition, while not restraining defendant from the exercise of its ultimate rights. Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of property for public use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted, with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which complainant would

sustain, upon payment of which the injunction would be vacated.

Assuming, as the Circuit Court did, and as we prefer to do in disposing of the case upon this record, that if the complainant had sustained damage, it had a cause of action, we, nevertheless, entirely agree that the bill was properly dismissed.

Evidence was adduced of the extent and character of the alleged damage, although the Circuit Court did not undertake to go into the question of amount, and the result was that the court concluded that the use of the track had not seriously obstructed, and would not in future seriously obstruct, access to complainant's premises, and that the lessening of the market or rental value of the property was in any event small; that a jury might find that no damage had been sustained or that it was inconsiderable; and that there was no proceeding which defendant could take to obtain an assessment of damages, if any, while the complainant had an adequate and simple remedy by an action at law.

The prayer was for an unconditional injunction, and although this was coupled with a prayer for general relief, a decree different from that specifically prayed could hardly have been awarded under the general prayer, as the averments of the bill were not introduced for that purpose; and besides, the complainant explicitly disclaimed upon the hearing any desire for the ascertainment of damages in this proceeding.

The statutes of Missouri provided for the assessment of compensation for the taking of property for public use, but not for such assessment where property was merely damaged, and complainant occupied the position of seeking by an absolute injunction to compel the defendant to pay such amount as accorded with its own judgment upon that matter. It may be that if this had been a case where compensation as such was demandable, the defendant, by filing a cross-bill, could have obtained an order such as was entered in *McElroy* v. *Kansas City*, but it is useless to indulge in speculation in this regard.

We are satisfied that complainant was not entitled to the relief prayed, and the decree of the Circuit Court is accordingly

Affirmed.

NEW ORLEANS v. PAINE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 1154. Submitted January 4, 1893. — Decided January 16, 1893.

While the location of the boundary lines of a land grant is pending before the Land Department, and the proper officers are bringing to bear upon it their own judgment and discretion, the courts have no right to interfere with their action by injunction.

The general rule is that the judicial power will not interpose, by mandamus or injunction, to limit or direct the action of departmental officers in respect of matters pending, within their jurisdiction and control.

THIS was a bill in equity filed in the Circuit Court for the Eastern District of Louisiana, by the city of New Orleans, suing as residuary legatee under the will of John McDonough, deceased, against the deputy surveyor general of the United States for the State of Louisiana, to enjoin him from surveying and locating a new back line or rear boundary of a French grant, and from dividing into sections lands alleged to belong to the plaintiff north of, and contiguous to, such new back line.

The grant in question was made April 3, 1769, by the proper authorities of the Province of Louisiana, then an appanage of the French crown, to Pierre Delille Dupard, and was described as "thirty arpents of front to the river, upon the whole depth which shall be found unto Lake Maurepas, of the land where heretofore were two villages of the Collapissas savages," etc. Upon the acquisition of the Territory of Louisiana by the United States, under the treaty of 1803, the greater part of this grant was confirmed to John McDonough, Jr. & Co., and was described by the board of land commissioners as having "thirty-two arpents front on the Mississippi River, with a depth as far as the Lake Maurepas, with side lines diverging as they extended into the interior," etc. McDonough having purchased the interest of his partner, devised his portion of the grant, upon certain charitable uses, to the cities of New Orleans and Baltimore, and upon partition made be-

tween the said devisees, the lands described in the bill fell to the plaintiff. In due course the government surveyed and fixed the front and side lines of the grant, but it seems that neither of these lines touched Lake Maurepas, nor was it included between them. When, in 1885, the State of Louisiana, claiming adversely to the city of New Orleans under the swamp land grant of March 2, 1849, 9 Stat. 352, c. 87, raised the question before the General Land Office as to what *depth* the claims were entitled, the surveyor general of Louisiana, to whom the matter had been referred, decided that the grant should extend to Lake Maurepas and the Amite River, by extending its lower side line back to said water boundary. On appeal to the Commissioner of the General Land Office, the decision of the surveyor general was affirmed; but on further appeal to the Secretary of the Interior, Mr. Lamar, he decided on January 6, 1888, that the depth of the grant should be determined by a straight line drawn through the centre of the grant from the front to the rear, terminating at the point of intersection of a line drawn at right angles thereto, so as to touch the lowest point of the southern shore of Lake Maurepas.

The matter was referred to the surveyor general of Louisiana, who directed the defendant Paine, as deputy surveyor, to examine carefully the southern shore line of Lake Maurepas, and, if entirely satisfied from reliable evidence, that there had been a change in said shore line since the grant was made in 1769, he was to run the line according to such location, and not according to its then location. These instructions were approved by the Commissioner of the General Land Office, under date of March 4, 1890. The defendant, the deputy surveyor, proceeded under these instructions, and satisfied himself that the southern shore line of Lake Maurepas had, for an indefinite time, been a moving line, slowly extending itself south and southwest; but as to where the shore line was in 1769, he could form no definite conclusion. "The only thing which seemed certain is that it was a long way from where it now is, and in fixing upon the distance . . . I have tried to adopt a location which would probably give the

Counsel for Appellant.

claims all the depth they are entitled to without extending them so far as some of the evidence would require." The bill averred that this survey was approved by the surveyor general, and was forwarded to the Commissioner of the General Land Office, "and thereupon, and in due official course, the said surveys of the said R. B. Paine were duly paid for by the United States, including his said survey and location of said back line of said Dupard grant."

This survey seems, however, never to have been formally approved, and on May 14, 1891, Mr. Chandler, then acting Secretary of the Interior, wrote to the Commissioner of the General Land Office, saying that he found nothing in the decision of the department of January 6, 1888, to indicate that it was the intention of the Secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769; but, on the contrary, it seemed to be clearly indicated that the southern shore of the lake, as it now exists, should be fixed absolutely as the starting point and determine the back line of the said grant. "You will instruct the surveyor general accordingly." In pursuance of this, the Commissioner of the General Land Office instructed the surveyor general to enter into a new contract with some competent deputy for the establishment of the back line from the southern shore of the lake as it now exists, and thereupon a new contract was entered into with the defendant Paine for a resurvey upon the basis of such instructions. Thereupon plaintiff filed this bill to enjoin such resurvey.

A restraining order was issued upon the filing of the bill, and a day fixed for the hearing of the motion for an injunction. A demurrer being filed to the bill, the case was brought to a hearing upon bill and demurrer, and a decree entered denying the injunction and dismissing the bill. 49 Fed. Rep. 12. From this decree an appeal was taken and allowed to the Circuit Court of Appeals, by which court the decree of the Circuit Court was affirmed and an appeal allowed to this court. 2 U. S. App. 330.

Mr. J. L. Bradford for appellant.

Mr. Assistant Attorney General Maury for appellee.

Mr. Justice Brown delivered the opinion of the court.

This case turns upon the power of the court to enjoin the action of an officer of the Land Department in relocating the boundaries of a land grant; and an injunction is demanded upon the theory that a former survey of the same line had been examined, approved and paid for, and that the rights of the plaintiff to the lands included in such survey had thereby become vested.

In *Noble* v. *Union River Logging Railroad*, decided at the present term, (*ante* 165,) we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the Head of a Department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power. In that case it appeared that the only remedy of the plaintiff was to enjoin the Secretary of the Interior from revoking his approval of a certain map, which operated as a grant of land. His contemplated action amounted in effect to the cancellation of a land patent.

So, in this case, if it were made to appear that the former survey had been completed and approved in such manner that all the lands included within the lines of the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling a title thereby acquired. But the difficulty here is that the facts do not exhibit such a case. It appears that the first survey was made under the direction of the surveyor general, who was himself acting under instructions from Mr. Lamar, then Secretary of the Interior, which instructions in his opinion authorized him to direct the defendant Paine to ascertain the shore line of Lake Maurepas as it existed in 1769, the date of the grant; and his

instructions to defendant, which were most careful and explicit as to the method of locating this line, were found to be satisfactory by the Commissioner of the General Land Office, who also approved his contract with the defendant for the survey upon the basis of these instructions. Defendant proceeded to act upon these instructions, and to locate the line as near as he could ascertain the southern shore of the lake to have been in 1769. His report of this survey seems to have been forwarded to the Commissioner of the General Land Office, but never to have been formally approved.

The only record evidence upon this subject consists of three letters: One from the Commissioner of the Land Office to the surveyor general, of January 23, 1891, in which he acknowledges the receipt of the duplicate plat and transcript of field-notes of defendant's survey, and also of certain protests, affidavits and letters, and in closing his correspondence says: "In view of the foregoing and of the condition expressed in the contract allowing partial payments as the survey progresses, I hereby accept the survey as far as herein considered, and, as the several points of objection to the acceptance of some of the lines established in this survey, as set forth in the protests above mentioned, will necessarily demand a further consideration by this office, you are directed to withhold the filing of the triplicate plats in the local land office until you are further advised in regard thereto." The second letter is from the acting Secretary of the Interior to the Commissioner of the General Land Office, under date of May 14, 1891, in which, speaking of the decision of Mr. Lamar, the former Secretary of the Interior, he says: "I find nothing in this decision to indicate that it was the intention of the Secretary to authorize an investigation as to whether the shore of the lake had been changed since 1769; but, on the contrary, it seems to be clearly indicated that the southern shore of the lake as it now exists should be fixed absolutely as the starting point to determine the back line of said grant. You will instruct the surveyor general accordingly." This letter does not indicate, as contended, a reversal of the action of Mr. Lamar, his predecessor in office, but merely that he put a different interpreta-

tion upon his decision from that of the surveyor general, under whose instructions the defendant had acted. The last letter was written by the acting Commissioner of the Land Office to the surveyor general, May 21, 1891, and states that "this line was run by Deputy Surveyor Ruffin B. Paine, under his contract No. 1, dated November 11, 1889, under instructions of your predecessor, and *was accepted by this office to the extent of payment for the work*, it having been done in accordance with his instructions; but *the plats were withheld from filing awaiting the decision of the department* as to the correctness of the instructions, in view of the original decision of the department in this case, dated January 6, 1888. It is unnecessary to enter into the details of the instructions issued by your predecessor, or of the work performed by his deputy in pursuance thereof, as they form a part of the files of your office and you are no doubt familiar with them. It is sufficient to state that the enclosed decision directs that the southern shore of the lake as it now exists shall be fixed absolutely as the starting point to determine the back line of the aforesaid claims. This necessitates the rejection of the survey executed by Paine as to the establishing of this line, and you will enter into a new contract with some competent deputy for its establishment as now directed by the department."

It is quite evident from this correspondence that the first survey was never formally approved by the Secretary of the Interior or the Commissioner of the Land Office, and that no title ever vested in the plaintiff to the lands included in this survey, though defendant, having obeyed his instructions, was, of course entitled to his pay. If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing. *Fourniquet* v. *Perkins*, 16 How. 82. Thus in *Gaines* v. *Thompson*, 7 Wall. 347, 352, it was held that the action of the Secretary of the Interior directing the Commissioner of the Land Office to cancel an entry of land was within

the exclusive control of the department, and that the court had no jurisdiction or authority to interfere with the exercise of this power by injunction. In delivering the opinion of the court, Mr. Justice Miller stated the general doctrine to be "that an officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action."

The case under consideration is not unlike that of *Stotesbury* v. *United States*, 146 U. S. 196, decided at the present term, in which a decision by the Commissioner of Internal Revenue authorizing the refunding of certain taxes, which was reported to the Secretary of the Treasury for his consideration and advisement, was held by the court not to have been a final decision, but to have been subject to a revision by the Secretary. Obviously the decision of the surveyor general approving the act of his deputy was not a finalty, since the papers were forwarded by him to the Commissioner of the Land Office, and by him to the Secretary of the Interior for final approval. So long as there was a superior officer whose approval was contemplated by law or the regulations of the department, no approval by a subordinate officer would operate as a finalty. In this particular the case is readily distinguishable from that of *United States* v. *Stone*, 2 Wall. 525, in which the Secretary of the Interior attempted to annul the action of his predecessor in issuing certain land patents, by revoking them. It is not at all improbable that the proper location of the back line of this grant may hereafter become the subject of judicial inquiry, but at present, while the matter is still pending before the Land Department and the officers are bringing to bear upon it their own judgment and discretion,

we have no right to interfere with their action by injunction. This case is within that large number cited in *Noble* v. *Union River Logging Railroad*, in which it was held that the judicial power will not interpose by mandamus or injunction to limit or direct the action of departmental officers in respect to pending matters within their jurisdiction and control.

The decree of the Court of Appeals affirming the decree of the Circuit Court dismissing the plaintiff's bill is, therefore,

Affirmed.

UNITED STATES *v.* HARMON.

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

No. 649. Submitted January 6, 1893. — Decided January 16, 1893.

In a suit brought by a marshal against the United States, under the act of March 3, 1887, c. 359, (24 Stat. 505,) to recover $1770.60 as fees and disbursements of the marshal, from March, 1886, to October, 1888, the items having been disallowed by the First Comptroller: *Held*, that the Circuit Court of the United States had jurisdiction to review items disallowed by the First Comptroller before March 3, 1887, although, by § 2 of the act, jurisdiction was withheld of claims which had theretofore "been rejected, or reported on adversely, by any court, department or commission authorized to hear and determine the same."

Items for marshal's fees for distributing venires; and for amounts paid for blanks for United States attorney; and for amounts charged for marshal's travel to attend court on days when the courts were held by adjournment over an intervening day, and were not held on consecutive days, and to attend special courts or special terms of court; and for expenses in endeavoring to make an arrest; and for travel to serve precepts, where he had in his hands for service, several precepts against different persons for different causes, and made service of two or more of such precepts in the course of one trip, making one travel to the most remote point of service, but charging full travel on each precept; and for amounts paid for hack hire in transporting prisoners to and from court; allowed.

Whether the payment of the amount of the judgment in favor of the marshal will exceed the maximum compensation of the plaintiff as marshal, and the proper expenses of his office, is a matter still open for adjustment at the Treasury Department.

The Circuit Court had a right, under § 15 of the act of 1887, to award certain costs to the plaintiff, considering the frivolous and vexatious nature of the objections taken to the greater part of this claim.

THE case is stated in the opinion.

Mr. Solicitor General and *Mr. Felix Brannigan* for appellant.

Mr. Edward M. Rand for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit brought in the Circuit Court of the United States for the District of Maine, February 7, 1890, by Charles B. Harmon against the United States, under the act of March 3, 1887, c. 359, (24 Stat. 505,) to recover $1770.60 as fees and disbursements of Harmon while marshal of the United States for that district, from March 9, 1886, to October 1, 1888, which were included in his account presented to the District Court, proved to its satisfaction by his oath, approved by it, forwarded to the First Auditor of the Treasury and by him to the First Comptroller, and disallowed by the latter, the items of the same being set forth in detail in schedules annexed to the petition.

The United States, by a plea in the nature of *non assumpsit*, put in issue the plaintiff's right to recover. The suit, under the requirement of § 2 of the act of 1887, was tried by the court without a jury.

There was filed the following admission in writing, signed by the district attorney of the United States: "In the above-entitled cause it is admitted, on behalf of respondent, that the services charged in the petition and schedules were actually rendered; that the disbursements charged were actually made in lawful money; and that the sums charged as paid to witnesses were actually and in every instance paid upon orders issued in due form, either by court or a commissioner of the Circuit Court, in the respective cases."

The case, as now presented before us, involves only items

numbered 2, 3, 4, 5, 6 and 9, discussed in the opinion of the Circuit Court.

There was filed, before the hearing, an "agreed statement of facts," signed by the attorneys for both parties, the only parts of which that it is important to recite being as follows:

"First. — As to jurisdiction:

"That of the total amount claimed by petitioner, items amounting to $140.32 were disallowed by the First Comptroller prior to March 3, 1887.

"Second. — As to the items claimed:

"That they are correctly classified and set forth in the abstract of schedules annexed to brief of petitioner.

"Third. — As to the several classes of claims:"

"2. Distributing venires, marshal's fees, $186.

"That, if the marshal is entitled to a fee of $2 for each venire distributed to the several constables, he is entitled to the amount claimed, but it is claimed by respondent that said amount was erroneously charged in the marshal's account as mileage, and was for that reason disallowed by the Comptroller.

"3. Paid for blanks for U. S. attorney, $14.

"That upon requisition of the U. S. attorney, approved by the Attorney General, this amount was paid by the marshal for blank indictments and informations for the necessary use of the U. S. attorney. That a similar charge has since been allowed by the Comptroller.

"4. Marshal's travel to attend court, $156.60.

"That of the amount claimed, $118.80 is for travel to attend regular terms of the Circuit and District Courts, and that one travel, $1.80, has been allowed and paid to the marshal for travel at each of said terms.

"That said $118.80 is charged for travel on days when said courts were held by adjournment over an intervening day, and were not held on consecutive days.

"That the remaining sum of $37.80 is charged for travel to attend 21 special courts or special terms of the District Court. That the docket of the District Court shows that said 21 special courts or special terms were duly held.

"5. Expenses endeavoring to arrest, $4.

"That this charge for two days at $2 was disallowed by the First Comptroller solely because he claimed it was not charged in the proper account.

"6. Travel to serve precepts, $237.60.

"That in some instances the officer had in his hands for service several precepts against different persons for different causes, and made service of two or more of such precepts in the course of one trip, making but one travel to the most remote point of service, but charging full travel on each precept. The following item, viz.:

"'1886, April 24. In U. S. *v.* Jeffrey Gerroir, travel to serve subpœna from Circuit Court, Massachusetts District, at Cranberry Isle, 314 miles, $18.84,'

is suspended by Comptroller because the only actual travel was from Portland to Cranberry Isle, say 206 miles. If travel as charged is not to be allowed, then this charge should be for 206 miles, $12.36. That in serving a warrant of removal (in every instance within this district) or warrant to commit, the marshal has charged travel, while the Comptroller claims that, transportation of officer and prisoner being allowed, no travel can be charged."

"9. Transporting prisoners to and from court, $78.

"That this amount was actually paid for hack hire in accordance with the usual practice, and that the charge had always before been allowed. The Comptroller claims that the amount was excessive and the use of hacks unnecessary."

"Fourth. — As to the allegations in the petition:

"That the marshal duly rendered his accounts as stated, and that the same were duly presented to the court and approved and forwarded to the accounting officer of the Treasury, as alleged."

The case was tried before Mr. Justice Gray and Judge Colt, Circuit Judge, and the opinion of the court was given by Mr. Justice Gray. 43 Fed. Rep. 560. The court found for the petitioner for the whole of his claim except $6.48, and rendered judgment in his favor for $1764.12 and $59.15 costs. It also, in pursuance of § 7 of the act of 1887, specifically

found the facts of the case to be as so admitted and agreed. The United States, within six months, filed a petition alleging errors and praying an appeal, which was allowed.

A material question in the case is, whether the Circuit Court had jurisdiction to pass upon those items of the claim, amounting to $140.32, which were disallowed by the First Comptroller before March 3, 1887. By § 2 of the act of that date, the Circuit and District Courts of the United States are vested with concurrent jurisdiction (within certain limits as to amount) of all matters which, by § 1 of the act, "the Court of Claims shall have jurisdiction to hear and determine," including "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable: *Provided*, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which have heretofore been rejected, or reported on adversely, by any court, department or commission authorized to hear and determine the same."

The question is, whether claims disallowed by the First Comptroller prior to March 3, 1887, were claims which, under § 1 of the act of that date, had been, prior to its passage, "rejected or reported on adversely, by any court, department or commission authorized to hear and determine the same."

It is contended for the United States, that, except where Congress, by special law, empowers some court or executive officer to hear and determine a claim against the United States, the accounting officers of the Treasury Department alone have the power to hear and determine it; that under § 236 of the Revised Statutes, "all claims and demands, whether by the United States or against them, and all ac-

counts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury;" that, as to marshal's accounts, their settlement and adjustment belong to the First Auditor and the First Comptroller alone, under §§ 269 and 277 of the Revised Statutes; that, prior to the act of 1887, the only remedies existing in favor of marshals, as against the action of the accounting officers, were, in proper cases, by set-off in the Circuit or District Courts, or by suits in the Court of Claims; that, prior to the establishment of the Court of Claims, the settlement and adjustment of accounts by the accounting officers of the Treasury Department, and their final action on claims and accounts, were regarded by all the departments of the government as a final determination, adjustment and adjudication of the claims and accounts so passed upon; that, in respect to hearing such claims, the accounting officers constituted the "department" which heard and determined them; that their powers came within the very terms of the act of 1887; that the act of 1887 cannot be construed so as to apply only to claims determined by courts and special tribunals; that, when the accounting officers of the United States settle accounts and claims, they are authorized to hear and determine them, and to reject or report adversely such claims or items as, in their judgment, should be disallowed; and, therefore, that the claims so reported are rejected by a department authorized to hear and determine them within the meaning of the act of 1887.

But we concur with the views of the Circuit Court on this point, which, in its opinion delivered by Mr. Justice Gray, are expressed as follows: "Upon the question whether a disallowance of an account by the First Comptroller of the Treasury is within the latter part of this proviso, there has been a diversity of judicial opinion. The Circuit Court for the Eastern District of Missouri held that it was, and its decision was followed by the District Court in this district, as well as in the Eastern District of Missouri. *Bliss* v. *United States*, 34 Fed. Rep. 781; *Rand* v. *United States*, 36 Fed. Rep. 671; *Preston* v. *United States*, 37 Fed. Rep. 417. But the opposite view has

since been maintained, on fuller consideration, by the District Court in Connecticut, in Georgia, and in Illinois. *Stanton* v. *United States*, 37 Fed. Rep. 252; *Erwin* v. *United States*, 37 Fed. Rep. 470; *Hoyne* v. *United States*, 38 Fed. Rep. 542.

"The earlier decisions are based upon § 269 of the Revised Statutes, by which it is made the duty of the First Comptroller 'to superintend the adjustment and preservation of the public accounts subject to his revision;' and upon § 191, which is as follows: 'The balances which may from time to time be stated by the Auditor and certified to the heads of departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided.'

"The clause of § 269, as to the general duty of the Comptroller to superintend the adjustment and preservation of public accounts subject to his revision, is a reënactment of a provision of earlier acts, reaching back to the foundation of the government. Acts of September 2, 1789, c. 12, § 3, 1 Stat. 66; March 3, 1817, c. 45, § 8, 3 Stat. 367; March 3, 1849, c. 108, § 12, 9 Stat. 396.

"Section 191 is a reënactment of the act of March 30, 1868, c. 36, 15 Stat. 54. Before that act it was settled by a series of opinions of successive Attorneys General that the action of the Comptroller, or of the Commissioner of Customs, was subject to the revision of heads of departments. See Opinion of Attorney General Stanbery, of September 15, 1866, and earlier opinions therein referred to. 12 Opinions of Attorneys General, 43. The action of accounting officers of an executive department was never considered as a conclusive determination when the question was brought before a court of justice. Acts

of March 3, 1797, c. 20, 1 Stat. 512; May 15, 1820, c. 107, § 4, 3 Stat. 595; Rev. Stat. § 3636; *United States* v. *Jones*, 8 Pet. 375, 384; *United States* v. *Bank of Metropolis*, 15 Pet. 377, 401; 1 Opinions of Attorneys General, 624; 5 Opinions of Attorneys General, 650.

"The sole purpose and effect of the act of 1868 were to regulate the business of the executive departments; to define the comparative powers of the Comptrollers or the Commissioner of Customs on the one hand, and of the heads of departments on the other, in the performance of their executive and ministerial duties; and to make the decision of a Comptroller or of the Commissioner of Customs final and conclusive, so far as the executive department was concerned, but not to affect the powers of the legislature or of the judiciary. 13 Opinions of Attorneys General, 5; 14 Opinions of Attorneys General, 65; 15 Opinions of Attorneys General, 192, 596, 626; *Delaware Steamboat Co.* v. *United States*, 5 C. Cl. 55.

"The act itself, after providing that the balances certified to the heads of departments by the Comptroller, or by the Commissioner of Customs, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be 'conclusive upon the executive branch of the government,' adds in equally unequivocal terms, 'and be subject to revision only by Congress or the proper courts;' and the further provision, which makes the decision of the Comptroller upon facts submitted to him by the head of a department 'final and conclusive,' reserves the legislative and the judicial authority with equal clearness by the qualifying words 'as hereinbefore provided.' Act of March 30, 1868, c. 36, 15 Stat. 54; Rev. Stat. § 191.

"The judgments of the Court of Claims, and of the Supreme Court on appeal from its decisions, accord with this view, and uniformly treat the action of the accounting officers as not conclusive in a suit between the United States and the individual. *McElrath* v. *United States*, 12 C. Cl. 201, and 102 U. S. 426, 441; *Chorpenning* v. *United States*, 11 C. Cl. 625, and 94 U. S. 397, 399; *Pittsburg Savings Bank* v. *United States*, 16 C. Cl. 335, 351, 352, and 104 U. S. 728, 734; *Wallace*

v. *United States*, 20 C. Cl. 273, and 116 U. S. 398; *Saunders* v. *United States*, 21 C. Cl. 408, and 120 U. S. 126.

"In § 1 of the act of March 3, 1887, c. 359, the words 'hear and determine' are used four times; once as applied to the Court of Claims, twice as applied to that court and to the Circuit and District Courts, and again as applied to 'any court, department or commission.' These words must be taken to be used in each instance in the same sense, and as implying an adjudication conclusive as between the parties, in the nature of a judgment or award. The proviso that nothing in this section shall be construed as giving to either of the courts named in the act jurisdiction to hear and determine any claims 'which have heretofore been rejected, or reported on adversely, by any court, department or commission authorized to hear and determine the same' must be limited to a rejection of a claim, or an adverse report thereon, by a court, department or commission, which determines the rights of the parties, such as the approval by the Secretary of the Treasury of an account of expenses under the captured and abandoned property acts, as in *United States* v. *Johnston*, 124 U. S. 236, or the decision of an international commission, as in *Meade* v. *United States*, 9 Wall. 691.

"Moreover, the Court of Claims, even before the passage of the act of 1887, had jurisdiction of claims under an act of Congress or under a contract, and could therefore hear and determine claims for legal salaries or fees. *Mitchell* v. *United States*, 18 C. Cl. 281, and 109 U. S. 146; *Adams* v. *United States*, 20 C. Cl. 115; *United States* v. *McDonald*, 128 U. S. 471; *United States* v. *Jones*, 131 U. S. 1, 16.

"We cannot believe that the act of 1887, entitled 'An act to provide for the bringing of suits against the government of the United States,' and the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decisions of accounting officers an authority and effect which they never had before."

Item 2 is as follows: "Distributing venires, marshal's fees, $186." As to this item, the agreed statement of facts says:

"That, if the marshal is entitled to a fee of $2 for each venire distributed to the several constables, he is entitled to the amount claimed, but it is claimed by respondent that said amount was erroneously charged in the marshal's account as mileage, and was for that reason disallowed by the Comptroller." As to this item 2, the Circuit Court in its opinion says: "In this district the jurors being drawn by constables in accordance with the laws of the State, the fees paid by the marshal to the constables for their services, as well as those charged by him for his own services, in distributing venires, are in accordance with the express words of the Revised Statutes, § 829, cl. 3, and with the settled course of decision in this circuit. *United States* v. *Cogswell*, 3 Sumner, 204; *United States* v. *Smith*, 1 Woodb. & Min. 184; *United States* v. *Richardson*, 28 Fed. Rep. 61, 73." In the case last cited the mode of summoning jurors in the First Circuit is fully explained. As to this item 2, all that the counsel for the United States says is, that the finding as to it is not of fact, but is a mere conclusion of law, and therefore is error. We do not perceive that there is any error.

Item 3 is as follows: "Paid for blanks for U. S. attorney, $14." As to this item 3, the agreed statement of facts says: "That upon requisition of the U. S. attorney, approved by the Attorney General, this amount was paid by the marshal for blank indictments and informations for the necessary use of the U. S. attorney. That a similar charge has since been allowed by the Comptroller." As to this item 3, the Circuit Court says: "The sums paid by the marshal, upon the requisition of the district attorney, approved by the Attorney General, for blank indictments and informations for the necessary use of the district attorney, having been paid by the marshal with the approval of the Attorney General, exercising the general supervisory power conferred by Rev. Stat. § 368, the marshal is entitled to be repaid those sums." All that the counsel for the United States says, in regard to item 3, is, that the item is payable only out of the earnings of the district attorney and is a part of his office expenses, and that the marshal cannot be allowed credit for that item, because there

is no law authorizing or making appropriation for such blanks. We think that item 3 is allowable.

Item 4 is as follows: "Marshal's travel to attend court, $156.60." As to this item 4, the agreed statement of facts says: "Of the amount claimed $118.80 is for travel to attend regular terms of the Circuit and District Courts; and one travel, $1.80, has been allowed and paid to the marshal for travel at each of said terms. That said $118.80 is charged for travel on days when said courts were held by adjournment over an intervening day, and were not held on consecutive days. That the remaining sum of $37.80 is charged for travel to attend twenty-one special courts or special terms of the District Court. That the docket of the District Court shows that said twenty-one special courts or special terms were duly held." As to this item 4, the Circuit Court says: "By the Rev. Stat. § 829, cl. 24, the marshal is to be allowed 'for travelling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only.' This allowance is not expressly, or by any reasonable implication, restricted to a single travel at each term, but extends to every time when he may be expected to travel from his home to attend a term of court. If the court sits for any number of days in succession, he should continue in attendance, and is entitled to only one travel. But, if the court is adjourned over one or more intervening days, he is not obliged to remain at his own expense at the place of holding court but may return to his home, and charge travel for going anew to attend the term at the day to which it is adjourned. His right to charge travel for going to each special court or special term is, if possible, still clearer, and is scarcely contested." The counsel for the United States says that this item is for mileage of the marshal for travelling more than once from his residence to attend a term of court, and is for travel caused by temporary adjournments of the court for a day or two during a term thereof, the marshal preferring to go home rather than to remain at his own expense at the place of holding the court; that a fair reading of § 829 of the Revised Statutes forbids more than one mileage for going to attend a term of court;

that it allows the marshal "for travelling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only," and does not say that he shall have such mileage for each time he travels from his place of residence to the place of holding court during a term thereof. No suggestion is made, on behalf of the United States, that, if item 4 is legal, the amount allowed is unreasonable. We think that the item was properly allowed.

Item 5 reads as follows: "Expenses endeavoring to arrest, $4." As to this item 5, the agreed statement of facts says: "That this charge for two days at $2 was disallowed by the First Comptroller solely because he claimed it was not charged in the proper account." As to item 5, the Circuit Court says: "The charge for expenses in endeavoring to make an arrest was no more than the statute permits to be allowed. Rev. Stat. § 829, cl. 18." As to this item 5, the counsel for the United States says that the finding is defective; that it is not shown that the expenses amounted to $2 a day; and that the fee bill allows necessary expenses only, and not exceeding $2 a day. We think the item is covered by the admission that the services charged in the petition were actually rendered and that the disbursements charged were actually made in lawful money. This $4 is for "expenses."

Item 6 is as follows: "Travel to serve precepts, $237.60." In regard to item 6, the agreed statement of facts says: "That in some instances the officer had in his hands for service several precepts against different persons for different causes, and made service of two or more of such precepts in the course of one trip, making but one travel to the most remote point of service, but charging full travel on each precept. The following item, viz.: '1886, April 24. In U. S. *v.* Jeffrey Gerroir, travel to serve subpœna from Circuit Court, Massachusetts District, at Cranberry Isle, 314 miles, $18.84,' is suspended by Comptroller because the only actual travel was from Portland to Cranberry Isle, say 206 miles. If travel as charged is not to be allowed, then this charge should be for 206 miles, $12.36. That in serving a warrant of removal (in every instance within this district) or warrant to commit, the marshal has

charged travel, while the Comptroller claims that, transportation of officer and prisoner being allowed, no travel can be charged." In regard to item 6, the Circuit Court says: "The general rule prescribed by Rev. Stat. § 829, cl. 25, allows the marshal 'for travel, in going only, to serve any process, warrant, attachment or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service.' The explanatory or restrictive provisions as to the cases of two persons served with the same precept, and of more than two writs in behalf of the same party against the same person, emphasize the general rule, and confirm its application to several precepts against different persons for different causes, although served at the same time. This clause of the fee bill, which allows for travel in going only, as a compensation for actual travel in both going and returning, is wholly independent of, and unaffected by, the distinct clause allowing fees for transportation of officer and prisoner, only while the officer has the prisoner in custody, and without any regard to any additional distance which he may be obliged to travel out and back in serving the warrant of arrest or removal. The United States rely on the act of February 22, 1875, c. 95, § 7, which, after providing that all accounts of attorneys, marshals and clerks for mileage and expenses shall be audited, allowed and paid as if the act of June 16, 1874, c. 285, had not been passed, further provides that 'no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.' 18 Stat. 334. We concur in the opinion of Attorney General Devens that this last provision, which manifestly includes marshals, does not deny a marshal full travel on two or more writs in his hands at the same time and served at the same place on different persons, inasmuch as his travel is actual and necessary to serve each and every of those writs; but that 'that provision was intended to apply to cases in which no actual travel is performed in serving process, as, for instance, where the writ is sent through the mail to be served by a deputy at or near the place of service.' 16 Opinions of

Attorneys General, 165, 169. It follows that by the statute of 1875 the travel to be allowed to the marshal for serving at Cranberry Isle a subpœna from the Circuit Court for the District of Massachusetts must be limited to his actual travel within his district from Portland to Cranberry Isle, and cannot include the constructive travel from Boston to Portland, amounting to $6.48, and that the marshal is entitled to recover the rest of the sums charged for travel to serve precepts." In regard to item 6, the counsel for the United States says that the claim is for travel fee on more than one writ, the writs being served on different persons, in different causes in the course of one trip; and that the same question is involved in No. 783, *United States* v. *Fletcher*, submitted at this term. The counsel for the United States, in his brief in No. 783, relies on the same provision of the act of February 22, 1875, c. 95, § 7, (18 Stat. 334,) which, recited above, referring to clerks, marshals, etc., provides that "no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law." But we think the view of Attorney General Devens, in his opinion of October 10, 1878, (16 Op. Att. Gen. 165, 169,) cited and quoted in the opinion of the Circuit Court in the present case, is the correct view on the subject; and that the item was properly allowed.

Item 9 is as follows: "Transporting prisoners to and from court, $78." In regard to item 9, the agreed statement of facts says: "That this amount was actually paid for hack hire in accordance with the usual practice, and that the charge had always before been allowed. The Comptroller claims that the amount was excessive and the use of hacks unnecessary." In regard to item 9, the Circuit Court says: "The hire of hacks to transport prisoners to and from court is agreed to have been in accordance with the usual practice, and to have always before been allowed, and must be presumed to have been required by the court for the prompt despatch of business." The counsel for the United States claims that it is contrary to law to allow that item; and that the service is covered by the *per diem* fee of $5 for attending court and bringing in and

committing prisoners and witnesses. But the $5 a day is given to the marshal for his attendance; and it must be presumed that the hack hire was necessary for the prompt despatch of business and for preventing the escape of prisoners. We think the item was properly allowable; and that there is no clear and unequivocal proof of mistake, as against the approval by the Circuit Court, within the principle laid down in *United States* v. *Jones*, 134 U. S. 483, 488.

It is also contended by the counsel for the United States that the Circuit Court erred in rendering its judgment in favor of the plaintiff for $1764.12, in the absence of a finding that the payment of that sum would not exceed the maximum compensation of the plaintiff as United States marshal, and the proper expenses of his office. But we think that is a matter which still remains open for adjustment at the Treasury Department.

The Circuit Court, under the discretion given to it by § 15 of the act of 1887, c. 359, 24 Stat. 505, 508, awarded to the plaintiff $59.15 costs, "considering the frivolous and vexatious nature of the objections taken to the greater part" of his claim. The items of costs allowed are not objected to, and do not appear in the record sent up. It must be assumed that the costs were taxed in accordance with the statute, which says that the costs "shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court."

Judgment affirmed.

SHOEMAKER *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1197. Argued November 28, 29, 1892. — Decided January 16, 1893.

Land taken in a city for public parks and squares by authority of law, is taken for a public use.

The extent to which such property shall be taken for such use rests wholly in legislative discretion, subject only to the restraint that just compensation must be made.

The proviso in the Maryland act of cession of the District of Columbia, that

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nothing therein contained should be " so construed to vest in the United States any right of property in the soil, as to affect the right of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States," has no reference to the power of eminent domain which belongs to the United States as the grantee in the act of cession.

The United States possess full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia.

It is within the constitutional power of Congress, in legislating for the creation of a commission charged with public duties, to provide that some members of it shall be appointed by the President, by and with the advice and consent of the Senate, and that other members of it shall consist of officers in the service of the United States, who had been appointed by the President and confirmed by the Senate, when the duties of the new office are germane to those of the offices already held by the latter.

Congress may increase the duties of an existing office without rendering it necessary that the incumbent should be again nominated, confirmed and appointed.

The approval by the President of the price to be paid by the United States for private land, condemned for public use in the exercise of the right of eminent domain, is not a judicial act.

An intention expressed by Congress not to go beyond a sum named as the aggregate, in condemning land for a park in Washington, is not a direction to appraisers to keep within any given limit in valuing any particular piece of property.

It is competent for the legislature, in providing for the cost of a public park, to assess a proportionate part of it upon property specially benefited.

In condemning lands for a public park, it is competent for the court, in the absence of a legislative direction prescribing the form of the oath to be administered to appraisers, to direct them to take an oath to " faithfully, justly and impartially appraise the value or values of said parcels of land, and of the respective interests therein, to the best of their skill and judgment."

In determining the values of lands so taken appraisers should exercise their own judgment, derived from personal knowledge and inspection of the lands, as well as their knowledge derived from the evidence adduced by the parties.

An appellate court will not interfere with the report of commissioners, (or appraisers,) in such case, to correct the amounts reported, except in case of gross error showing prejudice, corruption or plain mistake.

If there were any deposits of gold in the land condemned for the Rock Creek Park in Washington, those deposits were the property of the United States.

The filing of a map of the land proposed to be taken for the Rock Creek Park, made under § 3 of the act of September 27, 1890, 26 Stat. 492, c.

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1001, was not a finalty, and did not commit the commissioners to taking all the tracts included in it.

The owners of the tracts condemned for that park are not entitled to interest upon the respective sums assessed as damages for the taking.

Under the title of "An act authorizing the establishing of a public park in the District of Columbia," an act of Congress was approved on September 27, 1890, 26 Stat. 492, c. 1001, directing that a tract of land lying on both sides of Rock Creek, and within certain limits named in the act, be secured as thereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States. The act provided that the whole tract to be selected and condemned should not exceed two thousand acres, and that the cost thereof should not be in excess of a certain amount appropriated.

It was provided that the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, be, and they were by the act, created a commission (a majority of which should have power always to act) to select the land for the said park, of the quantity and within the limits prescribed, and to have the same surveyed by the assistant to the said Engineer Commissioner of the District of Columbia in charge of public highways.

The means to be employed in the ascertainment of the value of the lands to be selected, and in the acquirement of ownership and possession thereof by the United States, were provided for in sections 3, 4 and 5 of the act, which were as follows:

"Sec. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof

vested in the United States, subject to the payment of just compensation, to be determined by said commission, and approved by the President of the United States: *Provided*, That such compensation be accepted by the owner or owners of the several parcels of land.

"That if the said commission shall be unable by agreement with the respective owners to purchase all of the land so selected and condemned within thirty days after such condemnation, at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the Supreme Court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

"Said petition shall contain a particular description of the property selected and condemned with the name of the owner or owners thereof, if known, and their residences, so far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such application, without delay, to notify the owners and occupants of the land, if known, by personal service, and if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court; and when the value or values of such land are thus ascertained, and the President of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee-simple shall in like manner be vested in the United States.

"SEC. 4. That said court may direct the time and manner in which the possession of the property condemned shall be

taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession.

"SEC. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America and managed by the commission."

It was made the further duty of the commission, when they had ascertained the amount required to be paid for the land, and for expenses, to assess the same upon the lands, lots and blocks, situated in said District, specially benefited by reason of the location and improvement of said park, in proportion to such benefits to said property; and it was provided that if the commission should find that the benefits were not equal to the cost and expenses of the land obtained for the park, they should assess each tract specially benefited to the extent of the benefit thereto. If the proceeds of the assessment exceeded the cost of the park, the excess was to be used in its improvement, if such excess should not exceed the amount of ten thousand dollars; any part above that amount to be refunded ratably. The commission was to give due notice of the time and place of their meeting for the purpose of making such assessment for benefits, and all persons interested might appear and be heard. This assessment being duly made, it became the duty of the commission to apply to the Supreme Court of the District of Columbia to have it confirmed. The court was given power, after notice duly given to all parties in interest, to hear and determine all matters connected with said assessment, and to revise, correct, amend and confirm the same, in whole or in part, or order a new assessment in whole or in part, with or without further notice, or on such

notice as it should prescribe. The act also prescribed the mode in which payment of the assessment for benefits should be made after it was confirmed, and provided for the enforcement of such payment in the manner employed in the District for the collection of delinquent taxes. All payments under said assessment were to be made to the Treasurer of the United States, and all money so collected might be paid by the Treasurer, on the order of the commission, to any persons entitled thereto as compensation for land or services.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other expenses incidental thereto, the sum of $1,200,000 was appropriated out of any money in the Treasury not otherwise appropriated, one-half of which, as well as one-half of any sum annually appropriated and expended for the maintenance and improvement of the park, was made a charge upon the revenues of the District of Columbia.

The act finally provided that the public park authorized and established thereby should be under the joint control of the Commissioners of said District and the Chief of Engineers of the United States Army, and it was made their duty, as soon as practicable, to render the park fit for the purposes of its establishment, and to make and publish such regulations as they deemed necessary or proper for the care and management of the same.

On May 20, 1891, the commission appointed under the provisions of the act filed a petition in the Supreme Court of the District of Columbia, setting out therein that they had caused a map to be made of the lands selected by them for the park, showing the location, quantity and character of each tract or parcel of property to be taken therefor, and that they had filed and recorded the map in the public records of said District on April 16, 1891. The petitioners stated that immediately upon the filing of the map they made to each of the owners of said tracts of land an offer to purchase his property at a definite sum fixed by the commission and approved by the President of the United States, and that they had not been able within the time limited for such pur-

pose to purchase, by agreement with the owners, any of the lands, except five of the eighty-four tracts selected; and the petitioners therefore prayed the court for the appointment of three competent and disinterested commissioners to appraise the land so selected, and to return the appraisement to the court. The court directed that the petition be filed in general term, and ordered that the persons named as respondents to the petition, and all others interested or claiming to be interested in the land described, or in any part thereof, as occupants or otherwise, appear in court on or before June 15, 1891, and show cause why the prayer of the petition should not be granted, and why the court should not proceed at that time as directed by the act of Congress. The court further directed that a copy of this order be served upon such of the named respondents as should be found in said District at least seven days before June 15, 1891, and that a copy thereof be duly published in the periodical press of the District.

After the petition was filed, Pierce Shoemaker, one of the respondents thereto, died, and his death being suggested to the court, Louis P. Shoemaker, Francis D. Shoemaker, Abigail C. Newman, and Clara A. Newman, heirs at law and devisees of the said Pierce Shoemaker, deceased, were, on June 2, 1891, made parties respondent in his place and stead.

The said Louis P. Shoemaker and Francis D. Shoemaker, executors of the last will and testament of the said Pierce Shoemaker, deceased, appeared in court June 15, 1891, and moved that the petition be dismissed. This motion was based upon various grounds, each one of which impeached the constitutionality of the said act, and the validity of proceedings under it. These grounds were, in substance, that two members of the commission were appointed by Congress, and not by any executive officer or court; that the act provided that the President should perform a judicial function in participating in the appraisement of the several tracts of lands to be selected for the park, and in adjudicating upon awards respecting the same; that the approval or disapproval of the said appraisement was left to the President, who was virtually a party to the condemnation proceedings, and not left to an

impartial judicial tribunal to decide upon the question of just compensation for the property; that the amount to be paid for the property was limited to a fixed sum, regardless of its adequacy as just compensation therefor; that Congress by the act attempted to exercise the right of eminent domain within the District of Columbia for purposes foreign to the needs and requirements of its exclusive power therein; and that such exercise was in violation of its compact made with the State of Maryland upon the cession of territory thereof to the United States, that nothing contained in the act of cession, passed by the assembly of Maryland, should "be so construed to vest in the United States any right of property in the soil, as to affect the right of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States."

This motion was denied, the court being of opinion that it was not unconstitutional for the legislature to entrust the performance of particular duties to officials already charged with duties of the same general description, and that, besides, as the majority of the commission was empowered by the law to act in all cases, the three civilian members might legally discharge the duties of the commission, independently of the two army officers, if the appointment of the latter was irregular; that no judicial power was devolved upon the President by the act, he being only vested with authority either to acquiesce in the judgment of the assessors or to decline on behalf of the United States to accept the property, and having no power to take the property in disregard of their assessment; that the limitation by the act of the amount to be paid for said lands was not unconstitutional, as the appraisers were bound, as competent and disinterested commissioners, to return what they believed was the just value of the properties, regardless of any restriction in the act as to the cost thereof; that the condemnation of land for a public park was a taking of property for public uses within the meaning of the Constitution; that no relinquishment of the Federal power of eminent domain could be deduced from the legislation relating to the acquisition of said territory from the State of Maryland

by the United States; and that the United States could not have bound itself by any such condition, even though distinctly set forth in the act of cession. 19 Wash. Law Rep. 466.

The said respondents thereupon asked leave to file a demurrer to the petition. This being refused, they prayed in open court the allowance of a writ of error, returnable to this court, to review the judgment of the general term overruling the motion to dismiss the petition. This application was denied because that judgment was interlocutory. Application was then made to one of the justices of this court, and he denied it.

The court of the District of Columbia then made an order appointing three citizens of the District, whom it adjudged to be competent and disinterested, to appraise the values of the land selected for the park, with directions to return the appraisement into court, and to perform all other duties imposed upon them by the act of Congress.

The said respondents, who are the present plaintiffs in error, then presented to the court of the District a form of oath which they prayed might be administered to said appraisers, and also certain instructions which they prayed the court to give them. The court refused to administer the oath and to give the instructions proposed by plaintiffs in error, and a different oath was administered and different instructions given to said appraisers by the court. Exceptions to this action of the court were filed by plaintiffs in error, August 1, 1891.

The said appraisers entered upon the discharge of their duties. At the hearing before them evidence was offered by the plaintiffs in error for the purpose of sustaining certain allegations of the existence of gold in paying quantities in the tract of land shown on the map as tract No. 39. This evidence having been received by the appraisers, the United States moved the court strike it from the record. This motion was sustained, and the appraisers were directed not to consider that evidence in making up their award. The court held that if any deposits of gold existed in said land they were the

property of the United States; that the State of Maryland was the owner of all mines of gold or other precious minerals within its borders, by virtue of its confiscation of the property of the lord proprietary in 1780, who had never parted with his title, held under his charter from Charles I, to such mines; and that the legislature of the State of Maryland, by its act of cession, transferred its interest in any possible gold mines in the ceded territory to the United States. During the argument upon that motion the plaintiffs in error showed the court that in a resurvey patent granted by the State of Maryland in 1803, under which the plaintiffs in error mediately claim title, there was no reservation of mines, and contended that, as this patent was based upon a warrant of resurvey dated May 12, 1800, nine months before Congress assumed jurisdiction in the District of Columbia, the grantee under it acquired an equitable title to the land patented by virtue of that warrant. The court held that under the law of Maryland no equitable title could be created until the return of the certificate of survey to the land office; and that, as the patent did not show that such certificate was returned to the office, and as the party obtaining the warrant had, under the law, two years in which to have the certificate returned, the presumption would be that it was not returned until after 1801, and that, therefore, the grantee could take no title whatever under the patent until its issue in 1803. And further, that the State of Maryland could grant no title to lands within the ceded territory after the act of cession in 1791; and that the proviso therein with reference to the continuance of the jurisdiction of the laws of Maryland over persons and property in the ceded territory, until Congress should provide for the government thereof, applied only to laws affecting private rights, and did not continue the operation of the land laws of Maryland as to public lands owned by the State within that territory.

The plaintiffs in error then applied to the appraisers, in November, 1891, for permission to offer newly discovered evidence, relating to the ownership of the alleged gold deposits, to the end that they might move the court in general term,

upon the strength of such evidence, to rescind the order directing the appraisers to strike out of the record the evidence relating to the existence of gold in the property, and requested the appraisers to submit their application to the court in general term for further instructions. This application was submitted to the court, and the plaintiffs in error, on December 4, 1891, moved that the appraisers be instructed to receive the additional evidence touching the ownership of the alleged gold deposits in said tract No. 39, which motion was overruled. The new evidence tended to show that certain lands, which the court had held to be subject to a reservation of "royal mines" in a patent granted by the lord proprietary in 1772, were covered in part by a patent granted by him in 1760, which did not contain such reservation. The plaintiffs in error therefore contended that, though the patent of 1772 was original as to part of the lands described therein, it was, with reference to the lands granted in 1760, which lands included the said tract No. 39, a patent of confirmation only, and, as such, did not create a new estate, but simply recognized or reaffirmed the former one. The new evidence further tended to show that the grantee under those patents conveyed his estate to two persons as tenants in common; that the estate of one of those persons was confiscated as property of a British subject, and was afterwards, in 1792, conveyed by the State to the mediate grantor of the plaintiffs in error, without any reservation of said mines. The court was of opinion that the acceptance of a new grant from the lord proprietary, such as that described, necessarily involved the surrender of the original title, and therefore the patent of 1772 was original as to all the land it purported to grant or confirm; and that the conveyance made by the State in 1792 did not purport to convey anything else than the property confiscated, which was held subject to the reservation aforesaid; and that such conveyance made after 1791 could not be operative.

On December 19, 1891, the appraisers submitted their report and a copy of the proceedings before them, to the court, and the court ordered that the report, together with the testimony and exhibits, be filed.

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The plaintiffs in error filed their exceptions to this report January 4, 1892, said exceptions being based upon the grounds, among others, that the act of Congress was unconstitutional and all proceedings based thereon void; that the aggregate of the values, found by the assessors, of the lands included in the park, was in excess of the appropriation made by Congress; that the actual values of the lands were largely in excess of the values fixed by the appraisers; that the commissioners, in appraising the values of the property, disregarded certain parts of the evidence in respect thereto; that the attorney representing the government did not produce witnesses to impartially testify touching the value of said lands, but, on the contrary, placed a list of prices fixed by said park commission in the hands of divers persons proposed to be used as witnesses, for the purpose of affecting their judgment as to values, and to guide them in reaching values to correspond with those thus furnished them.

The plaintiffs in error contended that into the present act should be read the sundry civil appropriation act of August, 1890, wherein it was provided that the valuation by appraisers, to be appointed by the court, of lands to be purchased for the Government Printing Office, should be confirmed by the court, said appropriation act providing that after its passage, in all cases of the taking of property in said District for public uses, its provisions respecting such condemnation and appraisement should operate; and contended that under said appropriation act the court should review the evidence and proceedings before the appraisers appointed in the present instance, and decide whether the values fixed by them afforded just compensation for the property taken.

These exceptions were overruled, and the report confirmed. The constitutional questions involved having been already passed upon, the court decided, in overruling said exceptions, that the restriction in the act as to the cost of the lands is not a restriction upon the duty of the court to confirm the appraisement, but a restriction upon the government's finally securing the land, since it cannot be discovered whether or not the value is in excess of the appropriation until the court has dis-

charged its duty of assessing the land; that, as the evidence before the appraisers was conflicting, and the result simply an estimate based upon a comparison of the opposing opinions of witnesses, it cannot be said that the verdict was contrary to the evidence; that, as to the objection that lists of values fixed by the park commission were furnished to witnesses, an expert witness has a right to qualify himself by comparing his views with those of others, and to enlighten his judgment by any means which conduce to the formation of a reliable opinion, as after all he simply gives an opinion; that, as a general rule, the court has no right to review an appraisement simply because of error of judgment, if such has been manifested, on the part of the appraisers, as to value, and the said sundry civil appropriations act did not modify the rule; and that, under said appropriations act, the court must confirm the appraisement as a matter of course if the appraisers had discharged their duty, and if there were no legal ground for setting their report aside.

The park commission, in consideration of the limitation in the act with respect to the amount to be paid for the lands, and the difficulties resulting from an appraisement of values which, when added to the amount paid for tracts purchased and for expenses, would exceed the appropriation, on March 11, 1892, submitted for the inspection of the President a copy of the map, showing by red lines thereon the boundaries of a reduced area within the limits of the lands first selected, formed by the omission of certain tracts originally included. A letter of the park commission anticipating these difficulties had been referred to the Attorney General, and in his opinion thereon, dated April 10, 1891, he stated that if the assessed value of the land in the court proceedings exceeded the appropriation, the commission might exercise its discretion to pay for the land they regarded as most desirable.

In conformity with this interpretation of the act, the park commission reduced the area of the land proposed to be taken, to within the limits indicated by red lines on the said map, and, having shown to the President the cost of the lands within the reduced area, together with all expenses, requested him to decide the values appraised to be reasonable. In

response to this, by his letter to the park commission, dated April 13, 1892, the President stated his decision that the values fixed by the appraisers appointed by the Supreme Court of said District under the act were reasonable.

The park commission then filed a petition in said court, April 19, 1892, presenting the decision of the President, and showing that each and all the owners of said parcels, the assessed values of which had been so decided to be reasonable, had failed and neglected to demand or receive from the court those values, and that said owners claimed interest on their respective assessments from the date of the filing of the said original map. The petitioners therefore prayed the court to pass an order authorizing them to pay into court the assessed values of all of said parcels of real estate.

On May 2, 1892, the said respondents, now plaintiffs in error, moved to dismiss the petition on the grounds, among others, that the assessment of only a part of the lands shown on the map as originally prepared had been acted upon by the President; that no proceedings had been instituted on the basis of the reduced area, nor any map filed other than the original map; that the park commission having selected lands for the park, and filed a map thereof, had no power to reduce the area of the lands; and that for about a half mile along said Rock Creek, lands taken for the park lie upon only one side thereof, whereas said act provides that the park is to lie on both sides of said creek.

The court denied the motion, interpreting the act to express an absolute intent that there shall be a park on Rock Creek, and to give authority to the park commission, after making their original selection of lands for the park, to amend their work by abandoning such parcels as they were not authorized by the appropriation to purchase. The operation of the order denying this motion was suspended, however, so far as it might affect the property of the plaintiffs in error, until the further order of the court.

The plaintiffs in error then presented to the court an answer to the petition, setting up the same grounds of objection thereto as urged by them in their motion to dismiss the

Counsel for Plaintiffs in Error.

last-named petition, and requested that the answer might be filed. The court finding no point presented in the answer not already passed upon, denied the request to have the same filed, and ordered May 24, 1892, that the United States pay forthwith into the registry of the court the values, without interest thereon, appraised by the appraising commissioners theretofore appointed by the court, including the values of the property of plaintiffs in error.

Upon motion of the park commission, the court, on July 13, 1892, granted an order to show cause why the title in fee simple to the property of plaintiffs in error should not be declared by the court to be vested in the United States. The plaintiffs in error filed an answer to this rule, reserving therein all the objections theretofore taken by them during the progress of the said proceedings. The court overruled the objections, and ordered and decreed, July 16, 1892, that the fee simple title to each and all of the tracts of land represented by plaintiffs in error be vested in the United States, and that the owners of said tracts forthwith deliver up possession of their respective holdings to the park commission or its executive officer. On July 19, 1892, upon application of the United States, a special auditor was appointed to ascertain and report to the court the names of the persons respectively entitled to the appraised values of the tracts of lands selected for said park, claimed by the plaintiffs in error, and to report separately upon each tract or road within the boundaries thereof.

Thereupon plaintiffs in error sued out a writ of error to bring this final judgment and the record in the condemnation proceedings before this court for review.

In addition to the alleged errors above indicated, the plaintiffs in error now say, first, that the United States had no right, after filing the first map of the land selected, to abandon the taking of any part of the land condemned; and, secondly, that the assessment for benefits provided for by the act of Congress is beyond the power of the government, and that, therefore, the act is void.

Mr. Tallmadge A. Lambert and *Mr. Jeremiah M. Wilson* for plaintiffs in error.

Mr. R. Ross Perry and *Mr. C. C. Cole*, (with whom was *Mr. H. T. Taggart* on the brief,) for defendants in error.

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

In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.

It is true that, in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise and recreation, but places on which the owners of domestic animals might pasture them in common, and they were generally laid out as part of the original plan of the town or city.

It is said, in Johnson's Cyclopædia, that the Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure-ground, for rest and exercise in the open air. However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.

The validity of the legislative acts erecting such parks, and providing for their cost, has been uniformly upheld. It will be sufficient to cite a few of the cases. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234; *In re Commissioners of the Central Park*, 63 Barb. 282; *Owners of Ground* v. *Mayor of Albany*, 15 Wend. 374; *Holt* v. *Somerville*, 127 Mass. 408; *Foster* v. *Boston Park Commissioners*, 131 Mass. 225; also 133 Mass. 321; *St. Louis County Court* v. *Griswold*, 58 Missouri, 175; *Cook* v. *South Park Commissioners*, 61 Illinois, 115; *Kerr* v. *South Park Commissioners*, 117 U. S. 379. In these and many other cases it was, either directly or in effect, held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use.

In the case cited from the Missouri Reports, where the legislature had authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis County, situated in the eastern portion of the county, near to and outside of the corporate limits of the city of St. Louis, it was held that this was a public use, notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the act was not unconstitutional.

The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

A distinction, however, is attempted in behalf of the plaintiffs in error between the constitutional powers of a State and those of the United States, in respect to the exercise of the power of eminent domain, and this distinction is supposed to be found in a restriction of such power in the United States to purposes of political administration; that it must be limited in its exercise to such objects as fall within the delegated and expressed enumerated powers conferred by the Constitution upon the United States, such as are exemplified by the case of post-offices, custom-houses, court-houses, forts, dockyards, etc.

We are not called upon, by the duties of this investigation, to consider whether the alleged restriction on the power of eminent domain in the general government, when exercised within the territory of a State, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia, over whose territory the United States possess, not merely the political authority that belongs to them as respects the States of the Union, but likewise the power "*to exercise exclusive legislation in all cases whatsoever over such District.*" Constitution Art. I, Sec. 8, par. 17. It is contended that, notwithstanding this apparently unlimited grant of power over

the District, conferred in the Constitution itself, there was a limitation on the legislative power of the general government contained in the so-called act of cession by the State of Maryland, (Act of 1791, c. 45, § 2,) a proviso to which is in the words following: "Provided, that nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States." It is said that the acceptance by the United States of the grant constituted a contract between Maryland and the United States, whereby, in view of the foregoing language, the land owner was to be protected against any exercise by the general government of the sovereign power of eminent domain. It is sufficient to say that the history of the transaction clearly shows that the language used in the Maryland act referred to such persons as had not joined in the execution of a certain agreement by which the principal proprietors of the Maryland portion of the territory undertook to convey lands for the use of the new city, and their individual rights were thus thought to be secured. The provision had no reference to the power of eminent domain, which belonged to the United States as the grantee in the act of cession.

This position, contended for by the plaintiffs in error, was raised in the case of *Chesapeake & Ohio Canal* v. *Union Bank*, in the Circuit Court of the United States for the District of Columbia, and Cranch, C. J., said: "The eighth objection is that by the Maryland act of cession to the United States, of this part of the District of Columbia, (1791, c. 45, sec. 2,) Congress are restrained from affecting the rights of individuals to the soil, otherwise than as the same should be transferred to the United States by such individuals; and it is contended that this prohibits the United States from taking private property in this District for public use, and that the right of sovereignty, which Maryland exercised, was not transferred. We think it is a sufficient answer to this objection to say that the United States do not, by this inquisition or by the charter to the Chesapeake & Ohio Canal Company,

claim any right of property in the soil. They only claim to exercise the power which belongs to every sovereign, to appropriate, upon just compensation, private property to the making of a highway, whenever the public good requires it." 4 Cranch, C. C. 75, 80.

But this contention can scarcely have been seriously made in view of the explicit language of the Maryland act in its second section: "That all that part of said territory called Columbia, which lies within the limits of this State, shall be, and the same is hereby, acknowledged to be forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the Constitution of government of the United States." *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Gibbons* v. *District of Columbia*, 116 U. S. 404.

Proceeding upon the conclusion that the United States possess full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia, we come to a consideration of certain objections, taken in the court below and urged here, to the validity of the statute itself and to the proceedings under it.

There are several features that are pointed to as invalidating the act. The first is found in the provision appointing two members of the park commission, and the argument is, that while Congress may create an office, it cannot appoint the officer; that the officer can only be appointed by the President with the approval of the Senate, and that the act itself defines these park commissioners to be public officers, because it prescribes that three of them are to be civilians, to be nominated by the President and confirmed by the Senate. This, it is said, is equivalent to a declaration by Congress that the three so sent to the Senate are "officers," because the Constitution provides only for the nomination of "officers" to be sent to the Senate for confirmation; and that it hence follows that the other two are likewise "officers," whose appointment should have been made by the President and confirmed by

the Senate. As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

It is true that it may be sometimes difficult to say whether a given duty, devolved by statute upon a named officer, has regard to the civil or military service of the United States. *Wales* v. *Whitney*, 114 U. S. 564, 569; *Smith* v. *Whitney*, 116 U. S. 167, 179, 181. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

The second objection made to the validity of the act is because of certain functions to be performed by the President, which the objection characterizes as judicial, and hence beyond his legal powers, and as incompatible with his official duties. The duties prescribed to the President are the appointment of members of the park commission, the approval of the price to be given for lands where an agreement has been had between the owners and the commission, and, if an agreement is not made, and a value is put upon lands by appraisers appointed under the act, the decision whether such value is reasonable. The appointment of the commission is plainly an executive duty, and the approval of the value or price, whether fixed by agreement or appraisal, cannot be said to be a judicial act. What the President decides is not whether the value is reasonable as respects the property owner, but reasonable as regards the United States. Similar provisions were contained in the act of June 25, 1890, c. 613, 26 Stat. 174, condemning land for a city post-office, and in the act of August 30, 1890, 26

Stat. 371, 412, c. 837, §§ 2, 3, authorizing the acquisition of land for the use of the Government Printing Office. The President has nothing to do with fixing the price; but, after that has been done, by agreement or by appraisers, he must decide whether the United States will take the land upon such terms, or, in other words, whether such value is reasonable.

The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain aggregate expenditure, cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to.

A further objection is made to the validity of the act by reason of the sixth section, which provides for the assessment of benefits resulting from "the location and improvement of said park" upon lands so especially benefited.

The cases heretofore cited to show that the erection of parks in cities is a public use, in a constitutional sense, were, most of them, cases in which it was likewise held that it is competent for the legislature, in providing for the cost of such parks, to assess a proportionate part of the cost upon property specially benefited; and we need not repeat the citations.

No special request, on the subject of the legal effect of the provision in respect to special benefits, seems to have been made to the court below, and there is no specific assignment of error as to it. Nor does it appear that any person having

property actually assessed for special benefits is a party as plaintiff in error. We are therefore relieved from any extended consideration of this feature of the act.

Certain questions arose during the trial of the case below which are brought to our attention by bills of exception. One of these was as to the form of the oath administered to the appraisers. The defendants asked the court to administer an oath to "appraise the value of the respective interests of all persons concerned in the land within the Rock Creek Park upon the whole evidence, guided by the rules of law as furnished by this court." This the court declined to do, and prescribed an oath to "faithfully, justly and impartially appraise the value or values of said parcels of land and of the respective interests therein to the best of their skill and judgment."

As the statute did not prescribe any form for the oath, we do not perceive that the court exercised its discretion wrongfully in prescribing the form of oath that was used. The purpose of the defendants, in asking for the imposition of an oath in the form presented by them, would appear to have been to restrain the appraisers from being influenced by their own inspection of the lands, and to restrict them to the evidence or estimates that should be adduced before them. Whether this be so or not, the oath actually administered did not, as we understand it, leave the appraisers "at liberty at their discretion to disregard the evidence altogether and to make their appraisement without regard to the evidence," but their duty was to view the lands, hear the evidence, and fix the values.

Complaint is made, in another exception, of instructions given and refused by the court in instructing the commission. We shall briefly consider this objection. The instruction given was as follows: "The commissioners are instructed that they shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act of Congress of the 27th of September, 1890, authorizing said park, but any recent *bona fide* sales made before the passage of said act, of lots similarly situated and adapted to

similar uses, or recent *bona fide* contracts made before the passage of said act, with land owners, for other lands in the vicinity similarly situated, may be considered by the commissioners, looking at all the circumstances of these sales or contracts in the determination of the ultimate question of value."

A further instruction was given in the following terms: "The commissioners are further instructed that they shall be governed in their inquiry in making their valuations by the following considerations: What are the lands within the park limits now worth in cash, or in terms equivalent to cash, in the market, if a market now exists for such lands? What would any one needing lands for residence, agriculture or any other purpose pay for them in cash? They are not at liberty to place a value upon these lands upon the basis of what one might be willing to buy them on time for purely speculative purposes, nor can they consider the value given them by the establishing the park, and they are to make their valuation without consideration of the fact that a specific amount of money is appropriated by the act of Congress of 27th September, 1890."

The instructions asked for by the plaintiffs in error were as follows: "The commissioners shall estimate each parcel of land at its market value, and are instructed that the market value of the land includes its value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement or its intrinsic character, it is peculiarly adapted to some particular use — *e.g.*, to the use of a public park — all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation."

The theory of appraisement asked for by the plaintiffs in error differed from the one adopted by the court chiefly in two particulars — first, it treats the case as if it were one before an ordinary jury, whose action is determined by the evidence adduced; and, second, that the evidence might have

reference to and include any supposed or speculative value given to the property taken by reason of the act of Congress creating the park project: whereas the court regarded the functions of the appraisers as including their own judgment and inspection of the lands taken as well as a consideration of the evidence adduced by the parties.

We approve of the instructions given by the court in both of these particulars.

The scope of action of the board of commissioners was plainly, by the terms of the act and the nature of the inquiry, not restricted to a mere consideration of the evidence and allegations of the parties, but included the exercise of those powers of judgment and observation which led to their selection as fit persons for such a position.

While the board should be allowed a wide field in which to extend their investigation, yet it has never been held that they can go outside of the immediate duty before them, viz., to appraise the tracts of land proposed to be taken, by receiving evidence of conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had. *Kerr* v. *South Park Commissioners*, 117 U. S. 379, 380.

In connection with this part of the subject, we may appropriately consider the objection made to the action of the court below in declining to review and pass upon the evidence that had been produced before the commissioners.

If, as we have said, the court below was right in refusing to restrict the commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of the lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made.

The rule on this subject is so well settled that we shall content ourselves with repeating an apt quotation from Mills on Eminent Domain, 246, made in the opinion of the court below: "An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions."

A number of exceptions were filed to the action and conduct of the commissioners, but we think that they raised questions covered by the observations already made, and were properly disposed of by the court below.

Whether the plaintiffs in error were entitled to be allowed, in the assessment of damages, for the value of prospective gold mines in tract 39 designated on the map of the park, was a question mooted at the trial, and the action of the court, in striking out the testimony offered to show such value, and in holding that, if there are any deposits of gold in this ground, they are the property of the United States, is complained of in the 7th, 8th and 9th assignments of errors. The history of the tract in question was gone into at great length, and various patents of the Province and State of Maryland were put in evidence. The court below held that, as by the grant of Charles I to Lord Baltimore, "all veins, mines and quarries, as well opened as hidden, already found, or that shall be found within the regions, islands or limits aforesaid, of gold, silver, gems and precious stones," passed to the grantee, he yielding unto the king, his heirs and successors, "the one-fifth part of all gold and silver ore which shall happen from time to time to be found;" and as the confiscation of the proprietary's title in 1780 vested the same in the State of Mary-

land, and as also the royalty of one-fifth part of the gold and silver reserved to the king had also become, by the Revolution, vested in the State, consequently the United States succeeded to the State's title by the act of cession of 1791.

The discussion by the court below was so elaborate and careful that no useful purpose would be served by entering minutely into the subject in this opinion. It is sufficient to say that our examination of the evidence contained in the record fails to disclose any error in the ruling of the court below, respecting the ownership of a supposed gold mine in tract 39, and we adopt its opinion [1] as presenting a full and satisfactory treatment of the question.

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[1] The opinion thus adopted by this court will be found in the record, pages 168 to 175, and 212 to 218, and is as follows:

By Mr. Justice Cox:

We have had under consideration the motion made in this matter by the petitioners, and that motion is that the court strike out all the evidence introduced by the defendants Shoemaker and Truesdell relating to the existence of gold mines in tracts 39 and 42 on the map filed by said petitioners, on the ground that if any gold mines exist therein the title thereto is in the United States.

In order to solve this question we are compelled to go somewhat into the history of titles in Maryland. All land titles in the District are derived primarily from Maryland. We all know that the history of the title to real estate in Maryland commenced with the charter to Caecilius Calvert, Lord Baltimore, by Charles I, in the 8th year of his reign. That charter defines the limits of the province of Maryland and grants and confirms unto the said Caecilius Calvert, baron of Baltimore, his heirs and assigns, the lands and waters included within those limits, and goes on to say: "And moreover all veins, mines and quarries, as well opened as hidden, already found or that shall be found within the region, islands or limits aforesaid of gold, silver, gems and precious stones, and any other whatsoever, whether they be of stones or metals or of any other thing or matter whatsoever." They were granted to him, his heirs and assigns, forever, "to hold of us, our heirs and successors, kings of England as of our castle of Windsor, in our county of Berks, in free and common soccage, by fealty only for all services, and not *in capite* knight's service, yielding therefor unto us, our heirs and successors, two Indian arrows of those parts to be delivered at the said castle of Windsor every year, on Tuesday in Easter week, and also the fifth part of all gold and silver ore, which shall happen from time to time to be found within the aforesaid limits."

The twelfth and thirteenth assignments allege error in the court's action in confirming the report of the commissioners

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The right to mines of gold and silver was considered one of the *jura regalia* under the common law of England. In this country we have no *jura regalia*. Whoever owns the land owns everything contained in it, including mines, unless they be expressly reserved, and the same law is applicable to a transfer by the Federal Government.

This matter of the ownership of mines was discussed in the case of *Moore* v. *Smaw*, 17 Cal. 199, where the court in its opinion as delivered by the Chief Justice (now Mr. Justice Field), says:

"In the great case of *The Queen* v. *The Earl of Northumberland*, 1 Plowden, 310, which was argued before the barons of the exchequer and all the justices of England, it was held by their unanimous judgment 'that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen or of the subjects, belong to the Queen by prerogative, with the liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore;' and also 'that a mine royal, either of base metal containing gold or silver or of pure gold and silver only, may, by the grant of the King, be severed from the Crown, and be granted to another, for it is not an incident inseparable to the Crown, but may be severed from it by apt and precise words.' This case was decided in 1568, during the reign of Queen Elizabeth, and continues until this day an authoritative exposition of the doctrine of the common law. It is conclusive to the point that the right to the mines was not regarded by that law as an incident of sovereignty, but was regarded as a personal prerogative of the King, which could be alienated at his pleasure."

The title to mines in Maryland was vested by the charter in the lord proprietary, as he was called, subject only to a royalty of one-fifth part of them in favor of the Crown.

In an exposition by Kilty of "original titles as derived from the proprietary government, and more recently from the State of Maryland," called the Landholder's Assistant, and which has been referred to by counsel on both sides in the argument as a work of authority, it appears that the proprietary formulated from time to time rules and regulations for the disposition of his land, called "conditions of plantations, instructions, etc." These "conditions of plantations, instructions, etc.," became matter of record, and, so far as extant among the public records of the State in the year 1808, are printed in the work referred to, which was issued in that year, and were originally carried into effect by some one or other of his lordship's agents and chief officers in the province, such as his "lieutenant general," his "chief governor," his "lieutenant governor," and later by the governor and council, and others charged with the management of land affairs.

Three steps were necessary for transferring the title from the proprietary to the individual seeking the patent. The first was a warrant issued by the

of appraisement as to a portion of the land embraced in the map of the proposed park, leaving other portions of that land

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proper officer and which was the authority to the surveyor of the county to survey and lay off the particular quantity of land. The next step was the returning by the surveyor of his certificate of survey; and the third step was the issue of the patent. In the course of time another form of warrant came to be issued, called the warrant of resurvey. Parties having several contiguous tracts by patent from the land office procured from it a warrant of resurvey authorizing the surveyor to resurvey those tracts, the grounds assigned for which were the uncertainty of existing bounds and the desire of the parties to connect several adjoining tracts in one survey. At first the privilege of taking in adjoining vacancy over and above the quantities originally granted did not attach to this kind of warrants, but this subsequently became the main object of these resurveys. On resurveys lands included in older surveys were excluded and allowance made for the deficiency, either in contiguous vacancy or elsewhere. On the other hand, where land had been included in surveys beyond the quantity to which the party was entitled, the excess denominated "surplus land," was claimed by the proprietary, and, as this surplusage was more common than vacancy, it gave rise to numbers of warrants, sometimes demanded by parties when they found that the excess of their grants could not be concealed, and on other occasions issued by direction of the government where information of surplusage was obtained. In 1735 it was determined to grant warrants to the first discoverers, enabling them to make resurveys on the lands of other persons and to become purchasers of the surplusage found therein.

All the patents that were issued by the proprietary contained an exception of royal mines, and we understand those terms to mean mines of gold and silver; and the consequence was that they did not pass by these grants, but remained in the proprietary as his separate property. Notwithstanding the common-law maxim as to the ownership of property, *cujus est solum, ejus est usque ad caelum*, there may be two separate owners of the same land. A man may own the surface of the ground and underneath the surface may be owned by another person, so that, as the patent issued with that reservation, the proprietary remained the owner of the mines.

The present owners of the land, deriving title by mesne conveyances from the patents, claim that they are entitled to the mines, but as the patentee did not take the mines of gold and silver I do not see how the last owner has acquired title thereto. There can be no question here of adverse possession or title by adverse possession in the position taken by the claimants to these mines. The then proprietary was divested of his title by the American Revolution. When the Revolution broke out the British subjects left this country, perhaps for their country's good, and the effect of the Revolution, I might say with regard to the royalty that had been reserved by the King, was to transfer it to the State, and the property of the proprietary was confiscated by an act passed by the State in 1780, c.

unacted upon. We understand this objection to refer to the course of the park commissioners in securing the final action

45, of the session of that year. When you contrast this act of confiscation with the act passed by the Congress of the United States during the late civil war, it will be seen that the latter act subjected the property of those in hostility to the government to seizure and condemnation by judicial proceedings and sale and directed that the proceeds of the sale should be paid into the Treasury of the United States. If any property was seized and such legal proceedings were not taken the title never was passed, but remained in the owner. The act of Maryland is much stricter in its terms.

After a long recital of grievances committed by England the act of Maryland declares, "And it is hereby enacted and declared that all property within this State, debts only excepted, belonging to British subjects shall be seized and is hereby confiscated to the use of this State." In section 7, on the assumption that the title was at once vested in the State by the preceding enactments, the act goes on and directs that certain property, being certain iron works, lands and stock therein mentioned, "shall be, and are hereby, appropriated and set apart as a fund for making good and sinking certain bills of credit which had been emitted by the State." The act further enacted "that all British property confiscated in virtue of this act and not thereby appropriated for the redemption of the bills of credit lately emitted by this State and for the payment of debts shall be subject to the disposal of the General Assembly."

To remove any doubt of the meaning of the law, in c. 49 of the same session it is enacted that certain commissioners shall be appointed "for the purpose of preserving all British property seized and confiscated by the act of the present session," just before referred to, "and that the said commissioners shall be, and are hereby declared to be, in the full and actual seisin and possession of all British property seized and confiscated by the said act without any office found, entry, or other act to be done, and the said commissioners shall and may, as soon as may be, appoint proper persons in all cases that they may think necessary to enter into and take possession of any part of the said property," etc. This was a complete divesting at once of the title to the property owned by British subjects and vesting it in the State or in the commissioners to represent the State. Chapter 51 of the same session goes on and appropriates the manors owned by the late lord proprietary in several counties to certain purposes, and it provides "that this State will forever warrant and secure to the purchasers and their heirs any British property sold in pursuance of this act and will protect them in the peaceable possession thereof." This was followed by another act relating to forfeited estates and sales of reversionary rights where they were estates tail. There was another act in relation to claims against forfeited property by individuals, and section 2 of the latter act provided for the confiscation of the property of British subjects which

of the President upon a portion only of the lands described in the map as originally filed; and the contention is that the

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may be in the possession of others without any proper claim upon them. All of which shows the scope of the confiscation and that these acts were intended to reach every piece of property that belonged to British subjects. This intent runs all through them in fact and it is not necessary to refer to them in further detail. It is sufficient to say that it was the effort of the State to appropriate everything, every species of property that belonged to British subjects, and, of course, that would include mines as well as anything else. Certain grace was given to the owners of the property. They were allowed a certain time in which to come forward and swear fealty to the State and in that way save their property.

During the argument an inquiry was made whether the State of Maryland had ever made any reservation in her patents, issued since the revolution, of mines and quarries, or whether its legislation was silent on that subject, from which it might be inferred that she never intended to confiscate that species of property. A partial answer to that inquiry at least is found in c. 20 of the act of 1783 relating to the sale of confiscated property, by which it is enacted "that in all sales of the said lands there shall be a reservation of one fifth part of all mines of gold or silver found thereon to this State, which reservation shall be expressed in the deeds for the said lands." That showed that the subject of the ownership of mines was brought to the attention of the legislature, and that the State assumed itself to be the owner of the mines as well as of the surface of the land, and hence assumed that granting it would pass the mines unless there was a reservation, and so the State reserved one-fifth in all mines that might be found on this confiscated property. Now, it is true that there is no mention in the legislation of the State in regard to mines or mineral lands except in connection with the sale of the property, and the only object of any legislation would be directed towards a sale of the property, and it would have been useless to direct any sale of mines in the State at that time, which would account for the absence of legislation on that subject. It was not suspected at that time that any mines existed in the State. If there had been any idea that there were mines existing, there is no room for doubt at all, in view of the spirit manifested in this legislation in the series of acts running nearly twenty years, that the State would have been prompt in declaring as forfeited the interests of British subjects therein. It appears that nothing was ever done by the State that amounted to a relinquishment of any rights that were vested in it by confiscation. If there were any mines, however, they were the property of the State, by another act of the State, which act assumes that the State was the owner of the same by reason of the action taken which I have before referred to. In the case that I have heretofore cited — *Moore* v. *Smaw, et al.* — there was no hesitation at all upon the part of the justice, in delivering the opinion of the court,

map was a finality, so that if it turned out that the sum prescribed by the act of Congress would not suffice to pay for all

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in holding that "at the date of the cession of California to the United States no minerals of gold or silver had been discovered in the land embraced by the grant to the Fernandez or by the grant to Alavrada, and of course no proceedings had been taken by which any individual interest in them was acquired from the government. They constituted, therefore, at that time the property of the Mexican nation, and by the cession passed, with all other property of Mexico, within the limits of California to the United States."

Under the common law of England there was an implied reservation of mines of gold and silver. Looking at the terms of the cession under the act of 1791, we will find that they are much stronger than those employed in the act of cession of property in California to the United States, because they contained absolute words of cession, while the other does not. The language is "that all that part of the said territory called Columbia which lies within the limits of this State shall be, and the same is hereby, acknowledged to be forever ceded and relinquished to the Congress and Government of the United States in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the 8th section of the first article of the Constitution of the Government of the United States." These words, of course, are to be taken distributively. Congress and the government were given full and absolute right over persons, and they are given the full and absolute right to the soil and exclusive jurisdiction over both person and soil. It is rather difficult to see how they could be more specific in conveying whatever rights the State had in the land and soil. The State, of course, could only transfer to the United States the interest which it had; and to make the matter as clear as possible and remove doubt a proviso was added: "That nothing herein contained shall be so construed to vest in the United States any right or property in the soil so as to affect the rights of individuals therein." In other words, the State did not undertake to grant away the rights of individuals, but did undertake to give to the United States all her rights, both as to the soil and persons who resided in the part of the State ceded. The State relinquished all rights which she had and at the same time provided that the United States should not have any right in the soil that would affect the rights of individuals. The history that I have given of this property excludes all idea that the law did vest in the individuals the right to the mines. Nobody can doubt that the public domain passed to Congress, and that it has always acted upon that assumption in granting patents to vacant land that it has sold; and we can see no reason to doubt that the right of the State to any mines on the land separate from it also passed by this grant of the territory "in full and absolute right and exclusive jurisdiction as well of soil, as of persons residing or to reside thereon."

the tracts mentioned in the map, or if, for any other reason, the commissioners should exclude from their final selection

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We cannot escape from the conclusion that all public property of the State of Maryland within the District passed by the cession, and that the legislature by its act of cession transferred all interests in any possible gold mines in this District to the United States.

But a patent was introduced at the argument of a later date from the State of Maryland to Robert Peter, under whom these present owners claim title, and that patent has no reservation of any gold or silver mines, and it was claimed that for this reason whatever interest the State formerly had in these mines passed by this patent. That patent was dated in 1803. It will be remembered that the Congress of the United States assumed formal jurisdiction over this District and provided for its government by the act of February 27, 1801, three years before the date of this patent. The State of Maryland, of course, could not convey land that had already been ceded to the United States. But this paper suggests certain serious inquiries. The patent was a resurvey patent based upon a warrant dated the 12th day of May, 1800, which was nine months before the actual assumption of jurisdiction here by Congress; and the first inquiry is whether that did or did not give the parties equitable title, being prior to the time that the land was actually taken possession of under the cession by the Congress of the United States. That inquiry suggests one or two questions. The first is, under the law of Maryland did the land laws remain in force in that part of the territory ceded until the removal of the seat of government; and, if so, did the issuing of this warrant give an inchoate title, an equitable title which would prevail against the subsequent acquisition of the same legal title by the United States? The letter of the law seems to be that in all cases of resurveys no equitable title is created until the certificate of survey is returned to the land office. Upon the issuing of the warrants of resurvey the party had two years under the law within which to have the survey returned and pay the fees. It seems to me that no equitable charge could be laid against this property by reason of the issuing of the warrant of resurvey. The patent does not say that that survey was returned to the surveyor's office. The warrant was not issued until 1800 and the patent was not issued until 1803, and the presumption would, therefore, be that the certificate of survey was not returned until after 1801, so that there is nothing upon the face of this patent which would justify us in saying that there could be an equitable title acquired through the warrant.

There is a still more important question, and that is whether the State of Maryland at that period could convey any interest, legal or equitable, in the property. In the act of 1791, ceding this property to the United States, there is this proviso: "That the jurisdiction of the laws of this State over the persons and property of individuals residing within the limits of the cession aforesaid shall not cease or determine until Congress shall by law provide for the government thereof under their jurisdiction in manner

any tract originally included in the map, the whole proceeding would be vitiated, and the purpose of the act defeated. We

provided by the article of the Constitution before recited." Now, this continues in force the jurisdiction of the laws of the State of Maryland over the persons and property of individuals residing therein. To make that applicable to the present case it would be necessary to have extended it to the property held by the State; but it seems to me that that extended no further than to say that the laws that affected private rights should continue in force until proper provision was made by Congress. See what the consequence would be if another construction had been given to it. The State of Maryland extended to the Virginia shore, and suppose that after this cession and before 1801 the State of Maryland had undertaken to cede to the State of Virginia the whole bed or bottom of the Potomac River, from its source to its mouth, including that part in the District of Columbia, doubtless Congress could have had something to say about it after the cession had been made. We are satisfied, therefore, that the proviso does not continue in operation the land laws of the State of Maryland, and consequently no title could be derived at the dates of this survey and patent or at the date when the warrant upon which it was based was taken out. We are satisfied that the proviso does not continue in operation the land laws of the State of Maryland as to the public lands owned by the State within the said District, and that consequently no title to such lands could be obtained by patent from the State after the act of 1791.

At a much later time a citizen of Maryland who owned a tract of land in this District died, making a will disposing of his land and appointing an executor, and, the executor having declined to act, the chancellor appointed a trustee to carry out the trusts of the will and the title was declared vested in that trustee and a sale directed to be made, and the proceedings were in accordance with the law of Maryland; but this court had no hesitation in declaring the whole proceedings null and void for want of jurisdiction in the chancellor to give the relief asked for.

Upon the whole case, therefore, we are of the opinion that if there are any deposits of gold in this ground they are the property of the United States. This motion upon the part of the Government is granted.

Subsequently a motion was made to rescind the order, granting the motion on the part of the government, upon the ground of newly discovered evidence, the nature of which is shown in the second opinion of the court, taker from pages 212 to 218 of the record.

By MR. JUSTICE COX:

In this matter a motion has been made to rescind the order heretofore passed by this court directing the commissioners to disregard the evidence as to the deposits of gold in two of the tracts, numbered 39 and 42, the former being the property of Shoemaker and the latter that of Truesdell.

are unable to see the force of this view. The function of the map was not to finally commit the commissioners to taking

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It will be remembered that the conclusion announced by the court was founded upon a patent which was introduced on the part of the Government and dated in 1772 from the proprietor to one White, by which the royal mines — that is, the mines of gold and silver — were expressly reserved to the proprietor, and our argument was that they were derived through confiscation by the State and on behalf of the United States through the cession of 1791, and if such gold deposits existed there they were the property of the United States.

The present motion is based upon additional evidence said to have been discovered since the first order.

The first patent granted to White affecting the premises was on a resurvey in 1760, in which the land was granted without any reservation of royal mines, and it is supposed that those claiming under White were allowed to refer their title back to the first muniments of title, and that it is not affected or vacated by the subsequent patent of 1772, in which there was an express reservation of all royal mines.

As to the character of the tenure of land in this country since the revolution it has been said that it has become allodial. That is all true, but it must be remembered that at the date of the commencement of these tenures, all land in Maryland was held as essentially feudal. In the first place, the charter of Lord Baltimore conveyed to him this land, not to be held by knight's service, but by fealty, and a certain proportion of the precious metals that might be discovered on the land was reserved, and if Lord Baltimore granted this land in fee simple afterwards, the grantee held not of the Crown but of him, the lord proprietor. In this charter it is expressly stated that, notwithstanding the statute of *quia emptores*, Lord Baltimore was authorized to create minor court barons and grant patents to lands to be held in fee simple, but upon the rendition of such services, customs and rents as he should think proper, to be laid by him and not by the Crown, and in all these patents issued by him in fee simple there was that reservation and fealty, at least generally, in place of any other service; so that relation, as to the tenure by which the land was holden, existed all through between the lord proprietor and his grantees just as it did under the feudal system.

Now, to go back to the common law. A lessee for life or years could surrender his estate and take a new estate from the reversioner. Not only could that be done by the tenant, but the acceptance of a new estate by the grantee was itself a surrender of the old one, and that upon the principle that the two could not consistently stand together, and the acceptance of the later one necessarily involved a surrender of the first. For instance, if a lessee for years should take a lease for his own life or that of another man, the acceptance of the latter would necessarily be a surrender of the first, or if a lessee for forty years accept one for twenty-five years, or if a

all the parts included in it, but was to facilitate their proceedings in dealing with the owners. Congress could not have

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lessee for life accept a lease for years, say a lease for twenty years, the acceptance of the one would involve a surrender of the other.

Upon the question of what shall be considered in law a surrender of lands, it is said in Sheppard's Touchstone, 301, (edition of 1826, with notes by Atherly): "If lessee for life, or years, take a new lease of him in reversion, of the same thing in particular contained in the former lease for life or years; this is surrender in law of the first lease. 14 H 8, 15; Plow. 194; Dyer, 28; Co. 10, 67. As if lessee for his own life, or another's life, in possession or reversion, take a new lease for years; or a lessee for forty years takes a new lease for fifty years; the first lease in both these cases is surrendered. And this rule holdeth, albeit the second lease be for a less time than the first, as if lessee for life accept a lease for years, or lessee for twenty years accept a lease for two years. Perk. § 617; Co. 5, 11; Fitz. Sur. 3; Co. Super Lit. 218; 37 H 6, 17. And albeit the second lease be avoidable, as being made upon condition, as if lessee for twenty years take a new lease for twenty years, upon condition that if such a thing happen the second lease shall be void, and the thing do after happen; in this case, both these leases are become void; as where the lessor doth grant the reversion to the lessee upon condition, and after the condition is broken. Or if the second lease be made by tenant in tail, or the like: as if a man made a lease for years, of land, and then make a feoffment to another of the land, and then take back an estate to him and his wife of the land, and then make a new lease to the lessee for ten years; this is a surrender in law of the first lease; but if the second lease be merely void, then it is otherwise. Dyer, 140, 141; Dyer, 272; Dyer, 178, 177; Co. 5, 54, 55; Kely. 70. And therefore, if the lessor do, by words of covenant only, promise to his lessee that he shall have a new lease, and do never actually make it; this is no surrender in law. And this rule, as it seems, holdeth also, albeit the second lease be to the lessee and a stranger or to the lessee and his wife, (Dyer, 140, 141,) and albeit the second lease be by word only, and the first lease be by deed, if so be the thing granted by the lease be such a thing as may pass by word without writing; and albeit the second lease be in another right, as if the husband have a lease for years in the right of his wife, and then take a new lease to himself in his own name; and albeit the first lease be to begin presently, and the second be to begin at a day to come, or *e converso;* and albeit there be a mean estate between, as if the land be let to A for years, and after let to B for years, to begin after the first term, and the assignee of A doth take a new lease. Dyer, 178; Pasc. 40 El.; Co. Super Lit. 338; Co. 6, 69, 10, 53, 67, 5, 11; Dyer, 280; Dyer, 93, 112. So if one demise land for ten years to one, and after demise it for ten years to another, to begin at Michaelmas, and after the first lessee accept a new lease; in all these cases there is a surrender in law of the first leases. Dyer, 46; Co. 2, 60. And if there be two lessees for life, or years, and one of them take a new lease for

meant that the validity of the whole scheme should depend upon the accuracy with which the commission should define

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years, this is a surrender of his moiety; whereby it doth appear that a surrender in law may be made of some estates which cannot be surrendered by a surrender in fait for *fortior est dispositio legis quam hominis.* And hence it is, that a corporation aggregate may take a surrender in law without deed, although it cannot make an express surrender without deed. Co. 6, 69, 10, 67."

Now, technically there was no surrender of such a thing as a fee simple estate at common law. The owner of the estate might reconvey to his grantor or the latter's legal successor and take a new title. There may have been some particular object in doing that, though, of course, he is supposed to have taken the whole title in the first instance. I do not know that there are any examples of this since the days of the Saxons surrendering their estates to William the Conqueror and taking them back again under the conditions of feudal tenure imposed by him. Still, such a thing could be done as the owner of a fee simple granting back his title and taking a new grant if there was any object in doing it. Under the rules promulgated by the proprietary of Maryland that very thing was permitted — that is, the practice of surrendering the original grant in fee simple and taking a new title from the lord proprietor. Under these rules the owner of two contiguous estates, who might desire to have them resurveyed, might surrender them and take a new title for the two consolidated into one, or the owner of one estate might surrender his grant and take a new one and of the contiguous vacant land as a new entirety. The rules above referred to expressly provided that special warrants might be issued to resurvey two or more contiguous tracts for the person owning the same and to lay them out in one entire tract.

The third section of the instructions issued by the proprietary May 5, 1684, to certain persons whom he by commission of that date appointed a land council, and by which their powers and authority were defined, reads as follows: "To any person or persons haveing two or three or more tracts of land contiguous or adjoining one to the other, you may (upon suit made) grant special warrant to resurvey and lay out the same into one entire tract with liberty of takeing in or adding thereunto what waste land shall be found contiguous, and grant pattent for the same upon such conditions and tearms as you shall seem meete and reasonable, the person sueing for the same surrendering up the several former grants thereof to our chancellor or chancellors for the time being to be vacated upon record." Now, here is an express provision that the grantee of the fee simple might surrender his title to the lord proprietor and take a new title, and for the same reason that at common law prevailed in reference to leases for life and for years; but in that case the provision was not necessary, because when a new lease was made it necessarily involved a surrender of the original title, the original cession. Every one of these grants was a grant of the entire thing, for

in advance the several tracts with whose owners negotiations were to be had. It seems to us that it was a sufficient and

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the whole property right, and when one grant was surrendered a new grant was taken for additional land. The second grant was made upon an entire resurvey of the land; the two estates were different and the party could not hold both estates; they were not consistent, and that is the result in this very case. Here, in the first place, in 1760, was a patent for six hundred and eighty-one acres granted upon a warrant of resurvey; upon a resurvey of said patent in 1772 it was discovered that the land embraced in it was covered in part by patents of several prior patentees; that it contained portions of several older grants which had been improperly included in it, by the lines of one of which older grants it was divided into two distinct and unconnected parts; the surveyor thereupon in his return of the resurvey included the one of said parts nearest the beginning, which contained one hundred and fifteen acres, to which he added thirty-six acres of contiguous vacancy, making in all one hundred and fifty-one acres, and for this the patent of 1772 was granted. The patent for the rest of the land is not produced before us; but we may assume that there were two several patents issued, one of which embraced this land, and, of course, it is held under the conditions imposed by the grant. It won't do to say that that part of the land embraced in this patent of one hundred and fifty-one acres is held by the title acquired in 1760, because it is held as a part of a new and entire tract, and upon different terms, and for a different rental, and therefore there is an inconsistency in his claiming to hold the land both under the patent of 1760 and that of 1772. The original entry of six hundred and eighty-one acres has disappeared entirely, and that land is now held under two different patents. Any acceptance of a new lease providing different terms of rental and for a different period involves the surrender of the old lease, and so acceptance of a new grant from the lord proprietor embracing part of that which was formerly held under the old grant necessarily involved a surrender of the original title. The requirement that the original patentee shall formally surrender the title to be affected by the new grant has never been rescinded as far as we are advised. In point of fact, however, the practice has fallen into disuse. It appears from Mr. Kilty's statement that the practice was simply to enter on this certificate of resurvey an order for the patent to be surrendered, but finally the practice of surrendering the old certificate or patent seems to have been abandoned entirely. Now, there were two very good reasons for that: First, it was not necessary because of the very fact that an acceptance of a new title inconsistent with the former operated as a surrender of the former, and, next, because of the doubt that seems to have been raised of the effect of the claims in the matter of priority of some other individual who might in the interim between the old and the new patent have obtained a patent covering the same land, and as between several parties holding under different patents the one who held the old title would be regarded as retain-

reasonable compliance with the law if the map, as finally acted upon by the President, showed the location, quantity

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ing whatever interest he acquired under it for the purpose of preserving priorities; but that is altogether a different question from the relation of the tenant and the old proprietor, and as between them it seems to be very plain that the acceptance of a new title or a new grant was conceded to supersede the old title, and therefore we think that the new title must stand. There has been something also presented to us to affect our judgment in that particular. As another item of evidence it seems that James White originally conveyed his estate to Robert Peter and Adam Stewart as tenants in common. By an act of the assembly of Maryland the property of all British subjects was confiscated, and under that act Adam Stewart's was confiscated, and certain commissioners were appointed to take charge of the confiscated property and dispose of it. Adam Stewart's interest in this property was sold by these commissioners. I do not remember the date of the sale, but that is quite immaterial; somewhere about 1785. Afterwards, in 1792, the chancellor made a conveyance of the property which Adam Stewart had thus forfeited to Robert Peter. The deed from the State to Robert Peter contained no reservation of the mines, and it is claimed that this last deed from the commissioners to Robert Peter of the interest of Stewart's vested in Peter all interest in whatever mines might be on the property. An inspection of that instrument will show that it purports to do nothing of the sort. The deed recites that about two hundred and fifty acres of land, which it does not locate anywhere, the property of Adam Stewart, were confiscated and sold to Robert Peter, and the deed professes to convey the property of Adam Stewart and nothing else. The property that Adam Stewart had was an undivided moiety in the land and nothing more, and the deed from the chancellor does not on its face purport to convey anything else than exactly the property that was owned by Adam Stewart in conjunction with Robert Peter. The construction of the deed, therefore, does not bear out the claim on the part of the present holders; if it did, however, the result would have to be the same, because the deed from the State was not made until 1792, after the cession of the District to the United States, and the cession passed to the United States all the public domain within the limits of the District — that is, that part of it that had been a part of the State of Maryland — because it is said that all of the territory "is hereby acknowledged to be forever ceded and relinquished to the Congress and Government of the United States in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon." If this does not convey all the territory to the United States, then the United States never did acquire it, because that is the only cession by which a conveyance was made of the title to this property to the United States, and its title to it depends upon this cession and nothing else. All this property in the District that had formerly belonged to Maryland was ceded by this act in 1791, and, that having been done, the State of Maryland could

and character of the parcels of land to be taken, with the names of their owners.

The fifteenth and sixteenth assignments, which complain of the course of the court in adopting and acting upon the decision of the President of the United States approving the appraised values of part only of the land selected for the Rock Creek Park, present the same contention in another form, viz., that the court and commissioners were concluded by the enumeration of tracts contained in the map when first prepared, and call for no further remarks.

The fourteenth assignment charges the court with error in

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not thereafter have vested in any one the title to any part of the property. We do not find anything, however, in the circumstances referred to which affects this case. A point was made in argument which had not been made before and not founded upon any new facts in reference to the character of these proceedings before the chancellor upon the application for a repatent. Robert Peter had a resurvey patent in 1803 signed by the chancellor and founded upon a warrant of resurvey issued in 1800, about six or eight months before Congress had passed its law assuming jurisdiction over the District, and we held that that could not pass title to land in the District; but it is claimed that the proceedings before the chancellor as a judge of the land court was in its nature a judicial proceeding, and that all such proceedings and the result of them are saved by the act of Congress which assumed jurisdiction over this District. That is entirely a misconception, we think, of the act of Congress. All that it says is this: "That in all cases where judgments or decrees have been obtained or hereafter shall be obtained on suits now pending in any of the courts of the Commonwealth of Virginia or of the State of Maryland, where the defendant resides, or has property within the District of Columbia, it shall be lawful for the plaintiff in such cases, upon filing an exemplification of the record and proceedings in such suit with the clerk of the court of the county where the defendant resides or his property may be found, to sue out writs of execution thereon returnable to the said court, which shall be proceeded on in the same manner as if the judgment or decree had originally been obtained in said court." Now, this applies only to contests between private parties in which execution may issue and does not provide for a proceeding in which the State may be a party. The language is exclusively applicable to private parties.

We think, therefore, upon the whole, that none of the new considerations which have been presented to us shake our former conclusion and the motion to rescind the order is overruled. What I have said applies to the Shoemaker tract with more force than to the Truesdell tract, because that is admitted to be a new grant or, at least, taken under the patent in 1772 and not derived from a patent in 1760 at all.

refusing to allow interest on the amounts assessed as the values for lands selected for the Rock Creek Park. The argument shows that the interest claimed was for the time that elapsed between the initiation of the proceedings and the payment of the money into court. The vice of this contention is in the assumption that the lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map. Interest accrues either by agreement of the debtor to allow it for the use of money, or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course, neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained till the confirmation of the report. Then some of those entitled to the assessments accepted their money, the plaintiffs in error declined to accept, and the amounts assessed in their favor were paid into court, which must be deemed equivalent to payment.

It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority. *Reid* v. *Hanover Branch Railroad*, 105 Mass. 303; *Kidder* v. *Oxford*, 116 Mass. 165; *Hamersley* v. *New York City*, 56 N. Y. 533; *Norris* v. *Philadelphia*, 70 Penn. St. 332; *Chicago* v. *Palmer*, 93 Illinois, 125; *Phillips* v. *South Park Commission*, 119 Illinois, 626.

These various contentions and objections did not escape the attention of the court below, but were disposed of, as they arose in the proceedings, in opinions of great research and ability, which appear in the record. We have briefly reviewed

them here, not to add to what was so well expressed in those opinions, but to show that the questions so zealously and ably pressed upon us have not been disregarded.

Our conclusion is that we find, in the legislation creating the park and in the proceedings under it, no infringement of the constitutional or legal rights of the plaintiffs in error, and the judgment of the court below is accordingly

Affirmed.

WEATHERHEAD *v.* COUPE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 104. Argued January 4, 5, 1893. — Decided January 16, 1893.

Claims 1 and 3 of letters patent No. 213,323 granted to William Coupe, March 18, 1879, for an improvement in hide-stretching machines, construed.

The principal feature of the Coupe machine, covered by claim 1, and of his method of stretching hides, covered by claim 3, is, that the hide is stretched longitudinally and transversely at the same time; and a single passage of the hide through the machine is supposed to give it sufficient stretching transversely as well as longitudinally.

The defendant's machine has no stretcher bar, substantially such as that of the patent, giving a transverse stretch to the hide simultaneously with the giving of the longitudinal stretch; and, therefore, does not infringe the patent.

THE case is stated in the opinion.

Mr. Causten Browne and *Mr. Walter B. Vincent* for appellants.

Mr. Wilmarth H. Thurston for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought January 11, 1881, in the Circuit Court of the United States for the District of Rhode Island, by William Coupe and Edwin A. Burgess against George

Weatherhead, John E. Thompson, and William G. Evans, copartners as Weatherhead, Thompson & Co., for the alleged infringement of letters-patent of the United States No. 213,323, granted March 18, 1879, on an application filed January 24, 1879, to the said William Coupe for an improvement in hide-stretching machines. The bill of complaint alleges that the defendants from July 17, 1879, have made, used and sold hide-stretching machines containing the invention described in the patent. The answer sets up in defence want of novelty and non-infringement. A replication was filed, proofs were taken, and the case was brought to a hearing before the court, held by Judge Lowell, then Circuit Judge, and Judge Colt, then District Judge; and on the 20th of April, 1883, the opinion of the court (16 Fed. Rep. 673) was delivered by Judge Lowell, sustaining the patent, and holding that the first and third claims of it had been infringed.

On the 1st of May, 1883, an interlocutory decree for an injunction and account was entered. The master filed his report on January 7, 1888, exceptions were filed to it by the defendants, and they made a motion to dismiss the bill. The master found that the amount of gains and profits to be accounted for by the defendants was $15,412.82. The court, held by Judge Colt, filed its opinion on the motion and the exceptions November 15, 1888. 37 Fed. Rep. 16. It overruled the motion and the exceptions, and on May 6, 1889, entered a decree in favor of the plaintiffs for $15,412.82, with interest from February 1, 1888, and the costs of the suit. The defendants have appealed to this court. The only question contested here is that of infringement.

The specification of the patent is as follows: "The invention hereinafter described relates generally to an improved method of stretching and reducing to a uniform thickness the hides of animals previous to said hides being manufactured into dressed leather, or what is known as 'rawhide:' and it particularly relates to a combination of mechanism which, accompanied by certain hand manipulation, will accomplish the desired result of stretching and reducing the hides, as above mentioned.

"As is well known, all hides vary considerably in thickness at different points, and when taken from the liquor-vats in which they have been immersed to remove the hair, etc., they are found to be soft, flabby, wrinkled and fulled. Owing, therefore, to this condition of the hides, it is necessary, before they are dressed and finished for the market, that they be stretched throughout to remove the wrinkles and fulness, and also to reduce those parts which are thicker than other portions, so that, as far as possible, the hides shall be uniform in thickness.

"My invention consists in a combination of mechanical devices which are capable of producing, in connection with hand manipulation, the desirable results of thoroughly stretching the hides, and rendering them of even thickness in all parts, the said devices comprising, in the main, a friction-table or beam, over which the hides are dragged, a stretcher-bar of suitable form for stretching the hides transversely, and a slowly-revolving roller, to which the edge of each hide is secured, and around which it is wound after being drawn over the table or beam and the stretcher-bar.

"Referring to the drawings, Figure 1 represents a front elevation of my improved machine. Fig. 2 shows the same in central vertical transverse section, and Fig. 3 represents the stretcher-bar in perspective.

"As particularly shown in Fig. 1 of the drawing, my improved machine consists of the following devices: A pair of standards, as at A A′, in which is mounted a shaft, as at B, to which power is applied. Upon one end of this shaft is a pinion, as at C, arranged to mesh with a gear, as at D, loosely mounted on one end of a roller, as at E. The inner side of this gear D is provided with a clutch face or pin, as at *d*, for engagement with a clutch, as at F, splined [spliced?] to the roller E, and furnished with a shipping handle, as at G, so arranged as to be convenient of access to the operating attendant. The remaining parts of the machine consist of a narrow table or breast-beam, as at H, which is mounted in mortises, as at *a*, in the standards, A A′, and a stretcher-bar, as at K, likewise mounted in mortises, as at *a*′, and having its two

working faces doubly inclined, as at *k k'*, Fig. 3. Both the breast-beam H and stretcher-bar K are so arranged as to be easily inserted in their respective mortises, where they are confined in proper longitudinal position by the standard A' at one end, and a button, as at L, at the other end. The said beam and bar are capable also of lateral movement, to enable them to be moved backward to give room for a larger hide being wound upon the rollers, and also to facilitate their entire removal from

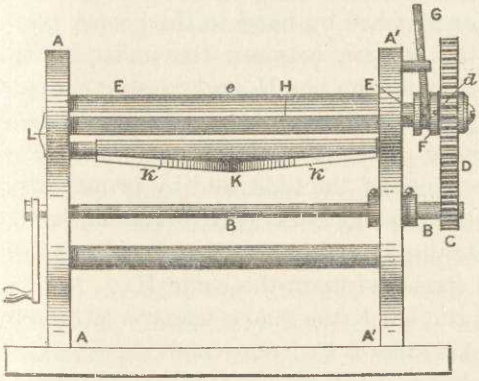

FIG. 1.

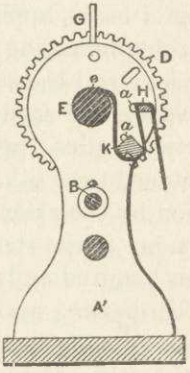

FIG. 2.

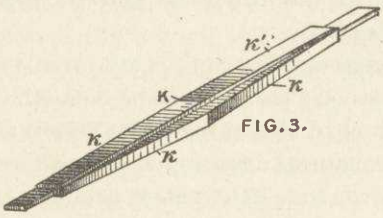

FIG. 3.

the machine after the hide has been stretched and is to be removed to give place for another.

"The methods of treating the hides and the operation of the mechanism above described are substantially as follows: A hide, as it comes from the vat, wrinkled and fulled, and with its various parts of unequal thickness, is placed over the table or breast-beam H, and one of its ends carried under the stretcher-bar K, and secured to the roller E by the clamp *e*,

the other end hanging free in front of the machine, as shown in Fig. 2. The operator now connects the roller E to the continuously revolving gear D by means of the handle G and clutch F, and the roller E slowly revolves, winding the hide around its surface, and drawing the said hide over the friction table or beam H, and around the stretcher-bar K. When any part of the hide whose thickness should be reduced, or whose wrinkled or fulled-up portion is to be smoothed out, passes over the table or beam H, the operator, who stands in front of said beam, applies pressure by hand to the proper portions, thereby increasing the friction between the under surface of the hide and the surface of the bar H, and causing the onward movement of such portions of the hide to be retarded. The portions thus pressed upon, therefore, are more severely stretched than other parts of the hide, and by proper manipulation by the attendant its thickness is rendered uniform, and it passes to the stretching-bar K in a smooth condition, having been longitudinally stretched upon the beam H.

"In passing over the bar K the hide is transversely stretched by the doubly inclined sides *k k'*, from which it passes onward to the roller E, winding about the said roller uniformly and smoothly. The machine is now stopped, the hide removed, another secured to the roller E, and the operations above described are repeated.

"From the foregoing description my improved machine will be readily understood; and it will be seen that my improvement in the method of stretching hides results from the combination of the mechanical agencies mentioned, coupled with the manipulation of the hide as it passes over the friction table or beam, at which time it is smoothed from wrinkles and reduced to a uniform thickness."

The patent has three claims, in these words: "1. The combination of a friction table or beam, over which the hide is drawn, a stretcher, substantially as described, and a revolving roller, to which the hide is secured and around which it is wound as the hide is drawn over the friction-beam and stretcher, substantially as set forth. 2. The combination of a revolving roller, to which the hide is secured and around

which it is wound, a laterally yielding stretcher and a laterally yielding friction table or beam, substantially as described. 3. The improvement in the method of stretching hides, which consists in dragging the hide over a stretcher, and also over a friction table or beam, by means of a revolving roller, to which the hide is secured, as described, whereby as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag by pressure applied to such thicker portions, to increase at such points the friction between the hide and the table, substantially as specified."

The master states correctly, in his report, that Coupe, being engaged in the manufacture of rawhide leather, was experimenting on methods of stretching it, and finally perfected the method and invented the machine for which he obtained the patent; that the defendant Weatherhead, contemplating for the first time the manufacture of rawhide leather in the fall of 1879, desiring to have a stretching machine, and hearing that Coupe had invented one, and having seen Coupe's patent, applied to him, on January 5, 1880, for a license to use it or for the sale of one of the machines; that Weatherhead, not being able to effect that object, got up a machine of his own, which Coupe notified him was an infringement on the patent; and that, the defendants persisting in using their machine, notwithstanding such notice, the present suit was begun.

Judge Lowell, in his opinion, says that rawhide leather is a hide which has been stripped of its hair, and softened, and brought to a state in which it is very soft, flabby and much wrinkled, but has not been tanned. He then proceeds: "The specification describes a table or beam, over which the hide is to pass, and which is breast high, in order that the workmen may conveniently use it; then the hide passes over a bar or stretcher, which is somewhat arched or crowned, in order to stretch the hide transversely; it then goes to a roller, to which it is clamped and over which it is slowly wound.

"The workman accelerates or retards the passage of the hide by lifting it up or pressing it down, and in this way the thicker parts secure a greater longitudinal pull from the roller than do the thinner parts, and the bar, by its shape, tends to

stretch the hide laterally as it passes from the table to the roller. The table and the bar have a lateral yield or adjustment to accommodate hides of different sizes.

"The first claim is for the combination of the table, the stretcher, and the roller; the second for the lateral yield in the table and stretcher; the third for 'the improvement in the method of stretching hides, which consists in dragging the hide over a stretcher, and also over a friction table or beam, by means of a revolving roller, to which the hide is secured, as described, whereby, as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag by pressure applied to such thicker portions, to increase at such points the friction between the hide and the table, substantially as specified.'

"There was a machine for stretching leather for belts well known to the patentee and to some others in the trade, which was made by modifying a splitting machine. Mr. Coupe did not, in fact, make his improvement upon this stretcher, but it is much more like his machine than anything else which preceded it.

"This old machine was used upon hard-tanned leather to adapt it to be made into belts for machinery, for which purpose it must be stretched with great power, eighteen or twenty thousand pounds to the square inch, in order to take out of it all possibility of further stretching. This was done by passing the leather through a trough which was brought up against the stretcher-bar with the force we have mentioned. Since the plaintiffs' method and machine have become known, Mr. Davis, an accomplished worker in leather, has tried with some success an enlarged copy of the old belt-leather stretcher, to do the work of the plaintiffs' machine. He is obliged to use a greater number of men or boys to tend the machine and prevent the pressure from ruining the hide, which, of itself, tends to prove that the machines are not alike; and we have no doubt that, if the plaintiffs' devices are considered an improvement upon this old machine, they embody a patentable improvement. They omit the means for producing the pressure, and add a table not useful in the old machine, but which,

in the new machine, enables the workmen to exert sufficient pressure.

"The defendants at one time used a machine which closely resembles that of the plaintiffs. At present they have one which works with a trough and bar, like the old belt-stretcher, with the addition of a table over which the leather passes, and which enables the workmen to spread out and manipulate the hide; upon the edge of this table is a piece of metal with grooves spreading outward, and these grooves have a tendency to stretch the hide laterally, or at least to prevent it from wrinkling; that is, to keep it to its lateral stretch, which seems to be much the same thing. The slot and bar are so placed in relation to each other that a hide is not squeezed between them, as in the old belt-stretcher; but, in the legitimate attempt to avoid infringement of the plaintiffs' invention, which the defendants intended to copy as far as they lawfully might, because they had failed to come to terms with the plaintiffs for a license, they now put into the trough a piece of board, supported at either end upon blocks, about one-third the width of the trough. The operation of the machine as thus modified is known only to the defendants themselves, and Mr. Weatherhead testifies that it exerts a pressure upon the hide, how great in pounds we do not know. We understand him to say that, by passing the hide through the machine several times, all parts come sooner or later under the board, and thus substantially all the stretching is done by its aid.

"Infringement of the plaintiffs' first claim is not escaped by the use of this piece of board, for, although it causes the defendants' machine to approach more nearly the old belt-stretcher, still the operation must remain to some extent at least like that of the patent. The manipulation with the table and grooves must enable the operator to use all the elements of the first claim upon two-thirds of the width of the hide each time it passes through the machine, and it depends altogether on the thickness and stability of the board whether the whole operation is or is not copied. The very presence of this removable board is evidence that the old machine is not satisfactory for the new use.

"The argument that a machine must be automatic in order to be patentable is not sound. A piano is not automatic, nor is any tool or implement intended for use by hand; but improvements in any such tool used in an art or industry are patentable.

"In the second claim the combination is limited to a laterally yielding stretcher and a laterally yielding friction table or beam; as one bar, however, in the defendants' machine is fixed and the other has a motion up and down, we find no infringement of this claim.

"The third claim appears to be for the exclusive right of using the machine referred to in the first claim, and, as the defendants have used such a machine, they have infringed the third claim, and we do not at present see how it could be infringed otherwise than by infringing the first claim."

In the testimony and the proceedings before the master, the consideration of the case seems to have gone solely upon the machine which Judge Lowell in his opinion states was used by the defendants "at present," and that machine is the only one considered by the defendants in their brief and their oral argument. The report of the master is based upon the use by the defendants of "their machine" for stretching hides, from January, 1880, to April, 1883, and he speaks, in his report, of but a single machine, and calls it "their infringing machine." The $15,412.82, reported by the master as gains and profits, is made up of three items, viz.: $3669.72 as the saving in the cost of stretching and manipulating the hides; $4403.66 for the increased area of hide secured; and $7339.44 as the increased value of the hides by reason of their improved condition. But the master makes no distinction as to how much of each of those items was due to the machine used at one time by the defendants, which, Judge Lowell states in his opinion, closely resembled that of the plaintiffs, and how much to the machine which the defendants used subsequently.

The plaintiffs contend that the defendants at first built and used a machine as near like a Coupe machine as possible, constructing it with two bars, one of which was bent or curved; that that machine was commenced in December,

1879, and completed in January, 1880; that in the latter month, on application by the defendants, Coupe declined to sell them one of his machines, and they then proceeded to complete their machine; that after August, 1880, the defendants informed Coupe that they had reconstructed their machine so as to take it outside of his patent; that Coupe, on examining it, notified the defendants that it was still an infringement; that they again reconstructed it; and that, as so reconstructed, it is the machine which they continue to use. It is claimed that that machine is an infringement of claim 1; that the use of it is an infringement of claim 3; and that it is the machine of which Judge Lowell speaks in his opinion as the machine used "at present" by the defendants.

On the whole case, we think the inquiry must be confined to that machine; and we are of opinion that claims 1 and 3, rightly construed, do not appear to have been infringed, and that the decree of the Circuit Court must be reversed.

The machine spoken of by Judge Lowell, in his opinion, as one well known to Coupe, and to some others in the trade, prior to the making of the invention by Coupe, was known in the art as the "dog" machine. In that machine, there were two dogs or clamps, corrugated on their inner side so as to hold the leather against slipping. The hide being grasped at two opposite parts of its edge by the two dogs, the latter were then pulled apart and the hide was stretched in the line between the two parts to which the dogs were clamped. The machine was then thrown out of gear, the dogs were taken off from the hide and applied to it in another place, and the process was so continued until the hide was considered to be sufficiently stretched.

The difficulty with that apparatus was that by it the stretch which it gave to one place it took out of another, and consequently the hide was not thoroughly stretched, being stretched always lengthwise but not crosswise, and contracting towards the centre line of pull between the dogs. Thus, when the hide was grasped at two other extreme points and pulled, the stretch first given was taken out again.

In the operation of the machine of the Coupe patent, the

hide is stretched longitudinally and transversely at the same time, instead of, as in the "dog" machine, stretching it first in one direction, across the hide, and then, by a subsequent operation, stretching it in another direction, transversely to the first direction. This transverse stretching in the Coupe machine is produced by the doubly inclined working faces *k k'* of the stretcher-bar K. The stretcher-bar K being highest in the centre, because its sides or working faces are doubly inclined, causes that part of the hide which passes over its highest point to make a longer circuit in passing from the table or breast-beam H to the roller E than do the other parts, and thereby that part is stretched somewhat more than the other parts, and the hide has a tendency to spread laterally towards the ends of the stretcher-bar where there is a shorter line of passage, and thereby it is stretched transversely to the longitudinal line of movement of the hide towards the roller E. This tendency is assisted by the use of the hands of the operator in pressing downward upon the hide. Thus the hide has a lateral stretch given to it simultaneously with its longitudinal stretch, while it is drawn through the machine by the roller E. The pull of that roller against the resisting pressure of the hands of the operator gives the longitudinal stretching, and the same pull gives the transverse stretching owing to the joint action of the pressure of the operator's hands and the form of the stretcher-bar K, with its doubly inclined working faces.

According to the specification of the patent, a single passage of a hide through the machine is supposed to give it sufficient stretching transversely as well as longitudinally; for the specification, after describing both stretches says: "The machine is now stopped, the hide removed, another secured to the roller E, and the operations above described are repeated."

In the old "dog" machine, the hide was stretched first in one direction and then taken out and grasped at another place, and stretched in a direction transverse to the first. The transverse stretching in the Coupe machine has the effect to preserve the result of the longitudinal stretching, and to stretch the hide completely in a single passage of it through the machine.

Opinion of the Court.

The first claim of the patent is for the combination of a friction table or beam, over which the hide is drawn, a stretcher, substantially as described, and a revolving roller, to which the hide is secured, and around which it is wound as it is drawn over the friction beam and stretcher. This is a claim to mechanism.

The third claim is a claim to an improvement in the method of stretching hides, which consists in dragging the hide over a stretcher and also over a friction table or beam, by means of a revolving roller to which the hide is secured, as described, whereby, as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag, by pressure applied to such thicker portions to increase at such points the friction between the hide and the table. The "pressure" mentioned in the third claim is the pressure applied by the hands of the operator to the hide as it passes over the friction table or beam.

It was correctly held by the Circuit Court, that the third claim is for the exclusive right of using the machine referred to in the first claim, and that it cannot be infringed otherwise than by infringing the first claim. If the defendants have used the combination of mechanism covered by the first claim, they have infringed it, and have also thereby used the method covered by the third claim.

Although the third claim is not confined to a passage of the hide through the machine only once, where such single passage does not produce a perfect result, it is manifest from the specification that the use of the combination covered by the first claim is intended and expected to produce complete longitudinal and transverse stretching simultaneously, by a single passage through the machine. Such stretching action, transverse as well as longitudinal, may not be, in a given instance, sufficiently severe, and a second application of the machine to the same hide may be required; but in both cases, the transverse stretching will take place simultaneously with the longitudinal stretching. The defendants do not so use their machine.

In the first claim of the patent, the stretcher-bar K is inter-

posed between the friction table or beam H and the revolving roller E. Therefore, to infringe the first or the third claim there must be used a stretcher-bar substantially such as described in the specification, of such form as will give a transverse stretch to the hide simultaneously with the giving of the longitudinal stretch.

In the defendants' machine, there is no stretcher-bar K or its equivalent, for transverse stretching, and the transverse stretching is not done simultaneously with the longitudinal stretching. On the contrary, in the defendants' method, the hide is grasped at two opposite portions of its edge and stretched on that line. It is then taken out, grasped between two other opposite portions of its edge, and stretched on that line transversely to the first line. It is thus stretched by the consecutive method operated by the old "dog" machine. That method is excluded by the Coupe specification.

In the defendants' machine, the line of tension runs in different directions at different times. Strains in it are imparted successively and not simultaneously. The theory of the Coupe specification is that, unless the hide is stretched transversely while it is stretched longitudinally, the stretch put into it when it is stretched in one direction will be wholly or partially taken out when it is stretched in another direction.

It is contended, however, that in the use of the defendants' machine, a transverse stretching is produced simultaneously, and by a device substantially like the doubly inclined stretcher-bar K of the patent. It is for the plaintiffs to establish that the defendants use substantially the doubly inclined stretcher-bar K. The mere smoothing out of wrinkles, and the stretching of the body of the leather so as to reduce it permanently to an equal thickness throughout, are two separate and distinct things. The operation of the doubly inclined stretcher-bar K is not that of merely smoothing out wrinkles in the hide. The Circuit Court seemed to be of the opinion that the outward spreading grooves on the edge of the table in the defendants' machine had a tendency "to stretch the hide laterally, or at least to prevent it from wrinkling, that is, to keep it to its lateral stretch, which seems to be much the same thing." The

machine of the defendants has divergent grooves or serrations formed on the surface of the friction table. We are of opinion that it is not a sound conclusion that the corrugations on the friction beam in the defendants' machine perform the office of Coupe's stretcher-bar K, interposed between the friction beam and the roller H. While it is true that the corrugations prevent the hide from wrinkling, yet, as there is not in the defendants' machine any lateral stretch, it is not true that such corrugations keep the hide to its lateral stretch. There is no lateral stretch which is kept from going back by such corrugations. Any office of the corrugations to keep a lateral stretch from going back would be unnecessary in the defendants' machine, because the hide is to be taken out and reattached at new points, and stretched longitudinally in the very direction in which the previous transverse stretching, if it existed, would have been performed.

It is shown by the evidence that the hide does not, in the defendants' machine, enter the grooves or serrations to any appreciable extent; that they are not deep enough to have any such effect; that there is no indication on the upper surface of the hide that its lower surface enters into the serrations; that there is no indication that the under surface of the hide is not supported by a smooth bar or table; and that this is shown by the fact that the upper surface of the hide appears smooth where it lies over the grooves or serrations. It is not shown by the evidence for the plaintiffs that the grooves are not too shallow to have any effect in giving lateral movement to the hide, or that the hide would not show on the upper surface whether the under surface was engaged in the grooves, or that there was any appearance on the upper surface indicating any such engagement.

Irrespectively of this, the combination of the first claim of the patent is one in which the stretcher-bar is interposed between the friction table or beam and the roller. In the defendants' machine, the organization is different.

We are of opinion that the first claim is not infringed, because the defendants do not have the stretcher-bar K, or any substitute for it, performing the same operation. They

get their transverse stretch by taking out the hide and grasping it at new points, and stretching it between those points. The corrugations only keep the hide from wrinkling, an operation which the patent says is performed before the stretcher-bar acts upon the hide. It does not appear that, as the defendants' machine is used, there is any lateral stretching of the hide simultaneously with its longitudinal stretching. The corrugations are not combined with the friction beam and the roller, as the convex stretcher-bar of the patent is; for that is interposed between the friction beam and the roller, and the description in the specification is that the hide, after being longitudinally stretched on the friction beam, passes to and is stretched transversely by the stretcher-bar; whereas, in the defendants' machine, the corrugations are integral with the friction beam. It would not be practicable to make the convex stretcher-bar of the patent integral with the friction beam. The specification describes the stretcher-bar as having a lateral movement relatively to the friction beam; and this excludes the idea of the stretcher-bar being integral with the friction beam.

The defendants do not stretch the hide longitudinally and transversely at the same time, but only stretch it longitudinally in different successive directions across the hide.

The third claim is not infringed, because the described method of operation of the combination of the first claim is not performed by the defendants.

The decree of the Circuit Court is reversed, and the case is remanded to that court with a direction to dismiss the bill with costs.

LUXTON v. NORTH RIVER BRIDGE COMPANY.

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

No. 1106. Submitted December 22, 1892. — Decided January 16, 1893.

An order of the Circuit Court of the United States, appointing commissioners to assess damages for land in New Jersey taken by the North River Bridge Company for the approaches to a bridge across the North or Hudson River between New York and New Jersey, under the act of July 11, 1890, c. 669, § 4, is not a final judgment, upon which a writ of error will lie.

THE case is stated in the opinion.

Mr. Gilbert Collins for plaintiff in error.

Mr. Joseph D. Bedle for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a writ of error to reverse an order made by the Circuit Court of the United States for the District of New Jersey, on the petition of the North River Bridge Company, appointing commissioners to assess damages for the appropriation and condemnation of land of the plaintiff in error in the city of Hoboken, county of Hudson and State of New Jersey, for the approaches to a bridge across the North or Hudson River between the States of New York and New Jersey, under the act of Congress of July 11, 1890, c. 669, (26 Stat. 268,) entitled "An act to incorporate the North River Bridge Company, and to authorize the construction of a bridge and approaches at New York City, across the Hudson River, to regulate commerce in and over such bridge between the States of New York and New Jersey, and to establish such bridge a military and post road," the constitutionality of which, as authorizing such appropriation and condemnation, is denied by the plaintiff in error.

At the threshold of the case lies the inquiry whether the order of the Circuit Court, appointing commissioners to assess damages for the taking by the petitioner of the respondent's land, is a final judgment upon which a writ of error will lie. This depends upon the terms and effect of the act of incorporation of the petitioner by the Congress of the United States, taken in connection with the general railroad law of the State of New Jersey.

By section 4 of the act incorporating the petitioner, Congress has enacted that the compensation for property, real or personal, appropriated and condemned under the act, shall "be ascertained according to the laws of the State within which the same is located;" that "in case any litigation arises out of the construction, use or operation of said bridge or approaches thereto and railroads thereon, or for the condemnation or the appropriation of property in connection therewith, under this act, the cause so arising shall be heard and tried before the Circuit Court of the United States for the judicial district in which the bridge or one of the approaches is located;" and that "applications for condemnation or appropriation of property shall be made in the Circuit Court of the United States for the district in which such property is situated, upon the petition of said company, and the hearing and trial of all other proceedings thereon shall conform as nearly as may be to the practice in the courts of the State in which such district is situated in the case of condemnation or appropriation of property for railroads." 26 Stat. 269, 270.

This direction that the proceedings in the Circuit Court of the United States shall "conform as nearly as may be to the practice in the courts of the State" must, of course, like the corresponding direction as to practice, pleadings and procedure in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress. *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Chateaugay Co., petitioner*, 128 U. S. 544; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

By the general railroad law of New Jersey, any railroad

corporation, which cannot agree with the owner of land required for the construction of its road, is to present an application, containing a description of the land, to a justice of the Supreme Court of the State for the appointment of three disinterested, impartial and judicious freeholders, residents in the county in which the land lies, to examine and appraise the land and to assess the damages; the commissioners so appointed are to make a report in writing of their assessment, and to file it, together with the description of the land, in the clerk's office of the county, to remain of record therein; either party aggrieved by the decision of the commissioners may appeal to the circuit court for the county, and there have the damages ascertained by the verdict of a jury, upon which judgment is to be entered; and the report so recorded, with proof of payment or tender by the corporation of the damages assessed by the commissioners, or found by the jury on appeal from their decision, is to be plenary evidence of the company's right to the land. New Jersey Laws of 1873, c. 413, §§ 12, 13, pp. 94, 95; Rev. Stat. of 1877, pp. 928, 929.

The description and report, so filed and recorded, have been declared by the Supreme Court of the State to be equivalent to a deed from the owner. *Hetfield* v. *Central Railroad*, 5 Dutcher, (29 N. J. Law,) 571, 574; *Taylor* v. *New York & Long Branch Railroad*, 9 Vroom, (38 N. J. Law,) 28.

By the practice in the courts of New Jersey, either the appointment of commissioners, or their award of damages, may be reviewed by the Supreme Court of the State on writ of *certiorari;* matters affecting the validity or the regularity of their appointment may be considered on *certiorari* to the justice appointing them, after the order of appointment and before they have acted; and questions of law affecting the power or the action of the commissioners may be determined on *certiorari* to them, after their award has been filed and not appealed from. *Morris & Essex Railroad* v. *Hudson Tunnel Railroad*, 9 Vroom, (38 N. J. Law,) 548; *Lehigh Valley Railroad* v. *Dover & Rockaway Railroad*, 14 Vroom, (43 N. J. Law,) 528; *Central Railroad* v. *Hudson Terminal Railway*,

17 Vroom, (46 N. J. Law,) 289; *De Camp* v. *Hibernia Railroad*, 18 Vroom, (47 N. J. Law,) 43, 518.

There are reasons why a writ of *certiorari* to review the appointment of the commissioners before they have acted, may be allowed in the courts of New Jersey, under the law of the State, which can have no application to proceedings in the Circuit Court of the United States, under the act of Congress. The appointment of commissioners under the state practice is made by a justice of the Supreme Court of the State, as a judge and not as a court, and is the first and last step to be taken by him. The award of the commissioners is not to be returned to him or to that court, but to the office of the clerk of the county in which the land lies, and is subject to appeal to a distinct tribunal, the circuit court of the county. Besides, the Supreme Court of New Jersey has power to issue writs of *certiorari*, according to the course of the common law; and a writ of *certiorari* to quash proceedings before a special tribunal for want of jurisdiction, or to bring them up to be completed, may issue at any stage of the proceedings, differing in this respect from a writ of error. *Hoxsey* v. *Paterson*, 10 Vroom, (39 N. J. Law,) 489; *Mowery* v. *Camden*, 20 Vroom, (49 N. J. Law,) 106.

But under the act of Congress the application for the appointment of commissioners and the order appointing them are required to be made, not to and by a judge sitting at chambers, but "in the Circuit Court of the United States." The award of the commissioners so appointed must be filed and recorded somewhere, in order to preserve the proof of the rights of both parties under it. To infer that it should be filed and recorded in the office of the clerk of the county in which the land lies would be most incongruous; for that would either subject an award of commissioners appointed by a court of the United States to appeal and review in a court of the State; or else require an award recorded in the clerk's office of a court of the State to be reviewed in the Circuit Court of the United States. The provisions of the statute of the State in this particular being inapplicable, and the act of Congress containing no special direction on the subject, the

only reasonable conclusion is that the report of the commissioners appointed by the Circuit Court of the United States must be returned to the court which appointed them, be made matter of record therein, and be subject to be confirmed or set aside by that court. *Boston & Worcester Railroad* v. *Western Railroad*, 14 Gray, 253, 258. And if a trial by jury should be had, by way of appeal from the assessment of the commissioners, it must likewise be in the same court. The case throughout, from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken, until judgment upon the award of the commissioners or upon the verdict of a jury, assessing those damages, remains in the Circuit Court of the United States and under its supervision and control.

The action of that court in this case, as in other cases on the common law side, is not reviewable by this court by writ of *certiorari*; *United States* v. *Young*, 94 U. S. 258; but only by writ of error, which does not lie until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error. Act of September 24, 1789, c. 20, § 22, 1 Stat. 84; Rev. Stat. § 691; *Rutherford* v. *Fisher*, 4 Dall. 22; *Holcombe* v. *McKusick*, 20 How. 552, 554; *Louisiana Bank* v. *Whitney*, 121 U. S. 284; *Keystone Co.* v. *Martin*, 132 U. S. 91; *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536.

As by the proceedings in the Circuit Court of the United States, in the case at bar, neither the title of the corporation in the land to be taken, nor the right of the owner to damages for taking it, would be adjudicated or established before the return of the award of the commissioners, it necessarily follows, under the acts of Congress and the decisions of this court, that the order appointing commissioners was interlocutory only, and that this writ of error was prematurely sued out, and must be dismissed for want of jurisdiction.

The case of *Wheeling & Belmont Bridge* v. *Wheeling Bridge*, cited by the plaintiff in error, is distinguishable from the present case. Jurisdiction of a writ of error to the Su-

preme Court of Appeals of West Virginia, affirming an order appointing commissioners under a somewhat similar statute, was there entertained by this court, solely because that order had been held by the highest court of the State to be an adjudication of the right to condemn the land, and to be a final judgment, on which a writ of error would lie, and could therefore hardly be considered in any other light by this court in the exercise of its jurisdiction to review the decisions of the highest court of the State upon a Federal question. 138 U. S. 287, 290. To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the State held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the Circuit Court of the United States.

Writ of error dismissed for want of jurisdiction.

SMITHMEYER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 645. Submitted January 9, 1893. — Decided January 23, 1893.

By sec. 7 of the act of October 2, 1888, 25 Stat. 505, 523, c. 1069, in regard to the building for the Library of Congress, which provided that all contracts for the construction of the building should be made by the Chief of Engineers of the Army, and repealed so much of the act of April 15, 1886, 24 Stat. 12, c. 50, as required the construction of the building according to the plan submitted by John L. Smithmeyer, and enacted that " hereafter, until otherwise ordered by Congress, no work shall be done in the construction of said Library except such as is herein provided for, and all contracts for work or materials not necessary for

the execution of the work contemplated herein are hereby rescinded," it was provided that "all loss or damage occasioned thereby or arising under said contracts, together with the value of the plan for a Library building," so submitted by Smithmeyer, "may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated." Smithmeyer and his partner afterwards brought a suit in the Court of Claims against the United States, to recover $210,000 as the value of plans and drawings made by them for a building for the Library, which were delivered to and accepted by the United States, and used in constructing the building. The Court of Claims *held*, that the acts of the parties indicated that the services of the plaintiffs should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the American Institute of Architects, and that they were entitled to recover $8000 a year for six years' services. *Held*, that that was a proper and reasonable decision.

Although the United States did not appeal, this court considered the question of the jurisdiction of the Court of Claims, and *held*, that, as the right of action of the plaintiffs accrued in 1886, and the Court of Claims from that time had full jurisdiction over it under its general jurisdiction, and as the general jurisdictional act of that court was not repealed by the act of 1888, to the extent of this case, the plaintiffs could waive the benefit of the additional method of adjustment provided by the act of 1888, and the general jurisdiction of that court and such additional method could both of them well stand together.

THIS was an appeal from a judgment in the appellants' favor in the Court of Claims for $48,000 damages, their demand sued for being $210,000. No appeal was taken by the government.

The case is stated in the opinion.

Mr. John Paul Jones, *Mr. Reese H. Voorhees*, and *Mr. James Coleman* for appellants.

Mr. Solicitor General and *Mr. Felix Brannigan* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit brought against the United States in the Court of Claims, by John L. Smithmeyer and Paul J. Pelz, architects, to recover the sum of $210,000, as 3 per cent on $7,000,000, the alleged cost of the building for the Library of Congress, when completed.

The petition alleges that the claimants made and prepared the general plans and drawings for the Library building now in process of construction at Washington City; that from the year 1873 to the year 1886, they, at the request of the United States, were employed in making plans and drawings for a building for the Library; that in 1886 such plans and drawings were delivered to the United States and accepted by the latter, which thereafter used and is using the same in the construction of said Library building; that it will cost, when completed, $7,000,000; that the customary charge by architects for the making of general drawings and plans for the construction of said building, and the reasonable value of such service so rendered by them, is 2½ per cent upon the cost of the building; and that there is now due to the claimants 3 per cent on the cost of said building, namely, $210,000.

The usual general traverse was put in by the United States. The Court of Claims heard evidence, and filed findings of fact, and afterwards additional findings of fact, all of which are set forth in the margin,[1] with a conclusion of law that, upon the

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[1] *Original Findings of Fact.*

1. The claimants, John L. Smithmeyer and Paul J. Pelz, were at the times hereinafter mentioned copartners doing business as architects in the city of Washington.

2. From the year 1873 until the 15th April, 1886, the claimants devoted their time as architects in the making of plans and drawings for a building for the Library of Congress. They acted under the direction and at the request of the commissions and committees of Congress mentioned in the following acts of Congress, viz.: The commission created by the sundry civil appropriation act, March 3, 1873, 17 Stat. 510, 513; the Joint Committee on the Library of Congress, sundry civil act, June 23, 1874, 18 Stat. 204, 226, and the legislative appropriation act, August 15, 1876, 19 Stat. 143, 168; the commission on the enlarged accommodation for the Library of Congress, act April 3, 1878, 20 Stat. 35; the joint select committee on additional accommodation for the Library of Congress, organized under the act June 8, 1880, 21 Stat. 165; deficiency act, March 3, 1881, 21 Stat, 414, 424; and the act April 15, 1886, 24 Stat. 15.

3. Under the act 3d March, 1873, providing for "a plan for a new library building for a Library of Congress," the commission appointed thereunder published and issued the following prospectus or invitation to architects:

findings, the claimants were entitled to recover $48,000; and it entered a judgment in their favor for that amount, from

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"WASHINGTON, *August*, 1873.

"To Architects:

"In accordance with the provisions of an act of Congress approved March 3, 1873, the undersigned hereby invite architectural plans or sketches (not including details or working plans) for a new building for the Library of Congress, to be drawn in accordance with limits and conditions which will be furnished to applicants. The sum of fifteen hundred dollars will be paid for such design as may be adjudged the best by the commission, one thousand dollars for the second best, and five hundred dollars to the third best, to be paid on the 31st of December, 1873.

"The plans must be submitted on or before the 1st day of November next, and addressed (prepaid) to the Librarian of Congress, Washington, D. C.

"Commission:

"Chairman of the Joint Committee on the Library.

"Chairman of the Senate Committee on Public Buildings and Grounds.

"Librarian of Congress."

4. During the ensuing thirteen years, that is to say, between March 3, 1873, and April 15, 1886, the claimants prepared for and submitted to different committees and commissions of Congress the following sets of plans and designs for a Library building, to wit:

(1.) In reply to the foregoing prospectus the claimants submitted a plan for a Library building in the Italian renaissance style of architecture, to said commission. Said building, by the terms of the prospectus, was to be 270 by 340 feet. These plans consisted of one perspective, one front elevation, one side elevation, one first-story plan, one second-story plan, and one section. They were accepted by said commission in December, 1873, and claimants were awarded the first prize for excellence of design and were paid therefor a premium of $1500. In that competition there were twenty-eight competitors, and prizes for first, second and third best plans, respectively, of $1500, $1000 and $500.

(2.) Shortly afterward claimants, at the request of the chairman and members of the Committee on the Library, submitted a new design as a modification of the above-mentioned design, making a change of elevation and some changes of ground plan. This design consisted of a colored perspective, a front elevation, a portion of first-story plan, and a part of the second-story plan, five drawings in all.

(3.) About 1875, at the request of Senator Howe, chairman of the Joint Committee on the Library, claimants prepared a plan for a new Library building in the Gothic style of architecture upon an entirely new basis. This plan was for a building 463 feet 11½ inches by 332 feet 9 inches, and the series of drawings consisted of seven different sketches, but four of which were submitted to the committee.

which the claimants have appealed to this court. The opinion of the Court of Claims was delivered by Judge Nott, and is

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(4.) Said Gothic plans were acceptable to the said committee, but at the session of Congress following, at the request of Senator Howe, chairman of said committee, claimants made modifications of the exterior design for said Gothic building, five in number, and these were submitted to his committee.

(5.) About 1877, at the request of Senator Howe, chairman of said committee, claimants prepared plans for a new Library building in the French renaissance style of architecture. These consisted of an elevation framed and colored and a pencil study of the front elevation. In general arrangement it corresponded with the Gothic design, which largely increased the capacity of the building over the premium plan, with the exception that the first and second stories were interchanged. In all designs previous to this one the building consisted of a basement, a very tall first story, and a subordinate second story. At the time these plans were prepared, instead of the Capitol Hill site originally contemplated for the erection of the Library, the committee considered Judiciary Square as a possible site, and, at the request of the committee, claimants prepared two cross-sections of Judiciary Square with the proposed building located, showing grades, sewers, etc. These plans were delivered to the said committee.

(6.) Claimants next prepared, at the request of the Joint Committee on the Library, a design for said building in the Romanesque style of architecture with perspective elevations, that being a cheaper style of architecture, and permitting the use of coarser material than the Gothic. There were three drawings in all in this set of plans, and they were submitted to the said committee.

(7.) About 1879, claimants, at the request of said committee, prepared a design in the German renaissance style of architecture, with finished perspective and eight other drawings, consisting of front, rear and side elevations, and a full set of plans of the different stories, together with a section showing the halls and reading-room, all of which were fully developed. The study of the reading-room was an entirely new and original design, and is the idea carried out in the plans finally adopted by the act of Congress of April 15, 1886, and as set forth in the report of the Chief of Engineers of the Army mentioned in the sundry civil act of March 2, 1889, 25 Stat. 939, 966, as Exhibit D. There were also many changes in this set of plans, to wit, in the ground plans, and showing higher development and greater elaboration of original ideas and progress both in construction and light effect.

(8.) In 1880, claimants prepared full general drawings for a building in the Italian renaissance style of architecture, embodying all the improvements which had been made by the claimants since 1873. In this set of plans there were finished drawings numbering forty. These drawings consisted of a colored perspective, with a full set of ground plans, elevations and

reported in 25 Ct. Cl. 481, but the additional findings of fact are not there set forth.

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sections, drawn on a large working-scale one-eighth of an inch to the foot and one-fourth of an inch to the foot, showing the complete arrangements of the building. These plans, with exterior modified as set forth in paragraph (10) below, are the plans adopted by act of Congress of April 15, 1886, aforesaid, and they were readopted by the act of March 2, 1889, above cited. These plans, drawings and designs, though prepared by the claimants' firm, were prepared in consequence of a request made to J. L. Smithmeyer, individually, by the Joint Select Committee on additional Accommodations for the Library of Congress under the act 8th June, 1880, as more fully set forth in finding 12.

(9.) In 1882, at the request of the said committee, claimants redesigned and revised the Gothic plans above referred to in paragraphs (3) and (4) of this finding, making perspectives and front elevations. These revised plans were also turned over to the committee, and were adopted by the Senate in a bill passed by that body authorizing the construction of a Congressional Library, but which failed in the House.

(10.) The set of Italian renaissance plans, prepared in 1880 by the claimants, under instructions of the committee as aforesaid, was very severe and simple, and at the request of the said committee in 1885 or 1886 two new designs were prepared by the claimants in the same style of architecture and submitted to them. These exterior plans were more ornate than those submitted in 1880. They made no changes in the interior of the building, but were intended to affect only the exterior, and consisted of perspectives. These perspectives were made for the color effect of using different shades of material in the elevation. They are on a large scale, and carefully considered with reference to the architectural effect of the building.

5. Claimants, in the year 1874, gave up their private business as architects, and from that time on until 1886 devoted themselves almost exclusively to the preparation of the plans above described, and up to the time of the commencement of this suit they had not regained their private business.

In 1882 one of the firm, Mr. Smithmeyer, travelled throughout this country and in Europe, visiting different library buildings in New York, Philadelphia, Boston, Baltimore, Liverpool, London, Paris, Brussels, Vienna, Berlin, Dresden, Leipsic and Hanover, at the request of the said joint select committee, for the purpose of obtaining information in respect to the architecture of the great library buildings of the world.

6. When Congress, by the act 15th of April, 1886, adopted the plans prepared by the claimants in the Italian renaissance style of architecture, as set forth in the preceding findings, the commission therein created was organized, and the work of constructing the Library building under and in accordance with the said plans so furnished by claimants and so adopted by Congress was commenced in the month of October, 1886.

Under the direction of the commission the foundation was laid for the

The claimants complain that, instead of being allowed $210,000, they were allowed only $48,000. The United States

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rotunda and centre building, and for the curtains and corner pavilions of the west front, after the plan so adopted by Congress, while the cellar excavation and drainage system for the entire building has been completed. Some 29,000 cubic feet of cut granite for the cellar walls and piers, and also small quantities of terra-cotta pipe for flue linings and broken stone for concrete, had been delivered on the premises. Only about 23,000 cubic feet of the granite, however, had been accepted and paid for. A partial outfit of derricks, tools, implements and other mechanical appliances had been collected, mainly by transfer from the completed building for the State, War and Navy Departments, and a number of contracts were in force.

7. (1.) In accordance with the provisions of the sundry civil act, October 2, 1888, 25 Stat. 505, 523, General Casey, Chief of Engineers, on October 3, 1888, assumed the superintendence of the new Library building.

In order to meet the requirements of said act, limiting the cost of said building to $4,000,000, General Casey so far changed the plans adopted by the act of April 15, 1886, as to reduce the cost within this prescribed limit, by cutting out the curtains connecting the wings with the central pavilion, and abutting the wings immediately thereupon, thus eliminating the courts formed by said curtains and the storage magazines contained therein, in this way decreasing the size of the proposed building and the amount of material required in its construction.

The plans so submitted are the plans marked A in the report of the Chief of Engineers and are the identical plans submitted by John L. Smithmeyer and adopted by Congress by the act of April 15, 1886, with certain parts omitted as aforesaid.

(2.) Plans D, mentioned in said act of March 2, 1889, are the identical plans which Congress had formerly adopted by the above-mentioned act of April 15, 1886, with certain interior parts of the building for book magazines omitted, which omitted parts are shown in the drawings appended to the said report of the Chief of Engineers.

8. At the time when the act 15th April, 1886, 24 Stat. 12, authorized the construction of a Library building "substantially according to the plans submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian renaissance style of architecture, with such modifications as may be found necessary or advantageous without materially increasing the cost of the building," no specifications fixing or designating the material of the building had been adopted, and until such specifications were adopted, or the kind of material was in some way determined, it was impossible to fix, except approximately, the amount of the estimated or anticipated cost of the building to be constructed.

The first estimate of the cost of the building authorized by the act April 15, 1886, made by any officer or agent of the government was made by the

has not appealed, but says that if the question of jurisdiction raised in the Court of Claims and appearing on the face of the

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Chief of Engineers of the Army in his report to the Speaker of the House of Representatives, bearing date December 1, 1888 — that is to say, after the duty of constructing the building had been devolved upon him by the act 2d October, 1888, (25 Stat. 505, 523.) In his report he submitted to Congress an "estimate of cost of the original plan modified," which "estimate" amounted to $6,003,140.

This original plan "modified" was the plan of the claimants adopted by the act April 15, 1886, and the modification consisted in omitting about one-sixth of the finished interior, though retaining the external walls of the building as originally designed by the claimants. The portion so omitted would cost, if built according to the original plan, about $1,000,000 in addition to the estimate of $6,003,140 made by the Chief of Engineers for the modified plan. This modified plan, to cost $6,003,140 was designated in the report to Congress as plan D, and is the same plan adopted and authorized by the act 2d March, 1889, 25 Stat. 939, 966.

But in 1884, while the claimants' plans were still under consideration in Congress, the claimant Smithmeyer had prepared a paper entitled "Description of the plans for a new building for the Congressional Library," which was "ordered to be printed for the information of the members of the House, April 3, 1884." The plans referred to in this document were the same plans then before Congress, subsequently designated as the plan of John L. Smithmeyer in the act of 1886, after which the building is now being constructed, and it was an accurate description of the said plan as then existing. It concluded with the following paragraph:

"The approximate estimate of the cost of completing this structure, made from the drawings on hand this date — *i.e.*, the plan adopted by the committee — in the Italian renaissance style of architecture, in stone and iron, will be $3,262,600, and the cost of completing such portions of the inside for occupation as will accommodate one million of books will be $2,323,600."

9. The usual and customary schedule of charges and the professional practice of architects, as prescribed by the American Institute of Architects, (chartered under the laws of the State of New York, and of which both claimants are members,) the Western Association of Architects, and other architectural societies, including the District of Columbia, and by the profession generally, fixes the rates of compensation and rules governing the same as follows:

"For full professional services, (including supervision,) 5 per centum upon the cost of the work.

"The charge for partial service is as follows:

	Per cent.
"Preliminary studies	1
"Preliminary studies, general drawings, and specifications	2½
"Preliminary studies, general drawings, specifications and details	3½

record, and hereinafter considered, is decided adversely to the United States, it is content that the judgment should be affirmed.

"For works that cost less than $10,000, or for monumental and decorative work and designs for furniture, a special rate in excess of the above.

"An additional charge to be made for alterations or additions in contracts or plans, which will be valued in proportion to the additional time and services employed.

"Necessary travelling expenses to be paid by the client.

"The architect's payments are successively due as his work is completed in the order of the above classifications.

"Until an actual estimate is received, the charges are based upon the proposed cost of the works, and the payments are received as instalments of the entire fee, which is based upon the actual cost."

These are the rates and rules established by the custom and usage of the profession, and are never deviated from by architects in good standing, except under exceptional circumstances, and then only by a special and express contract.

The plans under which the building for the Library of Congress is being constructed are designed and intended for a monumental building, within the meaning of the paragraph of the foregoing schedule which prescribes additional rates for such plans.

In a number of cases the executive branch of the government has employed architects at the rates prescribed by the foregoing schedule of the American Institute.

10. The plans prepared and submitted by the claimants, and accepted and so used by the government in the construction of the building, consisted of "preliminary sketches and general drawings," within the meaning of the classification in the schedule of the American Institute of Architects, and were so complete and perfect that any competent architect could take them and construct the contemplated building from them, without the assistance or advice of the claimants.

For such preliminary studies and general drawings the rate of remuneration prescribed in the schedule set forth in the preceding finding is, with specifications added, 2½ per cent upon the cost or proposed cost of the work, but, inasmuch as the kind of material and the style of finish for the Library building had never been fixed upon by Congress or by any officer or agent of the government, no specifications were ever prepared by the claimants.

They consequently were unable to furnish the specifications, and were relieved from the duty and labor of preparing them. The court finds $3300 to be the reasonable value of the service of preparing specifications for this building from which the claimants were so relieved — that is to say, if the claimants are entitled to recover a commission of 2½ per cent on the cost or proposed cost of the building, the sum of $3300 represents the

The question of the jurisdiction of the Court of Claims in this case arises on certain provisions of the act of October 2,

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amount which may be deducted for specifications, which they were ready and willing to furnish, but which they did not, in fact, furnish to the defendants.

11. On the 1st October, 1886, the commission created by the act of 15th April, 1886, appointed the claimant John L. Smithmeyer architect of the Library building and fixed his compensation at $5000 per annum. On the 13th November, 1886, the commission also appointed the claimant Paul J. Pelz principal draughtsman and fixed his compensation at $3000 per annum. The appointments were in writing. Mr. Smithmeyer continued in the service of the defendants as architect of the Library building until October 3, 1888, when he was removed by the Chief of Engineers. Mr. Pelz is still employed. The claimants at the time of accepting such appointments did not notify either Congress or the commission that they intended to charge according to the schedule of the Institute for the plans furnished, nor did they so notify Congress or the commission before the work began on the building under the act of 1886, but had previously notified the chairman of the joint select committee that they intended to charge for the plans.

During the preceding twelve years — that is, say, from October, 1874, to April 15, 1886 — the claimants had given substantially their whole time to the service of the committees and commissions having charge of the subject of a Library building, as is more particularly set forth in finding 4, and had also furnished the necessary draughtsmen and clerks and office room. It has been shown that the cost of draughtsmen, clerks and office rent is usually about 50 per cent of the gross receipts of an architect's business, and that the cost of plans and specifications in the office of the supervising architect of the Treasury is about 2½ per cent of the cost of the building; but it has not been shown what were the expenditures of the claimants during the twelve years above mentioned further than that their office rent was $600 per annum, and that they ordinarily employed a number of clerks and draughtsmen whose compensation respectively ranged from $2 a day to $10 a day.

12. Immediately after the enactment of the act of 8th June, 1880, the joint select committee therein named selected Edward Clark, Alexander R. Esty, and the claimant John L. Smithmeyer as the three suitable persons contemplated by that act to determine whether it was practicable and beneficial to provide additional library space in the Capitol or preferable to erect a separate building. The claimant's appointment was in the following words:

"*Rooms of the Joint Select Committee on Additional Accommodations for the Library of Congress,*
Washington, D. C., June 17, 1880.

"JOHN L. SMITHMEYER, Esq., *Washington, D. C.*

"SIR: The joint select committee contemplated by the act of Congress approved June 8, 1880, (a copy of which you will find inclosed,) being duly

1888, 25 Stat. 505, 523, c. 1069, entitled "An act making appropriations for sundry civil expenses of the government

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organized, have directed me to notify you that you have been selected as one of the 'three persons of suitable skill and attainments' provided for in said act, to consider the questions therein named.

"In making this communication to you the committee desire to call your attention to the provisions of the first section, relating to the examination of the Capitol building. This examination will be made in connection with your associates, Mr. Edward Clark, architect of the Capitol, and Mr. Alexander R. Esty, of Boston.

"It is not deemed necessary further to point out your duty in connection with the first section of said act, except to call your attention to the last sentence of the same. You will observe that provision is there made for a comparative examination and estimate of the advantages between library accommodations connected with the Capitol and the erection of a separate building for that purpose.

"The object of the act is to empower 'three persons of suitable skill and attainments' on the subject of architecture to determine whether it is 'practicable and beneficial' to provide additional accommodations for the Library in connection with the Capitol building or whether it is preferable to go elsewhere and erect a separate building. If you and your associates find adversely to the idea of building on the present Capitol, then the committee desire you and each of you to submit plans, specifications and estimates for a building at some eligible point in the city disconnected from the Capitol. In doing this the committee would advise that what is known as Judiciary Square, and also the ground east of the present Capitol ground, be taken into consideration; but in designating these points the committee do not intend to be understood as excluding from your consideration other eligible sites that may occur to you.

"If a new building should be decided on, it is the judgment of the committee that it should be not less than four hundred and fifty (450) feet in length and three hundred (300) feet in width; that it should be constructed of material as durable as the two wings of the Capitol; and that the interior should be brick, iron or other material as nearly fire-proof as possible. As to the interior arrangement and the practicability of its future extension and improvement, it is the desire of the committee that you consult with the Librarian of Congress.

"It is proper in this connection to call your attention especially to that part of section 1 which looks to the improvement of the 'legislative halls,' 'the convenience of communication between them,' 'their better ventilation, light and exposure to the open air.' That subject you will consider in connection, however, with the primary purpose of this legislation, which is to provide a structure for the better accommodation of the Library of Congress and for its future wants.

"The committee earnestly hope that you and your associates will be

for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," referred to in finding 7, which read as follows:

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able to meet at an early day and proceed with the duties pointed out in this act. They hope to receive a preliminary report from you, if possible, as early as the 1st of October next, and it is their expectation that they will have such reports from you as will enable them to report to Congress upon its meeting in December next.

"The committee have designated Mr. Edward Clark, Architect of the Capitol, to act as chairman of the board when in consultation.

"Very respectfully, yours, etc., D. W. VOORHEES,
"*Chairman.*"

After receiving such appointment the claimant Smithmeyer entered upon and performed the duties therein indicated, both with regard to the adaptation of the Capitol to the purposes of a library and with regard to a separate building. In the discharge of these duties he produced, at the request of the joint select committee in 1880, a plan or plans for the alteration and enlargement of the Capitol and a plan for a building to be erected on Judiciary Square, and likewise the plan or plans described in finding 4, subdivision 8, for a separate building. The latter plan or plans had inscribed upon them the name of Smithmeyer & Pelz, the claimants' firm-name, and were prepared by the firm and at its cost, but were delivered to the committee by the claimant Smithmeyer, and the plan so delivered was the same adopted by and referred to in the act 15th April, 1886, as "the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer." It was reported to Congress by the committee on the 14th January, 1881, restudied and greatly improved by the claimants, and was afterward modified at the request of the committee, as set forth in paragraph (10) of finding 4.

No express contract or agreement was entered into by the committee and the claimant Smithmeyer, determining his compensation for his services generally or for preparing these specific plans; neither was any contract whatever entered into between the committee and the firm of Smithmeyer & Pelz.

13. The following statement sets forth all the payments made by the defendants to the claimants in and about the matter of preparing plans for a building for a Congressional Library, including a plan for the extension of the Capitol. With the exception of the first item of $1500, all the payments were made to Smithmeyer alone for his individual services under the provisions of the act of June 8, 1880.

"For the building for the Library of Congress, as herein provided for, and for each and every purpose connected there-

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Statement of Payments.

From the $5000 appropriation of March 3, 1873, "for a plan for a new building for a Library of Congress." (17 Stat. 513:)

On December 29, 1873, "for one set of designs for a new building for the Library of Congress, the amount of the first premium"	$1500 00
From the appropriation of $8000 made by the act of June 8, 1880, 21 Stat. 165, and the act of March 3, 1881, (Ib. 424,) to be expended by the joint select committee, created by said act of June 8, 1880, for the purpose therein mentioned:	
On August 10,1880, "for services rendered the joint select committee to provide additional accommodations for the Library of Congress"	600 00
On October 23, 1880, "for services rendered and drawings submitted" for said committee	500 00
On —— —, ——, "for draughts of plans, etc., for library building"	802 00
On February 26, 1881, "for ground plans, elevations and perspective drawings of the Capitol building as illustrating the preliminary report on the subject of extending it"	650 00
On March 30, 1881, for "professional services rendered"	650 00
On November 2, 1881, for "labor on plans, sections, etc."	500 00
On February 28, 1882, for "services rendered"	400 00
On June 29, 1882, for "professional services rendered — *i.e.*, estimates, drawings, etc., etc."	$500 00
On August 23, 1882, for "professional services up to date"	800 00
On January 20, 1883, for "services rendered as professional expert"	955 00
On January 4, 1883, for "drawings, photographs, copies of plans and books purchased from C. Pulman, Esq., custodian of British Museum"	40 88
Total as above	$7897 88

14. The claimants have not submitted any demand to the Secretary of the Interior, under the provisions of the act of October 2, 1888, above cited, for adjustment and determination; nor have they, or either of them, made any claim to the executive department in regard to any matter alleged in their petition looking to the payment of the fees or compensation demanded in this suit.

15. Since October, 1886, the Library building has been and still is in process of construction according to the plan designated by the act 15th

with, including the cost of all professional and other personal services that the Chief of Engineers of the Army may deem

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of April, 1886, modified by the act 2d March, 1889, as is more fully set forth in the preceding findings.

16. The court finds the fair and reasonable value of the claimants' services in preparing the plans delivered to the joint select committee and reported to Congress on the 14th of January, 1881, and which are now being used by the government in the construction of a Library building, to be ($48,000) forty-eight thousand dollars.

Additional Findings of Fact.

1. From the passage of the act of 15th April, 1886, until October 1, 1886, neither of the claimants were in any way in the employ of the defendants.

At this time the claimant Smithmeyer was employed. The following letter shows the extent of his employment:

"WASHINGTON, D. C. *April* 19, 1887.

"JOHN L. SMITHMEYER, Esq.

"DEAR SIR: At a meeting of the commission held on Friday, October 1, 1886, you were appointed architect of the building for the accommodation of [the Library of?] Congress, at a compensation of $5000 per annum.

"Respectfully, L. Q. C. LAMAR.

"*Sect. of the Interior and Chairman Cong. Library Commission.*"

Subsequently, and on the 13th day of November, 1886, the commission employed the claimant Pelz as principal draughtsman of the building, and agreed to pay him $3000 per annum.

The claimants were not employed as a firm, and neither had any interest in the employment of the other, or in the services to be rendered by the other, or in the compensation to be paid for such services. Their employment related solely to service to be rendered by them in the future construction of the building, and no other.

2. Subsequently to the act of April 15, 1886, the defendants paid for the services of draughtsmen, computers, modellers and experts of every kind, and also all expense for stationery, instruments, clerk-hire, office rent, fuel, gas and all other necessary expense which might be connected with an architect's office, and none of such service or expense was paid by claimants or either of them. From April, 1886, to the 30th of April, 1888, the commissioners paid for such expense the sum of $33,803.29.

3. The acceptance of the salaries by Smithmeyer and by Pelz were the only acts, as far as appears, done by them or either of them, or agreements, express or implied, between them and the defendants or the commissioners, relative to their compensation as architects either for preparing the plans or superintending the work.

4. In determining the value of claimants' services in preparing the plans accepted by the defendants, and adopted by them, and used by them in the

necessary for the work and shall specially order, five hundred thousand dollars.

"This appropriation and all appropriations hereafter made, and all sums available from appropriations heretofore made for this purpose, shall be expended under the direction and supervision of the Chief of Engineers of the Army, who shall have the control and management of all said work and the employment of all persons connected therewith. And all contracts for the construction of said building, or any part thereof, shall be made by the Chief of Engineers of the Army, and so much of the act entitled 'An act authorizing the construction of a building for the accommodation of the Congressional Library,' approved April fifteenth, eighteen hundred and eighty-six, as requires the construction of said building substantially according to the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress, by John L. Smithmeyer, and so much of the first section as provides for a commission, together with the eighth section of said act, be, and the same are hereby, repealed, and the duties of said commission under said act are hereby devolved upon the Chief of Engineers of the Army, who shall annually report to Congress at the commencement of each session a detailed statement of all the proceedings under the provisions of this act, and hereafter, until otherwise ordered by Congress, no work shall be done in the construction of said Library except such as is herein provided for, and all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded. And all loss or damage occasioned thereby or arising under said contracts, together with the value of the plan for a Library Building

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construction of the Library building, no allowance has been made for service rendered after the 14th day of January, 1881, in restudying and improving such plans or in preparing the new designs for the exterior of said building as set forth in paragraph (10) of finding 4, and in the last paragraph of finding 12.

5. In fixing $48,000 as the fair and reasonable value of claimants' services in preparing said plans, accepted and adopted by the defendant, no allowance has been made for the expenses of the architect's office.

submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian Renaissance style of Architecture, may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated: *Provided*, That before any further contracts are let for the construction of said building general plans for the entire construction thereof shall be prepared by or under the direction of the Chief of Engineers of the Army, which plans shall be subject to the inspection and approval of the Secretary of War and the Secretary of the Interior: *And provided further*, That the total cost of said building shall not exceed four million dollars exclusive of appropriations heretofore made."

The particular provision referred to, is that "all loss or damage occasioned thereby, or arising under said contracts, together with the value of the plan for a Library Building submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian Renaissance style of Architecture may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated."

It is contended for the United States that the word "may" in such provision means "shall;" that the Secretary of the Interior was thus constituted a special tribunal to adjust and determine the equitable right of Mr. Smithmeyer for the value of his plan, that the Secretary of the Interior never had an opportunity to make payment for the plan, as, according to finding 14, the claimants did not submit any demand to him for an adjustment and determination under the act of October 2, 1888; and that neither the Court of Claims nor this court has any jurisdiction in the premises. It is contended that the act referred the claim to the Secretary of the Interior as a special tribunal, with exclusive power, not only to make an award, but also to pay its amount.

But this right of action accrued in 1886, and the Court of Claims from that time had full jurisdiction over it, under its general jurisdiction. The act of October 2, 1888, did not re-

peal, either expressly or by implication, the general jurisdictional act of the Court of Claims, to the extent of this case. The purport of the act of 1888 seems to have been to provide a method of adjusting the claim, if the claimants so desired, without a suit. The claimants had a right to the additional method, but they could also waive its benefit. The general jurisdiction of the Court of Claims and the additional method of adjustment can both of them well stand together. *De Groot* v. *United States*, 5 Wall. 419, 432; *Gordon* v. *United States*, 7 Wall. 188; *Henderson's Tobacco*, 11 Wall. 652; *Shutte* v. *Thompson*, 15 Wall. 151; *Bechtel* v. *United States*, 101 U. S. 597; *Campbell* v. *United States*, 107 U. S. 407; *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Harmon*, *ante*, 268.

The contention on the part of the claimants is that the value of their plans or services ought not to be estimated according to the rule of *quantum meruit*, but that they ought to be paid according to the rates established by the general usage of the architects' profession throughout the United States. On the evidence the Court of Claims, by finding 16, found the fair and reasonable value of the services of the claimants, in preparing the plans delivered to the Joint Select Committee, reported to Congress on January 14, 1881, and which are now used by the government in the construction of the Library building, to be $48,000. This was a finding on the evidence; the evidence is not before us; and without it, we are asked, on findings of facts as to work done in connection with plans which were not adopted, to reverse the judgment of the Court of Claims as to the reasonable value of the plans which were adopted, and for which alone the right to compensation exists.

It appears from the findings of the Court of Claims that no contract, express or implied, was entered into with the claimants, or either of them, by any commission, committee or public officer, empowered to adopt plans or employ architects, or to enter upon the construction of the building, until the act of April 15, 1886, c. 50, 24 Stat. 12, referred to in finding 8, was passed, which adopted the plan of Smithmeyer. That act did not constitute a contract, but only declared the intention

of the legislature. It might have been rescinded at any subsequent time before the claimants changed their position and entered upon the performance of the proposed work, without either party becoming liable to the other. *Tilley* v. *County of Cook*, 103 U. S. 155, 160, 161. From 1873 to 1886, the services of the claimants were of an advisory nature, for compensation, and were such services as are mentioned in the statement of payments in finding 13 as "professional services."

As found in finding 11, the commission created by the act of April 15, 1886, 24 Stat. 12, c. 50, appointed Smithmeyer, on October 1, 1886, to be architect of the Library building, at a compensation of $5000 per annum; and on November 13, 1886, it also appointed the claimant Pelz to be principal draughtsman, at a compensation of $3000 per annum, both appointments being in writing. Mr. Smithmeyer continued in the service of the United States, as architect of the building, until October 3, 1888, a period of over two years. It is further found in finding 11, that the claimants, at the time of accepting those appointments, did not notify Congress or the commission that they intended to charge, according to the schedule of the American Institute of Architects, for the plans furnished, nor did they so notify Congress or the commission before the work began on the building under the act of April 15, 1886, although they had previously notified the chairman of the Joint Select Committee that they intended to charge for the plans.

The acceptance by the claimants of employment at an agreed compensation per annum, before either party had acted on the faith of a different understanding, leaves no room for implying any other contract or usage. There was an express contract by which the claimants, as architects, were under the duty of furnishing plans at the agreed compensation.

In the opinion given by the Court of Claims, it is stated that the court was of opinion that the acts of the parties indicated that the services of the claimants should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the American Institute of Architects; that, instead of a percentage, the United

States elected to give, and the claimants consented to take, two annual salaries amounting to $8000 a year, as an equivalent for such percentage; that, as the claimants thus departed from the general rule of architects, of measuring their compensation by the customary fees of their profession, and did so without any express agreement or reservation as to the preceding part of their service, the court was of the opinion that such part should be estimated according to the same rule, which the parties had themselves adopted; and that, taking those facts of mutual acquiescence as elements for computing damages, bearing in mind that a period of about six years existed between October, 1874, when the claimants began to give their entire time to what may be termed the evolution of their plans, and January 14, 1881, when the plans were submitted to Congress, and remembering also that one of the claimants had received from the government, for other professional services connected with the Library, the sum of $4600, the court found as the value of perfecting the design and preparing the plans a like equivalent of six years' service at $8000 a year, and fixed the damages at $48,000. This we consider a proper and reasonable decision.

Judgment affirmed.

GLENN *v.* GARTH.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 1160. Submitted November 28, 1892. — Decided January 23, 1893.

The mere construction by the highest court of a State of a statute of another State, without questioning its validity, does not deny to it the full faith and credit which the Constitution and laws of the United States demand, in order to give this court jurisdiction on writ of error.

This is especially true when there are no decisions of the highest court of the latter State in conflict with the construction made by the court of the former State.

Motion to dismiss, or affirm. This was an action commenced October 26, 1886, in the Supreme Court of the city,

county, and State of New York, by John Glenn, as trustee, against David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, impleaded with others, to recover the amount of two assessments made by the courts of the State of Virginia upon the stock and stockholders of the National Express and Transportation Company, a corporation of that State.

The defendants denied that they had at any time become the holders or owners of shares of the capital stock of the corporation by assignment and transfer from the original subscriber or subscribers for said shares or otherwise, and denied that they at any time became and were received and accepted by the corporation as stockholders in and members thereof for the number of shares alleged, or any shares whatsoever.

The record of the judicial proceedings of the courts of Virginia put in evidence established the basis of plaintiff's right to recover against the stockholders of the company for the assessments in question, and evidence was adduced on both sides bearing on the question of the liability of defendants as stockholders.

The trial court directed a verdict for the plaintiff, and, on motion of defendants' counsel, ordered their exceptions to be heard in the first instance at the general term and that judgment be suspended in the meantime. At the general term defendants moved on their exceptions for a new trial, and the Supreme Court sustained the exceptions, set aside the verdict, and granted a new trial. From this order the plaintiff appealed to the Court of Appeals, giving the stipulation, exacted by the New York statute in that behalf, that if the order granting a new trial should be affirmed there should be judgment absolute against him. The Court of Appeals affirmed the order appealed from, with judgment absolute against the plaintiff. The remittitur and record were sent down to the Supreme Court, with directions to enter the judgment and to proceed according to law, whereupon the Supreme Court directed the judgment of the Court of Appeals to be made the judgment of that court, with costs to be adjusted, and that defendants have execution. The costs were adjusted and

judgment therefor entered May 10, 1892. Application was made in the Court of Appeals for a reargument, which was refused in due course. A writ of error from this court to the Supreme Court of New York was then allowed, and now comes before us on motion to dismiss.

The opinion of the Supreme Court in general term is given in the record, though not reported, as appears in 60 Hun, 584. The case is therein stated in substance as follows: Defendants Harrison, Garth and Lancaster were engaged in the business of bankers, and brokers in stocks, bonds and securities, in New York, under the firm name of Harrison, Garth & Co. They had a customer named Ficklin, who desired to purchase shares of the National Express and Transportation Company upon a margin. Garth agreed to carry the shares for Ficklin, that is, to pay for them as Ficklin purchased them, upon receipt of a sufficient margin to secure the firm against loss. This stock was not listed upon the New York Stock Exchange, but Ficklin informed Garth that he could pick the shares up at Baltimore and other places. Some time after the making of this arrangement several lots of the shares were purchased, presumably on Ficklin's orders, through McKim & Co., brokers in Baltimore, and, in accordance with Garth's promise to carry them, Harrison, Garth & Co. settled the account of McKim & Co. for what they had disbursed in the transaction. The certificates of stock were sent on from Baltimore by McKim & Co. to Harrison, Garth & Co., as security for the advances thus made by the firm to Ficklin. The invariable custom in such cases is for the seller to deliver the certificates to the broker with a blank assignment and power of attorney to transfer on the books of the company endorsed thereon. Such a thing as placing stock in the name of the firm, when thus acting as brokers, had never once occurred in all its business life. Instead of following the custom and forwarding the ordinary and proper documents, McKim & Co. had the shares transferred on the books of the company into the name of Harrison, Garth & Co., and it was the certificates naming the firm as the owners of the shares which were sent on to defendants. This act of McKim & Co. was not only contrary to

precedent, but as a matter of fact entirely unauthorized. The moment Garth observed the forms of the certificates, he repudiated the transfer to his firm, and endeavored to effect a retransfer. He knew that the stock was assessable and liability might result from the acceptance of the certificates made out in the name of his firm, but at the same time he could not prudently return the certificates to the company and demand their cancellation for the reason that the firm had advanced their money upon the security of the shares. He notified Ficklin and required him to have the stock taken up and transferred from the firm's name; he also returned the certificates to McKim & Co. with instructions to have them sold and transferred from the name of the firm. There was no delay or hesitation; disaffirmance followed at once upon notice of the unauthorized act. Some attempt was made upon the trial to prove that Harrison, Garth & Co. dealt directly with McKim & Co., but the evidence was insufficient even to amount to a conflict on that point.

The court ruled that no person could be made a stockholder without his knowledge or consent; that there is nothing in any statute which makes the books of a company incontrovertible evidence on that head; that the actual fact may always be inquired into, and if it be shown that the transferee upon the books never consented to accept the shares, the transfer to him is simply null and void; that these defendants had not by any neglect or default brought themselves within any just principle of estoppel; and upon a careful review of all the evidence adduced upon the trial the court found "that the defendants never became stockholders of the corporation represented by the plaintiff, and consequently are not responsible for the unpaid assessments sought to be recovered in this action."

The opinion of the Court of Appeals is reported in 133 N. Y. 18, 36, 43. The case was fully considered and discussed and the same conclusions arrived at. Among other things the learned judge who delivered the opinion of the court said: "But it is further claimed that under the statutes of Virginia, as expounded by their courts, the transfer upon the books of the

company is conclusive upon the defendants, and makes them stockholders at least as to creditors, irrespective of the circumstances of the registry. It is obvious that any enactment which enabled a wrongdoer to load upon a stranger the heavy responsibilities of a stockholder without his knowledge or assent would be an outrage upon the rights of the individual, not to be expected. The statutes of Virginia accomplish no such wrong, but operate reasonably within certain well-defined limits. We are referred to the Code of 1860, chapter 57 and section 7. That regulates the rights of the assignor of stock, appearing as owner upon the corporate books, relatively to his assignee who does not so appear, and to the creditors of and subsequent purchasers from the former, and vests the title in the assignee; not, let it be observed, for all purposes, but 'so far as may be necessary to effect the purpose of the sale, pledge or other disposition,' and subject to the provisions of the 25th section. That is in these words: 'A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as regards the company.' The plain meaning is that the corporation which has acknowledged the ownership and accepted its evidence and admitted it upon its records shall not be at liberty to dispute it. Its meaning is not that it shall be conclusive against the alleged stockholder. Indeed, in *Vanderwerken* v. *Glenn*, (85 Virginia, 9,) the court state the rule to be that the record upon the corporate books is *prima facie* evidence of the ownership, and after examining all the cases referred to I find none which venture any further."

And in the opinion upon the motion for reargument it was further said: "Of course, the question discussed is vital to the controversy. Under the law, both of this State and of Virginia, one may be, as we said in the former opinion, a holder of stock without being, in the full sense of the term, a stockholder. Our statute of 1848, as to manufacturing corporations, (c. 140, § 16,) and that of 1850, as to railroads, recognized that a person may hold shares as collateral without being liable to assessment; and it rests upon the obvious ground that the pledgor, in whose name the stock is registered, re-

mains the general owner, notwithstanding the pledge, and the company cannot treat him otherwise, nor practically claim that both pledgor and pledgee are at the same time stockholders of the same stock. The pledgor remains liable; the pledgee never becomes so. The statute of Virginia (Code of 1860, c. 57, § 25) makes those and only those stockholders, 'as it respects the company,' whose names are registered on its books as such; and that enactment, thus requiring an acceptance and recognition of the stockholder by the corporation, shows that it is a contract relation which is contemplated and involves an actual assent on both sides. The seeming intimation ventured on behalf of the appellant that the effect of that act is to make one conclusively a stockholder whose name was registered, whether he knew and assented or not, is too plainly unendurable to require serious discussion. No one can be made a stockholder without his consent, express or implied. And so there is no view of the subject which can dispense with proof of that assent by the defendants as a vital and necessary element of the plaintiff's case."

Mr. William C. Clopton, *Mr. Robert L. Harrison* and *Mr. John R. Abney* for the motion.

Mr. Burton N. Harrison opposing.

This court has jurisdiction upon the writ of error to review the judgment of the state court here complained of. The Federal question is clear, and the denial of the plaintiff's right under the Constitution of the United States is manifest. The plaintiff in error claimed under public acts and judicial proceedings of the State of Virginia. The refusal of the Courts of the State of New York to give to those acts full faith and credit, and to give to those judicial proceedings the same effect in their operation upon the title of this plaintiff in error to recover from these defendants in error, as they have by law and usage in the State of Virginia itself, (which is the full faith and credit required by the Constitution,) constitutes a proper case for review in this Court under Sections 709 and

905 of the Revised Statutes of the United States. *Hoyt* v. *Shelden*, 1 Black, 518; *Murdock* v. *Memphis*, 20 Wall. 590; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477; *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123; *Philadelphia Fire Ins. Co.* v. *New York*, 119 U. S. 110; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; *Dale Tile M'f'g Co.* v. *Hyatt*, 125 U. S. 46; *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Liggett*, 135 U. S. 533; *Lewis* v. *Glenn*, 84 Virginia, 947; *Vanderwerken* v. *Glenn*, 85 Virginia, 9; *Williams* v. *Taylor*, 120 N. Y. 244; *Sands* v. *Campbell*, 31 N. Y. 345; *Berrien* v. *Wright*, 26 Barb. 208; *McQueen* v. *Babcock*, 41 Barb. 337; *Hubbell* v. *Medbury*, 53 N. Y. 98; *Fincke* v. *Funke*, 25 Hun, 616; *Van Wagoner* v. *Terpenning*, 46 Hun, 425; *Wilkinson* v. *First Nat. Ins. Co.*, 72 N. Y. 499; *Murray* v. *Charleston*, 96 U. S. 432; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Furman* v. *Nichol*, 8 Wall. 44; *Green* v. *Van Buskirk*, 5 Wall. 307; *Crapo* v. *Kelly*, 16 Wall. 610.

Mr. John Howard, opposing, made the following points:

I. That the whole case depended upon Virginia law and judicial proceedings, and the facts as shown.

II. That the court below decided the case without respect thereto, and based its decision upon the common law and its usages and customs, and the private intention of the defendants in error, instead of upon their actual dealings with this stock, subject to the Virginia Code.

III. That the decision necessarily involved, by legal intendment and implication, a denial of the Federal rights involved.

IV. And that there was no separate and independent ground broad enough to support the judgment, except by excluding the Federal rights involved in the very nature of the proceedings and proofs, and in the decision of the court below adversely to the rights claimed.

V. That a judgment of reversal should be rendered, upon the merits, in accordance with the leading case of *Murdock* v. *Memphis*, 20 Wall. 590; and that this court should now render a judgment such as the New York court ought to have done.

And after having paid the judgment the defendants in error will have a clear remedy not only against whoever wrongfully caused the stock to be transferred to their names upon books of the company, (if anybody did,) but against their assignees of the stock for indemnity. *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241.

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

We are unable to discover any sufficient ground upon which to rest jurisdiction of this writ of error. The requirement of section 1 of Article IV of the Constitution, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," is referred to by counsel, as also section 905 of the Revised Statutes, which provides for the authentication of the acts of the legislature, and of the records and judicial proceedings of the courts, of any State or Territory, and concludes: "And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." And it is contended that the New York courts did not give to the statutes and jurisprudence of Virginia, and to the judicial proceedings in Virginia, the faith, credit and effect that they had by law and usage at home. As to judicial proceedings, the action of the Virginia courts was in no manner questioned by the decision under consideration. There was no judgment against the defendants *in personam* in Virginia, and their liability as stockholders was not determined by the decrees which had passed there against the company. Nor were the validity and effect of the statutes of Virginia denied, although, so far as relied on, their proper construction and operation were considered by the Court of Appeals.

Our attention has been called to no case in which it has been held by the highest tribunal of Virginia that the statutes referred to, (Code Va. 1860, c. 56, c. 57; Code 1873, c. 57,)

were intended to be conclusive of the liability of a party, who had never subscribed for stock or been a transferee thereof in fact, because of the presence of his name upon the books of the company without his consent or assent thereto.

In *Vanderwerken* v. *Glenn*, 85 Virginia, 14, the decision was, as stated by the Court of Appeals, that the appearance of the party, sought to be charged, on the company's books as a stockholder, was *prima facie* evidence of his being such, and this was conceded by the New York court. It is said that that was a mere common law legal presumption, and had nothing to do "with the statutory rights and obligations of actual dealers in the stock whose names appeared upon the books as holders of the stock with their knowledge and without dissent on their part, so far as the company and its creditors were concerned;" and that the New York court "went off upon the common law rule of evidence as to the appearance of stock upon the stock books, in respect of strangers, and utterly ignored and rejected the constitutional credit and effect due to the said statutes of Virginia in respect of persons actually dealing in such stock, and whose names appeared upon the books of the company as holders and owners of stock in the ordinary and regular course of its business as conducted under those statutes." But this involves in large part a consideration of the case upon the merits, and begs the question whether upon the facts these defendants occupied the position plaintiff ascribes to them.

If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved,

our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.

The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court. *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, and cases cited. In *Grand Gulf Railroad and Banking Co.* v. *Marshall*, 12 How. 165, 167, 168, the case was brought up from the Supreme Court of Louisiana, and involved an assignment by a corporation of Mississippi under the laws of that State. Mr. Chief Justice Taney, delivering the opinion of the court, after stating that, "in order to give this court jurisdiction the record must show that the point was brought to the attention of the state court and decided by it," for the obvious reason that "the party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the Constitution or laws of the United States; but if he omits to claim it in the state court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears in the record the judgment of the state court might have been in his favor if its attention had been drawn to the question," goes on to say that "it appears that the decision turned upon the construction (not the validity) of the act of Mississippi of 1840; and upon a question of merely local law, concerning the right by prescription claimed by the trustees. Nothing is said in relation to the constitutionality or validity of this act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided." The writ of error was therefore dismissed for want of jurisdiction. It does not seem to have occurred to the Chief Justice that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi statute by the construction given by the Louisiana court.

This record may be searched in vain for any proof that, as matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York; nor can the contention of counsel, that the

Virginia statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States.

Writ of error dismissed.

WALTER *v.* NORTHEASTERN RAILROAD COMPANY.

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

No. 1206. Argued and submitted January 11, 12, 1893. — Decided January 23, 1893.

A Circuit Court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments, in separate counties, no one of which amounts to $2000, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined in the bill and make an aggregate of over $2000.

This was a bill in equity filed by the Northeastern Railroad Company of South Carolina against the treasurer and sheriff of Charleston, Berkeley, Williamsburg and Florence Counties, through which the plaintiff's road passes, to enjoin them from issuing executions against or seizing the property of the plaintiff for the purpose of collecting a tax based upon an assessment alleged to be unconstitutional and void.

The substance of the bill was that the constitution of the State provided for a uniform and equal rate of assessment and taxation; that real estate is assessed for taxation once in five years at a uniform rate of from fifty to sixty per cent of its actual value; that personal property is assessed every year at the same rate or less; that this rate has become a uniform rule, and was accepted and acted upon by the assessing officers and boards of the State; that plaintiff returned its property at a valuation of from sixty to sixty-five per cent of its actual value; and that the State Board of Equalization for railroads arbitrarily assessed the property of this company at a much

higher rate, although, prior to the year 1891, it had accepted and acted upon a uniform rule of assessment; but that, at its meeting in 1891, it abandoned the rule theretofore accepted, and assessed railroad property at a rate exceeding its actual value, and in some cases doubled and trebled the previous rate, with intent to cast upon it a greater proportion of taxation, although no change was made in the assessment of other real and personal property; that the plaintiff, in common with the other railroads of the State, tendered in payment of its taxes the amount due under the levy estimated upon the value of its property as theretofore assessed, under the rule prevailing in that State, and set forth in its sworn return; and brought this bill to enjoin the taking possession of or selling its property under a tax execution to collect the excess.

Defendants demurred to this bill upon the ground: 1. That the court had no jurisdiction by reason of the insufficient amount in controversy. 2. That the plaintiffs had a complete and adequate remedy at law. 3. For want of equity. The case was heard upon this demurrer, and a decree was rendered overruling the demurrer and enjoining the collection of the taxes. See *Richmond &c. Railroad* v. *Blake*, 49 Fed. Rep. 904. Defendant appealed to this court under the 5th section of the Court of Appeals Act of March 3, 1891, 26 Stat. 826, 827, c. 517.

Mr. Samuel Lord for appellants. *Mr. D. A. Townsend*, Attorney General of the State of South Carolina, and *Mr. Ira B. Jones* were with him on the brief.

Mr. Henry A. M. Smith and *Mr. W. Huger Fitzsimmons* for appellee.

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

Objection was taken to the jurisdiction of the court below upon the grounds, first, that the matter in controversy with each of the defendants was less than $2000; and second, be-

cause the plaintiff had a complete and adequate remedy at law.

With regard to the amount in controversy, it is averred in the bill that the plaintiff returned, as required by law, its real and personal property for taxation at a "valuation of the same according to and under the uniform rules and methods of valuation adopted for the taxation of similar real and personal property," and tendered to the county treasurers of the several counties the amounts due for taxes upon such valuation as returned, such amounts aggregating over $18,000, and, in addition thereto, tendered to the county treasurer of Charleston County, $813.87, for the expenses of the railway commission, but that the defendants refused to receive the same unless plaintiff would also pay the taxes claimed to be due in excess of the amount so tendered, which were as follows: In Charleston County, $177.67; in Berkeley County, $1511.16; in Williamsburg County, $1332.50; and in Florence County, $571.33; making the total amount claimed $3592.66. It was further alleged that of these taxes, $4\frac{3}{4}$ mills were levied for State purposes; 2 mills for school purposes; and from $1\frac{7}{8}$ mills to $5\frac{3}{4}$ mills in the different counties, for county and all other purposes. It appears, then, that, while the total amount involved in this litigation is $3592.66, there is no claim made by the county treasurer of either county which is not less than $2000, and that of the entire claim of $3592.66, the State taxes represent but $1473.38. The residue is assessed for school and local purposes, is disbursed by the county commissioners, and is never paid into the state treasury at all. In short, the amount in dispute in each county is not only less than $2000, but is compounded of a state, school, and county tax, most of which is collected and paid out by the county authorities for local purposes.

Under these circumstances, it is entirely clear that, had these taxes been paid under protest and the plaintiff had sought to recover them back, it would have been obliged to bring separate actions in each county. As the amount recoverable from each county would be different, no joint judgment could possibly be rendered. So, had a bill for injunction been filed in a state court, and the practice had permitted, as in

some States, a chancery subpœna to be served in any county of the State, these defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county.

Is the plaintiff entitled to join them all in a single suit in a Federal court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2000? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in *Seaver* v. *Bigelows*, 5 Wall. 208; *Russell* v. *Stansell*, 105 U. S. 303; *Farmers' Loan and Trust Co.* v. *Waterman*, 106 U. S. 265; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Stewart* v. *Dunham*, 115 U. S. 61; *Gibson* v. *Shufeldt*, 122 U. S. 27; *Clay* v. *Field*, 138 U. S. 464.

As illustrative of the rule as applied to cases of joint defendants, it was held in *Stratton* v. *Jarvis*, 8 Pet. 4, that, where a libel for salvage was filed against several packages of merchandise, and a decree was rendered against each consignment for an amount not sufficient in itself to authorize an appeal by any one claimant, the appeal of each claimant must be treated as a separate one, and, the amount in each case being insufficient, this court had no jurisdiction of the appeal of any claimant. A similar ruling was made in *Spear* v. *Place*, 11 How. 522. In *Paving Co.* v. *Mulford*, 100 U. S. 147, a bill, filed against two defendants, alleging that each held certificates of indebtedness belonging to the plaintiff, was dismissed on final hearing, and plaintiff appealed, and it was held that, as the recovery, if any, must be against the defendants severally, and as the amount claimed from each did not exceed the requisite sum, this court had no jurisdiction. In *Schwed* v. *Smith*, 106 U. S. 188, 190, certain creditors recovered separate judgments against a debtor amounting in the aggregate to more than

$5000, but none of which exceeded that sum, and filed a bill against him and a preferred creditor to subject to the payment of their judgment goods which had been seized upon a prior judgment, in which they succeeded, and defendant appealed. The appeal was dismissed, the court holding that if the decree were several as to the creditors, it was equally so as to their adversaries. "The theory is, that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action." So in *Henderson* v. *Wadsworth*, 115 U. S. 264, it was held that where a suit was brought against several heirs to enforce their liability for the payment of a note on which their ancestor was bound, and separate judgments were rendered against each for his proportionate share, this court had jurisdiction in error only over such judgments as exceeded $5000; and, again, in *Ex parte Phœnix Ins. Co.*, 117 U. S. 367, that distinct decrees against different parties on a single cause of action in which there were distinct liabilities, could not be joined to give this court jurisdiction on appeal. In that case the suit was brought upon a single policy of insurance written by four different companies, and the decree was against each company severally for its separate obligation.

In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff. The disposition we have made of this question renders it unnecessary to consider the others.

Upon the whole, we are of opinion that this bill ought not to have been sustained, and the decree of the court must, therefore, be

Reversed, and the case remanded, with directions to dismiss the bill for want of jurisdiction.

KEELS *v.* CENTRAL RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of South Carolina. No. 1207. Argued with No. 1206. MR. JUSTICE BROWN. As the

facts of this case are substantially the same as the one just decided, the decision must be the same.

The decree of the court below will, therefore, be reversed, and the case remanded, with directions to dismiss the bill.

Mr. Samuel Lord, (with whom were, on the brief, *Mr. D. A. Townsend*, Attorney General of the State of South Carolina, and *Mr. Ira B. Jones*,) for appellants.

Mr. Henry A. M. Smith, (with whom was *Mr. J. T. Barron* on the brief,) for appellee.

COOKE *v.* AVERY.

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

No. 72. Submitted December 5, 1892. — Decided January 23, 1893.

In view of the requirements of Rev. Stat. § 953, respecting the authentication of bills of exceptions, it will be assumed, where a bill is certified by a District Judge holding Circuit Court, that the Circuit Justice and Circuit Judge were not present at the trial, unless the record clearly and affirmatively shows the contrary.

When it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States.

When a party, on the first trial of a cause in a Circuit Court, sets up such a right as the ground of Federal jurisdiction, and the jurisdiction is sustained, he cannot be permitted, on the second trial, to oust the jurisdiction by contending that no such right is in controversy.

Where a plaintiff's title rests upon the validity of a lien claimed to have been acquired under a judgment of a Circuit Court of the United States, the disposition of the issue depends upon the laws of the United States and the rules of its courts, and a Federal court has jurisdiction.

An index to an abstract of judgments in Texas, made under its laws for acquiring judgment liens, is sufficient, which gives the defendants' name or names correctly, and the names of the plaintiffs by a partnership title.

In Texas, in trespass to try title, the defendant cannot question the validity

of his grantor's title at the time of the conveyance to him when the plaintiff claims under the same grantor, unless he claims under a paramount title.

If the defendant in such an action pleads his title specially, he waives the general issue, and is confined to the defence specially pleaded.

The defendant in such an action, not having been in possession of the land in dispute for twelve months next before the commencement of the action under written evidence of title, offered to show that immediately after concluding his bargain for the property he entered into possession, and commenced making improvements, and erected improvements of great value on the property before he knew of the plaintiff's lien. This was done in order to enable him to get the benefit of the provisions in the Texas statutes relating to improvements. *Held*, that the offer was too vague.

A married woman was codefendant in an action of trespass to try title in Texas. Her interest was a community interest in the property by virtue of a conveyance to her husband. *Held*, that a personal judgment in damages for use and occupation, and for costs, could not be rendered against her.

This was an action of trespass to try title to a tract of land in Hunt County, Texas, brought by W. W. Avery, December 24, 1886, against J. H. Cooke; his wife, M. E. Cooke; and the Scottish-American Mortgage Company; in the Circuit Court of the United States for the Northern District of Texas, the plaintiff alleging that he was a citizen of the State of North Carolina; that the defendants Cooke were citizens of the State of Texas; and that the Mortgage Company was an alien corporation and a subject of Great Britain.

The petition averred that, on the 25th of November, 1886, plaintiff was lawfully seized and entitled to the possession of the land in question, located in Hunt County, Texas, in the Northern District of said State, and entitled to hold the same in fee simple, and that defendants Cooke unlawfully dispossessed him thereof, and still unlawfully withhold the same.

The Mortgage Company demurred, and also pleaded that on January 1, 1886, the defendants Cooke, who were at that time in possession of the land, and seized of good title in fee simple, and had the right to convey the same, executed a deed of trust thereon to one Simpson, as trustee, to secure a loan of money made by the company to the Cookes. The other defendants answered to the merits, and subsequently, on Feb-

ruary 13, 1888, defendant J. H. Cooke withdrew his answer, and filed a plea to the jurisdiction of the court, to the effect that the land had been conveyed to plaintiff by citizens of Texas on November 25, 1886, without consideration and for the purpose of conferring jurisdiction; and on the same day, not waiving his plea to the jurisdiction, he answered, (1) not guilty; (2) that he purchased the land in controversy from J. H. Payne, under whom the plaintiff claimed, "in actual ignorance of any lien upon said land, and in the belief that said tract of land was the homestead of said J. H. Payne, and that no creditor of said Payne could acquire a judgment lien thereon. That this defendant for more than twelve months before the commencement of this suit had actual adverse possession of said land in controversy, and that during said period defendant made upon said land permanent and valuable improvements in good faith, as follows: [The alleged improvements were enumerated, and the total value stated to be $11,900.] That said tract of land without said improvements is of the value of $2000, and by said improvements the same is enhanced in value by the cost or value aforesaid of said improvements. Defendant prays for the value of said improvements if plaintiff recovers said land," etc.

On February 11, 1889, plaintiff filed his amended original petition, which further alleged that plaintiff and the defendants derived title from one J. H. Payne as a common source; that the defendants deraigned title through a certain deed executed by Payne and his wife, January 2, 1886; while the plaintiff claimed title under an execution sale upon a judgment recovered against Payne, January 17, 1882, in case No. 198, in the Circuit Court of the United States for the Northern District of Texas, at Dallas, in favor of John Deere, Charles H. Deere, Stephen H. Velie, Alvah Mansur and L. H. Tibbetts, partners under the firm name of Deere, Mansur & Company, for the sum of $717.93 and costs of suit, all the proceedings upon and in reference to which were fully set forth. Plaintiff further alleged that by reason of certain laws of the United States and rules of the Circuit Court of the United States for the Northern District of Texas, which were specifically referred

to, the judgment was a lien upon the property from the date of its rendition, or became such on the date the abstract thereof was recorded and indexed in Hunt County, February 9, 1882, (as set out,) and continued to be a lien up to the date of the sale by the marshal, by reason whereof plaintiff had a superior title to the property; but that defendants denied that the judgment was ever a valid lien on the property under said laws and rules; and this constituted the controlling question in the case, upon the correct decision of which plaintiff's title depended. Plaintiff therefore averred that this suit arose under the laws of the United States and the rules of the Circuit Court, and that the Circuit Court at the institution of the suit had and still had jurisdiction thereof without regard to the citizenship of the parties thereto.

On June 8, 1889, the defendants Cooke demurred to that part of the amended original petition treating of jurisdiction, and further pleaded "that if they are not the owners of the land in controversy the title thereto is outstanding in one Y. D. Harrington, to whom it was conveyed by said J. H. Payne before the lien under which plaintiff claims attached, and defendants deny all the averments of said petition."

On the same day plaintiff demurred and excepted generally and specially to defendants' plea to the jurisdiction, and denied its allegations, and also replied to defendant J. H. Cooke's original answer by general and special demurrers or exceptions, and a general denial.

The cause came on for trial June 8, 1889, and the court having heard and disposed of the several demurrers and exceptions, the trial was proceeded with.

The plaintiff introduced in evidence a judgment of the Circuit Court rendered January 17, 1882, in favor of John Deere, Charles H. Deere, Stephen H. Velie, Alvah Mansur and L. H. Tibbetts, against J. H. Payne, in cause No. 198, for the sum of $717.93, of which the sum of $682.13 was directed to draw interest at the rate of ten per cent per annum, and the sum of $35.80 at the rate of eight per cent per annum, and for costs; and also a general index of all

judgments rendered in the court, which showed under the proper letter that the judgment in favor of Deere, Mansur & Co. against J. H. Payne was entered in minute book No. 1, page 534; also, an execution issued on the judgment, March 3, 1882, returned "no property found;" and an execution issued August 11, 1886, under which the land in controversy was levied on by the marshal, August 12, and sold by him, September 7, 1886, to Charles C. Cobb and John M. Avery; also the marshal's deed to said Cobb and Avery, made pursuant to the levy and sale, and dated September 7, 1886. Plaintiff also introduced the papers in case No. 198, including the original petition, which petition was endorsed: "In Circuit Court of United States, No. 198, Deere, Mansur & Company *v.* J. H. Payne," which endorsement was also on all the other papers in the cause; and the citation, which was duly served on Payne, notifying him to answer the suit in case "No. 198, of Deere, Mansur & Company, a firm composed of John Deere, Charles H. Deere, Stephen H. Velie, Alvah Mansur and L. H. Tibbetts, against J. H. Payne, defendant." The petition showed that the suit was brought on a promissory note, which was attached as an exhibit, and was dated April 16, 1880, executed by J. H. Payne, and payable to the order of Deere, Mansur & Co. Plaintiff further offered in evidence a certified copy of an abstract of the judgment in case No. 198, and a certified copy of the index of the abstract from the records of Hunt County. The certificate of the clerk of the county court of that county stated that said certified copies were true copies of the abstract recorded in the judgment record book No. 1, page 47, of Hunt County, and of the index, both direct and reverse, referring to said page 47, of said judgment record book, as appeared from the index in his office. The certified copy of the abstract was as follows:

"Circuit Court of the United States, for the Northern District of Texas, at Dallas.

"I, A. J. Houston, clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas, do hereby

certify that in said court, on Tuesday, January 17th, 1882, the plaintiffs recovered a judgment against the defendant for the sum of $717.93, of which the sum of $682.13 shall draw interest from said date at ten per cent per annum and the balance, $35.80, shall draw interest at eight per cent per annum, together with the costs by plaintiffs incurred; all of which said judgment and costs is yet due and unpaid by the defendant in case No. 198, and styled Deere, Mansur & Company, plaintiffs *v.* J. H. Payne, defendant; all of which appears from the records of said court now in my office.

"In testimony whereof I hereunto set my hand and affix the seal of said court, at Dallas, Texas, this 6th day of February, A.D. 1882, and of the Independence of the United States the 106th year.

[Seal of U. S. Circuit Court at Dallas, Tex.]

"A. J. HOUSTON,
"*Clerk of said Court.*

"Filed for record Feb'y 9th, 1882, at 10 o'clock A.M. Recorded same day and hour. A. CAMERON,
"*Co. Clerk, Hunt Co., Texas.*"

The certified copy of the direct and reverse index was as follows:

"*Direct Index to Judgment Record, Hunt County, Texas.*
"Plaintiffs' name: Deere, Mansur & Co.
Defendant's name: J. H. Payne.
Page of judgment record: 47.

"*Reverse Index to Judgment Record, Hunt County, Texas.*
"Defendant's name: J. H. Payne.
Plaintiffs' name: Deere, Mansur & Co.
Page of judgment record: 47."

The defendants objected to the introduction of the abstract because it did not correctly give the names of the plaintiffs in the judgment, and did not show the amount still due thereon,

as required by law; and to the index because it did not give plaintiffs' names; but the objection was overruled, and the abstract and index admitted, and defendants Cooke excepted.

Plaintiff then introduced a deed from Cobb and Avery to plaintiff dated November 25, 1886, and also "for the purpose of proving a common source of title and for no other purpose," a certified copy of the deed from Payne and wife to defendant J. H. Cooke, dated January 2, 1886. It further appeared that the Mortgage Company claimed under a deed of trust of the same date, executed by Payne and wife to Simpson, as trustee, to secure a loan of money, and that Payne derived title through a deed from Crabtree and wife to him, dated August 16, 1867, and duly acknowledged and recorded in April, 1868.

Two rules of the Circuit Court for the Northern District of Texas were then put in, to wit, Rule No. 1, adopted by that court at Dallas, April 2, 1880, as follows, viz.: "Rule 1. The modes of proceedings prescribed by the laws of Texas, when they do not conflict with the laws of the United States or a rule of the Supreme Court of the United States or of this court, are adopted."

And also Rule No. 1, adopted by the court at Dallas, July 26, 1881, which is as follows, viz.: "Rule 1. All laws and rules of procedure and practice prescribed by the legislature of the State of Texas as they now exist or as they may be changed and amended from time to time, when the same do not conflict with the law of the United States or a rule of the Supreme Court of the United States or of this court, are hereby adopted as the rule of practice in this court, and all suits by attachments, sequestration or otherwise brought in this court shall conform to the laws of the State of Texas in force at the time such suit is brought, provided the same does not conflict with a law of the United States or a rule of the Supreme Court of the United States or of this court."

It was agreed that Y. D. Harrington, assignee, fully administered the trust created by Payne's deed of assignment, hereinafter mentioned, prior to July 1, 1881, and made final report of his proceedings thereunder to the proper court and was discharged by said court prior to July 1, 1881, and ever since

that date had ceased to act as such trustee. It was also agreed that ever since the date of the assignment Payne and Cooke, claiming under Payne, had consecutively held peaceable and adverse possession of the land in controversy in this suit, cultivating, using or enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered, the deed to Payne antedating the deed of assignment, and that to Cooke, in evidence. It was further agreed that the assignee, Y. D. Harrington, never made any claim of title to the land by virtue of the deed of assignment or otherwise.

Plaintiff having closed, defendants Cooke moved that the cause be dismissed for want of jurisdiction. It was admitted that jurisdiction could not be maintained on the ground of the citizenship of the parties, and that, upon a former trial of the cause, defendants' counsel contended that, by a proper construction of section 916 of the Revised Statutes and the rules of the Circuit Court, the laws of Texas as they existed in 1873 governed the lien of the judgment, and that the lien was invalid thereunder because executions had not been issued on such judgment each year since its rendition, and that this was defendants' only contention on that trial in regard to the invalidity of said lien, while it was, on the other hand, insisted by plaintiff that the judgment lien was governed by the statute of Texas of 1879, under section 916 and the rules. The motion to dismiss was overruled, and the defendants Cooke excepted.

Thereupon defendants Cooke offered in evidence a general deed of assignment, under the law of Texas in that behalf, for the benefit of his creditors, from Payne to Harrington, dated October 16, 1880, which purported to convey to Harrington, for the benefit of such of Payne's creditors only as would accept its provisions, all Payne's property, real and personal, not exempt, but did not mention the land in controversy specifically, either in its body or in the inventory and exhibits attached. It provided for the disposition of the assigned property and the rendition of the surplus to Payne after paying the expenses and the creditors in full. The admission

of this assignment was objected to by plaintiff, the objection sustained, and defendants excepted.

Defendants Cooke offered in evidence the original deed made by Payne and wife to Cooke, dated January 2, 1886, which was objected to on the ground that defendants, having specially pleaded an outstanding title as a defence, could not prove title in themselves, which objection was sustained by the court, the deed excluded, and defendants excepted. Defendants then offered the original deed from Payne to Cooke, under the plea that they had placed valuable and permanent improvements on the land, and had had adverse possession for more than twelve months before the commencement of the suit, and in that connection offered to prove that in October, 1885, defendant J. H. Cooke had by parol agreed with Payne upon terms of purchase, but no consideration was paid Payne until the date of the deed; and that immediately upon making the agreement, Payne delivered to Cooke exclusive possession of the premises, and Cooke entered upon such possession, holding adversely and in good faith, and commenced the erection of improvements thereon, which enhanced the value of the land in controversy. The evidence was excluded and exception taken.

Defendants Cooke then offered to prove that from January 1, 1882, until the sale by him, Payne was the head of a family consisting of wife and children, and that the land was claimed and used by him as his homestead. The court sustained objection thereto, and defendants excepted.

Upon the conclusion of the evidence, the court instructed the jury to return a verdict for the plaintiff for the land and for the value of the rents and profits thereof from November 25, 1886, to the date of the trial, to which instruction defendants excepted. Thereupon a verdict for plaintiff was returned, with damages, and judgment entered by the court for the recovery from the defendants of the title and possession of the premises in question, together with the fixtures and permanent improvements thereon and appurtenant thereto, and that plaintiff have a writ of possession; and it was further adjudged that plaintiff recover of defendants

Cooke the sum found by the jury as damages, together with costs.

The Mortgage Company declining to join in the prosecution of the writ of error, an order of severance was entered, and this writ of error brought accordingly.

Mr. M. L. Crawford for plaintiffs in error.

Mr. John M. Avery for defendant in error.

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

The placita shows that the Circuit Court met at Dallas, in the Northern District of Texas, on May 20, 1889, the United States District Judge presiding, but that when the court assembled on June 8, 1889, pursuant to adjournment, the Circuit Justice, the Circuit Judge, and the District Judge were all present. The bill of exceptions is signed by the District Judge, and as it does not appear that the other judges were present at the trial, which ensued after the meeting of the court, we assume that it was had before the District Judge alone.

Section 953 of the Revised Statutes provides for the authentication of bills of exception by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause; and, therefore, if this trial had taken place before the Circuit Justice and one of the other judges, or before the Circuit and District Judges, the bill of exceptions would, of course, have been signed by the Circuit Justice or Circuit Judge, as the case might be. The motion to strike out the bill of exceptions upon the ground that it must be held that the judges who were present at the opening of the court were present on the trial, is therefore overruled.

Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege

or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Starin* v. *New York*, 115 U. S. 248, 257. In *Carson* v. *Dunham*, 121 U. S. 421, it was ruled that it was necessary that the construction either of the Constitution or some law or treaty should be directly involved in order to give jurisdiction, although for the purpose of the review of the judgments of state courts under section 709 of the Revised Statutes, it would be enough if the right in question came from a commission held or authority exercised under the United States.

Section 916 of the Revised Statutes is as follows: "The party recovering a judgment in any common law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereinafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

This section was taken from the act of Congress of June 1, 1872, entitled "An act to further the administration of justice," (17 Stat. 196, c. 255,) and was reënacted in the Revised Statutes, which took effect as of December 1, 1873. The remedies upon judgments under the section are such remedies as were provided by the laws of the State in force when it was passed or reënacted, or by subsequent laws of the State adopted by the courts of the United States in the manner provided for under that section. *Lamaster* v. *Keeler*, 123 U. S. 376.

On the former trial of this case the defendant contended that, under a proper construction of section 916 and the rules of the Circuit Court, the laws of Texas in force in 1873 gov-

erned the judgment lien under which plaintiff claimed title, and that by those laws the lien was lost because execution had not been issued each year prior to the issue of that on which the land was sold; while plaintiff contended that the statutes of Texas enacted in 1879 governed the lien, and under them the lien was not lost by failure to issue the execution each year.

It is now insisted by defendants that the latter is the true view, and hence it is said that there is no real and substantial controversy arising under the laws of the United States. Clearly, the right of a plaintiff to sue cannot depend upon the defence which a defendant may choose to set up, and as on the first trial defendants relied on the decision of a Federal question to defeat the action, such a concession of the existence of a Federal ingredient in the cause might fairly be held to bind them when they subsequently abandon it, and seek to oust the jurisdiction upon the ground that there could be no real dispute as to the applicable law.

By section 34 of the Judiciary Act of September 24, 1789, c. 20, (1 Stat. 92,) carried forward into section 721 of the Revised Statutes, it was provided that the laws of the several States except where the Constitution, treaties or laws of the United States might otherwise require or provide, should be regarded as rules of decision in trials at common law in the courts of the United States in cases where they applied.

Section 2 of the act of September 29, 1789, (1 Stat. 93,) provided that the forms of writs and executions and modes of process in the Circuit and District Courts in suits at common law should be the same in each State, respectively, as in the Supreme Courts of the same; and by the act of May 8, 1792, (1 Stat. 275, c. 36,) these forms and modes of proceeding as then in use in the courts of the United States, under the act of 1789, were permanently continued; but it was declared that they were subject to such alterations and additions as the said courts should, respectively, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States should from time to time think proper by rule to prescribe to any Circuit or District Court concerning the same. This delegation of power has been repeatedly held to be per-

fectly constitutional, and that the power to alter and add to the process or modes or proceeding in a suit, embraced the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied. *Wayman* v. *Southard*, 10 Wheat. 1; *Beers* v. *Haughton*, 9 Pet. 329, 359. The process act of May 19, 1828, (4 Stat. 278, c. 68; Rev. Stat. § 913,) made similar provision and declared that it should be in the power of the courts so far to alter final process therein as to conform the same to any change made by the state legislatures for the state courts.

By section 967, taken from the fourth section of the act of July 4, 1840, (5 Stat. 392, 393, c. 43,) the judgments and decrees rendered in a Circuit or District Court within any State cease to be liens on real estate in the same manner and at like periods as the judgments and decrees of the courts of such State cease by law to be liens thereon.

Under this legislation, judgments recovered in the Federal courts were undoubtedly liens in all cases where they were such by the laws of the States. *Baker* v. *Morton*, 12 Wall. 150, 158; *Ward* v. *Chamberlain*, 2 Black, 430; *Massingill* v. *Downs*, 7 How. 760. But no right in the States to regulate the operation of Federal judgments was thereby recognized, and the lien of such judgments depended upon the acts of Congress and the rules of the Federal courts. There was no law of Congress, however, prior to August 1, 1888, which expressly gave a lien to the judgments of the courts of the United States or regulated the same, but on that day an act was approved, which made such judgments liens on property throughout the State in which the Federal courts sat, in the same manner and to the same extent and under the same conditions only as if rendered by the state courts. 25 Stat. 357, c. 729.

As we have seen, section 916 became operative as such December 1, 1873. The statute of Texas in force at that date provided that final judgments rendered by any court of record of the State should be a lien on all the real estate of the judgment debtor situated in the county where the judg-

ment was rendered from the date of the judgment, and upon all his real estate situated in any other county from the time when a transcript of the judgment was filed for record in such other county, as provided, and that the lien should cease and become inoperative if execution were not issued upon the judgment within one year from the first date upon which the execution could by law be issued thereon. 2 Paschal's Ann. Dig. Art. 7005.

The Supreme Court of Texas decided that under this law a judgment ceased to be a lien for want of diligence, unless execution issued on it each year after it was rendered. *Bassett* v. *Proetzel*, 53 Texas, 569; *Barron* v. *Thompson*, 54 Texas, 235; *Anthony* v. *Taylor*, 68 Texas, 403.

In this case the judgment was rendered January 17, 1882, and execution issued thereon March 3, 1882, and no other, so far as appeared, until August 11, 1886, and if the lien of the judgment depended on the law of Texas as existing December 1, 1873, and the decisions of the Supreme Court of Texas were followed, the lien would have been lost by the failure to issue execution on it each year. By the Revised Statutes of Texas, passed in 1879, different provisions were made in relation to judgment liens. By Articles 3153 and 3154, it was provided that each clerk of the county court should keep in his office a "judgment record," in which he should record all abstracts of judgments filed for record and authenticated as required, and deliver to the judgment plaintiffs abstracts of such judgments duly certified. Article 3155 was as follows: "The abstract provided for in the preceding article shall show: 1. The names of the plaintiff and of the defendant in such judgment. 2. The number of the suit in which the judgment was rendered. 3. The date when such judgment was rendered. 4. The amount for which the same was rendered, and the amount still due upon the same. 5. The rate of interest, if any is specified in the judgment."

By Article 3157, the clerk was required to file and immediately record the abstract provided for in the preceding articles, in the judgment record, noting therein the day and hour of the record, and entering it at the same time upon the

index. Article 3158 was as follows: "The index to such judgment record shall be alphabetical, and shall show the name of each plaintiff and of each defendant in the judgment, and the number of the page of the book upon which the abstract is recorded." By Article 3159, any judgment recorded and indexed as provided should, from the date of such record and index, operate as a lien upon the debtor's real estate, which lien by Article 3160 was to continue for ten years from that date, unless the plaintiff failed to have execution issued within twelve months after the rendition of the judgment. Article 3163 made provision for recording and indexing in the same manner abstracts of judgments rendered in the United States courts. 2 Sayles' Tex. Civ. Stats. 93, Tit. 61, c. 1.

To what extent, if at all, these articles were adopted by the rules of the Circuit Court, and whether or not the lien could only be originated by compliance with the requisition as to the record and index of the abstract, was for the Circuit Court to determine in the first instance. Judgments by the common law were not liens upon real estate, but the lien arose from the power to issue a writ of *elegit* given by the statute of Westminster, 13 Edw. I, c. 18. *Morsell* v. *First Nat. Bank*, 91 U. S. 357, 360; *Massingill* v. *Downs*, 7 How. 760, 765; *Shrew* v. *Jones*, 2 McLean, 78, 80. It is argued that the writ of *elegit* and the lien resulting from the right to extend the land never obtained under the laws of Texas, while on the other hand it is said that, under the laws of Congress, this judgment was a lien throughout the jurisdiction of the Circuit Court from the date it was rendered, without any abstract being recorded and indexed by a state officer.

In *Massingill* v. *Downs*, where the state statute made the judgment a lien upon the land of the debtor in the county wherein it was recovered, and required the judgment to be recorded in other counties in order to extend the lien on land therein, it was ruled that a judgment in the Circuit Court was a lien on the debtor's land in the district without such record, or in other words, that the remedy for the enforcement of the judgment was coextensive with the process of the court. In

United States v. *Scott*, 3 Woods, 334, it was held by Mr. Justice Bradley, holding the Circuit Court for the Western District of Texas, (June term, 1878,) that a judgment of that court was a lien on defendant's lands throughout the district without being recorded in the several counties where they lay.

The argument is, however, that as by section 914 the practice, pleadings and forms and modes of proceeding in the Circuit and District Courts are required to conform to those of the state courts, the rule of the Circuit Court of April, 1880, adopting the "modes of proceeding prescribed by the laws of Texas" cannot refer to the modes of proceeding of that section, and must be construed to mean laws prescribing remedies upon judgments subsequent to the enactment of section 916. Hence, that no lien could originate, except in strict accordance with the law of Texas of 1879. The view taken by the Circuit Court rendered a solution of this question immaterial, but the inquiry is significant in its relation to jurisdiction.

It is unnecessary to pursue this branch of the case further. Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien, which he asserted and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject-matter was properly invoked.

Passing to the merits, we find that the rulings of the Circuit Court in reference to plaintiff's title were not based on any ground independent of the state statute of 1879, but assumed its applicability. The object of the provision for recording abstracts of judgments and indexing the same was to apprise subsequent parties, as, for instance, intending purchasers, of the existence and character of the judgments, if a reasonable amount of care and intelligence were exercised. The abstract in this instance gave the judgment debtor's name; the number of the suit in which the judgment was rendered; its date; the amount; the rate of interest; that the whole amount was still due and unpaid; and the name of

the plaintiffs as "Deere, Mansur & Co." In all these particulars it was in accordance with Article 3155, except that it did not give the individual names of the plaintiffs, although in giving the firm name it gave the surname of the plaintiff first in order. The index gave the defendant's name and the number of the page of the book upon which the abstract was recorded, and the plaintiffs' name as Deere, Mansur & Co., and this both directly and in the reverse order. The only ground on which this abstract and index could be held insufficient was that the names of the plaintiffs were not given in full in either abstract or index. Was this omission fatal to the lien? The Circuit Court did not think so, and we concur in that view.

In *Willis* v. *Smith*, 66 Texas, 31, 43, the Supreme Court of that State said: "The object of the statute is not to encumber the registry with full information, but to excite inquiry, and indicate the source of full information."

It appears to us that the source of full information was so indicated in this instance that no reasonably prudent or cautious inquirer could go astray.

In *Putnam* v. *Wheeler*, 65 Texas, 522, 525, the petition stated the names of the plaintiffs to be Royal T. Wheeler and Harry W. Rhodes, copartners as lawyers, but without giving the style of the firm, and the citation described the plaintiffs as Wheeler and Rhodes. This was held sufficient, and the Supreme Court said: "Giving the firm name of the plaintiffs was not such defect in the citation as required the reversal of the judgment."

Article 2281 of the Revised Statutes of Texas, prescribing the requisites of an execution, states that it shall, among other things, correctly describe the judgment, stating the court wherein, and the time when, rendered, the names of the parties, the amount actually due thereon, and the rate of interest. In *Smith* v. *Chenault*, 48 Texas, 455, the title of the judgment was "A. T. Chenault & Co. *vs.* Smith and Young," and the judgment ordered that the plaintiffs recover of the defendants, but the names of neither plaintiffs nor defendants were given, while the execution recited that "whereas, A. T.

Chenault and John O. McGhee . . . recovered a judgment against Elial M. Smith and Hugh F. Young," and the court held that the execution sufficiently described the parties to the judgment.

In *Hays* v. *Yarborough*, 21 Texas, 487, the judgment described the plaintiffs as "Yarborough and Ferguson," and it was held to be a sufficient description. These decisions are in harmony with the conclusion of the Circuit Court, and have not been overruled or disaffirmed so far as we are informed.

Since this writ of error was pending the Supreme Court of Texas has, indeed, held in *Gullett Gin Co.* v. *Oliver & Griggs*, 78 Texas, 182, that where the index failed to give the individual names of the defendants in a judgment, but only the firm name, it was fatally defective, and to the same effect is *Pierce* v. *Wimberly & Philips*, 78 Texas, 187, although in the latter case the full names of the plaintiffs were not given in the index. The court referred to *Nye* v. *Moody*, 70 Texas, 434, but in that case the abstract of the judgment had not been indexed at all. The distinction in importance between giving the individual names of the defendants and those of the plaintiffs is obvious.

Both parties claimed title from J. H. Payne as a common source, and defendants offered the assignment to Harrington to prove outstanding title without showing or attempting to show any connection of their title with his. The action was the statutory action of trespass to try title, (2 Sayles' Civ. Stats. Tex. Tit. 96, c. 1; Arts. 4784 to 4812,) and was not made otherwise or the issues changed by the averments of the amended petition introduced for the purpose of maintaining the jurisdiction. Under Article 4802 it was not necessary for the plaintiff to deraign title beyond a common source, and proof of a common source might be made by plaintiff by certified copies of the deeds showing defendants' chain or claim of title emanating from such common source. Defendants could not question the validity of their grantor's title at the time of the conveyance to them in a contest with plaintiff, claiming under the same grantor, unless, indeed, they claimed under a paramount title, which they had acquired or connected themselves with. This was so ruled in *Cox* v. *Hart*, 145 U. S.

376, where the decisions of the Supreme Court of Texas bearing on the point are fully cited. The assignment was properly excluded.

Defendants had pleaded (1) not guilty; (2) for allowance of value of improvements; (3) title outstanding in Harrington. Defendants offered the original deed from Payne to Cooke, dated January 2, 1886, which was objected to on the ground "that said defendants having specially pleaded an outstanding title, the defendants could not prove title in themselves." This objection was sustained and the deed excluded. Defendants also offered to prove that from January 1, 1882, until the sale to Cooke, Payne was the head of a family, and that the land was claimed and used by him as his homestead, and was therefore not subject to the judgment lien, execution, levy and sale through which plaintiff claimed. The same objection was made to this evidence and sustained.

The rule seems to be well settled that in this statutory action, if the defendant pleads his title specially, he waives the general issue, and is confined to the defence thus specially pleaded. In *Joyner* v. *Johnson*, 19 S. W. Rep. 522, the Supreme Court of Texas said: "The principle which underlies this doctrine is that when a party, either plaintiff or defendant, in an action of trespass to try title, pleads his title specially, he gives his adversary notice that he rests his case upon the title so pleaded, and it is to be presumed that he relies upon no other." *Shields* v. *Hunt*, 45 Texas, 424; *Custard* v. *Musgrove*, 47 Texas, 217; *St. Louis & Texas Railway* v. *Whitaker*, 68 Texas, 630. Apart from this, as we have held that the lien of the judgment was valid, the exclusion of the deed was immaterial. As to the suggestion in relation to the homestead, this was an affirmative defence, and could not be made under the pleadings as they stood. The plaintiff was not required to offer in chief any proof as to the homestead, in respect of which, indeed, he had been given no notice that it would be relied on, and the evidence offered by defendants was not in rebuttal of plaintiff's proof, but to establish an independent ground for invalidating the lien. No such defence was specially pleaded, while the general issue had

been waived. The reference to the homestead in the plea for the allowance of improvements had relation to that subject only, and could not be resorted to for any other purpose.

The provisions of the statutes of Texas on the subject of the allowance for improvements in actions of trespass to try title are contained in Articles 4813 to 4830, inclusive, (2 Sayles' Tex. Civ. Stat. 639,) and are set forth at length and considered in *Cox* v. *Hart*, 145 U. S. 376, 390. It must be alleged in the pleadings that the defendant and those under whom he claims have had adverse possession, in good faith, of the premises in controversy, for at least one year next before the commencement of the suit, and that he and those under whom he claims have made permanent and valuable improvements on the land sued for during the time they have had such possession. It is clear that the defendants Cooke were not in possession for twelve months before the commencement of the suit under any written evidence of title, for their deed was dated January 2, 1886, and the suit was commenced December 24 of that year; but they proposed to prove that they were in possession prior to the execution of the deed, under a verbal contract to convey, although they admitted that the consideration was not paid until the date of the deed. The evidence offered was to the effect that Cooke, after making his bargain with Payne, "immediately" entered upon possession and "commenced" the erection of improvements, and that he erected improvements of large value upon the land, in good faith, after the commencement of his possession and before he knew of any judgment lien. There is a lack of definiteness in this offer, which under the circumstances probably did not commend it to the Circuit Court, for it did not appear therefrom that any of the improvements were made before the date of the deed, or exactly when, except that it was before Cooke obtained actual knowledge of the judgment lien.

In *Elam* v. *Parkhill*, 60 Texas, 581, it is said: "To entitle a party to a recovery for the value of improvements it is essential that he be a possessor in good faith. . . . While title is not essential upon which to predicate a claim for the value of improvements, it is necessary that the party should enter and

claim under color of title. That is, the party must claim under an apparent title, which he in good faith believes to be the real title to the land." So in *Morrill* v. *Bartlett*, 58 Texas, 644, it was held that "a claim under the statute by a defendant sued for land, that he had made permanent and valuable improvements thereon, cannot be regarded when there is no evidence that he ever paid anything for the land, or received a deed therefor, and when he was informed of the controversy which jeopardized his possession before improving the land."

Many decisions of the Supreme Court of Texas to the same effect are cited by counsel. *House* v. *Stone*, 64 Texas, 677, 685; *Hatchett* v. *Conner*, 30 Texas, 104; *Powell* v. *Davis*, 19 Texas, 380; *Armstrong* v. *Oppenheimer*, 19 S. W. Rep. 520.

We are satisfied that defendants were chargeable with notice of the judgment lien, and did not as against the plaintiff occupy the position of adverse possessors, under a claim of title made in good faith prior to the deed of January 2, 1886. Moreover, no evidence was offered to prove the value of the land without regard to the improvements, an essential condition to the application of the statute. *Cox* v. *Hart*, *supra*. When and how far the remedy for valuable improvements may be sought in the courts of the United States, otherwise than in equity, we do not consider.

Judgment was correctly entered against all the defendants for the recovery of the title and possession of the land, and as the Mortgage Company was only interested through the deed of trust to Simpson, it was properly omitted in the recovery of damages.

It is conceded that the defendant M. E. Cooke was the wife of her codefendant, J. H. Cooke. The claim under the deed from Payne must be presumed to have been in community, it being the settled law of Texas that property purchased after the marriage is *prima facie* such, whether the conveyance be in the name of the husband or of the wife, or in their joint names. *Veramendi* v. *Hutchins*, 48 Texas, 531, 550; *Cooke* v. *Bremond*, 27 Texas, 457; *S. C.* 86 Am. Dec. 626; *Mitchell* v. *Marr*, 26 Texas, 329. But it does not follow that a general personal judgment, in damages for use and occupation, under

the statute, and for costs, could be rendered against Mrs. Cooke. The record disclosed nothing to justify the subjection of her separate estate to such a liability, and there was error in the judgment in this particular. *Linn* v. *Willis*, 1 Posey Cas. 158; *Garner* v. *Butcher*, 1 Posey Cas. 430; *Haynes* v. *Stovall*, 23 Texas, 625; *Menard* v. *Sydnor*, 29 Texas, 257. This does not involve the disturbance of the verdict or a reversal of the judgment in any other respect.

The judgment will therefore be affirmed except as to the recovery of damages and costs against M. E. Cooke, and that part thereof will be reversed as to her, with costs, and the cause remanded, with a direction to the Circuit Court to order the judgment to be modified so as to conform to the conclusion above announced. Ordered accordingly.

HARMAN *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 1022. Submitted January 9, 1893. — Decided January 23, 1893.

The ordinance of the city of Chicago, imposing a license tax for the privilege of navigating the Chicago River and its branches upon steam tugs licensed by the United States authorities under the provisions of Rev. Stat. § 4321, is an unconstitutional exercise of municipal authority, and is invalid.

Huse v. *Glover*, 119 U. S. 543, and *Sands* v. *Manistee Improvement Co.*, 123 U. S. 288, each distinguished from this case.

THIS was an action against the city of Chicago, Illinois, to recover the sum of three hundred dollars paid by the plaintiff on compulsion, and under protest, for licenses for twelve steam tugs of which he was the manager and owner. The action was commenced in the Circuit Court of Cook County, Illinois, and was tried by the court without the intervention of a jury, by stipulation of parties. At the trial the plaintiffs put in evidence the following agreed statement of facts:

Statement of the Case.

"It is hereby stipulated and agreed that for the purpose of determining the right of the defendant to require of the plaintiff a license, and to impose and collect a fine or license fee therefor, under an ordinance of the said defendant, hereinafter set forth, the following are the ultimate facts under which the said license was required, and the fine or license fee imposed and collected, viz.: That on the 26th day of September, 1888, the said plaintiff was the owner and manager of the following steam tugs, viz.: Tom Brown, F. S. Butler, J. H. Hackley, C. W. Parker, Bob Teed, A. B. Ward, W. H. Wolf, Crawford, G. B. McClellan, Mary McLane, Success and Wahbun; that said tugs, and each of them, were of twenty tons burden and upwards, and were on the said date and for long time prior thereto had been enrolled and licensed for the coasting trade in pursuance of and under the provisions of 'Title L' of the Revised Statutes of the United States, to which reference is hereby made and which are made a part hereof; that prior to the date aforesaid and on the 5th day of March, 1883, the common council of said city of Chicago, acting under the power supposed to be vested in it by chapter 24 of the Revised Statutes of the State of Illinois, and under which the said city was at said time incorporated, passed and enacted an ordinance regulating the navigation of steam tugs and other vessels on Chicago River and Lake Michigan and the waters tributary thereto, requiring that the owner thereof take out a license therefor, and imposing upon him a fine or penalty for failing so to do, which said ordinance is in the words and figures following:

"Be it ordained by the city council of the city of Chicago:

"SEC. 1. No person or persons shall keep, use or let for hire any tug or steam barge or tow-boat, for towing vessels or craft in the Chicago River, its branches or slips connecting therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned.

"SEC. 2. All applications for such license shall be made to the mayor, and upon payment of twenty-five ($25) dollars to the city collector, a license shall be issued for the period of one year by the city clerk for such tug, or steam barge or

tow-boat, and it shall be the duty of the city clerk to keep a register of the name of the person to whom such license is granted or transferred, the day when issued or transferred, the number of the license, and the name and description of the tug so licensed.

"SEC. 3. Every tug or steam barge or tow-boat shall have the number of the license and the name of the owner marked on both sides of such tug, or steam barge or tow-boat, in plain, legible figures and letters.

"SEC. 4. Any individual or person violating any provisions of this ordinance shall be subject to a fine of not less than five dollars ($5) nor more than fifty dollars ($50) for each offence.

"SEC. 5. This ordinance shall be in force from and after its passage.

"That said steam tugs were enrolled and licensed in the manner and for the purpose aforesaid, by the United States authorities in and at the Northern District of Illinois, in which the said defendant, the said city of Chicago, is situated, and were on the 26th day of September, 1888, and for a long time prior thereto had been engaged in the coasting and foreign trade, and in commerce and navigation, namely, in towing vessels engaged in interstate commerce into and out of the Chicago River and harbor from and to said Lake Michigan, and in pursuance of the conduct of the said trade, were navigating the said Chicago River and the waters of Lake Michigan, and the tributaries thereto, which said river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of said city of Chicago.

"That on the said day the said city collector of the said city of Chicago, the defendant herein, notified the said plaintiff to apply for and take out a license in pursuance of the requirements of the said ordinance for each of said steam tugs, and to pay therefor the sum of twenty-five dollars for each of said tugs, or the sum of three hundred dollars in the aggregate; that the said plaintiff thereupon notified the said collector that the said steam tugs, and each of them, were licensed for the coasting trade, in pursuance of and in accordance with the requirements of the laws of the said United

States, and were engaged in said trade on the said Chicago River and said Lake Michigan, and the waters tributary thereto, in the manner as aforesaid, and thereupon claimed to the said collector that the said ordinance was invalid, and that the said city of Chicago had no power or authority to require the said plaintiff to take out a license in pursuance of the requirements of the said ordinance, or to pay the said fee, whereupon the said collector of the said defendant caused the said plaintiff to be arrested upon a warrant issued for that purpose, and that while the said plaintiff was under arrest he paid the said license fee under protest, and took out the license as required by the said ordinance, and as demanded of him by the said collector, which said license was thereupon issued to him.

"That the amount of the fees so as aforesaid paid to the said collector for the said defendant was the sum of three hundred dollars; that the said sum was paid by the said collector into the treasury of the said defendant, the said city of Chicago, and that the questions which arise on the foregoing state of facts are as follows, viz.:

"1st. Whether or not the said defendant can require the plaintiff to take out the license and collect therefor the fees provided for in the ordinance aforesaid.

"2d. Whether there was vested in the defendant the power to require of the plaintiff the license and fee provided for in the ordinance aforesaid, and in the manner shown by the foregoing state of facts.

"3d. Whether the said ordinance under which said license was required and the said fee was imposed and collected, is legal and binding upon the plaintiff.

"4th. Whether the plaintiff is not entitled to judgment for the amount of fees so paid by him as aforesaid.

"It is hereby further stipulated that the said facts may be presented to the court and tried under the pleadings as they now stand, and that an order may be entered in said suit, submitting the same to the Honorable Richard S. Tuthill for trial without the intervention of a jury, and that either party shall have the right to appeal from the decision and final judgment of the court herein in the same manner and to the same ex-

tent as they would have if the same case had been tried in the usual and ordinary way."

And there was also introduced in evidence on behalf of the defendant in error an ordinance of the city council of the city of Chicago, in the words and figures as follows:

"SEC. 1. The inhabitants of all that district of country in the county of Cook and State of Illinois, contained within the limits and boundaries hereinafter prescribed, shall be a body politic, under the name and style of the city of Chicago; and by that name sue and be sued, complain and defend, in any court; make and use a common seal, and alter at pleasure; and take and hold, purchase, lease and convey such real and personal or mixed estate as the purposes of the corporation may require, within or without the limits aforesaid.

"SEC. 2. The corporate limits and jurisdiction of the city of Chicago shall embrace and include within the same all of township thirty-nine north, range fourteen east of the third principal meridian, and all of sections thirty-one, thirty-two, thirty-three and fractional section thirty-four, in township forty north, range fourteen east of the third principal meridian, together with so much of the waters and bed of Lake Michigan as lies within one mile of the shore thereof, and east of the territory aforesaid.

"SEC. 3. All that portion of the aforesaid territory lying north of the centre of the main Chicago River and east of the centre of the north branch of said river shall constitute the north division of said city; all that portion of the aforesaid territory lying south of the centre of the main Chicago River, and south and east of the centre of the south branch of said river and of the Illinois and Michigan Canal, shall constitute the south division of said city; and all that portion of the aforesaid territory lying west of the centre of the north and south branches of said river and of the Illinois and Michigan Canal shall constitute the west division of said city."

On the trial of the case the issues were found for the defendant; thereupon an appeal was taken to the appellate court for the First District of the State of Illinois, and there without argument the judgment was affirmed, and then an appeal was

taken by the plaintiff to the Supreme Court of the State. Upon a hearing before that court the judgment of the court below was reversed, and the ordinance of the city declared to be invalid; but upon petition a rehearing was granted, and the case was reargued. After such reargument the judgment previously rendered by the court was set aside and the judgment of the appellate court was affirmed. The plaintiff thereupon brought the case to this court upon a writ of error.

Mr. C. E. Kremer and *Mr. D. J. Schuyler* for plaintiff in error.

Mr. John S. Miller for defendant in error.

It is agreed that the Chicago River is from time to time deepened for navigation purposes, by dredging under the direction and at the expense of the city. The Supreme Court of the State, in its opinion in this case sustaining the ordinance as valid, based its decision upon the ground that as the Chicago River had been improved as a waterway by the city of Chicago at its expense, the license fee is to be sustained as a payment exacted by the city by way of an equivalent or compensation for the use of the improved waterway so provided by the city.

If this license fee can, by a reasonable construction of the ordinance, and by the facts in the case, be regarded as a mode of exacting compensation for benefits conferred by the city in providing an improved waterway, it should be sustained. There can be no question that the imposition of such a fee is a proper mode of exacting such compensation. *Cincinnati* v. *Bryson*, 15 Ohio, 625; *St. Louis* v. *Green*, 7 Mo. App. 468; *Frommer* v. *Richmond*, 31 Gratt. 646; *Charleston* v. *Pepper*, 1 Rich. (Law), 364.

The license fee exacted in this case can be sustained as an exaction or compensation for the benefits conferred by the improvement by the city of Chicago of the waters in question over which the jurisdiction of the city extends. In such cases it has been settled by the repeated decisions of this court that

the tolls or compensation exacted are to be sustained as a reasonable equivalent for such benefits conferred, and that they are in no sense an improper interference with commerce. *Huse* v. *Glover*, 119 U. S. 543; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Morgan's Steamship Co.* v. *Louisiana*, 118 U. S. 455; *Cooley* v. *Board of Wardens of Philadelphia*, 12 How. 299.

It can make no difference what form the compensation is made to take — whether as toll, or wharfage or license fee. The gist of the question is, whether the charge made can be regarded and sustained as compensation for benefits conferred by the authority imposing the charge.

The constitutional power of the several States to improve navigable waters lying within their boundaries, and to charge all vessels navigating such improved waterways reasonable tolls or compensation for their use in their improved condition, is not only supported by the decisions of this court but by many decisions of the state courts. A large number of these cases are referred to in the opinion of the Supreme Court of Illinois in this case, not yet reported, but which will be found in the record.

The Chicago River and harbor of the city of Chicago lie within the territorial limits and jurisdiction of the city. A large portion of the harbor of Chicago is the Chicago River. And the record shows that the Chicago River is from time to time deepened for purposes of navigation, under the direction and at the expense of the city of Chicago.

This court will take judicial notice of the condition and navigability of waters. "We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States." *The Montello*, 11 Wall. 411, 414. Equally so will the court take notice of the former navigability and non-navigability of public waters. *Escanaba Co.* v. *Chicago*, 107 U. S. 678.

It would seem very clearly to appear that the navigability

of the Chicago River has been secured almost entirely by the expenditure of municipal funds; that not only have the proprietors of tug boats been furnished with added convenience for the transaction of their business, but that the facilities for the transaction of their business have been furnished by the city of Chicago; that these boats never could have so operated upon the waters of the Chicago River as they originally were, and that the amount of compensation required by the city is so small as to have occasioned no complaint, even on the part of plaintiff in error.

In the respects above suggested, this case is totally unlike any of the cases in which it was held that the exactions sought to be imposed were unauthorized; and is similar to those cases in which it was held that the exaction could be collected for conveniences furnished; not only so, but this case is more strongly in favor of the city than any of the authorities cited by either party. For not only have these tug owners enjoyed added conveniences, but they have constantly made use of that condition of navigability which was furnished largely by the expenditure of the city's money, and without which they could have had no such opportunity to carry on their business at all.

None of the cases cited by the counsel for plaintiff in error, (such as: *Moran* v. *New Orleans*, 112 U. S. 69; *Robbins* v. *Shelby County*, 120 U. S. 489; *Leloup* v. *Mobile*, 127 U. S. 640; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217,) in any way involved the question of the right of the States (or of the local municipalities, under a grant of power from the State,) to exact a compensation for the use of navigable rivers or harbors, within their limits, by them improved, from vessels or boats engaged in interstate commerce or enrolled and licensed under the acts of Congress. The line of decisions referred to do not touch upon or in any way involve the principles involved in this case and laid down in the line of decisions in this court, of which *Huse* v. *Glover* and *Sands* v. *Manistee Co.* are examples.

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

The question presented for determination is the validity of the ordinance of the city of Chicago exacting a license from the plaintiff for the privilege of navigating the Chicago River and its branches by tug-boats owned and controlled by him. The Chicago River is a navigable stream, and its waters connect with the harbor of Chicago, and the vessels navigating the river and harbor have access by them to Lake Michigan, and the States bordering on the lake and connecting lakes and rivers. The tugs in question, from the owner of which the license fees were exacted, were enrolled and licensed in the coasting trade of the United States, under the provisions of the Revised Statutes prescribing the conditions of such license and enrolment. The license is in the form contained in section 4321 of the Revised Statutes, in Title L, under the head of "The Regulations of Vessels in Domestic Commerce." It declares that William Harmon, managing owner, of Chicago, having given bond that the steam tug (naming it and her tonnage,) shall not be employed in any trade while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn that this license shall not be used for any other vessel, nor for any other employment than herein specified, the license is hereby granted for such steam tug (naming it,) to be employed in carrying on the coasting and foreign trade, for one year from the date thereof. The license is given by the collector of customs of the district, under his hand and seal. The licenses for the several tugs were in this form, differing from each other only in the name of the tug licensed and its tonnage. The licenses confer a right upon the owner of the steam tugs to navigate with them the rivers and the waters of the United States for one year, which includes the river and harbor of Chicago, Lake Michigan, and connecting rivers and lakes. It appears from the record that at the time the license fees in controversy were exacted, these tugs were actually engaged in the coasting and foreign trade, and in towing vessels engaged in interstate com-

merce, from Lake Michigan to the Chicago River and its branches, and in towing vessels similarly engaged from the river into the lake.

In *Gibbons* v. *Ogden*, 9 Wheat. 1, 213, this court held that vessels enrolled and licensed pursuant to the laws of the United States, as these tugs were, had conferred upon them as full and complete authority to carry on this trade as it was in the power of Congress to confer.

The language of the court in that case respecting the first section of the act then under consideration is equally applicable to the provisions of section 4311 of Title L of the Revised Statutes. This latter section declares that "vessels of twenty tons and upward, enrolled in pursuance of this Title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force as required by this Title, and no others, shall be deemed vessels of the United States, entitled to the privileges of vessels employed in the coasting trade or fisheries." The first section of the act mentioned in *Gibbons* v. *Ogden* is substantially the same as the above section 4311, and, referring to the privileges conferred by it, the court said: "These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act."

The business in which the tugs of the plaintiff were engaged is similar to that of the vessels mentioned in *Foster* v. *Davenport*, 22 How. 244. In that case a steamboat was employed as a lighter and tow-boat in waters in the State of Alabama. It was, therefore, insisted that she was engaged exclusively in domestic trade and commerce, and consequently the case could be distinguished from the preceding one of *Sinnot* v. *Davenport*, 22 How. 227, argued with it, in which a law of Alabama, passed in 1854, requiring the owners of steamboats navigating

the waters of the State, before leaving the port of Mobile, to file a statement in writing in the office of the probate judge of Mobile County setting forth the name of the vessel, the name of the owner or owners, his or their place or places of residence, and the interest each had in the vessel, was held to be in conflict with the act of Congress passed in February, 1793, so far as the State law was brought to bear upon a vessel which had taken out a license, and was duly enrolled under the act of Congress for carrying on the coasting trade. But Mr. Justice Nelson, speaking for the court, replied as follows: "It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels, assisted to their port of destination. The case, therefore, is not distinguishable in principle from the one above referred to."

In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No State can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow-boat, towing vessels or craft for hire in the Chicago River or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the

city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. The steam tugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any port on Lake Michigan, or other lakes and rivers connected therewith. As justly observed by counsel: The citizen of any of the States bordering on the lakes who with his tug-boat, also enrolled and licensed for the coasting trade, may wish to tow his or his neighbor's vessel, must, according to the ordinance, before he can tow it into Chicago River, or any of its branches, obtain a license from the city of Chicago to do so. The license of the United States would be insufficient to give him free access to those waters.

In *Moran* v. *New Orleans*, 112 U. S. 69, 74, a law of Louisiana authorized the city of New Orleans to levy and collect a license upon all persons pursuing any trade, profession or calling, and to provide for its collection, and the council of that city passed an ordinance to establish the rate of licenses for professions, callings and other business for the year 1880, and, among others, provided that every member of a firm or company, other agency, person or corporation, owning and running tow-boats to and from the Gulf of Mexico, should pay a license fee of $500. The owner of two steam propellers, measuring over one hundred tons, duly enrolled and licensed at the port of New Orleans under the law of the United States, for the coasting trade, employed them as tug-boats in taking vessels from the sea up the river to New Orleans, and from that port to the sea. The city of New Orleans brought an action against him to recover the license under the ordinance, and obtained a judgment in its favor, which, on appeal, was affirmed by the Supreme Court of the State. Being brought to this court the judgment was reversed, with directions to the court below to dismiss the action of the city. In deciding the case this court, speaking by Mr. Justice Matthews, said of the license exacted: "It is a charge explicitly made as

the price of the privilege of navigating the Mississippi River, between New Orleans and the Gulf, in the coastwise trade, as the condition on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him for using his boats in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority? and reduced to that, it furnishes its own answer."

In the light of these decisions, and many others to the same effect might be cited, there can be no question as to the invalidity of the ordinance under consideration, unless its validity can be found in the alleged expenditures of the city of Chicago in deepening and improving the river. It is upon such alleged ground that the court below sustained the judgment and upheld the validity of the ordinance, and it is upon that ground that it is sought to support the judgment in this court.

The decisions of this court in *Huse* v. *Glover*, 119 U. S. 543, and in *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, are particularly referred to and relied upon. The attempt is made to assimilate the present case to those cases from the fact that it is conceded that the Chicago River is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee pro-

vided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expenses of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river. The license is not exacted as a toll or compensation for any specific improvement of the river, of which the steam barges or tugs have the benefit, but is exacted for the keeping, use or letting to hire of any steam tug, or barge or tow-boat, for towing vessels or craft into the Chicago River, its branches or slips connected therewith. The business of the steam barge or tow-boat is to aid the movement of vessels in the river and its branches and adjacent waters; that is, to aid the commerce in which such vessels are engaged.

As said by this court in *Foster* v. *Davenport*, 22 How. 244, from which we have quoted above, the character of the navigation and business in which the steam barges or tug-boats are employed cannot be distinguished from that in which the vessels towed are engaged. In *Huse* v. *Glover*, 119 U. S. 543, 548, the legislature of Illinois had, by various acts, adopted measures for improving the navigation of the Illinois River, including the construction of a lock and dam at two places on the river, and for that purpose created a board of canal commissioners and invested them with authority to superintend the construction of the locks and canals, to control and manage them after their construction, and to prescribe reasonable rates of toll for the passage of vessels through the locks. The works were constructed at an expense of several hundred thousand dollars, which was borne principally by the State, although the United States bore a part of it, sufficient to testify to their consent and approval of the work; and the commissioners prescribed rates of toll for the passage of vessels through the locks, the rates being fixed per ton according to the tonnage measurement of the vessels and the amount of freight carried. Certain parties engaged in the ice trade, and employing several vessels in transporting ice on the river and thence by the Mississippi and other navigable streams to St. Louis and other

Southern markets, all of which vessels were licensed and registered under the act of Congress, filed a bill alleging that, prior to the construction of the dams, the complainants were able to navigate the river without interruption, except such as was incident to the ordinary use of the channel in its natural state; that said dams were an impediment to the free navigation of the river; that for the construction of the locks they were charged and paid duties upon the tonnage measurement of their steamboats and other vessels, amounting to about five thousand dollars; and that similar charges would be made upon subsequent shipments. And the bill alleged that the imposition of the tolls and tonnage duties was in violation of article four of the ordinance for the government of the territory of the United States northwest of the Ohio River, passed July 13, 1787, which provides "that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be a common highway and forever free, as well to the inhabitants of the territory as to citizens of the United States, and those of any other State that may be admitted into the confederacy without any tax, impost or duty therefor," and of the article of the Constitution prohibiting the imposition of a tonnage duty by any State without the consent of Congress. The bill therefore prayed that the canal commissioners and persons acting under them might be restrained from exacting any tonnage duties or other charges for the passage of their steamboats or barges and other vessels used by them in navigating the Illinois River, and from interfering in any manner with the free navigation of the river in the course of their business. The Circuit Court of the United States sustained the validity of the statute and this court affirmed its judgment. In its opinion this court said:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by

the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River; and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state — and on that point the State must necessarily determine for itself — it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good."

We adhere to the doctrine thus declared. It was not new when stated in the case mentioned. It had been often announced, though, perhaps, not with as much fulness. That case differs essentially from the one before us. It pointed out distinctly the nature of the improvement; the benefit which it extended to vessels was readily perceptible, and no principle was violated, and no control of Congress over commerce, interstate or foreign, was impaired thereby. Congress, by its contribution to the work, had assented to it. The navigation of the river was improved and facilitated, and those thus benefited were required to pay a reasonable toll for the increased facilities afforded. Nothing of this kind is mentioned for consideration in the ordinance of Chicago. The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city under which the ordinance was passed is a general one to all municipalities of the State. Waters navigable in

themselves in a State, and connecting with other navigable waters so as to form a waterway to other States or foreign nations, cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress. Such right the defendants had from the fact that their steam barges and towboats were enrolled and licensed, as stated, under the laws of the United States.

The case of *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, does not have any bearing upon the case under consideration. The Manistee River is wholly within the State of Michigan, and its improvement consisted in the removal of obstacles to the floating of logs and lumber down the stream, principally by the cutting of new channels at different points and confining the waters at other points by embankments. The statute under which the improvement company was organized contained various provisions to secure a careful consideration of the improvements proposed and of their alleged benefit to the public, and, if adopted, their proper construction, and also for the establishment of tolls to be charged for their use. When the case came before this court it was held that the internal commerce of a State, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government, and, to encourage the growth of that commerce and render it safe, States might provide for the removal of obstructions from their rivers and harbors and deepen their channels and improve them in other ways, and levy a general tax or toll upon those who use the improvements to meet their cost, provided the free navigation of the waters, as permitted by the laws of the United States, was not impaired, and provided any system for the improvement of their navigation instituted by the general government was not defeated. No legislation of Congress was, by the statute of Michigan, in that case interfered with, nor any right conferred, under the legislation of Congress, in the navigation of the river by licensed or enrolled vessels, impaired, defeated or burdened in any respect. It was the improvement of a river wholly within the State, and, therefore,

Counsel for Plaintiff in Error.

until Congress took action on the subject, wholly under the control of the authorities of the State. *County of Mobile* v. *Kimball*, 102 U. S. 691, 699; *Escanaba Co.* v. *Chicago*, 107 U. S. 678.

It follows from the views expressed that the judgment of the Supreme Court of Illinois should have been for the plaintiff below, the plaintiff in error here. Its judgment will, therefore, be

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

DOYLE *v.* UNION PACIFIC RAILWAY COMPANY.

SAME *v.* SAME.

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

Nos. 100, 101. Argued January 3, 1893. — Decided January 23, 1893.

An agreement between a railroad company and an individual that the latter shall occupy a section-house of the company, and shall board there the section hands and other employés of the company at an agreed rate, the company to aid in collecting the payment out of the wages of the employés, does not create the relation of master and servant between the company and the individual, but does create a tenancy terminable at the will of the company.

In the absence of fraud, misrepresentation or deceit, a landlord is not responsible for injuries happening to his tenant by reason of a snow-slide or avalanche.

It is not reversible error in a judge of a Federal Court to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jurors are given to understand that they are not bound by such expressions of opinion.

THE case is stated in the opinion.

Mr. T. M. Patterson for plaintiff in error.

Opinion of the Court.

Mr. John F. Dillon, (with whom was *Mr. Harry Hubbard* on the brief,) for defendant in error.

Mr. Justice Shiras delivered the opinion of the court.

In the early part of November, A. D. 1883, Marcella Doyle, a widow, with a family of six children, agreed with the Union Pacific Railway Company to occupy the company's section-house, situated on the line of the railroad at or near Woodstock, in the county of Chaffee and State of Colorado, and to board at said section-house such section hands and other employés of the company as it should desire, at the rate of four and one half dollars per week, to be paid by the persons so to be boarded, and the company agreed to aid her in collecting her pay for such board by retaining the same for her out of the wages of the employés so to be boarded.

Mrs. Doyle moved with her children into the section-house, and continued in the discharge of her duties as boarding-house keeper until the 10th day of March, A. D. 1884, when a snow-slide overwhelmed the section-house, injured Mrs. Doyle, and crushed to death the six children residing with her.

Subsequently, Marcella Doyle brought, in the Circuit Court of the United States for the District of Colorado, two actions against the Union Pacific Railway Company, one for her personal injuries, the other for damages suffered by her in the loss of her children, and which latter action was based on a statute of the State of Colorado.

The actions resulted in verdicts and judgments in favor of the defendant company, and the cases have been brought to this court by writs of error. As the cases turn upon the same facts and principles of law, they can be disposed of together.

The record discloses that the facts of the case, as claimed by the respective parties, and certain admissions by the defendant company, were stated in a bill of exceptions, and upon which instructions by the court were given which are made the subject of the assignments of error.

The bill of exceptions was as follows:

"Be it remembered that on the trial of this cause, at the

November term A. D. 1886, of the said Circuit Court, the defendant admitted, and such admissions were received in evidence before the jury —

"That the plaintiff was at the several times named in the complaint a widow and the mother of the said Martin Doyle, Andrew Doyle, Christopher Doyle, Catharine Doyle, Marcella Doyle and Maggie Doyle, mentioned and named in the complaint as the children of the plaintiff, and as having each and all been killed by a snow-slide at Woodstock, in the month of March, A. D. 1884.

"That her husband and the father of said children had died previously to their death; that each of said children was of the age and sex stated in the complaint; was each unmarried and had no child nor children, and had each lived with their said mother, making their home with her up to the time of their death, and were each then living with the plaintiff, aiding and assisting her in and about making a living, and in about her duties and labors in the keeping of the section-house of the defendant at Woodstock, in the county of Chaffee and State of Colorado, where said children were killed; that said children were all killed while in said section-house, on the 10th day of March, A. D. 1884, by a snow-slide, which then and there occurred from the mountain side above said section-house; that said section-house was built and used by the defendant as and for a section-house and a place at which the section hands of the defendant, who should work on said section, could board and lodge.

"That on or about the 5th day of November, A. D. 1883, at the instance and request of the defendant and for the mutual benefit of herself and the defendant, the plaintiff undertook and agreed with the defendant to keep for it, during its will and pleasure, its section-house situated at or near Woodstock, on the line of its railroad, in the county of Chaffee and State of Colorado; that by the said agreement between her and the defendant the plaintiff was to provide and furnish board at said section-house for such section hands and other employés of the defendant as it should desire, at the rate of four and one-half dollars per week, to be paid by the persons so fur-

nished with such board, but the defendant was to aid and assist the plaintiff in collecting her pay for such board by stopping and retaining the same for her out of the wages of those so furnished with such board; that plaintiff thereupon, to wit, on the said 5th day of November, A. D. 1883, moved into said section-house with her family and entered upon the discharge of her duties as the keeper thereof, and remained there in the discharge of such duties until the occurrence of the snow-slide, on the 10th of March, A. D. 1884; that the defendant did not at any time notify or apprise the plaintiff or either of her said children or cause her or either of them to be notified or apprised of the danger of a snow-slide or snow-slides or of the liability of a snow-slide or snow-slides at such place where said section-house then was or in that locality. And the plaintiff, further to maintain the issues on her part, introduced evidence tending to show that said section-house was a one-story frame building and was constructed in 1882, about the time that said railroad was first operated in that section of the country; was situated in the mountains, near the base of a high and steep mountain, and in a place subject to snow-slides and dangerous on that account; that the sides of the mountain at the base of which was the house in question were marked by the tracks of former snow-slides, but only those familiar with snow-slides and their effects would know what they meant; that the defendant was aware of said danger at and before the time it engaged the plaintiff to keep its said section-house; that the plaintiff and her said children had never before resided in a region of country subject to snow-slides, and had no knowledge of snow-slides or of their indications or of the dangers incident thereto, and was not aware of the particular danger in question; that there was a prominence or hip on this mountain side, about ten or twelve hundred feet above the section-house, which cut off a view of the mountain side above said hip from the section-house or its immediate vicinity; that above said hip there was a large depression or draw on the mountain side extending from said hip to the summit, into which great quantities of snow fell and drifted during the winter season of each year, thus tend-

ing to create snow-slides of danger to persons in said section-house or its vicinity; that this danger was not apparent even to a person having knowledge of snow-slides and their causes without a view or examination of this mountain side above said hip; that the altitude of said section-house was about 10,200 feet, and of the summit of said mountain nearly 12,000 feet; that the snow-fall there was great in the winter season of each year, and that depressions on the mountain side were filled with snow by drifting; that the snow-slide of March 10th, 1884, which killed the said children, proceeded from this depression above said hip; that a snow-slide of less dimensions and of less scope and extent occurred there in February, 1883, in the same place and from the same source, which reached to within about two hundred feet of said section-house and of which the defendant had knowledge at the time thereof.

"That the attention of the superintendent of the construction of said railroad and of said section-house was called to the fact of such danger, at or about the time said section-house was built, by one of the civil engineers of said defendant who assisted in locating the line of said railroad.

"That her said son, Andrew Doyle, was an employé of the defendant — a section hand on the same section where said section-house was located — at the time he was so killed by said snow-slide; that the plaintiff and her said children were in said section-house at the time the said children were killed, and that none of said children were aware of said danger before the said snow-slide of March 10th, 1884, occurred.

"That through this prominence or hip on the mountain side there was a chasm or draw from twenty to thirty feet wide, which continued on down to the section-house, but became wider after leaving the hip; that with this draw another draw united about midway between the section-house and the said hip and formed one draw from their point of union to the section-house.

"That this mountain is a part of the range of mountains known as the Continental Divide, which divides the waters of the Atlantic from those of the Pacific. At this point above Woodstock station the course of the mountain is nearly east

and west. This railroad passes this mountain by means of a tunnel called 'Alpine tunnel,' which is to the westward of a line north of Woodstock and descends this mountain at a heavy grade, along the side thereof about midway between the section house and the said hip on the mountain, (which hip is termed a projection of rocks by some of the witnesses,) and passes on to the eastward of Woodstock a considerable distance, where it turns, and, forming a kind of horseshoe shape, runs back again past Woodstock, but between the section-house and said hip — the section-house being below and distant from this lower track about two hundred and thirty feet — and the two tracks forming this horseshoe are both between the section-house and said hip and on a direct line from the section-house up to the hip. The two tracks are about five hundred feet apart, the upper track being about seventy feet higher in point of altitude where they cross this line from the section-house to the hip on the mountain side above; that there was a water-tank on the upper side of the lower track fifty or sixty feet to the westward of the section-house, which water-tank was injured by the snow-slide of February, 1883.

"That the snow-slide of March 10th, 1884, spread out as it descended the mountain, so that where it passed over the lower railroad track its space in width was six or seven hundred feet, and the section-house was not far from the centre of said snow-slide track.

"That the contour of this mountain, beginning at the section-house and ascending the mountain, is about as follows, to wit: Above the section-house it slopes slowly to the first railroad track; then there is a rock-slide; then there is a bench above that and on the same level of the upper railroad track, and above that a steep gorge, and on each side of said gorge there is a thin belt of timber, and between these belts of timber and along the gorge there is a space from three to four hundred feet in width of nothing but rock, with a very steep slope, and above this slope some very steep rocks, (the hip on the mountain side,) and above this hip is a large basin or depression extending on up the mountain side three or four thousand feet long to the summit of the mountain, which has an elevation or

altitude of about 11,500 feet, the mountain side above the hip being very steep, having a slope of more than thirty-three degrees, and from the hip down there is quite a precipitous piece of rock, not perpendicular, but quite steep, and after or below that the slope is at an angle of about twenty-five degrees. In the basin above the hip there is no timber and in and about the section-house there is a space of eight or nine hundred feet square of [on?] which there is no timber except three or four trees.

"That the timber on the mountain side was sparse and scattered; that only a few trees were carried down by the snow-slide; that snow-slides do not always follow beaten tracks made by former snow-slides on the same mountain side, but frequently depart therefrom; that the snow-slide of March 10th, 1884, separated into broken fragments or divisions before reaching the base of the mountain, one of which struck the section-house, resulting in the injuries complained of.

"That the winter of 1883–4 was severer and the snow fell some deeper than the winter previous thereto, and that it snowed heavily and continuously from about the first of March to the 10th of March, 1884, and the trains had ceased to run on account of the snow; that ordinarily in the winter season the snow was from five to seven feet deep in said locality in places where it did not drift and after it had settled compactly; that it drifted greatly, filling up basins and depressions on the mountain sides; that there were rock-slides and existing evidences of former snow-slides on this mountain side above said section-house.

"That the snow-slide of February, 1883, deposited snow and débris on the upper track of the railroad above said section-house from twenty to twenty-five feet deep, and for a considerable space of time from then, during the remainder of that winter and the following spring, the said railroad was not operated on account of the snow.

"And the defendant, to maintain the issues on its part, introduced evidence tending to prove that said section-house was built below the said tracks and behind, and protected by a

thick growth of timber above and between said section-house and the mountain; that there were no marks or tracks of former snow-slides directly above or in the vicinity of said section-house; that the defendant was not aware of any danger from snow-slides at the place where the section-house was built, but, on the contrary, that the officers of the company had carefully examined the locality where the same was built and the contour of the mountains above the same to the summit of the range, and that said section-house was built at that place because the officers of the company thought that it was — [a?] safe place and could not be endangered by snow-slides, which were apt to occur in that part of the country; that the prominence or hip spoken of was a protection against snow-slides which might occur on the mountain sides above said section-house; that an examination of the ground, timber, and rocks in the vicinity of where the house was built and above, on the mountain side, showed that there had not been a snow-slide there for at least two hundred years; that the snow-slide of March 10th, 1884, was caused by a storm of unprecedented severity and duration, and that the same came down through the timber above said house, breaking down and carrying with it standing trees, from bushes up to trees two feet in diameter; that the snow-slide mentioned as occurring in February, 1883, came down a considerable distance to the north of where the one came down in 1884, and that the snow-slide in 1883 did no damage except to cover up a short distance of the railroad track and break in some boards of the house under the water-tank; that the attention of the superintendent of construction of said railroad was not called by any one to the fact of there being any danger from snow-slides at the place where said section-house was built, but that the conversation or notice referred to was in regard to a place a mile or more farther up Quartz Creek; that the said Andrew Doyle had been an employé of the defendant as a section hand, but had quit work some days before on account of the road being blockaded by snow and all attempts to open it having been abandoned, and for ten days or more before the snow-slide no work whatever was being done by defendant on said road for

a distance of several miles each way from said Woodstock; that said prominence or hip on the mountain side mentioned by the witnesses tended to protect said section-house and its immediate locality from snow-slides; that there was no chasm or draw immediately above said section-house, and that whatever formation of that kind there was on said mountain was a distance of two hundred feet or more north of said section-house; that said section-house was broken down by said snow-slide of March 10th, 1884, by a spreading out of the snow as it came down the mountain, and that said section-house was on the southerly side of said snow-slide; that the gorge referred to is simply an opening a few feet wide in the ridge of rock referred to as the hip or prominence; that a short distance above said prominence the general timber line of the country is reached, above which no timber occurs; that there was a considerable amount of timber between said section-house and the first railroad track and a thick growth of large timber immediately above the first railroad track, extending up some distance towards the second track of the loop, and some scattering timber above the upper track; that there are no rock-slides or existing evidences of former snow-slides on the mountain sides immediately above said section-house.

"And the foregoing was all the evidence in the case."

To the answers of the court to the prayers for instructions, and to the charge the plaintiff has filed thirteen assignments of error.

The twelfth assignment alleges that "the Circuit Court erred in charging the jury substantially to the effect that they must find for the defendant." And in the brief of the plaintiff in error it is asserted that the answers of the court to the several requests for instructions were in effect directions to the jury to find for the defendant.

Although, in point of fact, the court did not give the jury peremptory instructions to find for the defendant, but left the cases to them on instructions under which they might have found verdicts for the plaintiff, yet the validity of the plaintiff's exceptions to the court's treatment of the cases may be conveniently tested by assuming, for the present, that the

charge and instructions legally amounted to a direction to find for the defendant. If an examination of the facts and of the principles of law involved warrants us in concluding that the court would have been justified in so doing, it will not be necessary to consider each and every assignment of error nor to minutely scan isolated expressions used by the court.

The first question to be determined is what was the relation between the plaintiff and the railway company. Was Mrs. Doyle a servant or employé of the company, aiding in the transaction of its business and subject to its directions; or was she a tenant at will, holding the premises by an occupation during the will of the company? The facts averred by the plaintiff show that the company was not interested, in a legal sense, in the management of the boarding-house, did not receive the board money, pay the expenses, take the profits, or suffer the losses. The company could not call upon her for any account, nor could she demand payment from the company for any services rendered by her in carrying on the boarding-house. The fact that the company agreed to aid her in collecting what might be due to her from time to time by the boarders, by withholding moneys out of the wages payable to them by the railroad company, did not convert Mrs. Doyle into a servant of the company or change her relation to the company as a tenant at will of the company's house. Such an arrangement might equally have been made if Mrs. Doyle had been the owner of the house. The court below was not in error in holding that the relation of the parties was that of landlord and tenant.

If, then, such was the relation of the parties, upon what principle can a liability for the damages occasioned by the snow-slide be put upon the company? There was neither allegation nor proof of fraud, misrepresentation or deceit, on the part of the defendant company, as to the condition of the premises. Indeed, it was not even pretended that the catastrophe was in any way occasioned by the condition of the house.

It was, indeed, alleged that the section-house was built near the base of a high and steep mountain, and in a place subject

to snow-slides, and dangerous on that account; that the company was aware of said danger; that the plaintiff and her children had never before resided in a region of country subject to snow-slides, and had no knowledge of snow-slides, or of their indications, or of the dangers incident thereto; and that the company did not at any time notify or apprise the plaintiff or her children of the danger of snow-slides or of the liability of snow-slides at such place where said section then was or in that locality. And upon this alleged state of facts it was contended that the jury had a right to find that the railway company was guilty of carelessness or disregard of duty towards the plaintiff such as to make it liable in these actions.

It is, however, well settled that the law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes or snow-slides. The law is thus stated in a well-known work on Landlord and Tenant:

"There is no implied warranty on the letting of a house, that it is safe, well built or reasonably fit for habitation; or of land, that it is suitable for cultivation, or for any other purpose for which it was let. And where a person hired a house and garden for a term of years, to be used for a dwelling-house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, the principle was laid down, after an elaborate review of all the cases where a contrary doctrine seemed to have prevailed, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let. Consequently an abandonment of the premises under these circumstances forms no defence to an action for rent. And, in all cases where a tenant has been allowed, upon suggestions of this kind, to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment as to the state of the prem-

ises which were the subject of the letting; or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation, and that the lessee does not know it, and is influenced by his belief of the soundness of the house in agreeing to take it; for the conduct of the lessor may, in this respect, amount to a deceit practised upon the lessee." Taylor, Landlord and Tenant, § 382.

The principles applicable to the present case have been well stated in the recent case of *Bowe* v. *Hunking*, 135 Mass. 380. The syllabus states the case and decision as follows:

"A tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which has been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord; the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it, and it bore his weight, and he thought it would bear anybody's weight."

The judge directed a verdict for defendants, and the Supreme Court sustained this ruling. Field, J., giving the opinion of the court, said (p. 383): "There is no warranty implied in the letting of an unfurnished house or tenement that it is reasonably fit for use (citing cases). The tenant takes an estate in the premises hired, and persons who occupy by his permission, or as members of his family, cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter his premises (citing cases).

"In the case at bar there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained it must be on the ground that it was the duty of the defendants to inform the tenant of the defect in the

staircase; this duty, if it exists, does not arise from the contract between the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction, as a ground of liability, between an intentional and an unintentional neglect to perform it; but in such a case as this is there can be no such duty without knowledge of the defect. There is no evidence of any such knowledge, except on the part of C. D. Hunking, and the other defendants cannot in any event be held liable, unless his knowledge can be imputed to them, as the knowledge of their agent in letting the premises. The evidence is insufficient to warrant the jury in finding that C. D. Hunking intentionally concealed the defect from the tenant; and the action, if it can be maintained, must proceed upon the ground of neglect to perform a duty which the law imposed upon the defendants.

"A tenant is a purchaser of an estate in the land or building hired; and *Keates* v. *Cadogan*, 10 C. B. 591, states the general rule that no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit. See also *Robbins* v. *Jones*, 15 C. B. (N. S.) 240. This is the general rule of *caveat emptor*. In the absence of any warranty, express or implied, the buyer takes the risk of quality upon himself. *Hight* v. *Bacon*, 126 Mass. 10; *Ward* v. *Hobbs*, 3 Q. B. D. 150; *Howard* v. *Emerson*, 110 Mass. 320. This rule does not apply to cases of fraud."

This rule of *caveat emptor* has been applied also in many other cases, some of which we now refer to.

Keates v. *Cadogan*, above cited, was an action on the case. The declaration stated in substance that the defendant knew that the house was in such a ruinous and dangerous state as to be dangerous to enter, occupy or dwell in, and was likely to fall and thereby do damage to persons and property therein; that the plaintiff was without any knowledge, notice or information whatever that the said house was in said state or condition; that the defendant let the house to plaintiff without giving plaintiff any notice of the condition of the house; and

that plaintiff entered, and his wife and goods and business were injured. Defendant demurred to the declaration and the court unanimously sustained the demurrer. Jervis, C. J., giving the opinion said: "It is not pretended that there was any warranty, express or implied, that the house was fit for immediate occupation; but it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz., make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit: it was a mere ordinary transaction of letting and hiring." pp. 600, 601.

The rule of *caveat emptor* was also applied in the recent case of *Woods* v. *Naumkeag Steam Cotton Co.*, 134 Mass. 357. Defendant was owner of a tenement house, fitted for four families, and plaintiff was tenant at will, or wife of tenant at will. There were three stone steps, leading down from the yard to the street, on which ice and snow had accumulated, and on which plaintiff slipped and received the injury complained of. There was evidence tending to prove that at the time plaintiff was injured she was in the exercise of due care. The jury viewed the premises. Plaintiff contended that the steps were of such material and constructed in such manner that they occasioned the accumulation of snow and ice thereon improperly; and that the defendant's omission to place a rail on either side, or to take other reasonable measures to prevent one from falling, was such negligence as would render the defendant liable. But the trial court held there was no evidence to go to the jury, and directed a verdict for defendant; and the Supreme Court sustained this ruling. Field, J., giving the opinion, says (p. 359):

"There may be cases in which the landlord is liable to the tenant for injuries received from secret defects, which are

known to the landlord and are concealed from the tenant, but this case discloses no such defects in the steps . . . p. 361. The ice and snow were the proximate cause of the injury.

"The exceptions state that no railing had ever been placed on either side of the steps, that the jury viewed the premises, and that it was contended 'that the steps were of such material and constructed in such manner that they occasioned the accumulation of ice and snow thereon improperly.' The steps were of rough-split, unhewn granite, and the 'structure of the steps remained unchanged from the time of the plaintiff's first occupancy of the tenement to the time she received her injury.' The defendant was under no obligation to change the original construction of the steps for the benefit of the tenant."

Hazlett v. *Powell*, 30 Penn. St. 293, was an action of replevin, in which an apportionment of rent was claimed by the tenant of a hotel, on the ground that he had been partially evicted by the act of an adjoining owner in building so that the tenant's light and air from one side of his hotel were shut off or obstructed, and, as a result, that the hotel was rendered *pro tanto* unfit for the purpose for which it was intended to be used. There was an offer to prove certain facts, (p. 294,) which the court states as follows (p. 297):

"But the rejected proposition also contained an offer to prove that the lessor knew at the time of executing the lease that the adjoining owner intended building on his lot — at what time is not offered to be shown — and did not communicate this information to the lessees. We think he was not bound to do so; and that, if the evidence had been received, it would have furnished no evidence of fraud on [the] part of the lessor, or become the foundation in equity for relief of the lessee. The substance of the complaint regarded something that the lessor was no more presumed to know than the lessees; it was nothing which concerned the title of the lessor or the title he was about to pass to the lessees. It was a collateral fact — something only within the knowledge and determination of a stranger to both parties, and, if material to either, I can see no obligation resting on either side to furnish

to the other the information. It was not alleged that the lessor made any representations on the subject, or that there was any concealment of the information; or that any relation of trust and confidence existed between the parties; or that the lessees were misled by his silence, and entered into the contract under the belief that the vacant lot would not be occupied; or that they were in a position in which they could not by diligence have ascertained the fact for themselves, and that they were not legally bound to take notice of the probability that the ground would be occupied by buildings, and inquire for themselves. These were elements to be shown to constitute fraud, and make the testimony available.

"'The general rule, both in law and equity,' says Story on Contracts, § 516, 'in respect to concealment is, that mere silence in regard to a material fact, which there is no legal obligation to disclose, will not avoid a contract, although it operates as an injury to the party from whom it is concealed.' But the relation generally which raises the legal obligation to disclose facts known by one party to the other, is where there is some especial trust and confidence reposed, such as where the contracting party is at a distance from the object of negotiation, when he necessarily relies on full disclosure; or where, being present, the buyer put the seller on good faith by agreeing to deal only on his representations. In all these and kindred cases, there must be no false representations, nor purposed concealments; all must be truly stated and fully disclosed. 'The vendor and vendee,' says Atkinson on Marketable Titles, 134, 'in the absence of special circumstances, are to be considered as acting at arm's length.' 'When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract.' (Id.) Illustrative of this is the celebrated case of *Laidlaw* v. *Organ*, 2 Wheat. 178. The parties had been negotiating for the purchase of a quantity of tobacco; the buyer got private information of the conclusion of peace with Great Britain, and called very early

in the morning following the receipt of it on the holders of the tobacco, and, ascertaining that they had received no intelligence of peace, purchased it at a great profit. The contract was contested for fraud and concealment. Chief Justice Marshall delivered the opinion of the court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances, which might influence the price, though it were exclusively in his possession. And Chief Justice Gibson, in *Kintzing* v. *McElrath*, 5 Penn. St., (5 Barr,) 467, in commenting on this decision, says: 'It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.' See also *Hersey* v. *Keembortz*, 6 Penn. St., (6 Barr,) 129. When the information is derived from strangers to the parties negotiating, and not affecting the quality or title of the thing negotiated for, it is not such as the opposite party can call for. We see no error in the rejection of the evidence on account of this part of the proposition, as there was no moral or legal obligation for the lessor to disclose any information he had on the subject of the intended improvement of the adjoining lot. It was not in the line of his title. It was derived from a stranger; it might be true or false; and the lessees could have got it by inquiry, as well as the lessor.

"It is well settled that there is no implied warranty that the premises are fit for the purposes for which they are rented, (citing authorities,) nor that they shall continue so, if there be no default on the part of the landlord."

In the recent case of *Viterbo* v. *Friedlander*, 120 U. S. 707, 712, Mr. Justice Gray, who delivered the opinion of the court, said, in contrasting the doctrines of the common and civil law: "By that law" [the common law, unlike the civil law] "the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased."

The plaintiff's evidence failed wholly to show that there was any special and secret danger from snow-slides, which was known only to the railway company, and which could not have been ascertained by the plaintiff. It was, indeed, alleged

that "the section-house was in a place of danger from snow-slides;" but this was plainly the danger that impended over any house placed, as this one necessarily was, on a mountain side in a country subject to heavy falls of snow. The danger referred to was that incident to the region and the climate, and, in the eye of the law, as well known to the plaintiff as to the defendant.

On a careful reading of the plaintiff's evidence we are unable to see that the jury could have been permitted to find any positive act of negligence on the part of the railroad company, or any omission by it to disclose to the plaintiff any fact which it was the company's duty to disclose.

If, then, the plaintiff's case, as it appeared in her evidence, would not have justified a verdict on the ground of negligence or a fraudulent suppression of facts, and as the determination of the nature of the relation between the parties, as that of landlord and tenant, was clearly the function of the court, there would, in our opinion, have been no error if the court had really given a peremptory instruction to the jury to find for the defendant.

However, the record discloses that the court permitted the cases to go to the jury. It is true that the remarks made by the judge must have indicated to the jury that his own view was against the plaintiff's right to recover. But it has often been held by this court that it is not a reversible error in the judge to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jury are given to understand that they are not bound by such opinion. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 137 U. S. 568; *Simmons* v. *United States*, 142 U. S. 148.

It is not necessary for us to review in detail the criticisms made in the several instructions, for, as we have seen, even if such instructions had amounted, in a legal effect, to a direction to find for the defendant, no error would have been committed.

It is obvious that these views of the case of Marcella Doyle, claiming for her personal injuries, are equally applicable to her suit, under the statute, for the loss of her children. The

latter must be regarded as having entered under their mother's title, and not by reason of any invitation, express or implied, from the railway company, and hence they assumed a like risk, and are entitled to no other legal measure of redress.

No error being disclosed by these records, the judgment of the court below is, in each case,

Affirmed.

UNITED LINES TELEGRAPH COMPANY *v.* BOSTON SAFE DEPOSIT AND TRUST COMPANY.

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

No. 106. Argued January 5, 6, 1893. — Decided January 30, 1893.

The question of priority between two mortgages on lines of telegraph, considered.

A sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings.

THE case is stated in the opinion.

Mr. Robert G. Ingersoll for appellants.

Mr. William G. Wilson, (with whom was *Mr. Hamilton Wallis* on the brief,) for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 28th of August, 1883, a written agreement was made between the American Rapid Telegraph Company, (hereinafter called the Rapid Company,) a Connecticut corporation, and the Bankers' and Merchants' Telegraph Company, (hereinafter called the Bankers' Company,) a New York corporation. It recited that the Rapid Company was desirous of extending its telegraph system so as to connect Buffalo, New York, by a northerly route, with Chicago, Illinois; Pittsburg,

Pennsylvania, via Columbus, Ohio, Indianapolis and Terre Haute, Indiana, with St. Louis, Missouri; Columbus, Ohio, with Cincinnati, Ohio, and Louisville, Kentucky; and Terre Haute, Indiana, with Chicago, Illinois; and that the Bankers' Company was in a position to contract for and cause the construction or procurement, by purchase or otherwise, of portions or all of said lines. The agreement then provided as follows:

(1) The Bankers' Company agreed to construct or acquire, and to deliver to the Rapid Company, a four-wire telegraph line connecting the before-mentioned points, and to average not less than 35 poles, 30 feet long, to the mile, with two No. 6 and two No. 8 gauge galvanized extra B B wires thereon; to procure all rights of way; to fit up and furnish all offices; and to complete the whole within one year from the above date.

(2) The Rapid Company agreed to issue and deliver to the Bankers' Company, as soon as might be, $3,000,000 par value of first mortgage gold bonds, with coupons attached for 6 per cent interest from March 1, 1884, to September 1, 1893, payable semi-annually, the bonds to be secured by a mortgage dated September 1, 1883, covering all the franchises and property, including patents, of the Rapid Company, "as now owned by it, or hereafter to be acquired by it, including the lines and property to be constructed or acquired under the provisions of this contract."

(3) The floating debt of the Rapid Company, as a confidential obligation, having preference as to lien and payment before the said $3,000,000 of bonds, was to be reduced by the appropriation of the assets of the Rapid Company thereto, and the balance then remaining unpaid, not exceeding $100,000, was assumed by the Bankers' Company.

(4) Any difference regarding the interpretation or fulfilment of the agreement should be submitted to the decision and determination of Frederic H. May, whose decision should be final and binding on both companies.

On the 29th of August, 1883, a written agreement was made between the Bankers' Company and George S. Bullens, of

Boston, Massachusetts, holding for himself and others a majority in amount of the capital stock of the Rapid Company. That agreement referred to and recited the terms of the agreement of August 28, 1883, before mentioned; that the Bankers' Company was desirous of exchanging the whole or a large portion of the $3,000,000 of bonds for the capital stock of the Rapid Company; and that Bullens, acting for himself and associates, was willing to make such exchange. It then provided as follows: (1) The Bankers' Company obligated itself, as soon as it received the $3,000,000 of bonds of the Rapid Company, under the agreement of August 28, 1883, to deposit the same forthwith in the hands of Bullens, as trustee, and under a letter of instructions to him to hold them for exchange, dollar for dollar, with himself or others, for the stock of the Rapid Company, said stock, as soon as received by the trustee, to the extent of 51 per cent, to be handed over at once to the Bankers' Company; the balance of such stock, so received in exchange for bonds, or the balance of the bonds, if any, not exchanged, was to be held by Bullens, as trustee, until the completion of the lines of telegraph agreed to be built by the Bankers' Company under the agreement of August 28, 1883, and until the payment of the floating debt of the Rapid Company, and then handed over to the Bankers' Company; and the latter was to authorize Bullens to continue the exchange of bonds for stock up to, but not beyond, sixty days from August 29, 1883; (2) Bullens agreed to deliver to himself as trustee, for the purpose of exchanging for the bonds, not later than ten days from August 29, 1883, at least 51 per cent of the total stock of the Rapid Company, then outstanding.

The Rapid Company had been formed for the construction and operation of a system of telegraph lines. By the summer of 1883, it had constructed and equipped lines from Boston, Massachusetts, to Cleveland, Ohio, and Washington City; but, although its receipts from business then exceeded its outlay for operating expenses, it found that it needed extensions to Chicago, Cincinnati, St. Louis and Louisville, and the intermediate points. It turned its attention to the Bankers' Com-

pany, which, though having only a line from New York to Washington City, was doing a good business, and had in it men of means. It was supposed by both companies that each had something of advantage to offer to the other. Accordingly, the agreement of August 28, 1883, was made, to connect Buffalo with Chicago, Pittsburg with St. Louis, Terre Haute with Chicago, and Cincinnati with Louisville.

The agreements of August 28 and 29, 1883, were forthwith acted upon. The mortgage of the Rapid Company to secure the $3,000,000 of bonds was made September 15, 1883, to the Boston Safe Deposit and Trust Company, a Massachusetts corporation, (hereinafter called the Boston Company,) as trustee, and by its terms covered all the property of the Rapid Company, as incorporated by Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland and Ohio, or which might thereafter be acquired by those corporations, together with the lines of telegraph intended to be constructed or acquired for the Rapid Company, so as to connect Buffalo with Chicago, Pittsburg with St. Louis, Columbus with Cincinnati, and Louisville and Terre Haute with Chicago, and all property then owned or thereafter acquired for use in connection with said lines or property, or any of them. The $3,000,000 of bonds were issued to the Bankers' Company, and it transferred them at once to Bullens. Bullens exchanged them for the stock of the Rapid Company, so far as the holders of such stock elected to make the exchange, and transferred the 51 per cent of the stock to the Bankers' Company, retaining the remainder of the exchanged stock and all the unexchanged bonds. The Bankers' Company entered at once upon the performance of its part of the agreement of August 28, 1883, made a contract with telegraph constructors to build the new lines, and sent out men to locate those lines, under the supervision of Frederic H. May, who was the general manager of the Rapid Company.

All went on smoothly until May, 1884, when the Bankers' Company became financially embarrassed. At that date the line from Cleveland to Chicago had been substantially completed. The line between Freeport, Ohio, and Hammond, on

the State line between Indiana and Illinois, had been built by contract with Baldwin & Miller. The line between Cleveland and Freeport, Ohio, was built by a contractor named Farnsworth; and the line between Hammond and Chicago was built by employés of the Bankers' Company, without the intervention of any contractor. The four wires called for by the agreement of August 28, 1883, were connected through the different parts above mentioned, and the line was inspected and found to be complete. The line ran into the city of Cleveland over the poles which carried out of that city the line of the Rapid Company to Pittsburg and the East, and the two lines met and were connected by the same switch-board in the Cleveland office. In June, 1884, returns were made to New York of the business done by the offices between Cleveland and Chicago. The four wires above mentioned were working through to New York, and so continued to do, with the exception of a brief interval in August, 1884, down to December 30, 1887, when the suit now before us was commenced.

In July, 1884, the line between Pittsburg and Terre Haute was nearly completed, but there were gaps in it in various places, and it had not been connected with the Rapid Company's system at Pittsburg. The work upon it, so far as it had progressed, had been done by Baldwin & Miller, before mentioned, who stopped work in July or August, 1884.

Between the date of the agreement of August 28, 1883, and the month of July, 1884, the Bankers' Company or its stockholders acquired a majority in the board of directors of the Rapid Company, and elected or appointed the officers and managers of the Bankers' Company to the corresponding positions in the Rapid Company. Thus, the same men controlled the corporate machinery and property of both companies. A practical union of the two properties was expected to result from the complete performance of the agreement of August 28, 1883, and hence the Bankers' Company proceeded to string additional wires over a large part of the original lines of the Rapid Company, the receipts of the business of both companies went into a common treasury, and their operating ex-

penses were paid from the same source. A considerable sum, also, was spent in the repair and improvement of the original lines of the Rapid Company. The mortgage by the Rapid Company for $3,000,000 was recorded in Ohio between October 12 and December 22, 1883.

On November 24, 1883, the Bankers' Company, as a New York corporation, and as a New Jersey corporation, and as a Pennsylvania corporation, and as a Maryland corporation, executed a mortgage to the Farmers' Loan and Trust Company, a New York corporation, as trustee, to secure $10,000,000 of bonds of the Bankers' Company, and conveying all its property, including its "stocks of other companies" and "situate within the States of New York, New Jersey, Pennsylvania and Maryland, the District of Columbia, and within any other State or Territory of the United States," then owned or which might be thereafter acquired.

Default was made in the payment of the interest coupons which became due September 15, 1884, on the $3,000,000 of bonds of the Rapid Company. By the terms of the Rapid Company's mortgage, however, no proceedings for foreclosure could be begun until the default had continued for six months. On March 23, 1885, the Boston Company, trustee under the $3,000,000 mortgage, filed a bill in the Circuit Court of the United States for the District of Connecticut, for the foreclosure of that mortgage.

One Austin G. Day having recovered a judgment in the Supreme Court of New York against the Bankers' Company, sequestration proceedings followed, and on September 23, 1884, Richard S. Newcombe and James G. Smith were appointed by that court receivers of the Bankers' Company in New York. Those receivers were permitted to assume possession and control of the entire property of the Rapid Company, including the new line between Cleveland and Chicago, which was then in full operation as a part of the Rapid Company's system; and they were permitted to do so without any remonstrance from the officers of the Rapid Company, those officers being in fact the officers of the Bankers' Company and wholly in its interest. Smith, one of the receivers, was assistant general

manager of the Bankers' Company and also assistant general manager of the Rapid Company.

In the foreclosure suit in Connecticut, the Boston Company applied for the appointment of a receiver of the Rapid Company's property. That application was opposed by the receivers of the Bankers' Company, and by Edward S. Stokes, as the holder of receivers' certificates issued by them, and also by the Rapid Company, represented by the same officers who had suffered those receivers to take possession and control of the property of the Rapid Company. In spite of this opposition, the Connecticut court appointed Edward Harlan receiver of the property of the Rapid Company, and his receivership was extended over the whole property of that company by the courts of the other jurisdictions through which that property ran. Newcombe and Smith were succeeded as receivers by one James B. Butler, and he by John G. Farnsworth, who was appointed May 1, 1885, in an action brought by the Farmers' Loan and Trust Company to foreclose the $10,000,000 mortgage made by the Bankers' Company. In the latter suit, a foreclosure sale was had July 31, 1885, and Stokes bid the sum of $500,000 for the property of the Bankers' Company. By his direction, that sale was completed by a conveyance of the property to the United Lines Telegraph Company, a New York corporation, the deed of the referee being dated August 10, 1885, and acknowledged and recorded November 14–16, 1885.

The suit now before us was brought in the Circuit Court of the United States for the Southern District of New York, December 30, 1887, by the Boston Company against the Bankers' Company, the United Lines Company, Newcombe, Smith, Butler, Farnsworth, Stokes and the Rapid Company, as a Connecticut corporation. It is founded on the fact that there were conflicting claims to the title to the property covered by the terms of the $3,000,000 mortgage, and is brought in aid of the original suit in Connecticut, to determine those claims and ascertain what property was included in the mortgage. It embraces issues as to the right and title of the Rapid Company, and of the plaintiff, as trustee under

the $3,000,000 mortgage, to (1) those of the original lines of the Rapid Company called "reconstructed lines," which were in some measure repaired and rebuilt after the agreement of August 28, 1883; (2) the "strung wires," being wires strung upon the lines of the Rapid Company after the date of that agreement; and (3) the "Western lines," or lines described in that agreement and built thereafter, so far as they were built.

After issue was joined in the present suit, proofs were taken, and the case was heard before Judge Wallace. His opinion was delivered September 19, 1888, (36 Fed. Rep. 288,) and a final decree was entered April 4, 1889, adjudging that (1) as to the reconstructed lines, they remained the property of the Rapid Company; (2) as to the strung wires, they belonged to the Bankers' Company; and (3) as to the Western lines, the plaintiff having abandoned its claim to the unfinished southerly line between Pittsburg and Indianapolis, and insisted only that it was entitled to the northerly line between Cleveland and Chicago, (because that line was built and completed for the Rapid Company under the agreement of August 28, 1883, and was subject to the Rapid Company's mortgage,) the court so held. It is only this last point of the decision, affecting the line between Cleveland and Chicago, that is now under review, and the only appellants are the United Lines Company and Stokes.

The United Lines Company claims the property in question under its purchase on the decree of foreclosure of the $10,000,000 mortgage of the Bankers' Company, and asserts that its title is paramount to that of the plaintiff.

The answer of Stokes in the suit is a joint answer with the United Lines Company, and alleges that part of the property in controversy was sold on a judgment of the Court of Common Pleas of Cuyahoga County, Ohio, and that Stokes became the purchaser of it at that sale. The opinion of Judge Wallace says that as it appears that that sale was set aside and vacated as void, by an appellate court having jurisdiction, and as Stokes sets up in his answer no other right or claim, the controversy is reduced to the single question of title to the prop-

erty in dispute as between the plaintiff and the United Lines Company.

The Circuit Court said, in view of the two agreements of August, 1883, and of the testimony, that it was the understanding on the part of all concerned that the Bankers' Company was to acquire the property and control of the Rapid Company by acquiring all or a majority of the stock of the latter; that the stockholders of the Rapid Company, as an inducement to their consent, were to receive for their stock, dollar for dollar, the bonds of the Rapid Company secured by a mortgage which was to cover, not only all the property then owned by the company, but also the new lines which the Bankers' Company was to construct and deliver under the agreement; that the new line of telegraph which was built by the Bankers' Company, connecting the system of the Rapid Company at Cleveland with Chicago, was built upon rights of way secured in the name of the Bankers' Company, or of subordinate corporations of which that company was the owner, and through which it acted; that Mr. May, who represented the Rapid Company, was requested by the officers of the Bankers' Company to supervise the selection of the route, and did so; that, while the line was in process of construction, it was understood by those who represented the two companies that it was being built to form a part of the line which was to be a connected system between the Rapid Company at Buffalo, by a northerly route, and Chicago; that the portion of the new line which was to extend from Cleveland to Buffalo by a northerly route was not commenced; that the new line from Chicago to Cleveland was inspected and accepted by the Bankers' Company and was connected with the Rapid Company's system at Cleveland, the wires running into the office of the Rapid Company there; that, as early as July, 1884, the line was used as an adjunct of the Rapid Company's system; that there was no formal transfer or delivery of that line by the Bankers' Company to the Rapid Company; that detached portions of the lines from Pittsburg to St. Louis, by way of Indianapolis and Terre Haute, and from Cleveland to Chicago, by way of Cincinnati, Indianapolis and Terre Haute,

were built, but they were not completed prior to the appointment of a receiver of the Bankers' Company; and that the question of the lien of the $3,000,000 mortgage on those uncompleted lines was not involved.

As to the question of the validity of the $3,000,000 mortgage of the Rapid Company, the Circuit Court held that there was nothing immoral or dishonest in the transaction, on the part of that company or its stockholders; that there was nothing in the proof to show that those in control of the Bankers' Company were not acting in good faith towards the stockholders of the Rapid Company, their own company, or the public, or that there was any plan or purpose on their part, except to promote and consummate the legitimate business scheme of merging the two companies, and building up an extensive telegraph business, by extending and consolidating the existing systems; that there was no reason to doubt that the promoters would have carried out their enterprise honestly, and that their expectations would have been measurably realized, if the Bankers' Company had not become financially crippled at an early stage; that the proofs do not show that the parties to the August agreements, either those who represented the one company or the other, had any fraudulent design upon the public to be carried out by means of the mortgage; that, when the August agreements were made, the Bankers' Company had in its treasury, or available, about $1,000,000, and was supposed by those who represented the Rapid Company to be financially able to carry out its undertaking; that the case is destitute of evidence to justify the assumption that those who represented the Rapid Company supposed that the agreement of the Bankers' Company was to be carried out at the expense of third persons, much less by defrauding third persons; that the fact that the Bankers' Company used the bonds secured by its $10,000,000 mortgage to obtain the means for building the new line, was not inconsistent with the good faith of the officers of that company; that, at all events, the bondholders represented by the plaintiff were not shown to have been implicated in any fraudulent scheme; that the organic law of the corporations permitted them to do what

was provided for by the August agreements, and there was no ground upon which to assail the $3,000,000 mortgage as *ultra vires;* that the Rapid Company did not assert any objection to that mortgage; that those who were stockholders of the Rapid Company and became its bondholders, did not allege, and the Bankers' Company, after receiving the bonds and exchanging them for stock, could not be heard to allege, want of consideration, or a fraudulent consideration, or that the acts of the Bankers' Company, in acquiring and transferring the bonds, were without legal validity, while it retained the stock which it received as the fruits of the transaction, nor could it be permitted to assert that the August agreements were *ultra vires*, while retaining the fruits thereof; that it was equally clear that the bondholders of the $10,000,000 mortgage, who became creditors of the Bankers' Company after all those transactions took place, could not be heard to impeach the consideration of the plaintiff's mortgage; and that the question as to the rights of the parties to the property in controversy was merely whether it was covered by the lien of the mortgage, or equitably belonged to the plaintiff, and whether the rights of the plaintiff therein were paramount to those acquired under the $10,000,000 mortgage.

The Circuit Court further held that there was no satisfactory reason why the lien of the $3,000,000 mortgage should not include the "reconstructed lines;" that that mortgage was duly recorded before the $10,000,000 mortgage of the Bankers' Company was recorded, and no question arose under the registry act as to the priority of lien of the respective mortgages; that if it should be conceded that the money of the Bankers' Company exclusively was used in the improvements and reconstruction of those lines, and the improved value of the property represented nothing except what was put into it by the Bankers' Company, there was nothing to distinguish the case from the ordinary one where a mortgagor or his vendee of the mortgaged property makes repairs and improvements of a permanent character; that such improvements as become a part of the realty always enure to the security of the mortgage; but that the "strung wires" did not come

under the operation of that rule, as they did not lose their character as personalty.

The Circuit Court further held that the line from Cleveland to Chicago was constructed to connect Buffalo by a northerly route with Chicago, pursuant to the agreement of August 28, 1883, and was the same property described in and conveyed by the $3,000,000 mortgage, as "intended to be shortly constructed or required" for the Rapid Company; that the circumstance that there was no formal delivery or transfer of that property to the Rapid Company by the Bankers' Company was not material; that as soon as it was acquired by the Bankers' Company it became in equity the property of the Rapid Company; that it was competent for the latter to mortgage the lines which were not in existence at the date of the mortgage, but which, by the agreement of the Bankers' Company, were to be built or acquired thereafter, and were, by the terms of the mortgage, to enure to the security of the bondholders; that such a mortgage, although ineffectual as a conveyance *in præsenti*, took effect as an equitable transfer, and attached to the after-acquired property, as soon as the title of the mortgagor accrued; that this case was exceptional only because it presented a question of priority between two mortgages of after-acquired property; that upon the principle that, as between equal equities, priority of time will prevail, the lien of the $3,000,000 mortgage was paramount to that of the $10,000,000 mortgage subsequently created; that much stress had been laid upon the circumstance that the line in question was paid for in bonds of the $10,000,000 mortgage, or with the proceeds of such bonds, but that such fact was of no legal significance; and that those who bought the bonds of the $10,000,000 mortgage had no higher claim for consideration than the bondholders under the $3,000,000 mortgage, who parted with their property upon the promise that this line should stand as security for the payment of their bonds.

The Circuit Court further held, that the United Lines Company did not occupy the position of a *bona fide* purchaser of the property; that full notice of the equities and claims of the plaintiff was given to it before it purchased the property at

the foreclosure sale; that it acquired the rights of the bondholders under the $10,000,000 mortgage, and nothing more; that as to the suggestion that receivers' certificates were created pursuant to orders of the courts, in suits brought in state courts in New York and Ohio, in which receivers of the property of the Bankers' Company were appointed, which certificates were declared by the orders to be first liens on all the property of that company, and as to the contention that the lien of the $3,000,000 mortgage could not have precedence of those certificates, it was to be said that, as the plaintiff was not a party to those suits, the orders by which the certificates were created were nugatory as an adjudication upon the equities of the plaintiff; that no judgment in those suits could bind the plaintiff by a declaration that the certificates should outrank its equitable lien; that a purchaser of such certificates would not acquire a lien prior to the $3,000,000 mortgage upon the property included in it when it was recorded, or upon the accessorial improvements and additions; that it was not clear that a purchaser without notice and for value would not obtain a paramount lien upon the western lines, assuming that the certificates were authorized by a competent court having possession of the property by its receivers at the time; that those questions were not properly before the court, and could not be considered under the issues made by the pleadings; that the defendants did not assert in their answer that they were *bona fide* purchasers of such certificates, but the United Lines Company set up title under the foreclosure of the $10,000,000 mortgage, and Stokes founded his claim upon the sale by the Ohio court, which sale had been set aside; that it was no obstacle to the relief prayed by the bill that the real estate sought to be subjected to the decree was in another State; that it sufficed that the court had jurisdiction of the persons of the defendants and could compel them to observe its decree; and that there ought to be a decree for the plaintiff, conformable to the foregoing conclusions, with a reference to a master, if necessary, to ascertain what property was to be included in the description of the "reconstructed lines" in the decree.

After the delivery of the opinion, the United Lines Company and Stokes moved for a reargument on certain questions; but the motion was denied, and an order was made October 26, 1888, referring it to a special master to ascertain what property was to be included in the description of the property to be awarded to the plaintiff by the decree, and also to settle the decree. The special master, after hearing the parties, made a report, on January 18, 1889, determining the property to be so included and settling the form of the decree, and reporting to the court the evidence taken before him. The plaintiff excepted to the report, as also did the defendants the United Lines Company and Stokes, and Farnsworth, receiver. On a hearing of the exceptions, the court modified the description reported by the special master and the form of decree settled by him, confirmed his report subject to certain specified amendments, and on April 4, 1889, entered the final decree, before mentioned, in favor of the plaintiff, from which the United Lines Company and Stokes have appealed.

It is contended for the appellants that —

(1) Under the agreements of August, 1883, no bonds of the Rapid Company were to be delivered to the Bankers' Company; the bonds were intended for the stockholders of the Rapid Company and for no one else; the delivery made was simply colorable; the persons receiving them, apparently for the Bankers' Company, really received them for the purpose of handing them over to Bullens, the trustee, that they might be exchanged for the stock of the Rapid Company; and the Bankers' Company never received one of those bonds.

(2) The Bankers' Company, as a matter of law, had no right to build the Western lines for the Rapid Company, or any lines except for itself, and no right, in any event, to build lines for another company by using the proceeds of its own bonds in constructing such lines, leaving the holders of its bonds without any security.

(3) If the Bankers' Company in fact tried to build the Western lines for the Rapid Company, with money raised by the sale of the bonds of the Bankers' Company, and intended to turn such lines over to the Rapid Company, leaving its own

bondholders without any security, the transaction was fraudulent, and the Rapid Company was a party to the fraud.

(4) The evidence showed that the Rapid Company knew that the Bankers' Company had no money of its own with which to build the Western lines, and that the money for such construction was being raised by the sale of the Bankers' Company's bonds, and also knew that the purchasers of those bonds had been informed by the Bankers' Company that the bonds had been secured by a deed of trust to the Farmers' Loan and Trust Company on all the lines which the Bankers' Company then had, and on all which it might thereafter build; and the Rapid Company, so knowing, and having kept secret its agreements of August, 1883, was estopped from claiming any part of said lines as its property or as having been built for it.

(5) The Western lines, as a matter of fact, never were completed by the contractors for the Bankers' Company, and never were in fact delivered to that company before the appointment of the receivers in the foreclosure suit against it; so that it was never in a position to deliver the lines to any other company, even if the contract for such delivery had been honest and valid.

(6) The lines were never delivered by the Bankers' Company and were never received by the Rapid Company; no settlement was had between the companies; the Bankers' Company was never in a position to deliver the lines, never having had possession of them; the lines were put in possession of the receivers appointed in suits commenced by the contractors; afterwards they came into the possession of the receivers appointed in the foreclosure suit; and those receivers were authorized to issue $130,000 in certificates, and secure the same by a deed of trust to the Farmers' Loan and Trust Company.

(7) The Bankers' Company having failed to pay the amount due to contractors for construction and material, and receivers' certificates having been issued, the property came into the possession of the receivers of the Bankers' Company, and was never in the possession of the Rapid Company or of its receiver.

(8) Afterwards, it being impossible to finish the lines and

to keep them in repair from the earnings, the deed of trust made to secure the receivers' certificates was foreclosed; the receiver of the Rapid Company, duly appointed by the Circuit Courts of the United States in Connecticut, New York and Ohio, became a party to said action; and in that action a decree was entered that the property be sold for the payment of the receivers' certificates.

(9) The receiver of the Rapid Company, having been a party in the foreclosure suit in Ohio, was bound by the decision in that case; the ownership of the lines now in dispute, from Cleveland to Chicago, was settled in that suit by a court of competent jurisdiction, in a case where all the necessary parties were either plaintiffs or defendants, and such decision was final and binding upon all.

(10) The court below was misled, and supposed that the suit in Ohio had been decided upon the merits against the appellants in this case, or had been dismissed.

(11) The decree herein should be reversed and the property restored.

But we are of opinion that the line from Cleveland to Chicago became the property of the Rapid Company and was subject to the mortgage made by that company. That result was contemplated in the agreement of August 28, 1883, and in the mortgage of September 15, 1883. The $3,000,000 of bonds issued under that mortgage were delivered to the treasurer of the Bankers' Company on March 3, 1884. It was deliberately agreed between the two companies that the new lines in the West were to be built, were to belong to the Rapid Company, and were to be part of the security for the Rapid Company's bonds. The force of that agreement was not impaired by the fact that the Bankers' Company had made the further agreement of August 29, 1883, to exchange those bonds for stock, so far as the stockholders of the Rapid Company might elect to make such an exchange. Those who took the bonds from the Bankers' Company under the circumstances were authorized to expect that the company would perform its agreement, which was to give added security for the bonds, and they had a right to rely on such performance.

The line from Cleveland to Chicago was completed in compliance with the agreement, and was intended to be *pro tanto* a performance thereof. No further delivery of that line was practicable or requisite, than that which was made by connecting it with the system of the Rapid Company and using it as a part of that system. The same officers represented both companies, and both companies had the same general manager. His duty to his two principals, namely, the trust on the one side to deliver and on the other to receive the property, was sufficient to effectuate the necessary delivery from the Bankers' Company to the Rapid Company.

There is no ground for assailing the good faith of the agreement of August 28, 1883. It was entered into with perfect good faith on the part of the Rapid Company, and with every appearance of good faith on the part of the Bankers' Company; it violated no principle of law and no rule of good morals; and if it had been fully carried out, it is probable that both parties would have realized from it the benefits which they anticipated.

Nor is there any force in the objection that the agreement was *ultra vires*, on the part of the Bankers' Company. The statutes of New York authorized and justified it. The general power of a corporation to hold property in States other than the one which incorporated it, (in the absence of statutory prohibition in such States,) is firmly established. The Bankers' Company received the benefit of the August agreement, through which alone it acquired control of the Rapid Company, it enjoyed that control, took all the receipts of the Rapid Company's business, profited by the good will which that company had acquired, and thus obtained a benefit from the August agreement, which is beyond its power to restore; and the bondholders of the Bankers' Company, who are simply its creditors, and became such after the August agreement was made, are bound by the agreement made by it within the scope of its corporate powers.

It seems quite clear that the equities of the plaintiff and of the bondholders of the Rapid Company are superior to those of the bondholders of the Bankers' Company. The after-

acquired property of the Rapid Company, described in its mortgage, became subject to such mortgage as fast as it was acquired. *Dunham* v. *Railway Co.*, 1 Wall. 254; *Galveston* v. *Cowdrey*, 11 Wall. 459.

The equities of the two appellants are no greater than those of the bondholders of the Bankers' Company. It is well settled that a sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings. Neither the Rapid Company nor the plaintiff was a party to the suit for the foreclosure of the mortgage of the Bankers' Company. Therefore, whatever title either of them had to the property which was attempted to be sold in that foreclosure suit, remained unaffected by the suit. The same fact is true of the attempted sale in the Ohio proceeding, set up in the answer. Neither the Rapid Company nor the plaintiff was a party to that proceeding, and the attempted sale under it did not bar or impair their rights. Moreover, it is quite clear on the proofs that both of the appellants had notice of the title of the Rapid Company and the plaintiff. It is, therefore, unimportant to give special consideration to the Ohio proceeding, or to any claim based by Stokes upon it; and the fact is immaterial whether the sale under that proceeding was set aside, or whether the order setting it aside was subsequently reversed. There was nothing in the Ohio proceeding which could divest or impair the lien of the Rapid Company's mortgage, or the rights of the plaintiff as trustee for the Rapid Company's bondholders.

For these reasons, we are of opinion that the Circuit Court did not err in deciding that the Western lines came under the mortgage of the Rapid Company, and ought to pass under the foreclosure of that mortgage.

We have considered all the points made by the appellants, and are of opinion that there is nothing substantial in them, and we have remarked upon them as fully as seems to be necessary. *Decree affirmed.*

Mr. Justice Field and Mr. Justice Brewer dissented.

HORNER *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1247. Argued January 17, 1893. — Decided January 30, 1893.

Certain bonds issued by the Government of Austria, *held* to represent a "lottery or similar scheme," within the meaning of § 3894 of the Revised Statutes, as enacted by the act of September 19, 1890, c. 908, (26 Stat. 465); and a given circular *held* to be a "circular concerning any lottery, so-called gift, concert or other similar enterprise offering prizes dependent upon lot or chance," within the meaning of said § 3894; and the said circular *held* to constitute a "list of the drawings at any lottery or similar scheme," within the meaning of said § 3894.

What is a lottery, considered.

Cases in the United States and England, considered.

Although, by the bonds in question, Austria attempted to obtain a loan of money, she also undertook to assist her credit by an appeal to the cupidity of those who had money, and offered to each holder of a bond a chance of obtaining a prize dependent upon lot or chance, the element of certainty going hand in hand with the element of lot or chance, but the former not destroying the existence or effect of the latter.

THE case is stated in the opinion.

Mr. Herman Aaron, (with whom were *Mr. Alfred Taylor* and *Mr. Frederick S. Parker* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an indictment found May 16, 1892, in the Circuit Court of the United States for the Southern District of New York, founded on § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, c. 908, 26 Stat. 465. The section, as so amended, reads as follows: "No letter, postal card or circular concerning any lottery, so-called gift concert,

or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretences, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note or money order for the purchase of any ticket, tickets or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offence. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

Section 3894, as originally enacted in 1874, was an embodiment of § 149 of the act of June 8, 1872, c. 335, 17 Stat. 302, and read as follows: "Sec. 3894. No letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of

obtaining money under false pretences, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution." By the act of July 12, 1876, c. 186, § 2, 19 Stat. 90, § 3894 was amended by striking out the word "illegal."

The present indictment contains two counts. The first count alleges that Edward H. Horner, on December 29, 1891, did unlawfully and knowingly cause to be deposited in the post office at the city of New York, in the Southern District of New York, a certain circular to be conveyed and delivered by mail, "which said circular in the contents thereof, hereinafter set forth, concerned a lottery, and which was then and there addressed to Joseph Ehrman, 70 Dearborn Street, Chicago, Illinois, and was enclosed in an envelope with postage thereon prepaid and carried by mail, and which said circular contained, among other things, the following, to wit:" as is set forth in the margin, with the rest of said count.[1] The second count

[1] "Banking-house of E. H. Horner, No. 88 Wall Street.

"New York, *December* 27, 1890.

"110th redemption, December 1st, 1890, at Wien. The following 26 series were called in.

"Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.	Serie.	No.	Fl. S. W.
"121	36	20,000	1369	24	24,400	2666	63	400
"271	75	400		46	400		84	400
"280	22	1,000	1792	19	400	2988	2	400
"	65	400	1970	16	2,000		10	400
"461	37	400		69	400		48	50,000
"481	54	400		70	5,000		88	400
"	72	10,000	3288	28	400	3195	44	5,000
"487	69	400	2412	53	400		50	400
"493	6	400		74	400	3238	14	5,400
"684	14	400		82	400		52	400
"	56	400	2483	36	400	3486	35	400
"	94	400	2526	72	400	3685	39	400
"815	70	400		82	400		81	400
"	82	400	2531	44	400	3969	4	400
"853	23	400		91	1,000		14	400
"	61	400	2666	3	400		50	400
"	81	400		18	2,000			400

contains the same language as the first count, except that it alleges that Horner deposited the circular in the post office.

"All other bonds contained in the above twenty-six series not specially mentioned therein are redeemed with fl. 200.

"Payment on and after March 1, 1891.

"The next report of redemption will be published in the second half of the month of January, 1891.

"Customers who have been notified by special letter of the redemption of their bonds, can cash the respective amounts at my office."

That the said words and figures of the said circular relate to and concern certain so-called bonds issued by the Empire of Austria, and state on which of said so-called bonds payments were to be made and the amount thereof, a translation of the face of one of such bonds, so called, being as follows, to wit:

"Series 921. 100 florins. Number 60.

"*Premium Bonds.*

"One hundred florins, Austrian standard, as share of the loan of forty million florins, Austrian standard, made according to the law of November 17, 1863, (Law Journal of the Empire, No. 98,) for which the amount resulting according to the plan of redemption will be paid to the bearer by the Universal State Loan Treasury.

"Vienna, February 11, 1864.

"(Signed) JOSEPH RUDDE,
"*Imperial Royal Minister Counsellor.*

"[Coat of Arms.] PLENER,
"*Imperial Royal Minister of Justice.*

"For the board for controlling the State loans:

"(Signed) COLLERDO MANNSFELDT.

"(Signed) WINTERSTEIN.

"For the Imperial Royal Universal State Loan Treasury:

"(Signed) WINTER.

"(Signed) SCHIMKOWSKY."

Each of said so-called bonds having upon its face a series number and a number in the series, the amount of indebtedness which each of said so-called bonds purports to evidence being one hundred florins, the plan of drawing set forth on the back of each of said so-called bonds showing that up to April, 1874, there were to take place five drawings a year, on dates therein mentioned, to determine on which of the so-called bonds payments should be made, and the amounts of such payments, and that thereafter and until the end of the nineteenth year after the date of the issue of the so-called bonds, four drawings per year were to take place at stated dates for the same purpose, and that thereafter to and including the thirty-first year, three drawings were to take place for the same purpose at fixed dates

The defendant pleaded not guilty, was tried, convicted of the charges contained in the indictment, and sentenced, on

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for each year, and that thereafter to and including the fifty-fifth year after the date of issue of such so-called bonds two drawings per year were to take place for the same purpose, at the end of which time all of said so-called bonds were according to the plan aforesaid to be repaid; and according to said plan the smallest amount to be paid for any of such so-called bonds selected for payment during the first year after issue was one hundred and thirty-five gulden, during the second year one hundred and forty gulden, and during the third year one hundred and forty-five gulden, and so on, increasing in amount five gulden each year until the amount should reach two hundred gulden, which amount then remained fixed as the minimum sum to be paid for any of the so-called bonds, the payment of which should be determined by the drawings aforesaid, guldens and florins being denominations of money of the same value; under the said plan other large amounts being provided to be paid on certain of the so-called bonds to be determined by the drawings, thus during the first year the following sums being according to said plan to be paid on certain so-called bonds to be determined by such drawings, to wit:

On one bond	250,000 gulden
On one bond	25,000 gulden
On one bond	15,000 gulden
On one bond	10,000 gulden
On 2 bonds, each at 5000 gulden	10,000 gulden
On 3 bonds, each at 2000 gulden	6,000 gulden
On 6 bonds, each at 1000 gulden	6,000 gulden
On 15 bonds, each at 500 gulden	7,500 gulden
On 30 bonds, each at 400 gulden	12,000 gulden

And during subsequent periods other provision being made for such large amounts, all of said so-called bonds being in the same form as said copy translation and having the same drawing and redemption plan endorsed upon them and being identical in all respects, except that the series numbers and the number thereof vary as to each so-called bond, all of the drawings heretofore referred to by which, first, are determined the series of the so-called bonds to be paid or redeemed in each year, and, second, are determined the particular bonds in the series whose holders shall be entitled to the larger sums aforesaid, the numbers of which are drawn from the wheel, being conducted in such a way as that the determination of the numbers, both for redemption and for amounts, is wholly by lot or chance, the holder of each so-called bond having an equal chance with the holder of every other so-called bond, first, in securing an early payment of his so-called bond, and, second, in securing as a so-called payment for his so-called bond the very large prizes to which reference has been hereinabove made, the result in each case, as before alleged, being dependent wholly on lot or chance.

May 24, 1892, to pay a fine of $100. A bill of exceptions was made, which states that it was admitted on the record, by the counsel for both parties, that the bond in question in the case represented 100 florins, and was one of a series of bonds aggregating 40,000,000 gulden, state loan, and that the bonds, of which the one offered in evidence was one, all represented loans made to the Empire of Austria, and were issued for the purpose of raising revenue for the government, in order to defray governmental expenses and carry on general state affairs.

After the prosecution had rested, the counsel for the defendant moved the court to direct the jury to acquit, on the following grounds: (1) The defendant is not shown by the evidence to have committed any offence against any statute law of the United States or against the common law; (2) The circular, with causing the mailing whereof the defendant is charged in this prosecution, is not a matter prohibited under section 3894 of the Revised Statutes; (3) Said circular does not concern or relate to a lottery, so-called gift concert or similar enterprise offering prizes depending upon lot or chance, or concerning schemes devised for obtaining money or property under false pretences, nor does the same concern or relate to a lottery or similar scheme or a lottery ticket or part thereof; (4) That the bond or bonds mentioned in said circular which have been proved herein are not a lottery, so-called gift concert, or similar enterprise offering prizes depending upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretences, nor are the same a lottery or similar scheme or lottery ticket or part thereof; (5) That the bond or bonds mentioned in the indictment, and proved upon the trial herein, are government bonds issued by the Empire of Austria, and not within the language, meaning or purview of the statute for any violation of which the said Edward H. Horner, the defendant, has been charged herein. The counsel for the defendant also moved that the prosecution be dismissed on the same grounds severally as above enumerated. The court denied each of those motions, and the counsel for the defendant took, and was duly allowed, exceptions to such denials.

Opinion of the Court.

On the 14th of July, 1892, a writ of error from the United States Circuit Court of Appeals for the Second Circuit, to review the judgment of the Circuit Court, was allowed and sued out. In the Circuit Court of Appeals it was assigned for error: (1) That the matters charged in the indictment and proved upon the trial do not constitute a crime by the common law or under any statute of the United States; (2) That the circular with mailing or causing the mailing whereof the defendant is charged herein does not concern or relate to a lottery, so-called gift concert or similar enterprise offering prizes depending upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretences, nor does the same relate to a lottery or similar scheme, or a lottery ticket or part thereof; (3) That the bond or bonds mentioned in said circular and proved upon the trial are government bonds issued by the Empire of Austria, and not within the language, meaning or purview of the statute with a violation of which the said Edward H. Horner has been charged herein; (4) That the court erred in not directing the jury to acquit the defendant upon the trial hereof; (5) That said court erred in not dismissing the prosecution herein.

The Circuit Court of Appeals, on the 31st of October, 1892, pursuant to § 6 of the act of March 3, 1891, c. 517, 26 Stat. 828, certified to this court the following questions or propositions of law, concerning which it desired the instructions of this court for its proper decision: "(1) Do the bonds mentioned and described in the first and second counts of the indictment herein represent a 'lottery or similar scheme' within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States? (2) Is the circular described and set forth in the first and second counts of the indictment herein a 'circular concerning any lottery, so-called gift concert or other similar enterprise offering prizes dependent upon lot or chance' within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States? (3) Does the circular mentioned and set forth in the first and second counts of the indictment herein constitute a 'list of the drawings at any lottery or similar scheme'

within the meaning of section thirty-eight hundred and ninety-four of the Revised Statutes of the United States?"

It is contended on behalf of Horner that it is not a proper test to apply to the government bonds in question, whether or not they have an element of chance in them; that the test ought to be, whether they are a "lottery or similar scheme;" that they are not a "lottery or similar scheme;" and that all the questions certified should be answered in the negative.

It is urged that all the bonds are to be redeemed within fifty-five years from the date of their issue; that during the first year the Austrian government agrees to pay, as the minimum amount for any bond redeemed, 135 gulden; during the second year, 140 gulden; during the third year, 145 gulden; and so on, increasing 5 gulden in amount each year, until the minimum amount to be paid by the government on each bond redeemed is 200 gulden; that the primal object is only to raise money to carry on the government; that the money received by the government upon the bonds is not used as a fund out of which to pay prizes or to repay the loan; that the money for such purposes is raised by taxation and the usual means of raising revenue; that the bonds were issued in 1864, many years prior to the enactment of the original statute of the United States, which was passed in 1872; and that, as the government loan in question has for its primary object a loan, it is not transformed into a lottery because it has attached, as a subsidiary feature, an element which is like that of a lottery, in the distribution by lot or chance of certain larger premiums or awards.

But we are of opinion that the scheme in question falls within the inhibition of § 3894, as amended. The denunciation of that section is no longer against sending by mail a circular concerning an "illegal" lottery, but is against mailing a "circular concerning any lottery, so-called gift-concert, or other similar enterprise offering prizes dependent upon lot or chance."

Each "premium bond" states that the 100 florins is a "share of the loan of forty million florins," for which will be paid to the bearer "the amount resulting according to the

plan of redemption." This plan of redemption is set forth on the back of each bond, and by it each bond belongs to a distinct series, the number of which is on the face of the bond, together with the number of the bond in that series. Thus, the bond set out in the first count is No. 60 of Series 921. The bonds do not purport to be payable on a certain day, but, in order to determine what bonds are to be paid, and at what time, and what amount is to be paid on each of them respectively, it is stated on the back of the bonds, (which are dated February 11, 1864,) that until April, 1874, there are to be five drawings a year, on certain dates, to determine on which of the bonds payments are to be made and the amounts of such payments; that thereafter, and until the end of the nineteenth year from the date of the issue of the bonds, four drawings a year are to take place at stated dates, for the same purpose; that thereafter, to and including the thirty-first year, three drawings a year are to take place at certain dates, and that thereafter, to and including the fifty-fifth year after the date of the issue, two drawings a year are to take place for the same purpose, at the end of which time all of the bonds are to be paid. According to such plan, the smallest amount to be paid for any bond selected for payment during the first year after issue is 135 gulden; during the second year, 140 gulden; during the third year, 145 gulden; and so on, increasing in amount five gulden each year, until the amount reaches 200 gulden, which amount then remains fixed as the minimum sum to be paid for any bond the payment of which shall be determined by such drawings.

Under the plan, other and larger amounts are provided to be paid on certain of the bonds, to be determined by the drawings, namely, during the first year, on one bond, 250,000 gulden; on one, 25,000 gulden; on one, 15,000 gulden; on one, 10,000 gulden; on each of two bonds, 5000 gulden; on each of three, 2000 gulden; on each of six, 1000 gulden; on each of fifteen, 500 gulden; and on each of thirty, 400 gulden.

The first count further alleges that during subsequent periods other provision is made for such larger amounts; that all of the bonds are in the same form, have the same drawing

and redemption plan endorsed upon them, and are identical in all respects, except that the series number and the number thereof vary as to each bond; and that all of the drawings, by which are determined, first, the series of the bonds to be paid or redeemed in each year, and second, the particular bonds in the series whose holders shall be entitled to the larger sums, "the numbers of which are drawn from the wheel," are conducted in such a way that the determination of the numbers, both for redemption and for the larger amounts, "is wholly by lot or chance," the holder of each bond having an equal chance with the holder of every other bond, in securing, first, an early payment of his bond, and second, as a payment for his bond the very large prizes to which reference is above made, the result in each case "being dependent wholly on lot or chance." The circular set forth in the indictment contains a list of the drawings of the scheme.

In the Century Dictionary, under the word "lottery," is the following definition: "A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for the distribution of prizes by chance among persons purchasing tickets, the correspondingly numbered slips or lots, representing prizes or blanks, being drawn from a wheel on a day previously announced in connection with the scheme of intended prizes. In law the term *lottery* embraces all schemes for the distribution of prizes by chance, such as policy-playing, gift-exhibitions, prize-concerts, raffles at fairs, etc., and includes various forms of gambling. Most of the governments of the continent of Europe have at different periods raised money for public purposes by means of lotteries; and a small sum was raised in America during the Revolution by a lottery authorized by the Continental Congress. Both State and private lotteries have been forbidden by law in Great Britain and in nearly all of the United States, Louisiana and Kentucky being the two notable exceptions." Under that definition, the circular in question had reference to a lottery.

In Webster's Dictionary, "lottery" is defined as "A distribution of prizes by lot or chance."

In Worcester's Dictionary, it is defined as "A distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles;" and it is there said that during the eighteenth century the English government constantly availed itself of this means to raise money for various public works.

In the Imperial Dictionary, the word is defined thus: "Allotment or distribution of anything by fate or chance; a procedure or scheme for the distribution of prizes by lot; the drawing of lots. In general, lotteries consist of a certain number of tickets drawn at the same time, some of which entitle the holders to prizes, while the rest are blanks. This species of gaming has been resorted to at different periods by most of the European governments, as a means of raising money for public purposes."

Although the transaction in question was an attempt by Austria to obtain a loan of money to be put into her treasury, it is quite evident that she undertook to assist her credit by an appeal to the cupidity of those who had money. So she offered to every holder of a 100-florin bond, if it was redeemed during the first year, 135 florins, if during the second year, 140 florins, and so on, with an increase of 5 florins each year, until the sum should reach 200 florins; and she also offered to the holder, as part of the bond, a chance of drawing a prize varying in amount from 400 florins to 250,000 florins. Every holder of a bond has an equal chance with the holder of every other bond of drawing one of such prizes. Whoever purchases one of the bonds, purchases a chance in a lottery, or, within the language of the statute, an "enterprise offering prizes dependent upon lot or chance." The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter. What is called in the statute a "so-called gift concert" has in it an element of certainty and also an element of chance; and the transaction embodied in the bond in question is a "similar enterprise" to lotteries and gift concerts.

In *United States* v. *Zeisler*, 30 Fed. Rep. 499, the Circuit

Court of the United States for the Northern District of Illinois, held by Judge Blodgett, referring to certain bonds issued by the city of Vienna, in Austria, under a scheme in substance like that embodied in the bonds now before us, decided that circulars concerning the drawings thereunder were within the inhibition of § 3894. Judge Blodgett, in his opinion in the case, said pp. 500, 501: "If these drawings determined only the time when these bonds would be paid, I should say that the mere determining of that time by lot or drawing would not give them the characteristics of a lottery; but when a city or a government, in order to make an inducement for people to buy their bonds, holds out large prizes to be drawn by chance, or determined by lot in the manner in which prizes are usually determined in even an honestly conducted lottery, it seems to me it comes clearly and distinctly within the inhibiting clause of the statute under which this indictment is found. The mere reading of one of these bonds, and the drawing plan annexed to it, which is put in evidence, shows that it was the intention to stimulate the sale of the bonds by these large prizes, which were to be determined at every drawing, and which every holder of a bond had the chance of obtaining; and hence it seems to me that the purpose of the scheme was not only to determine by lot when the bonds should be paid, but also to determine certain extraordinary chances to the holders of the fortunate numbers drawn. The mere fact that these bonds are authorized by the law of a foreign country, and sanctioned by the policy of such country, does not, as it seems to me, in the least degree affect the question in this case. In *Governors of the Almshouse &c.* v. *American Art Union*, 7 N. Y. 228, a lottery was defined to be 'a scheme for the distribution of prizes by chance;' and the same definition is given in *Thomas* v. *People*, 59 Illinois, 160, and *Dunn* v. *People*, 40 Illinois, 465. The bonds in question certainly involved a lottery, within the meaning of the cases I have cited, and many more to the same effect might also be quoted. The circular sent through the mail was intended to induce persons to purchase and deal in these bonds with the hope of becoming the lucky winners of some

of the high prizes to be distributed at each drawing; and the fact that the purchasers of the bonds were, by the drawing plan, to get back their principal, and in the aggregate what is equivalent to a very small rate of interest upon that principal, does not, as it seems to me, change the character of the transaction, or relieve it from the characteristic features of a lottery; that is, that high prizes, out of all due proportion to the amount of money paid for a bond, were to be drawn for, and distributed by chance among the holders of these bonds, in the same manner as the prizes are determined in an ordinary lottery."

In *Ballock* v. *State*, 73 Maryland, 1, the Court of Appeals of Maryland held that the selling of the Austrian bonds in question was a violation of the anti-lottery law of that State. The Maryland Code, article 27, § 172, provided against the drawing of any lottery, or the selling of any lottery ticket, in the State; § 173 provided that all devices and contrivances designed to evade the provisions of § 172 should be deemed offences against it; § 174 provided a punishment for offending against any of the provisions of § 172 and § 173; § 183 provided that the preceding sections should apply to all lotteries, whether authorized by any other State, District or Territory, or by any foreign country, and that the prohibition of sale of any lottery ticket or other device in the nature thereof, should apply to lotteries drawn out of Maryland as well as those drawn within it; and § 184 provided that the courts should construe the foregoing provisions, relating to lotteries, liberally, and should adjudge all tickets, parts of tickets, certificates or any other device whatsoever, by which money or any other thing was to be paid or delivered on the happening of any event or contingency, in the nature of a lottery, to be lottery tickets. Ballock was indicted and convicted for violating those provisions, by selling Austrian government bonds substantially like the bonds in question here. The Court of Appeals said, (p. 8:) "It is true that Austrian government bonds are vendible and ought to be treated as other articles of commerce, as a rule; but when those bonds are coupled with conditions and stipulations which change their character

from simple government bonds for the payment of a certain sum of money to a species of lottery ticket which falls under the condemnation of our statutes, it must be classed as its conditions characterize it, and then it is not vendible under our law, and it does not violate constitutional provision or treaty stipulation to so hold." The court further remarked that it had been vigorously argued, that because the money ventured must all come back, with interest, so that there could be no final loss, it could not be a lottery, and added: "At some uncertain period determined by the revolution of a wheel of fortune, the purchaser of a bond does get his money repaid; but we do not think this deprives the thing of its evil tendency, or robs it of its lottery semblance and features. The inducement for investing in such bonds is offered of getting some '*bonus*,' *large and small*, in the future, *soon or late*, according to the chances of the wheel's disclosures. The investment may run one year or it may run thirty years, according to the decision of the wheel. It cannot be said this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit and a love of making gain through the chance of dice, cards, wheel or other method of settling a contingency. It certainly cannot be said that it is not in '*the nature* of a lottery,' and that it has no tendency to create desire for other and more pernicious modes of gaming. Our statute does not justify a court, expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery, simply because there can be no loss, when there may be very large contingent gains, or because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies, which the State is seeking to prevent."

In *Long* v. *State*, 74 Maryland, 565, 572, it was said to be a valid exercise of power in a State to protect the morals and advance the welfare of the people by prohibiting every scheme and device bearing any semblance to lottery or gambling.

In *Cohens* v. *Virginia*, 6 Wheat. 264, 441, it was held that where an act of Congress empowered the corporation of the

city of Washington to authorize the drawing of lotteries for certain purposes it could not force the sale of the tickets in Virginia, where such sale was prohibited by law. That case is a strong authority in favor of the view that, although lottery tickets are authorized by one government, such validity cannot authorize their sale within the territory of another government which forbids such sale. That is the case now before us.

As to what have been held to be lottery tickets by the courts of the several States, reference may be made to *Commonwealth* v. *Chubb*, in the General Court of Virginia, 5 Randolph, 715; *Dunn* v. *The People*, 40 Illinois, 465, where it was held that the character of the transaction would not be changed by assuming that the ticket represented an article of merchandise intrinsically worth the amount which the holder would be obliged to pay, and that if every ticket in any ordinary lottery represented a prize of some value, yet if those prizes were of unequal values, the scheme of distribution would still remain a lottery; *Thomas* v. *The People*, 59 Illinois, 160, where a ticket was a receipt for money in payment for the delivery of a copy of an engraving, and for admission to certain concerts and lectures, for which it was sold, and money was to be distributed in presents amounting to a certain number, to the purchasers of engravings, and it was held that that was a scheme for the distribution of prizes by chance, and constituted a lottery, it being apparent that some of the purchasers would fail to receive a prize, and that even if the ticket to the concerts and lectures, and the engraving, were intrinsically worth the price paid, the scheme would still be a lottery; *Chavannah* v. *The State*, 49 Alabama, 396, where it was held that the venturing of a small sum of money for the chance of obtaining a greater sum was a lottery; *Commonwealth* v. *The Sheriff*, 10 Phila. Rep. 203, where it was said that whatever amounted to the distribution of prizes by chance was a lottery, no matter how ingeniously the object of it might be concealed; *Holoman* v. *The State*, 2 Tex. App. 610, where it was held that selling boxes of candy at fifty cents each, each box being represented to contain a prize of money or jewelry, the purchaser selecting his box in ignorance of its contents, was a

device in the nature of a lottery; *State* v. *Lumsden*, 89 Nor. Car. 572, where a like device was held to be a lottery; and *Commonwealth* v. *Wright*, 137 Mass. 250.

Cases in England are to the same effect. In *Reg.* v. *Harris*, 10 Cox's C. C. 352, it was held that a lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what purported to be of the value of a shilling, and also to the chance of a greater value than a shilling, was an illegal lottery within the statute. In *Sykes* v. *Beadon*, 11 Ch. D. 170, 190, there were holders of certificates, who subscribed money to be invested in funds which were to be divided amongst them by lot, and divided unequally, that is, those who got the benefit of the drawings got a bond bearing interest and a bonus, which gave them different advantages from the persons whose certificates were not drawn; and it depended upon chance who got the greater or the lesser advantage. The scheme was held to be a subscription by a number of persons to a fund for the purpose of dividing that fund among them by chance, and unequally; and Sir George Jessel, Master of the Rolls, characterized the scheme as a lottery. In *Taylor* v. *Smetten*, 11 Q. B. D. 207, packets were sold, each containing a pound of tea, at so much a packet. In each packet was a coupon entitling the purchaser to a prize, and that fact was stated publicly by the seller before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it. It was held that the transaction constituted a lottery, within the meaning of the statute.

The only case of importance to the contrary is that of *Kohn* v. *Koehler*, 96 N. Y. 362. That was an action brought in the Supreme Court of New York by Kohn against Koehler, under § 32 of part 1, c. 20, title 8, article 4, of the Revised Statutes of New York, which provided that "any person who shall purchase any share, interest, ticket, certificate of any share or interest, or part of a ticket, or any paper or instrument purporting to be a ticket or share or interest in any ticket, or purporting to be a certificate of any share or interest in any

ticket, or in any portion of any illegal lottery, may sue for and recover double the sum of money and double the value of any goods or things in action which he may have paid or delivered in consideration of such purchase, with double costs of suit." Kohn sued to recover double the amount paid by him to Koehler for a bond issued by the authority of the government of Austria, like the bonds now in question before us, and which the Court of Appeals stated "purported on its face to be a share or interest in and to a certain illegal lottery."

The constitution of New York of 1846, in article 1, § 10, provided as follows: "Nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed, within this State." By § 22 of part 1, c. 20, title 8, article 4, of the Revised Statutes of New York, a penalty was provided against a person who should set up or propose any money to be distributed by lot or chance, to any person who should have paid or contracted to pay any valuable consideration for the chance of obtaining such money; by § 24, all contracts made or executed for the payment of any money in consideration of a chance in a distribution of money should be void; and by § 26, "every lottery, game or device of chance, in the nature of a lottery, by whatever name it may be called, other than such as have been authorized by law, shall be deemed unlawful, and a common and public nuisance."

At the special term of the Supreme Court, the defendant had a judgment in his favor, which was reversed by an order of the general term. 21 Hun, 466. The Court of Appeals reversed the order of the general term and affirmed the judgment of the special term. In its opinion the Court of Appeals said that the purpose of the Austrian government, in issuing the bonds, was to obtain money for its own use; that the provision by which, upon a certain contingency, the holder of the bond might receive an additional sum, was no doubt an inducement held out for the purpose of obtaining money on the same, but it did not constitute the main feature and the substance of the transaction between the government and the purchaser of the bond; and that it could not be held, upon any sound theory, that the privilege of obtaining by lot or

chance a larger sum than the principal, interest and premium, which the holder was sure to get in any event, imparted to the loan the character, object and accompaniments of a mere lottery scheme, in violation of the constitution and laws of the State of New York. Judge Finch dissented.

It is to be noted that the New York statute under which the action referred to was brought, was aimed against a share or interest in an "illegal" lottery. The act of Congress of June 8, 1872, now § 3894 of the Revised Statutes, as originally enacted, condemning only "illegal" lotteries, was amended by the act of September 19, 1890, so as to cover "any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance." As the New York statute contained the word "illegal," it may be that the Court of Appeals gave force to the view that the Austrian loan was a legal lottery, from the fact that it dwelt so largely on the idea that the bonds were issued by the Austrian government, in accordance with its laws, for the purpose of obtaining a loan of money, in connection with the further facts stated by it; that like bonds had been issued by several governments of other countries, and that the bond in question was an evidence of debt and a public security of a foreign government, exposed for sale in the same manner as other securities upon which money is loaned. It by no means follows that the Court of Appeals would have made a like decision on a statute with language in it like that of § 3894.

The case of *Ex parte Shorbet*, 70 California, 632, merely followed the ruling in *Kohn* v. *Koehler*, *supra*.

The question whether the transaction covered by this indictment was an offence against § 3894, was sought to be raised in the case of *Horner* v. *United States*, No. 2, (143 U. S. 570,) which was before us prior to the finding of this indictment, on an appeal from an order of the Circuit Court dismissing a writ of *habeas corpus* sued out on the commitment of Horner by a commissioner of the court, to await the action of the grand jury. The point was raised here, on the appeal, that the Austrian bond scheme was not a lottery; but this court said (p. 577) that that question was properly triable by the Circuit Court, if

an indictment should be found, and that it was not proper for this court on the appeal, or for the Circuit Court on the writ of *habeas corpus*, to determine the question as to whether the scheme was a lottery. We have now considered that question, and are clearly of opinion that § 3894 applies to the transaction.

The three questions certified must each of them be answered in the affirmative, and it is so ordered.

CLEMENT *v.* FIELD.

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

No. 111. Submitted January 3, 1893. — Decided January 30, 1893.

In Kansas, in an action of replevin to enforce a chattel mortgage of a machine sold to the defendant by the plaintiff, and mortgaged back to secure the purchase money, the defendant may set up, as a defence, failure of the machine to do the work guaranteed and damage to him from delay in the delivery; and if the jury pass upon these issues, the judgment on their verdict is a bar to a subsequent action by the purchaser of the machine against the vendor, to recover damages for such failure and such delay.

Gardner v. *Risher*, 35 Kansas, 93, distinguished from *Kennett* v. *Fickel*, 41 Kansas, 211.

This action was commenced in the District Court of Rice County, Kansas, August 10, 1885, by the plaintiffs in error, and in the following month, after the pleadings were filed, was removed into the Circuit Court of the United States for the District of Kansas. The essential averments of the petition are that on or before June 22, 1883, W. P. Clement, M. B. Clement, and Charles Eustis, partners doing business under the firm name of Clement, Eustis & Co., were engaged in raising sorghum cane, and manufacturing sugar and molasses therefrom, in Rice County, Kansas, and that J. A. Field and Alexander McGee, of St. Louis, Missouri, partners doing busi-

ness under the firm name of J. A. Field & Co., were engaged in making cane mills; that on or about that date Clement, Eustis & Co., the plaintiffs, employed J. A. Field & Co., the defendants, to make for them a certain kind of cane mill, to be delivered on board the cars in St. Louis on or before August 1, 1883, and agreed to pay for the same the sum of $1850 — $500 cash in hand, $500 on November 1, 1883, and $850 on November 1, 1884, with interest at six per cent per annum on the second deferred payment from the said date of shipment, and that promissory notes were given by the plaintiffs for the deferred payments, secured by a chattel mortgage on the mill. The plaintiffs averred that the defendants warranted the mill to be as good and to be capable of doing as much work and as good work as any mill made, and promised, in case of its failure to operate as warranted, to replace it at their own expense with a mill that would so operate, or refund the purchase money; that the mill proved not to be as warranted; that the defendants failed, neglected and refused to perform their contract regarding the said warranty, and that the mill was not delivered on board the cars in St. Louis until August 15, 1883, by reason of which delay, as well as by the said breach of warranty, the plaintiffs were deprived of profits which they should have realized, and were compelled to incur certain expenses, whereby they sustained damages which they sought in the action to recover.

The answer denied generally the averments of the petition, and contained several special defences, one of which was, that on October 2, 1884, the said defendants brought an action against the said plaintiffs in the Circuit Court of the United States for the District of Kansas, to recover possession of the said mill, alleging that they were entitled thereto by reason of an alleged breach of the conditions of said chattel mortgage, and that their interest in the mill amounted to the value of the said promissory notes, with interest, or $1450; that the plaintiffs filed an answer to that petition, alleging that the defendants had no interest in the mill, and that nothing was due on account of the notes for the reason that the mill was not shipped on August 1, 1883, and that it did not prove to be

as warranted, whereby the defendants became liable to the plaintiffs for damages in a sum greater than the amount of the notes and interest, and asking that the alleged damages might be set off against the notes and interest, and that the plaintiffs might have judgment for such balance over the amount of the defendants' claim.

The answer averred that the action of replevin was tried upon its merits before the court and a jury; that the jury found that the defendants were entitled to possession of the mill, and that the value of their interest therein was $1151.20; that, in accordance with the verdict, judgment was duly entered, and that by reason thereof the plaintiffs had had a former recovery against the defendants upon the cause of action set out in the petition to which the answer is addressed.

The reply of the plaintiffs admitted that the defendants brought the action of replevin, and that the plaintiffs appeared therein and sought to have judgment for their damages sustained by reason of the said breach of contract and warranty, but averred that they were not permitted by the court to make such defence to the action, and that their damages were not therein adjudicated.

The case came on for trial December 7, 1887, in said Circuit Court of the United States, and, a jury being waived, was tried by the court. The defendants produced for the inspection of the court the record in the replevin action, and offered other evidence, which, in the opinion of the court, showed that the property sought to be recovered in that action was the same property mentioned in the petition in the present case; that the notes and chattel mortgage in the action of replevin were the same notes and mortgage described in the said petition; that the claims for damages in that action were based upon the same grounds as the causes of action set out in the said petition; that the replevin action was tried upon its merits and submitted to a jury upon the evidence and the instructions of the court, and determined as stated in the answer in the present suit; that the defendants in that action (plaintiffs in this case in the court below) introduced evidence tending to establish their said claim for damages, and that

none of the evidence offered in support of such claim for damages was ruled out by the court or excluded from the jury.

The court thereupon decided that the plaintiffs had had a former recovery against the defendants upon the cause of action set up and tried in the replevin proceedings; that the proceedings and judgment therein constituted a complete bar to the plaintiffs' cause of action herein, and gave judgment for the defendants.

The plaintiffs then moved for a new trial. This motion was overruled, whereupon they brought the case before this court upon a writ of error.

Mr. A. B. Jetmore and *Mr. A. P. Jetmore* for plaintiffs in error.

The evidence offered by the defendants below upon their plea of former recovery, under the fourth defence of their answer, constitutes no bar to the right of recovery of the plaintiffs in error. The most that can be claimed, if anything, is, that it constitutes only a partial bar. *Spencer* v. *Dearth*, 43 Vermont, 98, 105. The rule of *res judicata* is, that if a fact has been once directly tried and determined by a court of competent jurisdiction, the same parties cannot properly be again allowed to contest the same matters, either in that court or any other. *Holcomb* v. *Phelps*, 16 Connecticut, 127, 131; *Johnson* v. *White*, 13 Sm. & Marsh. 584. But this rule does not apply to matters which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the judgment. *Hopkins* v. *Lee*, 6 Wheat. 109.

The jury in the replevin action may have found a verdict in favor of the defendants below without considering the question of damages. *Bullen* v. *Shannon*, 14 Gray, 433, 439; *Wood* v. *Jackson*, 8 Wend. 1; *Aiken* v. *Peck*, 22 Vermont, 255; *Smith* v. *Weeks*, 26 Barb. 463; *Ridgley* v. *Stillwell*, 27 Missouri, 128; *Washington Steam Packet Co.* v. *Sickles*, 24 How. 333; *Lawrence* v. *Hunt*, 10 Wend. 80; *S. C.* 25 Am. Dec. 539; *Norton* v. *Huxley*, 13 Gray, 285; *Finley* v. *Hanbest*, 30 Penn. St. 190.

Argument for Plaintiffs in Error.

The fact that the defendants in the replevin action set up specially breaches of contract and of warranty, and asked damages therefor, did not entitle them to any affirmative relief, or any relief. The same evidence was admissible for the defendants below under the general denial of their answer in said replevin action. It is only the matter upon which the plaintiffs prevailed in their replevin action, to wit, the possession of the property under the chattel mortgage, that was in issue. *Bailey* v. *Bayne*, 20 Kansas, 657; *White* v. *Gemeny*, 47 Kansas, 741.

Whether the action of the plaintiffs in error is necessarily barred by the result of the replevin action, would seem to depend upon whether, if both actions had been brought simultaneously, one could have been pleaded in abatement of the other; for, if it could not, they cannot be regarded as absolutely identical in law.

The defendants in error, in their brief of points and authorities, lay down the following proposition: "The defendants in an action of replevin, brought by plaintiffs to enforce a special lien against property covered by chattel mortgage given to secure part of the purchase-money, may, when plaintiffs sold said property with a warranty to defendants, if there has been a breach of said warranty, plead the same as a set-off, and recoup damages in reduction of plaintiffs' special claim upon such property; and if such damages equal plaintiffs' claim, it will defeat their recovery."

To sustain the above, they cite and urge the case of *Gardner* v. *Risher*, 35 Kansas, 93. That case, while it seems to partially sustain the contention of the defendants in error, it will be remembered, was decided by a divided court. Mr. Justice Johnston in that case dissented from the majority of the court, and insisted that a replevin action is in the nature of a tort, and that a set-off can only be pleaded in an action founded on contract.

That court, in the case of *Kennett* v. *Fickel*, 41 Kansas, 211, has adopted the doctrine announced by Mr. Justice Johnston in his dissenting opinion above referred to. The court in that case lays down the following doctrine, Mr. Justice Johnston

delivering the opinion of the court: "The court ruled correctly in striking this count from the answer. The second cause of action, setting forth a set-off, cannot be pleaded as a defence in an action of replevin. Such an action is founded upon the tort or wrong of the defendant, and not upon contract; and § 98 of the code specifically provides that 'a set-off can only be pleaded in an action founded on contract.' If either of the parties named owned and had the right of possession to the property, and the plaintiff wished to rely upon that fact, he could have shown it under the general denial. *Wilson* v. *Fuller*, 9 Kansas, 176; *Yandle* v. *Crane*, 13 Kansas, 344; *Bailey* v. *Bayne*, 20 Kansas, 657; *Holmberg* v. *Dean*, 21 Kansas, 73."

Mr. Seneca M. Taylor for defendants in error.

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

This was an action to recover damages for an alleged breach of warranty, and we are called upon to consider the legal effect of a plea to the action, setting up a former recovery by the plaintiffs.

The transaction out of which the controversy arose was a sale by J. A. Field & Co., defendants in error, to Clement, Eustis & Co., plaintiffs in error, of a cane mill for the sum of $1850, whereof $500 was payable in cash, and the rest in notes secured by a chattel mortgage on the mill. One of the terms of the sale was a warranty by the vendors that the mill would do as good work as any other mill for a similar purpose, and should be of good material and workmanship.

Payment of the notes not having been made, J. A. Field & Co. brought an action of replevin, under the provisions of the chattel mortgage, to recover possession of the mill, or, in default of recovering actual possession, to recover a money judgment for the unpaid purchase money, amounting to $1350 with interest. To the declaration in replevin, Clement, Eustis & Co. pleaded that, by reason of delay in deliver-

ing the mill and of its failure to come up to the terms of the warranty, they had been damaged in an amount largely in excess of the unpaid purchase money.

The issue thus raised was submitted to a jury, with the following instructions:

"The defendants' damages would be, if entitled to damages, the whole of the cane lost by the delay caused by plaintiffs' fault and failure of the mill to work up to its capacity, and also the loss of juice during that time caused by the fault of the mill in not properly pressing it from the cane, and any expenses incurred in repairs.

"And should you find damages for defendants, and that such damages equalled or exceeded the entire debt due on the mill, then you will find for the defendants.

"If you find damages, but they do not equal plaintiffs' debt, then you will find for plaintiffs and state the value of plaintiffs' interest in the mill, which would be their debt and interest, less the damages."

Under these instructions the jury found for the plaintiffs, and assessed the value of the plaintiffs' special interest in the property at the sum of $1151.20.

As the amount of plaintiffs' unpaid purchase money, at the time of the trial, was $1350 with interest, it is obvious that the jury allowed the defendants, as a set-off, damages in an amount of between two hundred and three hundred dollars.

Subsequently, Clement, Eustis & Co. brought the action which is now before us, claiming damages in a large sum of money arising out of an alleged delay in the delivery of the mill, and by reason of an alleged breach of the warranty that the mill would do its work as well as any other mill, and be of good material and workmanship.

To this action, J. A. Field & Co., the defendants therein, pleaded a former recovery by Clement, Eustis & Co., in that in the previous suit in replevin, they had set up the same claims for damages asserted in the present action, and had been allowed credit for them by the jury in finding their verdict.

The parties waived a jury, and agreed that the action might be tried by the court.

Thereupon, J. A. Field & Co., to sustain their plea of a former recovery, put in evidence the record of the suit in replevin. The court was of opinion that the record of the proceedings in the replevin suit sustained defendants' plea of a former recovery, and was a complete bar to the plaintiffs' cause of action in the present case, and entered judgment accordingly in defendants' favor.

It is claimed in this court that the court below erred in its judgment sustaining the plea of a former recovery, because the record in the replevin suit shows that the question of damages for breach of contract and of warranty was withdrawn from the jury by the court, except to prevent a recovery therein.

We do not so read the record. On the contrary, it plainly appears that the court instructed the jury that they were at liberty to find damages in defendants' favor, and to set off the amount of such damages against the plaintiffs' debt. It is true that the court told the jury that should they find damages for defendants equalling or exceeding the entire debt due on the mill, they should then find for the defendants. This instruction may have been understood to mean that, if defendants' damages exceeded the amount of plaintiffs' claim, the jury could not go further and find a verdict in defendants' favor for the amount of such excess. And in such an event it may be that, so far as defendants' damages exceeded the plaintiffs' debt, the defendants would not have been precluded from maintaining a subsequent action for such excess.

But the jury's verdict shows that, while they allowed damages in defendants' favor, they found such damages to have been far less than the amount of plaintiffs' debt, and, accordingly, if the defendants were bound by that finding of the jury, there was no excess of damages on which they could base a subsequent suit.

In *Burnett* v. *Smith*, 4 Gray, 50, it was ruled that, in an action to recover damages for a false representation as to the value of certain corporation stock, it was competent for the plaintiff to avail himself of such false representation in reduction of damages in the action on the note given for the stock.

Another objection urged to the judgment of the court below

is that the action in replevin was an action founded upon tort, and not upon contract, that a set-off can, under the Code of Kansas, only be pleaded in an action founded on contract, and that hence the defendants in the replevin suit in question could not legally plead a set-off of the damages caused by the breach of warranty.

The Supreme Court of Kansas disposed of this contention in *Gardner* v. *Risher*, 35 Kansas, 93, which, like the present, was a case wherein the plaintiff sought, by a writ of replevin, to enforce the provisions of a chattel mortgage, and the defendant set off against the notes secured by the mortgage certain damages incurred by reason of breaches of a contract. The court held that, as the plaintiff's claim was really founded on contract, the defendant could, notwithstanding that the form of the action was replevin, avail himself, by way of set-off, of damages caused by the failure of the other party to the chattel mortgage to comply with his contract.

The later case of *Kennett* v. *Fickel*, 41 Kansas, 211, is cited on behalf of plaintiffs in error as holding that a set-off cannot be pleaded as a defence in an action of replevin, because such an action is founded upon the tort or wrong of the defendant, and not upon contract. An examination of these two cases satisfies us that they are not irreconcilable. They were both suits in replevin, but, in the earlier case, the plaintiff's cause of action originated in the provisions of a chattel mortgage, and the suit in replevin was resorted to in pursuance of one of those provisions, and was regarded by the court as, in substance, founded on contract. The later case was founded on a wrongful taking by the defendant of property of the plaintiff, and was, therefore, in substance as well as form an action *ex delicto*.

The replevin suit pleaded in answer in the present case was substantially a proceeding in enforcement of contract provisions, and therefore within the decision in *Gardner* v. *Risher*, 35 Kansas, 93.

Moreover, the record shows that, in point of fact, the defendants did plead a set-off in the replevin suit, and had the benefit of such a plea, and it seems to us that they cannot

now be heard to say that the plea was not allowable in such case. There is high authority for saying that, as that question was a subject of judicial inquiry in the action of replevin, it would not be open elsewhere, even in behalf of the plaintiffs in replevin, against whose contention the set-off was allowed. *Bartlett* v. *Kidder*, 14 Gray, 449, 450; *Merriam* v. *Woodcock*, 104 Mass. 326.

Much less can the defendants in the replevin suit, at whose instance and in whose favor the set-off was allowed, be permitted afterwards to escape from the effect of a judicial inquiry invoked by themselves. The use of a so-called action of replevin as a mode of enforcing provisions of a contract in writing seems scarcely consistent with the nature and purpose of that form of action, as understood and enforced in England and the older States of this Union; but, as the Supreme Court of Kansas, in the case already cited, has approved of such a proceeding, and has likewise held that it is competent, for a defendant in replevin, to set up as a defence unliquidated damages arising out of a breach by the plaintiff of the contract, and as the plaintiffs in error in the present case themselves resorted to such a defence and obtained its benefits, it was not error in the Circuit Court of the United States for the District of Kansas to hold that the plaintiffs in error were precluded by the verdict and judgment in the replevin suit.

The judgment of the Circuit Court is

Affirmed.

BARNETT *v.* KINNEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 415. Submitted January 9, 1893. — Decided February 6, 1893.

An assignment of all his property, made for the benefit of his creditors with preferences, by a citizen of Utah to another citizen of Utah, which is valid by the laws of Utah and valid at the common law, is valid in Idaho against an attaching creditor, as to property in Idaho of

Statement of the Case.

which the assignee has taken possession, notwithstanding the provision in the Revised Statutes of Idaho that no assignment by an insolvent debtor otherwise than as therein provided is binding on creditors, and that creditors must share *pro rata*, without priority or preference.

This was an action of replevin commenced in the District Court of Alturas County, Territory of Idaho, on December 12, 1887, by Josiah Barnett against P. H. Kinney to recover the possession of certain goods and chattels mentioned in the complaint and for damages and costs. The case was submitted to the court for trial, a jury having been expressly waived, upon an agreed statement of facts, and the court made its findings of fact as follows: That on November 23, 1887, M. H. Lipman was a citizen of the United States and of the Territory of Utah, residing and doing business at Salt Lake City, and was possessed and the owner of real and personal property in Utah, and of certain personal property at Hailey, in Alturas County, Idaho; and that he was indebted to divers persons, (none of whom were then, or at the time of trial, citizens, residents and inhabitants of Idaho,) and was insolvent, and on that day duly made, executed and delivered to Barnett, as his assignee, a deed of assignment in writing, which was accepted by Barnett, who assumed the execution thereof; that by the assignment, Lipman sold, transferred, assigned and delivered to Barnett all his property, real and personal, wherever found, in trust, to take possession and convert the same into cash, and pay the necessary expenses, and then his creditors, according to certain classes named in the assignment, preferences being made thereby in favor of certain creditors, as against others, all being designated by classes; that on November 25, 1887, Barnett, as assignee, took actual possession of the personal property situated in Idaho, and on November 26, and before the property was taken by Kinney, filed the assignment for record in the proper office in Alturas County; and that Kinney had actual knowledge and notice in the premises. It was further found that the assignment "was and is valid by the laws of the Territory of Utah;" that Lipman was indebted to the St. Paul Knitting Works, a corporation organized and

existing under the laws of the State of Minnesota, the liability having been incurred by him as a citizen, resident and inhabitant of Utah, and in the transaction of his business there; that on November 26, 1887, and while Barnett was in actual possession, Kinney, who was sheriff of Alturas County, under a writ of attachment in favor of that corporation and against Lipman, took possession of the property; and that thereupon this action of replevin was commenced and the possession of the property delivered to Barnett, who had sold the same and retained the proceeds subject to the final disposition of the action. It was further found that prior to the taking of the property from Barnett by Kinney under the writ of attachment and after the assignment had been recorded, Kinney, as sheriff, had taken it from Barnett's possession under a writ of attachment issued at the suit of a firm located in Nebraska against Lipman, and it had been retaken from Kinney in an action of claim and delivery brought by Barnett against him, which action was still pending. It was also found that the goods had been shipped from Lipman's store in Utah in September, 1887, to Alturas County, and that Lipman from September, 1887, up to the time of making the assignment, had been doing business in Idaho in the running of a branch store at Hailey, in Alturas County; and that at the time of bringing this action defendant was wrongfully detaining the property from the possession of plaintiff.

The court found as conclusions of law that the assignment, a copy of which was annexed to the finding of facts, was a good and valid instrument, and conveyed title to the property in question; and that the plaintiff at the time of bringing the action and the trial was entitled to the possession of the property, and to judgment therefor, and for nominal damages and costs. Judgment having been entered, an appeal was prosecuted to the Supreme Court of the Territory, by which it was reversed, and the cause remanded to the District Court with instructions to enter judgment for the defendant. The record shows that the case had been tried in the District Court before the then Chief Justice of the Territory, and that a change had taken place in that office

when the hearing was had on appeal. Of the three members composing the Supreme Court, one was for reversal and another for affirmance, while the Chief Justice had been of counsel between the same parties in a case in the same District Court, but "with a different attaching creditor," and he stated that he had not participated in the discussion of the case, but, his associates having reached opposite conclusions, the disagreeable duty rested upon him "of breaking the dead-lock," which he did by concurring in the opinion for reversal. The majority opinion is to be found in 23 Pac. Rep. 922, and the dissent in 24 Pac. Rep. 624. The case was brought by appeal to this court.

Mr. Attorney General Miller and *Mr. C. S. Varian* for appellant.

Mr. William Stone Abert and *Mr. John W. Warner* for appellee.

The assignment, being in direct conflict with the Revised Statutes of Idaho, which prohibit preferences, (§ 5898,) was inoperative to pass title to property in that Territory. *Warner* v. *Jaffray*, 96 N. Y. 248; *Brown* v. *Smart*, 69 Maryland, 320, 329; *Ex parte Dickinson*, 29 So. Car. 453, 461; *Mason* v. *Stricker*, 37 Georgia, 262; *Paine* v. *Lester*, 44 Connecticut, 196; *Pierce* v. *O'Brien*, 129 Mass. 314; *Zipcey* v. *Thompson*, 1 Gray, 243; *Moore* v. *Church*, 70 Iowa, 208. The power of a State or Territory to pass such laws relating to insolvents is settled, (*Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18,) and the principle is well settled that where the *lex loci contractus* and the *lex fori* come into collision as to conflicting rights, the comity of nations must yield to the law of the land. *Walworth* v. *Harris*, 129 U. S. 355; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Milne* v. *Moreton*, 6 Binney, 353; *S. C.* 6 Am. Dec. 466; *Green* v. *Van Buskirk*, 5 Wall. 307; 7 Wall. 139.

The resident insolvent, under the law of Idaho, is not permitted to prefer any creditor in Idaho over any non-resident

creditor, and it would be unjust to concede the contention of the assignee, that a non-resident insolvent, doing business in Idaho, can make an assignment, giving preferences to non-residents over residents of the place where he carries on business, and where his property is also situated.

There can be no distinction in administering the law, and no preference can be given or right denied to the citizen of one State over the citizen of another State or Territory of the United States. *Green* v. *Van Buskirk*, 7 Wall. 139; *Brown* v. *Smart*, 69 Maryland, 327; *Hibernia Bank* v. *Lacombe*, 84 N. Y. 367, 385; *Paine* v. *Lester*, 44 Connecticut, 197; *Ex parte Dickinson*, 29 So. Car. 462.

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

The Supreme Court of the Territory held that a non-resident could not make an assignment, with preferences, of personal property situated in Idaho, that would be valid as against a non-resident attaching creditor, the latter being entitled to the same rights as a citizen of Idaho; that the recognition by one State of the laws of another State governing the transfer of property rested on the principle of comity, which always yielded when the policy of the State where the property was located had prescribed a different rule of transfer from that of the domicil of the owner; that this assignment was contrary to the statutes and the settled policy of Idaho, in that it provided for preferences; that the fact that the assignee had taken and was in possession of the property could not affect the result; and that the distinction between a voluntary and an involuntary assignment was entitled to no consideration.

Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicil of the owner, will be held to be valid in the courts of another country, where the property is situated and a different local rule prevails.

We had occasion to consider this subject somewhat in *Cole*

v. *Cunningham*, 133 U. S. 107, 129, and it was there said: "Great contrariety of state decision exists upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the states, the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicil of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual *situs* of the property when that is elsewhere than at the domicil of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

We have here a voluntary transfer of his property by a citizen of Utah for the payment of his debts, with preferences, which transfer was valid in Utah, where made, and was consummated by the delivery of the property in Idaho, where it was situated, and then taken on an attachment in favor of a creditor not a resident or citizen of Idaho. Was there anything in the statutes or established policy of Idaho invalidating such transfer?

Title XII of Part Second of the Revised Statutes of the Territory of Idaho, entitled "Of proceedings in insolvency," (Rev. Stats. Idaho, §§ 5875 to 5932,) provided that "no assign-

ment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors;" that creditors should share *pro rata*, "without priority or preference whatever;" for the discharge of the insolvent debtor upon compliance with the provisions of the title, by application for such discharge by petition to the District Court of the county in which he had resided for six months next preceding, with schedule and inventory annexed, giving a true statement of debts and liabilities and a description of all the insolvent's estate, including his homestead, if any, and all property exempt by law from execution. The act applied to corporations and partnerships, and declared that if the partners resided in different counties, that court in which the petition was first filed should retain jurisdiction over the case. Nothing is clearer from its various provisions than that the statute had reference only to domestic insolvents. As pointed out by Judge Berry in his dissenting opinion, the first section of the fifty-eight upon this subject, in providing that "every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities," demonstrates this. The legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho, belonging to citizens of other States or Territories, could not be applied to the payment of their debts unless they acquired a six months' residence in some county of Idaho, and went through its insolvency court.

The instrument in controversy did not purport to be executed under any statute, but was an ordinary common law assignment with preferences, and as such was not, in itself illegal. *Jewell* v. *Knight*, 123 U. S. 426, 434. And it was found as a fact that it was valid under the laws of Utah. While the statute of Idaho prescribed *pro rata* distribution without preference, in assignments under the statute, it did not otherwise deal with the disposition of his property by a debtor nor prohibit preferences between non-resident debtors and creditors through an assignment valid by the laws of the debtor's domicil. No just rule required the courts of Idaho, at the instance of a citizen of another state, to adjudge a trans-

fer, valid at common law and by the law of the place where it was made, to be invalid, because preferring creditors elsewhere, and, therefore, in contravention of the Idaho statute and the public policy therein indicated in respect of its own citizens, proceeding thereunder. The law of the *situs* was not incompatible with the law of the domicil.

In *Halsted* v. *Straus*, 32 Fed. Rep. 279, 280, which was an action in New Jersey involving an attachment there by a New York creditor as against the voluntary assignee of a New York firm, the property in dispute being an indebtedness of one Straus, a resident of New Jersey, to the firm, Mr. Justice Bradley remarked: "It is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void. But this law applies only to New Jersey assignments, and not to those made in other States, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a non-resident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by non-resident debtors. *Bentley* v. *Whittemore*, 4 C. E. Green, (19 N. J. Eq.) 462; *Moore* v. *Bonnell*, 2 Vroom (31 N. J. Law,) 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If Deering, Milliken & Co. were a New Jersey firm they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicil. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case, would be unreasonable and uncalled for."

In *May* v. *First National Bank*, 122 Illinois, 551, 556, the Supreme Court of Illinois held that the provision in the statute of that State prohibiting all preferences in assignments by debtors applied only to those made in the State, and not to those made in other States; that the statute concerned only domestic assignments and domestic creditors; and the court, in reference to the contention that, if not against the terms, the assignment was against the policy of the statute, said: "An assignment giving preferences, though made without the State, might, as against creditors residing in this State, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors — that it was the policy of the law that there should be an equal distribution in respect to them. But as the statute has no application to assignments made without the State, we cannot see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect to foreign creditors, and why non-residents are not left free to execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors."

In *Frank* v. *Bobbitt*, 155 Mass. 112, a voluntary assignment made in North Carolina and valid there, was held valid and enforced in Massachusetts as against a subsequent attaching creditor of the assignors, resident in still another State, and not a party to the assignment. The Supreme Judicial Court observed that the assignment was a voluntary and not a statutory one; that the attaching creditors were not resident in Massachusetts; that at common law in that State an assignment for the benefit of creditors which created preferences was not void for that reason; and that there was no statute which rendered invalid such an assignment when made by parties living in another State, and affecting property in Massachusetts, citing *Train* v. *Kendall*, 137 Mass. 366.

Referring to the general rule that a contract, valid by the law of the place where made, would be regarded as valid elsewhere, and stating that "it is not necessary to inquire whether this rule rests on the comity which prevails between different states and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses," the court said that the only qualification annexed to voluntary assignments made by debtors living in another State had been "that this court would not sustain them if to do so would be prejudicial to the interests of our own citizens or opposed to public policy." And added: "As to the claim of the plaintiffs that they should stand as well as if they were citizens of this State, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens nor opposed to public policy, no cause appears for pronouncing it invalid." And see, among numerous cases to the same effect, *Butler* v. *Wendell*, 57 Michigan, 62; *Receiver* v. *First National Bank*, 7 Stewart, (34 N. J. Eq. 450); *Egbert* v. *Baker*, 58 Connecticut, 319; *Chafee* v. *Fourth National Bank of New York*, 71 Maine, 514; *Ockerman* v. *Cross*, 54 N. Y. 29; *Weider* v. *Maddox*, 66 Texas, 372; *Thurston* v. *Rosenfield*, 42 Missouri, 474.

We do not regard our decision in *Green* v. *Van Buskirk*, 5 Wall. 307; 7 Wall. 139, as to the contrary. That case was fully considered in *Cole* v. *Cunningham*, *supra*, and need not be reëxamined. The controversy was between two creditors of the owner of personalty in Illinois, one of them having obtained judgment in a suit in which the property was attached and the other claiming under a chattel mortgage. By the Illinois statute such a mortgage was void as against third persons, unless acknowledged and recorded as provided, or unless the property was delivered to and remained with the mortgagee, and the mortgage in that case was not acknowledged and recorded, nor had possession been taken. All parties were citizens of New York, but that fact was not

considered sufficient to overcome the distinctively politic and coercive law of Illinois.

In our judgment, the Idaho statute was inapplicable and the assignment was in contravention of no settled policy of that Territory. It was valid at common law, and valid in Utah, and the assignee having taken possession before the attachment issued, the District Court was right in the conclusions of law at which it arrived.

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

Judgment reversed.

In re HAWKINS, Petitioner.

ORIGINAL.

No number. Submitted January 23, 1893. — Decided January 30, 1893.

This court cannot, by mandamus, review the judicial action of a Circuit Court of Appeals in refusing to receive further proofs offered by an appellant, in an admiralty cause pending in that court on appeal.

THE petitioner libelled the yacht Lurline and claimant in the District Court of the United States, for the Eastern District of New York, to enforce a state law lien under a maritime contract for repairs. Judgment having been rendered in favor of the petitioner, the claimant appealed to the Circuit Court of Appeals for the Second Circuit. Upon the filing of the briefs of counsel, it appeared that the claimant proposed to contend that the value of the work and materials furnished by the libellant under the contract had not been proved. Thereupon libellant's proctor gave notice to take testimony on these points and did take such testimony. The counsel for claimant moved to suppress these depositions, which motion was granted and the following opinion filed:

Per Curiam. Motion granted, for the reason that the testimony taken on deposition in this court was available to libel-

lant on the trial in the District Court, witness and books being both present there; that it does not appear he was prevented from presenting such testimony except by his own choice; that he was as well informed as to its materiality under the issues when he closed his case as he is now, and was expressly notified by respondent's motion to dismiss, that the latter contended libellant's proof as to the amount of labor performed was insufficient.

Thereupon application was made here for leave to file a petition for a writ of mandamus to the Circuit Court of Appeals, directing the judges to receive the depositions, and to give them the consideration which in law they were entitled to receive, according to the practice of courts of admiralty.

Mr. George A. Black, for the petitioner, contended that the act of the Circuit Court of Appeals and of the Judges thereof in suppressing the depositions was unlawful in that, by the decisions of this court in *The Lucille*, 19 Wall. 73, *The Charles Morgan*, 115 U. S. 70, and *The Hesper*, 122 U. S. 256, an admiralty appeal is a new trial, and by Section 862 of the Revised Statutes of the United States, and Admiralty Rules 49 and 50 of this court, the right on such new trial to give new proofs is secured to petitioner; and that said statute, rules and decisions remain unrepealed and in full force, and are binding upon said Circuit Judges and said Circuit Court of Appeals and had been disregarded by them.

With the petition the following paper was also presented, entitled "Brief of *Amici Curiæ* on petition for mandamus:"

"The undersigned, advocates in admiralty, practising as such in the Second Circuit, appear as *Amici Curiæ* in the above proceeding, and respectfully show to this court:

"That from the foundation of the judicial system of the United States until within a few years back, under the practice on appeal in admiralty cases from the District to the Circuit Courts, the appellant had the right to take new testimony to be used on his appeal, when he had in his petition of appeal stated that he desired to have his appeal heard on new

evidence. That such right to take new testimony on appeal was according to the ancient practice of the admiralty, and was recognized by the Supreme Court, which made rules regulating the mode in which such new testimony should be taken, which rules have never been repealed by the Supreme Court. That the statute creating the new Circuit Court of Appeals merely provided for a review of decrees of the District Court by appeal, which, of course, in admiralty cases, must be an admiralty appeal, which has always been held to be a new trial.

"That the Circuit Court of Appeals in the Second Circuit soon after its organization . . . adopted the following rules:

"'RULE 1. The appeal shall be heard on the pleadings and evidence in the District Court unless the appellate court on motion otherwise order.'

"'RULE 7. Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defence or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party.'

"'RULE 8. If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.'

"That the effect of these rules is that the right to take new testimony on appeal, which the parties to an admiralty suit have always had, has been taken away, and for it has been substituted *a right to apply* to a judge of the Circuit Court of Appeals *for permission* to take new testimony, which he may grant or refuse, at his discretion.

"That, in the case of *Hawkins* v. *The Yacht Lurline*, the Circuit Court of Appeals has ordered certain depositions which had been taken to be used on the trial of the appeal to be suppressed.

"That the undersigned have read the brief of the advocate

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for the appellee in answer to the motion made to suppress such depositions, and that said brief seems to them to show that the right of the benefit of new testimony on the trial of an appeal in admiralty has been given by statute and the rules of the Supreme Court.

"That, if such statutory right existed, it does not seem to be within the proper scope of the power of the Circuit Court of Appeals to take it away by a rule governing its own practice.

"We therefore request that the Supreme Court will examine into the question, and will determine whether in admiralty appeals the parties have the right to offer upon the trial of the appeal such evidence (whether new evidence or evidence taken in the District Court) as they shall see fit, or whether the taking of new evidence is a mere privilege, to be granted or not by the Judge of the Circuit Court of Appeals in his discretion.

"And that the Supreme Court, if it shall determine that the parties have such a right, may take such measures, by a mandamus or otherwise, as shall secure such right.

"Robert D. Benedict, of Benedict & Benedict.
"Wilhelmus Mynderse, of the firm of Butler, Stillman & Hubbard, 54 Wall St., New York.
"Geo. Bethune Adams, of Wilcox, Adams & Green, 69 Wall St., New York.
"Wm. W. Goodrich, of Goodrich, Deady & Goodrich.
"Joseph F. Mosher, of Carpenter & Mosher, 62 Wall St., N. Y.
"Everett P. Wheeler, of Wheeler, Cortis & Godkin.
"Harrington Putnam, of the firm of Wing, Shoudy & Putnam.
"Sidney Chubb.
"Henry Galbraith Ward, of Robinson, Biddle & Ward.
"William D. Guthrie, of Seward, Guthrie & Morawetz.
"David Willcox, of Bristow, Peet & Opdyke.
"Frank D. Sturges, of the firm of Owen, Gray & Sturges.
"Wm. G. Choate, of the firm of Shipman, Larocque & Choate.
"Wm. D. Shipman, of Shipman, Larocque & Choate.

"Wm. G. Wilson, of Wilson & Wallis.
"Henry T. Wing, of Wing, Shoudy & Putnam.
"J. Langdon Ward, of North, Ward & Wagstaff.
"Mark Ash, of Alexander & Ash.
"James J. Macklin, of Stewart & Macklin.
"F. R. Coudert, of Coudert Brothers.
"Treadwell Cleveland, of Evarts, Choate & Beaman.
"Lorenzo Ullo, of Ullo, Ruebsamen & Cochran.
"Lewis Cass Ledyard, of Carter & Ledyard.
"Wm. Allen Butler, of Butler, Stillman & Hubbard."

Mr. John Murray Mitchell opposing.

THE CHIEF JUSTICE: This is an application on behalf of John P. Hawkins for leave to file a petition for a writ of mandamus to the Circuit Court of Appeals for the Second Circuit and to the judges thereof, commanding them to receive and duly consider certain depositions or further proofs taken by petitioner on appeal in an action pending in that court wherein he is the libellant and appellee. The depositions in question were suppressed by the court on motion and for reasons given.

We cannot by mandamus review the judicial action thus had in the exercise of legitimate jurisdiction. *In re Morrison, petitioner*, *ante*, 14; *Ex parte Morgan*, 114 U. S. 174; *Ex parte Burtis*, 103 U. S. 238; *Ex parte Schwab*, 98 U. S. 240.

Leave to file the petition is

Denied.

THORINGTON *v.* MONTGOMERY.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 1080. Submitted January 23, 1893. — Decided February 6, 1893.

The Fifth Amendment to the Constitution operates exclusively in restriction of Federal power, and has no application to the States.

A controversy as to the good faith of a transaction by which the title to the property which forms the subject of this litigation was transferred to the plaintiff in error is *held* to involve no Federal question.

Opinion of the Court.

THIS was a motion to dismiss or affirm. The case is stated in the opinion.

Mr. W. Hallett Phillips and *Mr. H. C. Semple* for the motion.

Mr. John M. Chilton opposing.

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

The opinion of the Supreme Court of Alabama in this case is given in the record, and reported in 10 S. Rep. 634, and refers to *Winter* v. *City Council of Montgomery*, 79 Alabama, 481; *Thorington* v. *Montgomery*, 82 Alabama, 591; and *Thorington* v. *Montgomery*, 88 Alabama, 548. It appears that a decree was rendered in favor of the city of Montgomery and against Mary E. Winter and others by the chancery court at Montgomery, in August, 1884, for taxes due for previous years on six lots of land in the city, and a sale directed if the amount were not paid, which decree was affirmed December 10, 1885; that in October, 1885, certain of the lots were ordered to be sold for delinquent taxes for the year 1884; and that in November, 1885, three of the lots were sold under the decree and bought in in the name of Mrs. Thorington, Mrs. Winter's daughter, and the taxes for 1884, interest, charges and costs were paid. On January 25, 1886, Mrs. Thorington filed a bill in the chancery court seeking to enjoin the sale of the three lots, with the others, by the city, to satisfy the total sum of unpaid taxes ascertained by the decree. The bill was dismissed, but on appeal the decree was reversed, and, the case having been remanded, the bill was again dismissed. On a second appeal, the decree was again reversed on the ground that the effect of the purchase by Mrs. Thorington under the tax sale was to cut off all prior liens for taxes for the years preceding 1884; but it was observed in the opinion that if it were shown that the money with which the lots were purchased was not, in fact or legal effect, Mrs. Thorington's, or

that there was collusion or a secret trust for the taxpayer, then the doctrine of estoppel would not apply. The cause having again been heard by the chancery court, the bill was again dismissed, and on the third appeal by Mrs. Thorington the decree was affirmed by the Supreme Court, to which judgment this writ of error was sued out.

We cannot find that any Federal question was raised in the proceedings in the chancery court. The only error assigned in the Supreme Court was that "the court below erred in rendering the final decree made by it dismissing appellant's bill and in overruling objections to testimony." It is stated in the writ of error that in the cause "between Sallie G. Thorington, appellant, and the City Council of Montgomery, appellee, wherein was drawn in question appellant's right under Article V of the amended Constitution of the United States to have the testimony of her, the said Sallie G., which had been taken under a duly issued commission in that behalf, read in her behalf on the trial of the said cause, and the decision was against her right and claim to be so heard, a manifest error hath happened, etc."

The Fifth Amendment operates exclusively in restriction of Federal power, and has no application to the States, but in the brief for plaintiff in error it is said that the Fourteenth Amendment was violated in her case in respect of the provision: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The controversy seems to have been as to the good faith of the transaction by which the title to the property was transferred to Mrs. Thorington at the tax sale, it being contended by the city that the purchase was a mere device to evade the indebtedness for taxes, and that the property was still chargeable with such indebtedness. This was the conclusion of the chancery court, and its judgment was affirmed by the Supreme Court. We find from the record, the opinion of the Supreme Court and the decision of the chancellor, that at the April term, 1890, of the chancery court a motion and affidavit on behalf of plaintiff were filed, April 14, 1890, for an order to

compel the city to produce in court certain testimony alleged to have been taken by respondent, "or, if that may not be consistently and legally done, that reasonable opportunity be given complainant to further justify her case herein by allowing complainant reasonable opportunity to establish the said testimony so taken for use in complainant's behalf in this cause." The cause was not tried at that term, nor did it appear that any action was taken on the motion or that the attention of the court was called to it. The case was submitted to the chancellor, October 15, 1890, at the October term, and on October 16, when the argument had been nearly completed, an application was made that the submission be set aside in order that the motion made at the last term of the court might be considered. It was stated by the chancellor that at a former time counsel had asked the court to instruct the commissioner to return a deposition he had taken, to him, and the commission to the court as having been improperly issued, and that the chancellor instructed the commissioner to take whatever action as to the deposition he might choose, but in no event to permit either party to the suit to examine it. The chancellor held that the deposition was taken improperly, and that it was the right of complainant's counsel to ask the court that it should not be subjected to the scrutiny of defendant's counsel; but that if it were then before the court it could not be used for any purpose unless in the meantime the deposition of the witness had been subsequently taken, and the former deposition should be offered to contradict any of the statements made in the latter. The chancellor added: "It cannot be disputed that if any one desired to take action in the matter to get the deposition of either of these witnesses there has been ample time to have done so. The submission in this cause was made without any application for a continuance in order to get the deposition of these witnesses, one of whom is the complainant. The complainant has never taken any steps during the time this case has been continued from year to year to get her own or her mother's deposition in the case. Under these circumstances the motion to set aside the submission on that ground is denied."

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As to this matter, the Supreme Court held that there was nothing which the court could review; that no ruling was shown to have been had or asked on the motion in April, 1890, although the cause was continued; and that the application made October 16, 1890, was addressed to the court's discretion, and could not be revised.

This decision upon a matter of practice under the State procedure did not draw in question any right complainant had under the Constitution or laws of the United States. It affords no basis for the contention that her right to be heard in her own behalf was denied, and we are of opinion that not only was no Federal question brought to the attention of the State courts, but that none such necessarily arose or was decided. *Writ of error dismissed.*

ARNOLD *v.* UNITED STATES.

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

No. 825. Argued January 13, 16, 1893. — Decided February 6, 1893.

Knit woollen undershirts, drawers and hosiery are subject to duty as "wool wearing apparel," under paragraph 396 of section 1 of the act of October 1, 1890, 26 Stat. 567, 597, c. 1244, and not as "knit fabrics made on frames," under paragraph 392 of the same act.

THE appellants imported into the port of New York, by the steamship Alaska, several cases containing knit woollen undershirts, drawers and hosiery. The collector assessed duty on them, under paragraph 396 of § 1 of the tariff act of October 1, 1890, 26 Stat. 567, 597, c. 1244, as "wool wearing apparel." The appellants protested, claiming that the articles were dutiable only under paragraph 392 of the same act, as "knit fabrics made on frames." On this protest, the board of general appraisers, reversing the decision of the collector, held that the merchandise should have been classified as contended by the importers, under paragraph 392, and not under paragraph 396. Thereupon the collector made application to the United States Circuit Court for the Southern District of New York,

Counsel for Appellees.

for a review of the matter. Additional testimony was taken as authorized by the statute, and, on hearing, that court reversed the decision of the board of general appraisers and sustained the ruling of the collector. 46 Fed. Rep. 510. From this decision appellants appealed to this court. Paragraphs 396 and 392 are as follows:

"396. On clothing, ready made, and articles of wearing apparel of every description, made up or manufactured wholly or in part not specially provided for in this act, felts not woven, and not specially provided for in this act, and plushes and other pile fabrics, all the foregoing, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals the duty per pound shall be four and one-half times the duty imposed by this act on a pound of unwashed wool of the first-class, and in addition thereto sixty per centum ad valorem."

"392. On woollen or worsted cloths, shawls, knit fabrics and all fabrics made on knitting machines or frames, and all manufactures of every description made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, not specially provided for in this act, valued at not more than thirty cents per pound, the duty per pound shall be three times the duty imposed by this act on a pound of unwashed wool of the first-class, and in addition thereto forty per centum ad valorem; valued at more than thirty, and not more than forty cents per pound, the duty per pound shall be three and one-half times the duty imposed by this act on a pound of unwashed wool of the first-class, and in addition thereto forty per centum ad valorem; valued at above forty cents per pound, the duty per pound shall be four times the duty imposed by this act on a pound of unwashed wool of the first-class, and in addition thereto fifty per centum ad valorem."

Mr. Stephen G. Clarke and *Mr. William B. Coughtry* for appellants.

Mr. Assistant Attorney General Maury for appellees.

Opinion of the Court.

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

The question in this case is whether knit woollen shirts, drawers and hosiery come within the enumeration of "clothing, ready made, and articles of wearing apparel of every description, made up or manufactured wholly or in part . . . of wool," as provided in paragraph 396; or of "knit fabrics, and all fabrics made on knitting machines or frames, and all manufactures of every description made wholly or in part of wool," as found in paragraph 392. In the original brief filed by counsel for appellants, it is conceded that either enumeration, in the absence of the other, might cover these goods; though, in the reply-brief, it is contended that in no proper sense of the term are the appellants' importations wearing apparel; and in support thereof definitions are quoted from several dictionaries, in which the word "apparel" is defined as "external clothing," "external habiliments or array," and "a person's outer clothing." As against this, counsel for the government also refers us to dictionaries, in which the term "wearing apparel" is defined as "garments worn, or made for wearing; dress in general;" and the noun "wearing," as "that which one wears; clothes; garments." But it is unnecessary to search or compare the dictionaries. The term "wearing apparel" is not an uncommon one in statutes, and is used in an inclusive sense as embracing all articles which are ordinarily worn — dress in general. Indeed, in this very statute, paragraph 752, in respect to articles exempt from duty, names "wearing apparel and other personal effects (not merchandise) of persons arriving in the United States." Obviously, the term is here used as covering all articles of dress; while "personal effects" refer to other matters of personal baggage not used as clothing. And it cannot be believed that a person coming into the United States is permitted to bring in his outer clothing free from duty, while his underclothing is subject to duty and seizure for the non-payment thereof. So in exemption statutes is frequently found the term "wearing apparel." Thus, for

instance, in the General Statutes of Kansas, page 474, c. 38, sec. 4, is this description of exempt property: "First, the wearing apparel of the debtor." And in the late bankruptcy act "the wearing apparel of the bankrupt" is excepted from the operation of the assignment. Rev. Stat. sec. 5045. No one would suppose that under such statutes a man's pantaloons and shoes were exempt, while his drawers and socks were not. Not only is that the general sense in which the term is used in statutes, but also the very form of the language here used indicates an intent to compass within the enumeration every article which is ordinarily worn or recognized as an article of dress. The language is, "clothing, ready made, and articles of wearing apparel of every description." The words "clothing, ready made," would include coats, pants, vests and overcoats, at least; and the sweeping term added thereafter, "articles of wearing apparel of every description," was obviously meant to reach out and include everything that one wears. We think that the concession made by appellants' counsel in their principal brief is beyond question.

Each paragraph, as will be noticed, contains the words "not specially provided for in this act;" and the contention of appellants is, that the enumeration in paragraph 392 is more specific, and that therefore it should control, referring, in this connection, to *Solomon* v. *Arthur*, 102 U. S. 208, 212, and *Hartranft* v. *Meyer*, 135 U. S. 237. But we think that the reverse is true, and that the description in 396 is more of a special enumeration than that in 392. Clothing and articles of wearing apparel are more specific than cloths and knit fabrics. Out of cloths and knit fabrics clothing and wearing apparel are made. The latter are included within the former, while the former are not included within the latter. So, if the decisive matter was the more special enumeration, we think 396 would be preferred. And in this connection may be noticed the relative rate of duty, which is higher for the articles in 396 than for those in 392. The idea which runs through this statute is well known to be that of protection to our manufactures. As the duty prescribed by 396 exceeds that prescribed by 392, it suggests that the articles named in

396 have been subjected to an additional process, which is to be protected by an increase of duty. And so it is, that paragraph 392 is apparently intended to provide the duty for what may be considered "piece-goods," manufactured material; while that part of paragraph 396 which we have been considering, and which stands, as it were, correlated to paragraph 392, does not refer to manufactured material, but that material carried by an additional process of manufacturing into the condition of manufactured articles. It is true that we find shawls named with cloths and fabrics in paragraph 392, and they are manufactured articles; yet they closely resemble manufactured material, and are little more than piece-goods cut into sizes suitable for use. It is also true that paragraph 396 names felts, plushes, etc., in addition to clothing and wearing apparel, and they are manufactured material rather than manufactured articles; but the articles embraced within the terms clothing and wearing apparel are put in a class by themselves, and separated from the other articles named in the paragraph by the expression "not specially provided for in this act," and it may well be that Congress thought that the manufacture of felts, plushes, etc., required so much more labor than that of cloth and knit fabrics, as to justify subjecting them to the higher duty of manufactured articles, like clothing and wearing apparel.

But more significant is the change made in the provisions of the tariff of 1890 from those in that of March 3, 1883, 22 Stat. 488, c. 121. A paragraph of that tariff act (22 Stat. 509,) is as follows:

"Clothing, ready made, and wearing apparel of every description, not specifically enumerated or provided for in this act, and balmoral skirts, and skirting, and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the alpaca, goat or other animals, made up or manufactured wholly or in part by the tailor, seamstress or manufacturer, except knit goods, forty cents per pound, and in addition thereto, thirty-five per centum ad valorem."

Knit goods, it will be perceived, are excepted from the

description of "clothing, ready made, and wearing apparel of every description." In *Brown* v. *Maryland*, 12 Wheat. 419, 438, Chief Justice Marshall recognized as "a rule of interpretation, to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made." Applying that rule it follows that but for the exception the general description of "clothing, ready made, and wearing apparel" would include knit goods; and when by the legislation of 1890 this exception was stricken out, it is very persuasive that Congress understood and intended that no articles of wearing apparel should be excepted from the enumeration of paragraph 396, because they were knit goods or fabrics.

And again, there is some significance in the substitution of the term "knit fabrics" in the act of 1890, for "knit goods," in that of 1883. For while they are frequently interchangeable, it would seem as though "knit goods" more appropriately described manufactured articles; while "knit fabrics" referred more especially to manufactured material, piece goods. Thus in the subsequent description, in paragraph 396, are these words, "plushes and other pile fabrics." Obviously they refer to manufactured material rather than manufactured articles. And in this connection it is well to notice that, according to the testimony, there are goods known to the trade which are piece goods, and which are fabrics made on knitting machines or frames. One witness, John D. Ashwell, manager of the Norfolk and New Brunswick Hosiery Company, a company dealing in undershirts, drawers and hosiery, and who had been connected with that company for eighteen years, testified that he had never heard such articles called "knit fabrics," saying: "I never had a man ask me for knit fabrics in our line of business that I know of. Had he written to me for knit fabrics, I should have told him that we did not have them, that we did not sell them, and sent him to parties who did make them." The change of the term, therefore, strengthens the conclusion deduced from other considerations.

Our conclusion, therefore, is that there was no error in the decision of the Circuit Court, and it is *Affirmed.*

SCHUNK *v.* MOLINE, MILBURN AND STODDART COMPANY.

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

No. 1153. Submitted January 9, 1893. — Decided February 6, 1893.

A statute of the State of Nebraska authorizes a creditor in certain cases to bring an action on a claim before it is due and to have an attachment against the property of the debtor. A citizen of Ohio brought an action in the Circuit Court of the United States for the district of Nebraska against a citizen of Nebraska, to recover $530.09 which was overdue, and $1664.04 which was to become payable in the following month, and an attachment was issued under the statute against the defendant's property. The Circuit Court sustained its jurisdiction and gave judgment in plaintiff's favor for both sums. *Held*,

(1) That the Circuit Court had jurisdiction, notwithstanding the fact that a part of the sum sued for was not due and payable when the action was commenced, and the amount actually due and payable was less than $2000;

(2) That if there were any error in the decision, on which this court expresses no opinion, the defendant, if desiring to have it reviewed should have taken the case to the Circuit Court of Appeals.

On the 14th of November, 1891, defendant in error commenced a suit against B. A. Schunk in the Circuit Court of the United States for the District of Nebraska on several notes, some of which, amounting to $530.09, were past due, while the others, amounting to $1664.04, were not then due. The prayer of the petition was in these words:

"Wherefore the plaintiff prays judgment against the said defendant for the said sum of $530.09, with interest thereon from the respective dates of the notes which are now past due, together with the further sum of $1664.04, which will become due, and payable the 1st and 8th days of December, 1891, with interest thereon from the respective dates of said promissory notes, and the plaintiff prays that it recover a judgment for all of its costs paid out and expended in this action, and

plaintiff further prays for a judgment against said defendant for all reasonable costs of collection of the above-mentioned indebtedness, and for a judgment including plaintiff's attorney's fees in the sum of $250."

Under the provisions of the state statutes, an attachment was issued against the property of the defendant. The section authorizing this is in these words:

"Sec. 237. A creditor may bring an action on a claim before it is due, and have an attachment against the property of the debtor, in the following cases: *First.* Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts. *Second.* Where he is about to make such sale, conveyance, or disposition of his property, with such fradulent intent. *Third.* Where he is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts." Cobbey's Consolidated Statutes, 1891, p. 1003; Compiled Stats. Neb. 1891, p. 884.

Subsequent sections prescribe the proceedings to be pursued, the regularity of which in this case is not challenged. A demurrer to the petition on the ground, among others, that no cause of action was stated was overruled, a motion to discharge the attachment denied, and judgment rendered on May 21, 1892, for the sum of $2347.50, together with $100 as an attorney's fee. To reverse this judgment the defendant below, as plaintiff in error, has sued out a writ of error from this court.

Mr. Walter J. Lamb, *Mr. Arnott C. Ricketts* and *Mr. Henry H. Wilson*, for plaintiff in error.

An attachment upon a claim not yet due is a different thing from an attachment upon a claim already due. In the former the attachment is an original process; in the latter an ancillary process, arising out of the jurisdiction over the principal cause of action. Where jurisdiction has been obtained over a cause of action on a claim already due, it is in no way affected by

the success or failure of the attachment proceeding. That proceeding is merely ancillary to the principal case, and the court still exercises its jurisdiction over the principal case regardless of the fate of the attachment proceeding. It was clearly this ancillary proceeding, in no way affecting the original jurisdiction of the court, that must have been contemplated by section 915 of the Revised Statutes. It is, however, entirely different when an attachment is issued upon a demand before due. There the court has no jurisdiction to hear and determine the principal case except by virtue of the jurisdiction obtained by the seizure of the property. There the original and substantial jurisdiction is the power to attach and sequester the defendant's property and to hold it to answer the plaintiff's demand when the same shall become due. In such a proceeding, the right to maintain the action at all rests wholly upon the success of the attachment proceeding. No suit can be maintained in any court upon such a demand under the Nebraska statute except by virtue of the seizure of the property. *Green* v. *Raymond*, 9 Nebraska, 295.

In the event that the attachment proceedings are wrongfully brought and on motion the attachment is dissolved, the court loses jurisdiction over the whole matter and cannot enter judgment on the claim after it becomes due if it was not due at the commencement of the suit. In other words, in this class of attachments the jurisdiction over the claim, not yet due, is incidental and ancillary to the original and independent jurisdiction to issue the attachment, seize and sequester the property. *Pierce* v. *Myers*, 28 Kansas, 364. *Gowan* v. *Hansen*, 55 Wisconsin, 341.

It will be noticed that sec. 915 of the Revised Statutes of the United States restricts remedies by attachment to "common law causes," while the Nebraska code authorizes such an attachment in the state court in any civil action, whether it be at common law, in equity, or founded upon a statute. The Federal statute cannot be held to carry into Federal jurisprudence the whole state law of attachments. At common law an action upon a claim not yet due was unknown. No suit could be maintained except upon a present obligation to pay.

This action, being a purely statutory proceeding, not primarily to liquidate a demand about which a controversy has arisen, but to seize and hold defendant's property to answer a claim to mature in the future about which no controversy has or could have yet arisen, does not come within the class of "common law causes" mentioned in Rev. Stat. § 915. Strictly speaking, it is not an action on the debt at all but a statutory proceeding to seize and hold property till a cause of action arises. That being the nature of this proceeding, the Circuit Court acquired no jurisdiction over it, and had no power to order the seizure of such property in a case where it had no jurisdiction of the subject matter without such seizure. The jurisdiction must exist in order to give the power to make the seizure. Such jurisdiction cannot be founded upon the seizure. The state, and not the Federal legislature, has conferred the jurisdiction to issue an original attachment, and the state legislature has power to confer it upon the State but not upon the national tribunals.

Mr. John L. Webster, *Mr. Warren Switzler* and *Mr. James McIntosh* for defendant in error.

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

In this case the only question that can be considered is, under section 5 of the Court of Appeals act of March 3, 1891, 26 Stat. 826, c. 517, that of the jurisdiction of the Circuit Court. *McLish* v. *Roff*, 141 U. S. 661.

The errors assigned are, first, in overruling the demurrer; second, in holding that the court had jurisdiction to seize and sequester the property to secure the payment of a debt not yet due; third, in holding that it had jurisdiction to issue an attachment upon a demand not yet due; and, fourth, in allowing an attorney's fee. Of course, the latter matter presents no question of jurisdiction.

With respect to the other assignments, the plaintiff was a corporation created by and a citizen of the State of Ohio, and

the defendant a citizen of Nebraska. The jurisdiction of the Circuit Court was, therefore, invoked on the ground of diverse citizenship. By the act of March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, jurisdiction is given to the Circuit Courts over controversies "between citizens of different States, in which the matter in dispute exceeds" the sum or value of two thousand dollars. The claim of the plaintiff was to recover $2194.13 and interest. The right to recover this, or any part thereof, was challenged by the demurrer.

In *Gaines* v. *Fuentes et al.*, 92 U. S. 10, 20, this court said: "A controversy was involved, in the sense of the statute, whenever any property or claim of the parties capable of pecuniary estimation was the subject of litigation and was presented by the pleadings for judicial determination." *Hilton* v. *Dickinson*, 108 U. S. 165.

Within the letter of the statute there was, therefore, a controversy between citizens of different States, in which the matter in dispute was over the sum or value of two thousand dollars.

It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim which was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defence to the suit for at least the amount not yet due, yet the fact of a defence, and a good defence, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the Circuit Court would have jurisdiction? There would be presented a claim to recover the $2500; and

whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defence to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defence will be presented by the defendant, or, if presented sustained by the court? We do not mean that a claim, evidently fictitious, and alleged simply to create a jurisdictional amount, is sufficient to give jurisdiction. In *Bowman* v. *Chicago &c. Railway*, 115 U. S. 611, the damages as originally stated in the declaration were $1200. By amendment they were raised to $10,000; but it being evident that the increase was simply to give this court jurisdiction on error, and not because there was really a claim for any such damages, the case was dismissed for want of jurisdiction. The authorities on this question are collected in the opinion of Chief Justice Waite; and it may be laid down as a general proposition, that no mere pretence as to the amount in dispute will avail to create jurisdiction. But here there was no pretence. The plaintiff in evident good faith, and relying upon the express language of a statute, asserted a right to recover over $2000; and that its claim was not merely specious, is shown by the fact that after a contest it did recover a judgment for the full amount that it claimed. A case much in point is that of *Upton* v. *McLaughlin*, 105 U. S. 640, 644. That was a suit brought by an assignee in bankruptcy more than two years after the cause of action accrued, and it was claimed that the trial court had no jurisdiction, because of a provision of section 5057 of the Revised Statutes of the United States, 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." But it was held that the court did have jurisdiction, and this, notwithstanding sections 55 and 57 of the Code of Civil Procedure of Wyoming, the Territory in which that litigation took place, authorized

a defendant to demur to the petition when it appeared upon its face either that the court had no jurisdiction or that the petition did not state facts sufficient to constitute a cause of action, and also provided that these objections were not waived by not taking them by either demurrer or answer. Speaking for the court, Mr. Justice Blatchford said: "It is contended that a petition which shows upon its face that the cause of action is barred by a statute of limitation, is a petition which does not state facts sufficient to constitute a cause of action; and that that objection, though not taken by demurrer or answer, may be taken at any time. But we are of opinion that the statutory provisions referred to cannot properly be construed as allowing the defence of a bar by a statute of limitation to be raised for the first time in an appellate court, even though the petition might have been demurred to as showing on its face that the cause of action is so barred, and thus as not stating facts sufficient to constitute a cause of action." In other words, it was held that although there was a perfect defence apparent upon the face of the petition, yet the court had jurisdiction — *i.e.*, the right to hear and determine; and further, in that case, that the defence was not available when suggested for the first time in the appellate court. So, here, the Circuit Court had jurisdiction, because the amount claimed was over two thousand dollars; and although it appeared upon the face of the petition that a part of the claim was not yet due, still the court had jurisdiction — the right to hear and determine whether this matter constituted a good defence to any part of the amount claimed.

But it is said that the plaintiff, in a Federal court, cannot avail himself of the right given by a state statute, to attach for a claim not yet due; that state statutes can confer no jurisdiction on the Federal courts; and that, therefore, the Circuit Court had no jurisdiction to issue the attachment in this case. Even if it were conceded that such contention were well founded, (and we express no opinion in that matter,) the result would not be as claimed, that the Circuit Court was ousted of all jurisdiction. It would be simply an instance in

which a court having jurisdiction gave to a party greater relief than he was entitled to. Surely, the court, the matter in dispute being over two thousand dollars, and therefore a controversy within its jurisdiction, has a right to hear and determine, in the exercise of jurisdiction, whether the plaintiff was entitled to this extraordinary relief. If it be conceded that it erred in granting such relief, it would be simply a matter of error, and not one of jurisdiction.

But was it error? Section 915, Revised Statutes, provides that "in common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such Circuit or District Courts may, from time to time, by general rules, adopt such state laws as may be in force in the States where they are held in relation to attachments and other process: *Provided*, That similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

It is sufficient to say that this section of the statute makes it clear that a question was presented worthy at least of the consideration of the Circuit Court, and whose determination, even though erroneous, was not sufficient to oust the court of jurisdiction.

Unquestionably, the Circuit Court had jurisdiction; and if the defendant sought to have any matter of error considered, it should have taken the case to the Circuit Court of Appeals.

Judgment affirmed.

Mr. Justice Field dissented.

STANLEY *v.* SCHWALBY.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 1092. Submitted January 6, 1893. — Decided February 6, 1893.

For purposes of jurisdiction there is no distinction between suits against the government directly, and suits against its property.

Where property of the United States is involved in a litigation to which they are not technically parties under authority of an act of Congress, the attorney for the United States may intervene by way of suggestion, and in such case the court will either stay the suit or adjust its judgment according to the rights disclosed on the part of the government.

United States v. *Lee*, 106 U. S. 196, distinguished from this case.

When the United States become a party defendant to an action brought by a citizen the bar of the statute of limitations is a valid defence, if set up and maintained.

The defence of adverse possession may be set up by the United States in an action to try title to real estate, and, if supported by the proof, is a valid defence.

When an officer of the United States, in possession under their authority of real estate claimed by them, is sued in a state court in trespass to try title to the real estate, and sets up that claim and that authority as a defence in the action, an adverse judgment in the highest court of the State draws in question the validity of an authority exercised under the United States, and gives this court jurisdiction to review that decision on writ of error.

This was an action of trespass to try title, brought February 23, 1889, in the District Court of Bexar County, Texas, against David S. Stanley and three other defendants, by Mary U. Schwalby, whose husband, J. A. Schwalby, was afterwards made a party plaintiff, to recover a certain parcel or lot of land in the city of San Antonio. Mrs. Schwalby claimed title to one-third of the lot, as one of the three heirs of her father, Duncan B. McMillan, deceased; and subsequently one Joseph Spence, Jr., intervened and asserted title to one-third of the lot through a conveyance made to him by Duncan W. McMillan, another of said heirs. Judgment of possession of the whole lot was prayed, upon an averment that defendants entered without right or title.

Statement of the Case.

The land in question was part of a military reservation of the United States, and was used and occupied as a military post, and David S. Stanley and his codefendants were officers of the army of the United States, holding and occupying the land under authority of the United States. They pleaded not guilty, and specially that they held lawful possession of the property as officers and agents of the United States, which had had title and right of possession, under conveyance duly recorded, since the year 1875, as innocent purchasers for value without notice; and also the three-year, the five-year, and the ten-year statutes of limitation of Texas, and a claim for allowance for permanent and valuable improvements.

The United States District Attorney appeared for the United States, acting, as he alleged, "by and through instructions from the Attorney General of the United States," and joined on behalf of the United States in the pleas of the other defendants.

The District Court being of opinion that the United States could not set up the statute of limitations, whether for three, five, or ten years, or otherwise, the pleas of the United States to that effect were ordered to be stricken out.

On the trial evidence was adduced on both sides bearing upon the title and the purchase of the property by the United States and the value of the improvements. It appeared that one Dignowity was the common source of title, and had executed a statutory warranty deed of the lot in controversy to Duncan B. McMillan, dated and acknowledged May 9, 1860, but not recorded until September 30, 1889; that McMillan, then a widower, died February 5, 1865, leaving three children him surviving, of whom plaintiff, Mary U., was born September 11, 1848, and married J. H. Schwalby, January 18, 1871; and Duncan W., was born November 2, 1850, and conveyed to Joseph Spence, Jr., the intervenor, March 26, 1889, by deed acknowledged that day and filed for record March 29, 1889.

Dignowity died in April, 1875, testate, and by the terms of his will, which was duly probated that month, his property passed to his widow, who, on May 1, 1875, in her own right, and as independent executrix of her husband's will, released and

Counsel for Defendants in Error.

quitclaimed to the city of San Antonio all her right, title and interest in the lot in question, "known as the McMillan lot," with covenant of warranty against any person claiming by, under or through Dignowity or his estate. The city of San Antonio conveyed this and three other lots by warranty deed, dated June 16, 1875, and recorded October 21, 1875, to the United States for military purposes.

General Stanley testified that he was a brigadier general of the United States army, that his codefendants were officers of the same, and that they took and held possession as such officers.

It was contended that the evidence tended to show that the city and the United States took with notice of a previous sale to McMillan; that McMillan had never paid the purchase price in full; that the unrecorded deed was never delivered to McMillan, but held in escrow; and that Dignowity paid the taxes on the lot from 1860 to 1875.

The District Court gave judgment in favor of the plaintiffs Schwalby and Spence, that each had title to one-third of the lot and for the possession of the whole, and also in favor of the United States for $1521 for the improvements, that being the difference between the value thereof and the amount found due from the United States for the use and occupation of the premises. Both parties excepted to the judgment and perfected an appeal therefrom. The Supreme Court of Texas reversed the judgment, and rendered judgment dismissing the action as to the United States; that plaintiffs recover from the defendants, Stanley and others, possession of the lot in question, and the sum of two hundred dollars, being the value of the use and occupation of said land, together with costs; to review which judgment this writ of error was sued out. The opinion is reported, in advance of the official series, in 19 S. W. Rep. 264.

Mr. Assistant Attorney General Maury for plaintiffs in error.

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

Supposing the United States properly in the case, for the present, it could plead no limitation under the Texas law as especially no tribunal was open for these parties to get relief as against it, and, therefore, it was quite right that its pleas of limitation were struck out. *United States* v. *Insley*, 130 U. S. 263; *United States* v. *Nashville, Chattanooga &c. Railway*, 118 U. S. 120; *United States* v. *Thompson*, 98 U. S. 486; *Dow* v. *Johnson*, 100 U. S. 158; *Lindsey* v. *Miller*, 6 Pet. 666.

This immunity from suit, enjoyed by the United States, does not protect its officers who commit trespass, and withhold illegally the possession of lands from rightful owners. *United States* v. *Lee*, 106 U. S. 196.

Although the *Lee Case* was hotly and stubbornly contested on every inch of the ground, and was decided at last by a bare majority, yet it has received since then the succor of several indorsements, if any were requisite. *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 452; *Hans* v. *Louisiana*, 134 U. S. 1; *In re Ayers*, 123 U. S. 443, 501; *Pennoyer* v. *McConnaughy*, 140 U. S. 1.

And, following as a necessary consequence, the state Supreme Court properly held that the United States could not be made a party in this suit in the absence of an act of Congress authorizing it — not even if the district attorney had instructions to make it a party which instructions do not appear in the record. *Carr* v. *United States*, 98 U. S. 433. See also cases above cited. The latter case was not interfered with as to this point in the *Lee Case*.

It is probable the instructions were to defend for these parties, who claimed to hold the land as United States officers in its name, and not to make the United States a party; but as held by the court, such instructions to make it a party, if given, would have been of no force. Therefore, the dismissal of the United States from the case was certainly correct.

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

In *The Siren*, 7 Wall. 152, 154, Mr. Justice Field, who spoke for the court, in adverting to the familiar rule of the common law that the sovereign cannot be sued in his own courts without his consent, and the ground upon which the rule rested, said: "This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*, 8 Pet. 436, 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property."

If then this suit had been directly against the United States or the property of the United States, it could not have been maintained, and it is only upon the proposition that it was brought, not against the United States, but against the officers of the United States as individuals, although holding possession of the property under their authority and as belonging to them, that it proceeded to judgment. The District Attorney of the United States acting, as he alleged, "by and through instructions from the Attorney General of the United States," filed certain pleas on behalf of the United States, among others, of limitation, and for allowance for valuable improvements. No question seems to have arisen in the state District Court as to the authority of the district attorney to do this. The court ruled that the United States could not plead the statutes of limitation, and therefore struck those pleas out, but sustained the plea claiming an allowance for improvements, and rendered judgment in favor of the United States for the value thereof. The Supreme Court of Texas held that as the instructions of the Attorney General were not found in the record and no act of Congress empowering him to make the United States a party, either plaintiff or defendant, to an action in a state court was referred to, the United States could not be regarded as

a party and therefore reversed the judgment below and rendered judgment dismissing the United States from the case. The error assigned to this action of the Supreme Court has not been pressed by counsel for the government and we are not called upon to express any opinion upon it. We should remark, however, that from a very early period it has been held that even where the United States is not made technically a party under the authority of an act of Congress, yet where the property of the government is concerned it is proper for the attorney for the United States to intervene by way of suggestion, and in such case if the suit be not stayed altogether, the court will adjust its judgment according to the rights disclosed on the part of the government thus intervening. Such was the leading case of *The Exchange*, 7 Cranch, 116, 147, where the public armed vessel of a foreign sovereign having been libelled in a court of admiralty by citizens of the United States to whom she had belonged and from whom she had been forcibly taken in a foreign port, by his order, the District Attorney filed a suggestion stating the facts, and the Circuit Court having entered a decree for the libellants, disregarding the suggestion, this court, upon an appeal taken by the attorney of the United States, reversed the decree and dismissed the libel, and Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

Probably the instructions here were that the District Attorney should make defence for General Stanley and his fellow officers, and in addition he thought it wise to bring the rights of the United States to the attention of the court by application in their name.

The argument for the plaintiffs in error is confined to the disposition of the pleas setting up the statutes of limitation, in respect of which the decision did not turn upon the question whether on the facts the bar was or was not complete, but upon the view that, although as between individuals a perfect defence might have been made out, it could not be availed of by or under the United States.

By the Texas statute relied on it was provided that every suit to recover real estate "as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." Title was defined to mean a regular chain of transfer from or under the sovereignty of the soil; and color of title to mean a consecutive chain of such transfer down to the person in possession, without being regular, as if one or more of the muniments were not registered or not duly registered. "Peaceable possession" was described as "such as is continuous, and not interrupted by adverse suit to recover the estate," and "adverse possession" was defined as "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." The statute also provided that five years' peaceable and adverse possession of real estate, "cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered," should be a bar; and that ten years' like peaceable and adverse possession, with cultivation, use or enjoyment, should have a like result; and also that whenever in any case the action of a person for the recovery of real estate was barred, the person having such peaceable and adverse possession should "be held to have full title, precluding all claims." 2 Sayles' Tex. Civ. Stats. 109, Tit. 62, c. 1.

The Supreme Court of Texas was of opinion that the bar of the statute could not be interposed by or under the United States, because the United States are not bound by such statutes, as well as because no action could be brought against the United States.

The rule that the United States are not bound and the reason for it are thus given in *United States* v. *Nashville, Chattanooga &c. Railway*, 118 U. S. 120, 125: "It is settled beyond doubt or controversy — upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided — that the United States, asserting rights

vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." And this doctrine was declared by the court in *United States* v. *Insley*, 130 U. S. 263, 266, to be "applicable with equal force, not only to the question of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity."

To the same effect, Mr. Justice Story, in *United States* v. *Hoar*, 2 Mason, 311, 313, 314, said: "The true reason, indeed, why the law has determined that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects, 1 Bl. Com. 247,) is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments. . . . But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases, the reasoning applicable to them applies with very different, and often contrary force to the government itself."

But, as observed by Mr. Justice Strong, delivering the opinion of the court in *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239, while the king is not bound by any act of Parliament unless he be named therein by special and particular words, he may take the benefit of any particular act though

not named. And, he adds, that the rule thus settled as to the British crown is equally applicable to this government; and that so much of the royal prerogative as belonged to the king in his capacity of *parens patriæ* or universal trustee, enters as much into our political state as it does into the principles of the British constitution.

The general rule is stated in Chitty on the Law of the Prerogatives of the Crown, 382, clearly to be "that though the king may avail himself of the provisions of any acts of Parliament, he is not bound by such as do not particularly and expressly mention him." "For it is agreed in all our books that the King shall take benefit of any act, although he be not named." *Calvin's Case*, 7 Rep. 32*a*; *Magdalen College Case*, 11 Rep. 67, 68; *The Queen & Buckberd's Case*, 1 Leonard, 150; 1 Bl. Com. 262.

We think there is nothing to the contrary in *Rustomjee* v. *The Queen*, 1 Q. B. D. 487, where, by a treaty between the Queen of England and the Emperor of China, the Emperor had paid to the British government a sum of money on account of debts due to British subjects from certain Chinese merchants, who had become insolvent, and it was held that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants, and that the statute of limitations did not apply to a petition of right. The political trust with which Her Majesty was charged in respect of her own subjects afforded no basis for the prosecution in a court of a claim as against a debtor or trustee, and, of course, limitation had no application. Indeed, the form of proceeding by petition of right, even as simplified and regulated by 23 and 24 Vict. c. 34, is so far variant from proceedings between subject and subject, as to give adjudications thereunder but slight, if any, bearing upon the question under discussion. *Tobin* v. *The Queen*, 14 C. B. (N. S.) 505.

It was in view of the ancient rule and its derivation that the Supreme Court of Wisconsin in *Baxter* v. *State*, 10 Wisconsin, 454, held that while the statute cannot be set up as a defence to an action by the government, this rule being founded upon

the public good and the protection and preservation of the public interest, instead of furnishing any support for the position that as a defendant the State could not have the benefit of the statute, would fully sustain the opposite conclusion.

And so, in *People* v. *Gilbert*, 18 Johns. 227, it was pointed out by way of illustration that the same rule of construction applied to the statute concerning costs, which the State may recover, though not obliged to pay them because not included in the general terms of the statute.

It is obvious that the ground of the exemption of governments from statutory bars or the consequences of laches has no existence in the instance of individuals, and we think the proposition cannot be maintained that because a government is not bound by statutes of limitation therefore the citizen cannot be bound as between himself and the government.

Of course, the United States were not bound by the laws of the State, yet the word "person" in the statute would include them as a body politic and corporate. Sayles, Art. 3140; *Martin* v. *State*, 24 Texas, 61, 68.

This brings us to consider the objection that the United States cannot obtain or be protected in title through adverse possession, unless an action would lie against them for the recovery of the property. It by no means follows that because an action could not be brought in a court of justice, therefore possession might not be regarded as adverse so as to ripen into title. In the case of a government, protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of the right to possession, or of the abandonment of his claim by another, when an action cannot be brought, as the action itself when it can.

In *Comegys* v. *Vasse*, 1 Pet. 193, 216, quoted from and applied by Mr. Justice Lamar in *Williams* v. *Heard*, 140 U. S. 529, 543, it was remarked by Mr. Justice Story: "It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the King of Great Britain, nor the govern-

ment of the United States, is suable in the ordinary courts of justice for debts due by either. Yet, who will doubt, that such debts are rights?" However, the very institution of this suit shows, as the fact is, that these claimants could have brought such an action as this at any time between the date when the United States took possession and the filing of this petition.

As stated by Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 451, it may be accepted as unquestioned that neither the United States nor a State can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in this court by virtue of the original jurisdiction conferred by the Constitution. Accordingly, whenever it can be clearly seen that a State is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defence is that he has acted under the orders of the government.

In these cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defence he must show that his authority was sufficient in law to protect him. In this class is included *United States* v. *Lee*, 106 U. S. 196, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence.

In such a case the validity of an authority exercised under the United States is drawn in question, and where the final judgment or decree in the highest court of a State in which a decision could be had is against its validity, jurisdiction exists in this court to review that decision on writ of error.

The case before us is an action of trespass to try title, brought against officers of the United States, exercising an authority under the United States, in holding possession of the property in controversy. Laying out of view the intervention by the District Attorney of the United States in the direction of making the United States a party, and considering the case in its relation to the defences interposed by General Stanley and his fellow officers, we are unable to perceive why the statutory bar, if complete, could not be availed of. Although not bound by statutes of limitation, the United States as we have seen were entitled to take the benefit of them, and inasmuch as an action could have been brought at any time after adverse possession was taken, against the agents of the government through whom that was done and by whom it was retained, the objection cannot be raised against them that the statute could not run because of inability to sue. The alleged trespass was committed by the defendants, as the servants of the United States and by their command, yet if they showed the requisite possession in themselves as individuals, though in fact for the United States, under whose authority they were acting, the defence was made out. Agents when treated as principals may rely upon the protection of the statute. *Ware* v. *Galveston City Company*, 111 U. S. 170.

In any view, they were not mere trespassers, and if subject to suit during the statutory period of peaceable and adverse possession, they could not, after its expiration, be found guilty of an unlawful withholding from the original owner. The tort which must be the gist of the action in order to render it maintainable against the officers of the United States as individuals, could not be predicated of them under such circumstances.

We refrain from any consideration of the case upon its merits, but, for the reasons indicated, reverse the judgment,

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

Judgment reversed.

MR. JUSTICE FIELD dissenting.

I am unable to agree with the majority of the court in the judgment rendered in this case, or in the reasons upon which it is founded. The action is styled one of trespass to try title. It is, in fact, the form adopted in Texas to determine the title to real property in controversy, and the principles governing ejectments govern their disposition. It was commenced in a District Court of the State of Texas, in the county of Bexar.

The petition, the first pleading in the action, alleges that Mary U. Schwalby, who is herein joined by her husband, was, on the first of February, 1889, lawfully seized of certain described premises in the county of Bexar, holding the same in fee simple, and entitled to the possession thereof; that afterwards, on the second of February, the defendants unlawfully entered upon the premises and dispossessed her therefrom, and withholds them from her, setting out a description of the premises in full. The petition concludes with a prayer that the plaintiff may have judgment for the recovery and possession of the premises, and for costs.

The premises were a part of a military reservation of the United States in Texas, and were occupied as a military post. The defendant, David S. Stanley, and his codefendants were officers of the army of the United States, and as such were in possession of and held the land, and, answering for himself and them, he says that as individuals they do not claim, and have no title to, the land in controversy, but claim that they are lawfully in possession thereof as officers and agents of the United States, and that the United States "*holds in herself*" complete title to the property in controversy, and that the defendant, as an officer of the United States in possession, enters a plea of not guilty to the trespasses and allegations charged in the petition.

The designation thus given to the United States as "*herself*," in a pleading drawn by one of their attorneys is open to criti-

cism, as, in the Constitution, both before and since the civil war, the United States have always been designated in the plural; thus, Article III, section 3, declares that "treason against the United States shall consist only in levying war against *them*, or in adhering to *their* enemies, giving them aid and comfort;" and Article XIII, adopted since the civil war, declares that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States or any place subject to *their* jurisdiction."

In the amended answer filed by the defendants they pleaded not guilty, and alleged that they had lawful possession of the property as officers and agents of the United States, which had title and right of possession since 1875 under conveyance duly recorded, and that they were innocent purchasers for a valuable consideration, without notice of any outstanding title. They also pleaded specially the three years', the five years', and the ten years' statutes of limitations, and set up a claim for allowance for permanent and valuable improvements.

I fully agree with the court that, if this action had been brought directly against the United States, it could not be sustained, for it is among the axioms of the law that the government, State or national, is not amenable to civil process at the suit of a private citizen, except upon its consent to submit to such jurisdiction. Any judgment rendered in proceedings not voluntarily assented to would necessarily be void, whether the judgment be rendered for money or specific property. It may be doubted whether the appearance in this case of the United States, by a District Attorney, without further evidence of their assent to the process, is sufficient. The answer of the United States that they appear by the District Attorney, under instructions of the Attorney General of the United States, the Supreme Court of Texas held to be insufficient, as the instructions of that officer did not appear in the record, and there was no act of Congress authorizing him to make the United States a party to the action in the state court. That court, therefore, reversed the judgment of the lower court, and dismissed the action so far as it was against

the United States. It also held that the United States could not plead the statute of limitations. In this decision I think that court was clearly right, and, although this court does not expressly approve that doctrine, it would seem from its language that it might be implied that the United States could plead the statute. From any such implication I emphatically dissent. The whole theory upon which statutes of limitations are founded, whether for the repose of litigation, or upon presumption of performance, from lapse of time, of the obligations alleged, or from other causes, is that, during the period prescribed by the statute, the party has had full right, without legal hindrance, to prosecute his demand against the party invoking the bar of the statute, and has failed to do so. As justly observed by the court below, "it would be contrary to reason to hold that it was the intention of the law-making power that a right should be barred by failure to bring an action within a prescribed time, when, at the same time, the right to bring the action was denied."

Now, no such bar can be pleaded by the United States for the reason that no action can be instituted against them without their express consent. They can have no occasion to plead such a statute, because they can always insist upon their immunity from judicial process. If they assent to the action they, of course, do not wish the benefit of such a statute.

The cases where the government, State or national, without being named, may invoke the benefit of a law passed for private parties, applies to a very different class of cases than the one before us. A specified time for presenting claims against the government may be prescribed by statute, but we may look in vain for cases like the one before us, in which the government, not being suable during the time prescribed by statute, may interpose the lapse of time as a bar to an action whenever it is subsequently permitted.

But it is admitted that in cases where officers of the army, or agents of the government, State or national, are in possession of real property, holding it for either of them, they cannot, in an action for its recovery, rely upon their agency or official character under the government as a justification of

their possession, without showing a title in the government. They must show in that way their right to the possession under that title. The case of *United States* v. *Lee*, 106 U. S. 196, is sufficient authority on this point. Referring to that case, in *In re Ayers*, 123 U. S. 443, 501, this court said: "In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants, claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals, for the individual wrong and trespass." See also *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 452. Establishing the title of the government and thus showing their own possession under the government to be rightful, the action will be defeated. But the officers or agents cannot plead the statute of limitations in their own behalf if they hold under the United States, and in maintaining a different doctrine there is, in my opinion, a plain error in the decision of the court. The action of ejectment, or of trespass to try title, necessarily implies the wrongful possession of the defendant. He can only defeat that position by showing title or ownership in the party under whom he holds or in himself. But how can he show title or ownership in himself? If he has a title by deed which he can trace back beyond the claim of the plaintiff he can do so; but if he relies upon the statute he must show adverse possession of the property in himself for the period prescribed. To render his possession adverse it must be accompanied by a claim of title or ownership in himself as against the whole world. It must be exclusive and continuous, and not referable to any other claimant. If the defendant admits that any other person, or that the government, has the title, or owns the property at any time within the period of prescription, his adverse possession, on which alone he can rely, fails, and his claim of right to the property is defeated. This doctrine is sustained by the whole current of authorities in the English and American courts, as will be seen by reference to the

treatise on the statute of limitations by Angell, and also to the one by Buswell, under the chapters on "Adverse Possession," where the adjudged cases are cited. See also Sedgwick and Wait on Trial of Title to Land, sec. 729 to sec. 740; and *Doswell* v. *De la Lanza*, 20 How. 29; *Melvin* v. *Merrimack Proprietors*, 5 Met. (Mass.) 15; *Ward* v. *Bartholomew*, 6 Pick. 408; and *Adams* v. *Burke*, 3 Sawyer, 415, 420.

The statute of Texas prescribing the limitations of actions for the recovery of real property is not materially different, except in the periods designated, from the statutes of limitations of other States. It provides that every suit to recover real estate "as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." "Peaceable possession" is described as "such as is continuous, and not interrupted by adverse suit to recover the estate." Adverse possession is defined as being "an actual and visible appropriation of the land, *commenced and continued under a claim of right inconsistent with and hostile to the claim of another.*"

If the defendants cannot show title in the party under whom they hold, or in themselves, they are trespassers against the real owner, whether they claim under the government or a private party, and the doctrine that if they hold under the government, the title to which is not established, they can be allowed to set up adverse possession in themselves, or, in other words, to plead the statute of limitations, when they expressly disavow any claim or title to the property, upon the assertion of which alone such adverse possession can be maintained or the statute made available, is, in my judgment, in conflict with well settled principles, and the whole course of judicial decisions in England, and in every State of the Union. The defendants, by their own admissions, are not in a position to set up any such defence.

In re HABERMAN MANUFACTURING COMPANY, Petitioner.

ORIGINAL.

No number. Submitted January 30, 1893. — Decided February 6, 1893.

Under § 7 of the act of March 3, 1891, c. 517, 26 Stat. 826, 828, which provides for an appeal to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction, on a hearing in equity, the granting of a stay of the operation of the injunction during the pendency of the appeal, by the court which granted or continued it, is not a matter of right, but is a matter of discretion.

Such discretion of that court cannot be controlled by a writ of mandamus from this court.

On the 5th of January, 1893, an interlocutory decree was made, on final hearing, in a suit in equity in the Circuit Court of the United States for the Southern District of New York, brought against the Haberman Manufacturing Company, for the infringement of a patent for improvements in the manufacture of enamelled iron ware. The decree held that the patent was valid and had been infringed by the defendant, and awarded a recovery of profits and damages, to be ascertained on a reference to a master, and also a perpetual injunction. The defendant perfected an appeal to the Circuit Court of Appeals for the Second Circuit from such interlocutory decree, and, on the 20th of January, 1893, applied to the Circuit Court for a stay of proceedings in that court pending the appeal, including a stay of the injunction, and for the acceptance and approval of a supersedeas bond for that purpose, which bond, in any amount satisfactory to the court, it offered to file. But the court denied the application. The defendant now applies to this court for leave to file a petition that a writ of mandamus issue to the judges of the Circuit Court commanding them to approve and direct the filing of a supersedeas bond in such amount as that court shall fix, to supersede the injunction, and to enter an order vacating, sus-

pending, or superseding the injunction, which was issued on January 5, 1893, and subsequently served.

Mr. Charles E. Mitchell and *Mr. Robert N. Kenyon* for petitioner. *Mr. W. H. Kenyon* was on the brief.

The petition which this motion asks leave to file involves the question whether upon an appeal in a patent suit taken to the United States Circuit Court of Appeals pursuant to the seventh section of the act of Congress, of March 3, 1891, 26 Stat. 826, 828, c. 517, from an interlocutory decree granting an injunction, the defendant and appellant is entitled as a matter of right to a supersedeas of the injunction pending the appeal. That section is as follows: "Sec. 7. That where, upon a hearing in equity in a District Court, or in an existing Circuit Court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree, may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the Circuit Court of Appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal."

The suit against this petitioner in the Circuit Court of the United States for the Southern District of New York is one for the infringement of a patent, and is therefore "a cause in which an appeal from a final decree may be taken . . . to the Circuit Court of Appeals."

Section 7 gives to a defendant taking an appeal under that section from an interlocutory order or decree granting an injunction, an absolute right to a supersedeas of the injunction pending the appeal, upon the filing of a bond satisfactory to the court.

This is its plain meaning, as has been decided by Judge Jackson, Circuit Judge for the Fifth Circuit, in the case of *Pasteur* v. *Blount*, 51 Fed. Rep. 610.

Argument for Petitioner.

Judge Jackson's opinion is supported and enforced by a consideration of the language of this section, the evident purpose of its enactment, and the previous practice and legislation which it was designed to supersede.

That it was the intention of Congress that the injunction should be stayed pending the appeal, is shown by the particular form of expression adopted in this section. The section says that "the proceedings in other respects in the court below shall not be stayed," thereby necessarily meaning "that the proceedings in some respect shall be stayed."

The phrase or expression, "the proceedings shall be stayed" or "the stay of proceedings" is shown by an examination of the statutes and cases to have a recognized and well-established meaning. It has always been used in connection with appeals and writs of error to refer to the suspension of execution under a judgment or the suspension of the enforcement of a decree. The mere taking of an appeal and the transferring of a case by such appeal from a lower to a higher court has never been termed a stay of proceedings. *Kitchen* v. *Randolph*, 93 U. S. 68; *Hogan* v. *Ross*, 11 How. 294.

The conditions and regulations prescribed by section 7 in reference to an appeal from an interlocutory order or decree, also confirm the view herein contended for, that the appeal was to operate as a stay of the injunction.

The statute provides that such appeal must be taken within thirty days. This part of the statute has no special meaning unless the statute intended that pending the appeal the injunction should be stayed. This clause was certainly not intended for the benefit of the defendant. It was a restriction upon the defendant's rights. It must then have been intended as a benefit to the complainant, to save the complainant from some hardship or injury that would otherwise result to it. The only hardship or injury that could result to a complainant from the postponement of the appeal would be in case the injunction was suspended during the appeal. If the injunction was not suspended, the delaying of the appeal would work no hardship to the complainant but, on the contrary, would benefit the complainant by giving him the monopoly of the business

during a longer period of time. Evidently this limitation of the defendant's time to appeal was put into the statute as a result of the very fact that, under the statute, the defendant was entitled to an absolute stay of the injunction pending the appeal, and it was therefore only just to make the defendant push his appeal with all possible speed.

It has always been a recognized principle of practice, that where the right to a supersedeas or a stay of proceedings was to follow an appeal or a writ of error, that right must be exercised with great promptness, and the law has always strictly and narrowly limited the time within which such right could be exercised. *Sage* v. *Central Railroad Company of Iowa*, 93 U. S. 412.

The history of the practice upon appeals and writs of error in this country and in England will show, as we believe, that this seventh section was enacted by Congress with the purpose of giving to the defendant a supersedeas of the injunction pending the appeal in order to establish what seemed to Congress the wisest and most reasonable rule of procedure in such cases.

Prior to 1772, in the English Chancery practice appeals could be taken to the House of Lords from interlocutory orders or decrees of the Chancellor, and such appeals operated as a stay of the entire proceedings in the lower court, including not only the proceedings in reference to the subject-matter of the appeal, but all the proceedings in the case of any nature whatsoever.

In 1772 it was decided that the jurisdiction of the Court of Chancery in such a case was suspended only as to the matter appealed from, but that it was not totally suspended so as to prevent a proceeding as to any other matter in the cause. *Earl of Pomfret* v. *Smith*, 4 Bro. P. C. 700. See also *Hovey* v. *McDonald*, 109 U. S. 160, and *Hart* v. *Mayor of Albany*, 3 Paige, 383.

From 1772 until 1807 it seems to have been the rule that upon such an appeal from an interlocutory order or decree the proceedings in the lower court were stayed in reference to the subject-matter appealed from, but not in other respects.

In 1807 the House of Lords adopted a rule that the proceedings in the lower court upon such an appeal should not be stayed, but that it should be within the discretion of the Chancellor to stay the proceedings pending the appeal or not, according to the circumstances of the case. The reason for this change in the rule was because the number of appeals to the House of Lords had so increased and the delay attendant upon such appeals was so great, that it was felt to be a great inconvenience and injustice to deprive the successful party in the lower court of the benefit of its decree for so long a time.

The practice established by Section 7 of the present act is an adoption of this former practice of the English Court of Chancery, but with such provisions, to wit, that the appeal must be taken within thirty days and that the case shall be preferred in the Court of Appeals, that the inconvenience and injustice inherent in this practice as it prevailed in England at the beginning of this century has been done away with.

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

It is contended for the petitioner that it is entitled, as a matter of right, to a supersedeas of the injunction pending the appeal, and that the Circuit Court had no discretion to refuse it. As authority for this alleged right reference is made to § 7 of the act of March 3, 1891, c. 517, 26 Stat. 828, which provides: "That where, upon a hearing in equity in a District Court, or in an existing Circuit Court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the Circuit Court of Appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of said appeal."

Opinion of the Court.

It is clear that this is a case in which the appeal was properly taken and within the time limited; and it is contended for the petitioner that under § 7 it has an absolute right to a supersedeas of the injunction pending the appeal, on the filing of a bond satisfactory to the Circuit Court. Reference is made to the case of *Pasteur* v. *Blount*, 51 Fed. Rep. 610, in the Circuit Court for the Southern District of Ohio, where, a supersedeas having been allowed, on granting a like appeal, a motion to vacate the supersedeas was denied, the court (Jackson, Circuit Judge) saying that, under § 7, there was no discretion in the court or judge allowing the same to deny or refuse the appellant a supersedeas.

The argument made is, that the use, in § 7, of the words "in other respects," implies that there must be a stay as to the operation of an injunction, while the only discretion given is as to ordering a stay, "in other respects" than as to the injunction. But there is no express provision that the operation of the injunction must be stayed. The matter is rested wholly on implication. The defendant is sought to be protected by requiring him to take an appeal within thirty days and by giving precedence to the case in the appellate court; and discretion is given to the Circuit Court to proceed or not on the interlocutory decree pending the appeal. Where a plaintiff has an adjudication that he is entitled to an injunction, he has rights which cannot be abridged or stayed by language which is not more clear and unambiguous than that contained in § 7. The matter may be made clear by legislation. As it stands, the Circuit Court had a discretion to grant or refuse a supersedeas; and its discretion, as we have uniformly held, (*In re Hawkins, Petitioner*, *ante*, 486, and cases there cited,) cannot be controlled by a writ of mandamus.

Application denied.

HAMBLIN v. WESTERN LAND COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 1042. Submitted January 23, 1893. — Decided February 6, 1893.

There must be at least color of ground for the averment of a Federal question in a case brought here by writ of error to the highest court of a State, in order to give this court jurisdiction.

When a line of a land grant railroad as located does not satisfy the terms of the granting act, whether the Land Department may not consider it as a temporary and provisional one, *quære*.

A reservation of public land from entry, made by the Department of the Interior as coming within the limits of a railroad grant, operates to withdraw the land from homestead entries, even if found afterwards not to come within such limits.

A valid homestead entry could not be made upon indemnity lands of the Sioux City & St. Paul Railroad Company after the patent from the United States to the State of Iowa, issued June 17, 1873, under the act of May 12, 1864, 13 Stat. 72, c. 84.

This case is submitted on a motion to dismiss or affirm. The facts are these: Defendant in error, the Western Land Company, on August 24, 1887, filed its petition in the District Court of O'Brien County, Iowa, to recover from the defendant Hamblin, now plaintiff in error, the possession of the northeast quarter of section 1, township 95 north, range 41 west, fifth principal meridian. Defendant appeared and answered; a trial was had, and on April 23, 1888, judgment was rendered in favor of the plaintiff, the Western Land Company, for the possession of the property. From this judgment Hamblin appealed to the Supreme Court of the State, which, on February 10, 1890, affirmed the judgment of the District Court. Thereupon Hamblin sued out a writ of error from this court.

The Land Company's record title consisted of a patent from the United States to the State of Iowa, dated June 17, 1873, conveying the land to the State for the use and benefit of the Sioux City and St. Paul Railroad Company; a decree of the Circuit Court of the United States for the Southern District of Iowa, of May 18, 1882, (*Chicago & St. Paul Railway* v.

Sioux City &c. Railroad, 10 Fed. Rep. 435,) modified on May 21, 1886, in pursuance of a mandate from this court, (*Sioux City & St. Paul Railroad* v. *Chicago & St. Paul Railway*, 117 U. S. 406,) by which the title of this land was adjudged held by the State in trust for the Chicago, Milwaukee and St. Paul Railway Company; a patent from the State of Iowa to the Chicago, Milwaukee and St. Paul Railway Company, of date September 27, 1886; and a warranty deed from the latter company to the Western Land Company, of date May 26, 1886.

Hamblin's claim to the land rests upon the fact that in February, 1884, nearly eleven years after the issue of the patent, he took possession and made application to enter it under the homestead laws of the United States. This application apparently failed, and he made a second application in September, 1885. He built a house upon the land, and made other improvements, and has resided on it since March, 1884. It does not appear that the Land Department ever recognized any right in him to enter the land; so that his only claim is based upon the fact of occupation, made, as he says, with a view to entering it as a homestead.

Mr. John S. Monk for the motion.

Mr. W. L. Joy opposing.

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

It is doubtful whether there is a Federal question in this case. A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. *Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87. In the latter case it was said that "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."

Opinion of the Court.

Now, in ordinary cases, it would not be doubted that a party entering upon vacant land, the title to which had been conveyed from the general government by patent to an individual, could not create a Federal question such as to give this court jurisdiction over the judgment of the highest court of the State, by simply averring that such possession was taken with a view of entering the land under the homestead laws of the United States, and that he went through the form of making application to the local land office for permission to make such entry; for if he could, as is suggested in the foregoing quotation from 142 U. S., almost any case in ejectment could be taken from the Supreme Court of a State to this. In order that such claim of the party in possession may raise a genuine Federal question, there must be some reason to believe that the apparent legal title transferred by the patent from the United States was wrongfully conveyed, and that the real title in fact remains in the government; and whether there be such shadow upon the legal title of the Land Company, that the denial of Hamblin's right to enter the land as a homestead presents a genuine rather than a fictitious Federal question, is a doubtful matter. We must therefore investigate not merely the instruments by which the legal title passed to the Land Company, but the legislation and proceedings claimed to give authority therefor.

On May 12, 1864, Congress passed an act granting lands to the State of Iowa, to aid in the construction of two railroads. 13 Stat. 72, c. 84. So much of the first section as is material for the question here involved is as follows: "That there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the west fork of the Des Moines River; also to said State for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main Street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north lat-

itude, until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State." It will be noticed that the road of the McGregor Company was to proceed westerly, on or near the forty-third parallel, to an intersection with the Sioux City road, in the county of O'Brien. On August 30, 1864, that company filed in the General Land Office a map of the definite location of its line. This line extended westwardly to a point in section 19, township 95, range 40, in O'Brien County, where it was then expected that a junction would be formed with the Sioux City road. In July, 1867, the Sioux City Company filed its map of definite location. Both of these maps were approved. The line of the Sioux City Company ran through the northwest corner of O'Brien County, and the western terminus of the McGregor Company's line, as located, was about nine miles south and twelve miles east of the point at which the Sioux City line entered O'Brien County on the west. The McGregor line did not, therefore, intersect with the Sioux City line in O'Brien County, nor come nearer to it than 17 or 18 miles. It will be noticed that, under the statute, the Sioux City line was not to be located so as to intersect with the McGregor line, but the latter was to proceed in a westerly direction and intersect the Sioux City line. In other words, the Sioux City Company had the primary right of location, the McGregor Company the subordinate, and the latter company was to locate its line in a westerly direction so as to connect with the Sioux City line wherever located in O'Brien County. So, although the McGregor Company's map of definite location was approved when filed, yet, after the filing and approval of the map of definite location of the Sioux City Company's line, the location made by the McGregor Company was questioned as not in conformity with the terms of the act; and on September 2, 1869, a new map of definite location was filed, and this has since been recognized by the Land Department as the true line of definite location. On March 15, 1870, and May 11, 1870, the local land offices were instructed by the Commissioner of the General Land Office to recognize this as the true line, and to restore to the public domain such lands

reserved upon the location in 1864 as did not come within the ten-mile limit of the location of 1869. In other words, so far as it could, the Land Department set aside the location made in 1864, and approved and adopted that made in 1869. The land in controversy is within ten miles of the line of the McGregor Company's line, as located in 1869; but is west of the terminus of the McGregor Company's line, as located in 1864, and, therefore, not within the place or indemnity limits as determined by that location. It is also within the indemnity limits of the Sioux City Company's line. It appears from the recitals in the patent to the State, in 1873, that the land in controversy was selected as indemnity land for the Sioux City Company, and was patented to the State for the use and benefit of that company. With reference to the subsequent proceedings, it is sufficient to say that the Chicago, Milwaukee and St. Paul Railway Company succeeded, under legislation of the State of Iowa, to the rights of the McGregor Company, and constructed its road on nearly the line of 1869, and so as to intersect with the Sioux City road; that the litigation in the Circuit Court was between the Sioux City Company and the Milwaukee Company; that the outcome of that litigation was an adjudication of the rights of the Milwaukee Company to this land; and that, in pursuance of that litigation, the legal title thereto was conveyed by the State to the Milwaukee Company.

Now, the contention of plaintiff in error is, that after the approval by the Land Department of the map of definite location, filed in 1864, by the McGregor Company, the powers of that company in respect to a location were exhausted, and as authority therefor reference is made to the cases of *Van Wyck* v. *Knevals*, 106 U. S. 360, 366, and *Walden* v. *Knevals*, 114 U. S. 373. In the former of these cases this court said: "But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior, and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent." Congress never having assented to a change,

it is claimed that the only valid location was that in 1864, and that the land in controversy, not being coterminous with the line as then established, never came within the terms of the grant, but remained absolutely the property of the government, notwithstanding the error of the ministerial officers of the government in executing a patent to the State. It may be observed in reply, first, that in all the cases in which this question of the finality of a location has been before this court, the line as located conformed to and satisfied all the terms of the granting act, and the decision was that such a line, having been once definitely located, could not be changed; while in the case at bar, the line as located in 1864 did not satisfy the terms of the act, because it failed to intersect in O'Brien County with that of the Sioux City Company. Of course, until the line of the Sioux City Company was definitely located, it was impossible for the McGregor Company to determine where it could intersect with it. And it may be that the line of 1864 was justly considered as only a temporary and provisional one; so at least it seems to have been regarded by the Land Department, and we are not prepared to say that its decision was not correct.

But it is unnecessary to decide, and we do not rest the case upon this question. It is referred to as perhaps throwing such a shadow upon the record title of the Land Company, as to justify us in holding that a real and not fictitious Federal question was presented, for on other grounds the ruling of the Supreme Court of Iowa was unquestionably correct. In the first place, whether the location of the line in 1869 was of any validity or not, it was in fact accepted by the Land Department, and by the letters of March 15 and May 11, 1870, the land in controversy was, with others, withdrawn to satisfy the grant as determined by that location, and such a reservation by the Interior Department, it is well settled, operates to withdraw the land from entry under the preëmption or homestead laws. *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Wolsey* v. *Chapman*, 101 U. S. 755; *Bullard* v. *Des Moines & Fort Dodge Railroad*, 122 U. S. 167; *United States* v. *Des Moines Navigation &c. Co.*, 142 U. S. 510. As therefore the

land was so situated that Hamblin could not make a valid homestead entry, it follows that he is not in a position to question the conveyance of the legal title by the patent from the government.

But, further, the land was within the indemnity limits of the Sioux City road; it was therefore land which might be selected by that company to supply any deficiency in the granted lands; and the patent from the United States shows that it was so selected; and it was patented to the State for the use and benefit of that company. There is nothing in the record to show that such selection was not properly made, or that the land was not rightfully conveyed to the State for the benefit of that company, unless it be the decree of the Circuit Court, and that decree, if conclusive in this litigation, establishes the validity of the line located in 1869, and the rights of the Milwaukee Company to the land by virtue of the grant and that location. Of course, Hamblin is in no position to insist upon any rights of the Sioux City Company, and the case stands thus: The patent to the State for the use and benefit of the Sioux City Company was valid, unless the location in 1869 of the McGregor Company's line was valid; if the latter was valid, then the patent should have been issued to the State for the benefit of the Milwaukee Company. The question of right as between the two railroad companies has been settled by judicial decision, and Hamblin is in no position to question the force and effect of that decision. The judgment of the Supreme Court of Iowa was unquestionably right.

Affirmed.

FLEITAS *v.* RICHARDSON, (No. 1.)

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 29. Argued April 14, 1892. — Decided March 6, 1893.

In executory process, according to the Civil Code of Louisiana, in the Circuit Court of the United States, an order, made without previous notice, for the seizure and sale of mortgaged land to pay the mortgage debt, under which the sale cannot take place until the debtor has had notice and opportunity to interpose objections, is not, at least when he does interpose within the time allowed, a final decree, from which an appeal lies to this court.

THIS was a bill in equity, filed June 29, 1888, in the Circuit Court of the United States for the Eastern District of Louisiana, by Gilbert M. Richardson, a citizen of New York, against Francis B. Fleitas, a citizen of Louisiana, and residing in that district, for a seizure and sale of mortgaged lands in the parish of St. Bernard in that district, under executory process, in accordance with the provisions of the Louisiana Code of Practice, the material parts of which are copied in the margin.[1]

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[1] ART. 63. When the hypothecated property is in the hand of the debtor, and when the creditor, besides his hypothecary right, has against his debtor a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized immediately and sold for the payment of his debt, including the capital, the interest and the costs, pursuant to the rules provided hereafter for executory proceedings.

ART. 98. The proceedings are ordinary, when citation takes place, and all the delays and forms of law are observed. They are executory, when seizure is obtained against the property of the debtor, without previous citation, in virtue of an act or title importing confession of judgment, or in other cases provided by law.

ART. 732. Executory process can only be resorted to in the following cases:

1st. When the creditor's right arises from an act importing a confession of judgment, and which contains a privilege of mortgage in his favor.

2d. When the creditor demands the execution of a judgment which has been rendered by a tribunal of this State, different from that within whose jurisdiction the execution is sought.

Statement of the Case.

The bill alleged that the defendant, on January 28, 1884, executed and delivered to the plaintiff five promissory notes for $12,600 each, payable to the plaintiff's order on January 1, in 1885, 1886, 1887, 1888 and 1889, respectively, with interest

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The proceeding by provisional seizure (attachment) or *in rem* resembles in some sort the executory process, but should not be confounded with it, as they are subject to different rules.

ART. 733. An act is said to import a confession of judgment in matters of privilege and mortgage, when it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage.

ART. 734. When the creditor is in possession of such an act, he may proceed against the debtor or his heirs, by causing the property subject to the privilege or mortgage to be seized and sold, on a simple petition, and without a previous citation of the debtor.

ART. 735. In obtaining this order of seizure, it shall suffice to give three days' notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles between the place of his residence and the residence of the judge to whom the petition has been presented.

ART. 738. The debtor, against whom this order of seizure shall have been rendered, may obtain an injunction to suspend the sale, if before the time of sale he files in the court issuing the order his opposition in writing, alleging some of the reasons contained in the following article, and of which he shall swear to the truth.

ART. 739. The debtor can only arrest the sale of the thing thus seized, by alleging some of the following reasons, to wit:

1. That he has paid the debt for which he is sued;
2. That he has been remitted by the creditor;
3. That it has been extinguished by transaction, novation, or some other legal manner;
4. That time has been granted to him for paying the debt, although this circumstance be not mentioned in the contract;
5. That the act containing the privilege or mortgage is forged;
6. That it was obtained by fraud, violence, fear, or some other unlawful means;
7. That he has a liquidated account to plead in compensation to the debt claimed;
8. And finally, that the action for the recovery of the debt is barred by prescription.

ART. 740. When the judge grants an injunction, on the allegation under oath of any of the reasons mentioned in the preceding article, he shall require no surety from the defendant, but he shall pronounce summarily on the merits of his opposition if the plaintiff requires it.

at the yearly rate of eight per cent; and on the same day, by authentic act of mortgage, passed before a notary public in the presence of two witnesses, (a copy of which was annexed to the bill,) mortgaged the lands in question, to secure the payment of these notes, which were duly paraphed by the notary *ne varietur* to identify them with the act of mortgage, and that the last two notes (copies of which, with the paraph of the notary thereon, were also annexed to the bill,) and interest since July 1, 1887, had not been paid; that Shattuck & Hoffman, a commercial firm named in the mortgage, had no interest in these notes, and the plaintiff believed they had no interest in the act of mortgage; and that under these notes and the mortgage there was past due and owing to the plaintiff the sums of $27,216, with interest since January 1, 1888, on $25,200 thereof at the rate of eight per cent, and on $2016 thereof at the rate of five per cent.

The copy of the act of mortgage, annexed to the bill, showed that it was made to secure the payment of the notes to the plaintiff, and also to secure the payment to Shattuck & Hoffman of advances made by them to the defendant, under a written agreement between them and him of the same date, not exceeding the amount of his debt to the plaintiff; and authorized the mortgagees, in case any of the debts thereby secured should not be paid at maturity, to cause the mortgaged property "to be seized and sold under executory process, without appraisement, to the highest bidder for cash, hereby confessing judgment in favor of said mortgagees, and of such person or persons as may be the holder or holders of said promissory notes, and all assigns of said Shattuck & Hoffman, for the full amount thereof, capital and interest, together with all costs, charges, and expenses whatsoever;" and further provided that, in the event of a foreclosure of the mortgage and sale of the premises, "then out of the proceeds of said sale the said indebtedness to said Gilbert M. Richardson, whether held by said G. M. Richardson or his assigns, shall be paid by priority over said indebtedness due or to become due to said Shattuck & Hoffman or their successors and assigns."

Upon the filing of the bill, on June 29, 1888, the court

made the following order: "Let a writ of seizure and sale issue herein, as prayed for, and according to law, to satisfy complainant's demands as set forth in the foregoing bill and petition. Let the marshal seize and take into his possession according to law the property described in the foregoing petition, and then let the sale of this property be stayed till the further orders of this court."

On June 30, 1888, the clerk of the court issued to the defendant, and the marshal served upon him, a notice in these terms: "Take notice that payment is demanded of you, within three days from the service hereof, of the amount specified in the writ of seizure and sale granted on the bill of complaint herein, a copy of which accompanies this notice, with interest and costs; and, in default of payment within that delay, the property referred to in said bill of complaint will be seized and sold according to law, subject to the order on said bill. A further delay of one day for every twenty miles distance from your domicil to this city, at which place this court is held, is allowed you by law."

On the same day, the defendant, appearing for that purpose only, prayed for, and was refused, an appeal or writ of error from that order to this court.

At the next term of the Circuit Court, on November 19, 1888, the defendant, appearing for the purpose of the motion only, moved that all the orders and proceedings in the case be quashed and set aside, for want of jurisdiction, and also because, if the Circuit Court had authority under any circumstances to issue executory process, no case was made in the bill for issuing it, for want of authentic evidence, inasmuch as the mortgage appeared upon its face to have been made to include a private agreement between the defendant and Shattuck & Hoffman, (a copy of which, verified by his oath, was annexed to the motion;) and also, "making known unto the court that he will make no other and further appearance or pleading herein, at all times believing the proceeding void in law and this court without jurisdiction over the same," and praying that, if the court should refuse to quash the proceedings, he might be allowed an appeal to this court from the order of seizure and sale.

Statement of the Case.

On November 22, a writ was issued to the marshal, commanding him to seize and take into his possession, according to law, the property described in the mortgage, and to sell it to satisfy the plaintiff's demands as set forth in the bill, and repeated in the writ; "said sale to be for cash, without appraisement, and said sale to be stayed until the further orders of the court, under its order dated June 29, 1888, on the bill herein;" and to make return of his proceedings to the court.

On November 24, the plaintiff moved to strike the defendant's motion from the files, as not being allowed by the rules of the court, or by the laws of Louisiana; and the court denied the motion to quash, as well as the motion to strike from the files, but granted the appeal, upon the defendant giving bond in an amount to be fixed by the court, and referred the case to a master to report the facts to enable the court to determine that amount.

On the return of the master's report, the court, on December 7, 1888, made the following order: "This cause came on to be heard, and was argued by counsel; whereupon the court, on consideration thereof, and further reconsidering the whole matter with reference to the order or decree awarding executory process herein, and the defendant's applications for appeal therefrom, doth now order that so much of the order of June 29, 1888, awarding executory process herein, as directs the marshal to stay the sale of the property directed to be seized till the further orders of the court, be stricken out; and that all orders made subsequently to the date of the defendant's application for an appeal on June 30, 1888, except the order of reference to the master to report the facts upon which the amount of bond could be determined and fixed, be revoked; and that an appeal, to operate as a supersedeas, be allowed to said defendant *nunc pro tunc* as of said 30th day of June, 1888, according to his petition then presented, on his giving bond as required by law, with good and solvent surety, in the sum of one thousand dollars. And it is further ordered that the marshal, on the filing of such bond, release from seizure the property he has seized herein, and that the exceptions to the order of reference be overruled."

Opinion of the Court.

On the same day, the defendant gave bond accordingly to prosecute his appeal to this court "from the decree rendered on June 29, 1888."

Mr. J. R. Beckwith for appellant.

Mr. Thomas J. Semmes for appellee.

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

At October term, 1888, this court denied a motion to dismiss or affirm, submitted on briefs under Rule 6. But on fuller consideration of the case, and in the light of the oral arguments of counsel, we are constrained (although the question is not free from difficulty,) to hold that this court has no jurisdiction, because the order appealed from is not a final judgment or decree.

By the Louisiana Code of Practice, an act of mortgage, passed before a notary public in the presence of two witnesses, with an acknowledgment and identification of the debt thereby secured, imports a confession of judgment, upon which the creditor is entitled to executory process, and to obtain, without previous citation to the debtor, an order for the seizure and sale of the mortgaged property for the payment of the debt. Arts. 63, 98, 732, 733, 734. But the clerk of the court is required to give notice of this order to the debtor three days before the sale, adding a day for every twenty miles between the place of his residence and the place where the court is held. Art. 735. If such notice is not given to the debtor, the proceeding is erroneous. *Saillard* v. *White*, 14 Louisiana, 84; *Hart* v. *Pike*, 29 La. Ann. 262. The debtor may obtain an injunction to suspend the sale, if before the time of sale he files in the court his opposition in writing, under oath, alleging that the debt has been paid, or remitted, or extinguished, or that the time of payment has been extended, or that the act of mortgage is forged, or obtained by fraud, violence, or other unlawful means, or that he has a

liquidated account to plead in compensation, or that the action for the debt is barred by prescription. Arts. 738, 739.

The provisions of that code, making the acknowledgment of the debt and mortgage, in solemn form before a notary public, conclusive evidence, upon which, without previous notice to the debtor, the creditor may obtain an order for the seizure and sale of the mortgaged lands to satisfy his debt, bear some analogy to proceedings, (never denied to be due process of law,) which were well known where the common law prevailed, before the adoption of the Constitution of the United States — such as the recognizances called statute merchant and statute staple in England, and similar recognizances in Massachusetts, taken before a court or magistrate, and upon which, when recorded, execution might issue without previous notice to the debtor, and be levied upon his lands or goods. 2 Bl. Com. 160, 341, 342; Bac. Ab. Execution, B; *The King* v. *Giles*, 8 Price, 293, 316, 351; Mass. Stat. 1782, c. 21; *Albee* v. *Ward*, 8 Mass. 79, 84; Rev. Stat. c. 118; Gen. Stat. c. 152; Pub. Stat. c. 193.

In Louisiana, however, the act before the notary, as well as the order for seizure and sale, includes no lands but those described in the mortgage; and, although the creditor may obtain that order without previous notice to the debtor, the sale cannot take place until the debtor has had notice and opportunity to interpose objections.

This proceeding, therefore, is a civil suit *inter partes*, which, where the parties are citizens of different States, is within the jurisdiction conferred by Congress on the Circuit Court of the United States. Act of September 24, 1789, c. 20, § 11, 1 Stat. 79; Rev. Stat. § 739; Acts of March 3, 1875, c. 137, § 1, 18 Stat. 470; March 3, 1887, c. 373, § 1, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 434; *Toland* v. *Sprague*, 12 Pet. 300; *Levy* v. *Fitzpatrick*, 15 Pet. 167; *Chaffee* v. *Hayward*, 20 How. 208, 215; *Marin* v. *Lalley*, 17 Wall. 14. And the proceeding, though in summary form, is in the nature of a bill in equity for the foreclosure of a mortgage, and clearly belongs on the equity side of that court. *Brewster* v. *Wakefield*, 22 How. 118, 128; *Walker* v. *Dreville*, 12 Wall. 440;

Marin v. *Lalley*, 17 Wall. 14; *Idaho & Oregon Co.* v. *Bradbury*, 132 U. S. 509, 515.

The debtor being entitled to notice and hearing before an actual sale of the property, it would seem, upon principle, that the order for a sale must be considered as interlocutory only, and not the final decree in the case, at least when the debtor does, within the time allowed by the code, come in and contest the validity of the proceedings. *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 545, 547, 549, and cases there cited.

By the decisions of the Supreme Court of Louisiana, indeed, such an order, "exhausting the power of the court *quoad* the application," although its execution may be stayed on the opposition of the debtor, is subject to appeal, under the practice in that State. Louisiana Code of Practice, arts. 565, 566; *Harrod* v. *Voorhies*, 16 Louisiana, 254; *Mitchell* v. *Logan*, 34 La. Ann. 998, 1003; *Ralston* v. *British & American Mortgage Co.*, 37 La. Ann. 193. But the practice or the decisions of the State in this respect cannot control the appellate jurisdiction of this court from the Circuit Court of the United States, as defined by act of Congress. Rev. Stat. § 691; *Luxton* v. *North River Bridge*, *ante*, 337, 341.

Upon the question whether the order of seizure and sale was a final judgment, the case of *Levy* v. *Fitzpatrick*, above cited, is much in point, and was fully discussed in the opinion delivered by Mr. Justice McKinley, who was peculiarly familiar with the law of Louisiana. In that case, a writ of error to reverse the order of seizure and sale, made without previous notice to the debtors, was dismissed, for want of jurisdiction; and Mr. Justice McKinley, speaking for the whole court, said:

"Had this proceeding taken place before a judge of competent authority in Louisiana, the debtors might have appealed from the order of the judge to the Supreme Court of that State; and that court might, according to the laws of Louisiana, have examined and decided upon the errors which have been assigned here. But there is a marked and radical difference between the jurisdiction of the courts of Louisiana, and

those of the United States. By the former, no regard is paid to the citizenship of the parties; and in such a case as this, no process is necessary to bring the debtors before the court. They having signed and acknowledged the authentic act, according to the forms of the law of Louisiana, are, for all the purposes of obtaining executory process, presumed to be before the judge. Louisiana Code of Practice, arts. 733, 734. An appeal will lie to the Supreme Court of Louisiana from any interlocutory or incidental order, made in the progress of the cause, which might produce irreparable injury. *State* v. *Lewis*, 9 Martin, 301, 302; *Broussard* v. *Fralian*, 4 Martin, 489; *Gurlie* v. *Coquet*, 3 Martin (N. S.) 498; *Seghers* v. *Antheman*, 1 Martin (N. S.) 73; *State* v. *Pitot*, 12 Martin, 485."

But, as the judge went on to say, "the jurisdiction of the courts of the United States is limited by law, and can only be exercised in specified cases." He then observed that by the Judiciary Act of 1789, c. 20, § 11, giving the Circuit Court of the United States original jurisdiction of suits at common law or in equity between citizens of different States, no judgment could be rendered by a Circuit Court against any defendant not served with process, unless he waived the necessity of service by entering his appearance in the suit: and that, by section 22 of the same act, only final judgments of the Circuit Court could be reviewed by this court on writ of error; and added: "It is obvious that the debtors were not before the judge, in this case, by the service of process, or by voluntary appearance, when he granted the executory process. In that aspect of the case, then, the order could not be regarded as a final judgment, within the meaning of the twenty-second section of the statute. But was the order a final judgment, according to the laws of Louisiana? The fact of its being subject to appeal does not prove that it was, as has already been shown. Nor could it, *per se*, give to the execution of the process, ordered by the judge, the dignity of a judicial sale. Unless at least three days' previous notice were given to the debtors, the sale would be utterly void. *Grant* v. *Walden*, 6 Louisiana, 623, 631. This proves that some other act was

necessary, on the part of the plaintiffs, to entitle them to the fruits of their judgment by confession. And in that act is involved the merits of the whole case; because, upon that notice, the debtors had a right to come into court and file their petition, which is technically called an opposition, and set up, as matter of defence, everything that could be assigned for error here, and pray for an injunction to stay the executory process till the matter of the petition could be heard and determined. And upon an answer to the petition coming in, the whole merits of the case between the parties, including the necessary questions of jurisdiction, might have been tried, and final judgment rendered. Code of Practice, Arts. 738, 739. From this view of the case, we think the order granting executory process cannot be regarded as anything more than a judgment *nisi*. To such a judgment a writ of error would not lie. The writ of error in this case must therefore be dismissed." 15 Pet. 170–172.

The single ground of that decision, as appears by these extracts from the opinion, was that there had been no final judgment in the Circuit Court. The point that the case, though coming from the State of Louisiana, where the distinction between common law and equity is not preserved, yet, being essentially a suit in equity in the Circuit Court of the United States, should have been brought to this court by appeal, and not by writ of error, was not considered or noticed, and had not then been decided, although it is now well settled. *McCollum* v. *Eager*, 2 How. 61; *Walker* v. *Dreville*, 12 Wall. 440; *Marin* v. *Lalley*, 17 Wall. 14.

In *Marin* v. *Lalley*, above cited, the order of seizure and sale was made by the Circuit Court on March 28, 1872; the defendants afterwards came in, filed various objections, oppositions and answers, and prayed that the proceedings might be quashed; the court, on June 3, ordered that "the objections and answers of the defendants to the order of seizure and sale be overruled;" and the defendants, on June 13, appealed (as appears on referring to the record) from "the order for executory process, entered herein on the 28th day of March, 1872, and made final on the 3d day of June, 1872, by judg-

ment of this honorable court." The appeal taken by the defendants in that case, and which this court refused to dismiss on motion, was not an appeal from the original order of March 28, but from that order as made final by the judgment of June 3, and was, therefore, an appeal from that judgment. It was of this final order, made after notice to and opposition by the defendants, that Chief Justice Chase, in delivering judgment, said: "It is in substance a decree of foreclosure and sale, which has repeatedly been held to be a final decree." "If there were any doubt as to the finality of the original order, there can be none that it became final when the answer and objections were overruled. That order seems to have been made contradictorily with the debtors. Their opposition was overruled, and their property decreed to be seized and sold to pay their debts." And he distinguished *Levy* v. *Fitzpatrick*, above cited, on the ground that the order there held not to be a final judgment was "the original order, without the three days' notice, and without any act on the part of the debtors." 17 Wall. 17, 18.

The present case appears to us to be governed by *Levy* v. *Fitzpatrick*, and to be likewise distinguishable from *Marin* v. *Lalley*.

The original order of the Circuit Court for a seizure and sale was made June 29, 1888, and directed the marshal to seize the property, but to stay the sale until the further orders of the court. On June 30, a notice, together with a copy of the bill and order, was issued by the clerk and served on the defendant; and the defendant, appearing specially for the purpose, prayed for an appeal from that order, which was denied. These were all the proceedings which took place at the first term.

At the next term, the defendant, on November 19, again appearing specially, moved to quash the proceedings, and, if that should be refused, renewed his prayer for an appeal from the order of June 29. The writ of seizure and sale was not issued to the marshal until November 22, and directed that the sale should be stayed until the further orders of the court, under its former order. On November 24, the court denied

the motion to quash, and granted the appeal, upon the defendant giving bond in an amount to be determined. On December 7, the court, reconsidering the whole matter with reference to the order of June 29, and to the defendant's application of June 30 for an appeal from that order, ordered that so much of that order, as directed the marshal to stay the sale until the further orders of the court, be stricken out; and that an appeal, to operate as a supersedeas, be allowed to the defendant *nunc pro tunc* as of June 30, 1888, on his giving bond in the sum of $1000. The defendant gave bond accordingly to prosecute his appeal "from the decree rendered on June 29, 1888."

It thus clearly appears that the only appeal claimed by the defendant was from the original order of seizure and sale of June 29, 1888, made before notice to the defendant, and was allowed, as of June 30, upon the application which he had then made, as soon as he had notice of that order; and that no appeal was, in terms or by implication, claimed, applied for, allowed or taken from the order of December 7, which was the final order of the Circuit Court in this case.

It necessarily follows that the order appealed from was not a final decree, and that the appeal must be dismissed for want of jurisdiction.

We are the more ready to accept this conclusion, because we have no doubt that if, upon this record, the appeal could be treated as having been taken from the final decree of December 7, no reason is shown for reversing the judgment of the Circuit Court. The only objections taken below to the order and proceedings, as appears by the motion to quash, were that the Circuit Court had no jurisdiction, and that there was no authentic evidence of the debt to Shattuck & Hoffman, secured by the same mortgage as the notes to the plaintiff. But that the Circuit Court, sitting in equity, had jurisdiction of the case, has been already shown. And there being authentic evidence of the plaintiff's debt, the want of like evidence of the separate and distinct debt to Shattuck & Hoffman, which by the express terms of the mortgage was subordinate to the debt to the plaintiff, is immaterial. *Chambliss* v. *Atchison*, 2 La. Ann. 488, 491; *Renshaw* v. *Richards*, 30 La. Ann. 398;

Statement of the Case.

Dejean v. *Hebert*, 31 La. Ann. 729; *Soniat* v. *Miles*, 32 La. Ann. 164.

Appeal dismissed for want of jurisdiction.

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

FLEITAS *v.* RICHARDSON, (No. 2.)

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 148. Argued April 14, 1892. — Decided March 6, 1893.

The liability of a husband to his wife for her paraphernal property, secured by legal mortgage of his estate, under the law of Louisiana, is extinguished by his discharge in bankruptcy; her mortgage, therefore, cannot attach to land acquired by him after the discharge; and a subsequent mortgagee from the husband may set up the discharge in bankruptcy against the wife.

This was a bill in equity, filed December 30, 1887, by Mary Corinne Warren Fleitas, authorized by her husband Francis B. Fleitas, both citizens of Louisiana, against Gilbert M. Richardson, a citizen of New York, Albert R. Shattuck and Francis B. Hoffman, citizens of Massachusetts, and partners under the name of Shattuck & Hoffman, and others, in the district court of the parish of Orleans and State of Louisiana, to remove a cloud on her title to lands in the parish of St. Bernard in that district, which she claimed under a judgment and sale on execution upon a legal mortgage from her husband, and to restrain the above named defendants from seizing and selling the lands under a conventional mortgage from him.

The case was duly removed by said defendants into the Circuit Court of the United States, upon the grounds that there was a separable controversy between them and the

plaintiff, and that the suit involved a question under the bankrupt law of the United States as to the effect of the husband's discharge in bankruptcy upon the plaintiff's claim and mortgage.

In that court, a supplemental bill, answers (setting up, among other defences, the husband's discharge in bankruptcy,) and replications were filed, and on May 31, 1889, the case was heard upon pleadings and proofs, by which the material facts appeared to be as follows :

The plaintiff was married to Francis B. Fleitas on February 6, 1868. Before the marriage, and on the same day, they and her parents signed a marriage contract before a notary public, and in the presence of two witnesses, which provided that there should be a community of acquets and gains between the husband and wife, in accordance with the provisions of the Civil Code of Louisiana; and by which her parents declared that, in consideration of her intended marriage, they thereby made to her a donation of $20,000 in money; and Fleitas acknowledged that he had received that sum, and declared that "he has taken charge of said amount for account of his said future wife, and for which he holds himself and remains liable to her according to law;" and "by mutual consent it is hereby agreed that all the property of the future wife, now owned by her, or which may be hereafter acquired by her with funds unto her belonging, shall be and remain her paraphernal property." This contract was duly recorded on September 27, 1870, in the parish of St. Bernard.

Francis B. Fleitas, on April 25, 1877, obtained a discharge in bankruptcy in the District Court of the United States for the Eastern District of Louisiana, under proceedings commenced April 26, 1876; and afterwards, and before 1884, purchased the lands in question; and on January 28, 1884, mortgaged them by notarial act duly recorded, to secure debts of his to Richardson, and to Shattuck and Hoffman.

On September 3, 1887, the plaintiff filed a petition in the district court of the parish of St. Bernard against her husband, for separation of property, and for a recognition of her mortgage on all his lands in that parish, alleging that he was

largely in debt, and that there was danger that his estate would not be sufficient to satisfy her rights and claims; on the same day, he filed an answer, denying all her allegations, except the marriage and the marriage contract; and on September 10, 1887, she recovered judgment against him, dissolving the community of acquets and gains, decreeing a separation of property between them, and ordering that the sum of $20,000, held by him as her paraphernal property, be returned to her, and be recognized as secured by legal mortgage on all his lands in that parish, to take rank and effect from September 27, 1870. Execution was issued on this judgment, under which the sheriff levied on the lands in question, and on November 19, 1886, sold and conveyed them to the plaintiff.

On June 29, 1888, Richardson instituted executory proceedings upon the mortgage of January 28, 1884, for the seizure and sale of the lands, as set forth in the next preceding case, (*ante*, 538,) the record of which was made part of the record in this case.

In the present case, the Circuit Court dismissed the bill and the supplemental bill, upon the ground that the husband's discharge in bankruptcy barred the plaintiff's claim, and defeated any mortgage or lien in her favor. 39 Fed. Rep. 129. The plaintiff appealed to this court.

Mr. J. R. Beckwith for appellant.

Mr. Thomas J. Semmes for appellees.

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

The law of Louisiana as to the rights of married women, which must have a controlling influence on the decision of this case, differs widely from the common law, and a statement of some of its principal rules cannot well be avoided.

By the law of Louisiana, persons contracting marriage may, by ante-nuptial contract before a notary public and in the presence of two witnesses, make such agreements as they

please (not affecting the legal order of descents,) concerning the title and enjoyment of their property, and of donations made to them by third persons in consideration of the marriage. Civil Code, Arts 2325 (2305), 2328 (2308), 2329 (2309), 2331 (2311). And the partnership or community of acquets and gains exists between them by operation of law, unless otherwise stipulated in the contract. Arts. 2332 (2312), 2399 (2369).

The separate property of the wife is that which she "brings into the marriage, or acquires during the marriage by inheritance, or by donation made to her particularly," and "is divided into dotal and extra-dotal. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extra-dotal property, otherwise called paraphernal property, is that which forms no part of the dowry." Arts. 2334 (2314), 2335 (2315).

"The wife has a legal mortgage on the property of her husband," for the restitution or reinvestment of the dotal property or dowry, and "for the restitution and reinvestment of her paraphernal property." Art. 3319 (3287). The marriage contract, out of which this mortgage arises, is required to be recorded in the parish where the husband's property is. Art. 3349; Louisiana Rev. Stat. § 2381. Such a mortgage is not required, like ordinary mortgages, to be reinscribed every ten years. Civil Code, art. 3369 (3333). It attaches to any lands acquired by the husband during coverture, and while his liability to the wife continues to exist. *Johnson* v. *Pilster*, 4 Rob. (La.) 71, 76.

As a general rule, contracts of sale between husband and wife are prohibited; but one of the exceptions to this rule is that he may transfer property to her in settlement of claims arising out of her separate property. Civil Code, art. 2446 (2421).

The wife has no estate of dower in the lands of her husband, nor any right corresponding or equivalent to dower at common law. The decision in *Porter* v. *Lazear*, 109 U. S. 84, therefore, has no application to this case.

The liability of the husband to the wife, for her separate

property received by him under the marriage contract, is in the nature of a debt secured by mortgage of his lands, and may be enforced by her by direct suit against him.

Although the wife cannot maintain an action, in relation either to her dotal or to her paraphernal property, against a third person, unless authorized by her husband, or, if he fails to do it, by a judge, yet she may, with the authorization of the court in which she brings the action, sue her husband "for the separation of property, or for the restitution and enjoyment of her paraphernal property." Code of Practice, arts. 105–108. The object of the provision requiring the wife to obtain the authorization of the court is to protect the husband against vexatious and unadvised family suits, and the want of such authorization is waived if the husband accepts service without taking the objection. *Le Blanc* v. *Debroca*, 6 La. Ann. 360; *Spivey* v. *Wilson*, 31 La. Ann. 653.

The wife may, at any time during the marriage, sue the husband for a separation of property, "when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims." Civil Code, art. 2425 (2399). Consequently, a transfer of property, or a confession of judgment, by an insolvent husband to his wife, in settlement of her claims, is good against his creditors. *Lehman* v. *Levy*, 30 La. Ann. 745, 750; *Levi* v. *Morgan*, 33 La. Ann. 532; *Thompson* v. *Freeman*, 34 La. Ann. 992.

Beside the power which the wife has to sue her husband for a separation of property when the disorder of his affairs endangers her rights, she has the absolute right, at any time, and at her own discretion, without regard to the condition of the husband's affairs, to resume the sole possession and administration of her paraphernal property, and to maintain a suit against him for that purpose. Civil Code, arts. 2384 (2361), 2385 (2362), 2387 (2364), 2391 (2368); *Brooks* v. *Wiggington*, 14 La. Ann. 687; *Joly* v. *Weber*, 35 La. Ann. 806, 809, and cases cited; *Burns* v. *Thompson*, 39 La. Ann. 377.

When there is a community of acquets and gains, the fruits and income of the wife's paraphernal property administered by the husband belong to the conjugal partnership or com-

munity. Civil Code, arts. 2386 (2363), 2402 (2371). The husband may appropriate such fruits and income to his own use. *Wimbish* v. *Gray*, 10 Rob. (La.) 46; *Miltenberger* v. *Keys*, 25 La. Ann. 287. He is not liable to her for neglecting to collect them. *Wallace* v. *McCullough*, 20 La. Ann. 301. Nor is he liable for interest on the debt to his wife, except after she has obtained judgment against him. *Burns* v. *Thompson*, 39 La. Ann. 377.

The debt of the husband to the wife is so like an ordinary debt, that it may be seized and sold on execution against her. *Hawes* v. *Bryan*, 10 Louisiana, 136. And in proceedings in insolvency *in invitum* against the husband, under a statute of the State, she may prove and vote upon her paraphernal claim, even if she has not renounced the community of acquets and gains. *Planters' Bank* v. *Lanusse*, 10 Martin, 690, and 12 Martin, 157.

Where, after a wife had recovered a judgment of separation of property, and an execution thereon had been partly satisfied, the husband went into bankruptcy and obtained a discharge, the Supreme Court of Louisiana held that her debt was barred, and could not be enforced against property subsequently acquired by him; and said that it must "regard the balance of the debt due by the husband to his wife as extinguished by the discharge in bankruptcy, and that consequently she had no longer a right to issue an execution; that any property acquired by him afterwards was free from any claim on her part; and that, in truth, the community had ceased to exist." *Alling* v. *Egan*, 11 Rob. (La.) 244, 245.

Such being the nature of the liability of the husband to the wife for her paraphernal property, under the law of Louisiana, it was clearly provable by her against him as a debt under the bankrupt act of the United States. Rev. Stat. § 5067; *In re Bigelow*, 3 Benedict, 198; *In re Blandin*, 1 Lowell, 543; *In re Jones*, 6 Bissell, 68, 78.

It is equally clear that it has none of the elements of a trust, certainly not of such a technical trust as to make it a fiduciary debt, within the meaning of that act; and that, consequently, it was barred by his discharge in bankruptcy. Rev. Stat.

§§ 5117, 5119; *Hennequin* v. *Clews*, 111 U. S. 676; *Upshur* v. *Briscoe*, 138 U. S. 365.

The remaining question is whether the appellees can avail themselves of that discharge. The dates bearing upon this question are as follows: The marriage contract, out of which the plaintiff's mortgage arose, was made in 1868, and recorded in 1870. The husband's discharge in bankruptcy was obtained in 1877 from all debts due at the commencement of proceedings in 1876, including his liability to his wife. She had, as yet, no mortgage on these lands, because they were not his property. After this, he purchased the lands, and, in 1884, mortgaged them to the appellees. In 1887, the wife sued the husband and obtained a judgment for a separation of property, declaring a mortgage in her favor as of the date of the recording of the marriage contract; and upon that judgment took out execution, under which the sheriff levied upon the lands and sold them to her.

Under these circumstances, by the law of Louisiana, the debt of the husband to the wife was extinguished by his discharge in bankruptcy; and thereupon her mortgage, which was but a security for that debt, disappeared with it, and could not attach to these lands, upon his subsequently purchasing them; and the appellees, claiming as his creditors, under the mortgage from him to them, were entitled to set up his discharge in bankruptcy against any lien claimed by her upon the lands. Civil Code, arts. 3278 (3245), 3285 (3252), 3466 (3429); *Alling* v. *Egan*, 11 Rob. (La.) 244; *Upshur* v. *Briscoe*, 37 La. Ann. 138, 153, and 138 U. S. 365, 379; *Larthet* v. *Hogan*, 1 La. Ann. 330; *New Orleans Co.* v. *Recorder of Mortgages*, 27 La. Ann. 291; *Klotz* v. *Macready*, 44 La. Ann. 166.

Neither the omission of the husband to plead his discharge in bankruptcy in his wife's suit against him, nor the judgment recovered by her in that suit, can affect the title of the appellees (who were not parties to that suit) under the previous mortgage to them. *Decree affirmed.*

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

Syllabus.

HAYES *v.* PRATT.

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

No. 19. Argued March 25, 1892. — Decided March 6, 1893.

A citizen of Pennsylvania, born in New Jersey, devised and bequeathed the residue of his estate, real and personal, consisting mostly of property in Pennsylvania and in Michigan, with some real estate in New Jersey, to his executors, in trust to sell and invest at their discretion, "and to appropriate and use the principal or income thereof for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics;" and appointed as his executors H, a citizen of New Jersey, and W, a citizen of Pennsylvania, "and in the event of the death of either or both of them, first, P, and next, N, to supply vacancy." W took out letters testamentary in Pennsylvania, and there administered the property in Pennsylvania and in Michigan, and, with the approval of a Pennsylvania court, appropriated it to found a home for such mechanics, incorporated by the legislature of Pennsylvania to carry out the testator's charitable intention. H took out letters testamentary in New Jersey, and took care of the real estate there, and died having done nothing beyond obtaining the opinion of counsel that the executors would be authorized, in their discretion, to provide a bed for such mechanics in a hospital, incorporated in New Jersey, for "the care, nurture and maintenance of sick, infirm, aged and indigent persons, and of orphan and destitute children," and whose by-laws provided that patients in a condition to be discharged, or whose disease was incurable, should not remain in the hospital, and that those able to pay for their maintenance should do so. After the deaths of H and W, a son of H took out letters of administration with the will annexed of the unadministered goods, chattels and effects of the original testator in New Jersey; and, after having assured P that he would not dispose of the real estate in New Jersey without giving him an opportunity to show that the Pennsylvania corporation was entitled to it, sold it, and, without any order of court, and without P's knowledge or consent, paid the proceeds to the New Jersey corporation, taking a bond of indemnity. *Held*, that P, on taking out letters testamentary in Pennsylvania, was entitled, as executor, and upon filing a copy of those letters, to maintain a bill in equity against the New Jersey administrator in the Circuit Court of the United States for the District of New Jersey to recover those proceeds, with interest, and costs.

Statement of the Case.

THIS was a bill in equity, filed August 11, 1884, in the Court of Chancery of the State of New Jersey, by Dundas T. Pratt, a citizen of Pennsylvania, describing himself as "succeeding executor of the last will and testament of George Hayes, late of the city and county of Philadelphia, in the State of Pennsylvania, deceased," and by the Hayes Mechanics' Home, a corporation organized under the laws of Pennsylvania, and established at Philadelphia, against Henry Hayes, a citizen of New Jersey, administrator of George Hayes, for an account of property of the deceased received by him, amounting to more than $5000, and for payment thereof to either of the plaintiffs, as the court might direct.

The case was duly removed, upon the defendant's petition, into the Circuit Court of the United States for the District of New Jersey, and was there, after an answer and a general replication had been filed, heard upon pleadings and proofs, by which it appeared to be as follows:

George Hayes was a jeweller, was born in Newark in the State of New Jersey in 1815, and there lived until 1847, when he removed to Philadelphia, and became interested in and identified with the mechanics of that city, and resided and did business there until June 1, 1857, when he died, leaving a dwelling house and personal estate in Philadelphia, real estate in Michigan, and an interest in real estate in Newark, (on which he had lived and carried on his business before his removal to Philadelphia,) and a will, dated June 16, 1855, duly executed and published according to the laws of Pennsylvania and of New Jersey, by which, after payment of debts and legacies, he provided as follows:

"Item. As to the rest, residue and remainder of my estate, both real and personal, and of every nature and kind whatsoever, I give, devise and bequeath the same to my executors hereinafter named, their heirs, executors and administrators forever, in trust to realize the same in the manner deemed by them the most advisable, and keep the same invested in such manner as they in their discretion may deem most advantageous, and to appropriate and use the income or principal thereof for the purpose of founding and supporting, or uniting

in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics.

"Item. To better enable my said executors to carry out and perfect my intentions as expressed in the last foregoing item, I authorize and empower them to sell all or any of my real estate, either at public or private sale, either for cash or part cash, and reserving ground rent or taking mortgage for the purchase money, as the case may be, without any liability of the purchaser or purchasers thereof as to the application or misapplication of the purchase or consideration moneys.

"Lastly. I nominate, constitute and appoint my brother, Jabez W. Hayes, and my friend, Dr. Lewis E. Wells, (and in the event of the death of either or both of them, then I appoint, first, Dundas Pratt, and next, my brother in law, Horace H. Nichols, to supply vacancy,) to be the executors of this my will."

Dundas Pratt, named in the will, was Dundas T. Pratt, one of the original plaintiffs and present appellees. It does not appear that Nichols ever did anything in regard to this trust.

Lewis E. Wells resided in Philadelphia, and proved the will and was appointed and qualified as executor thereof in the orphans' court of Philadelphia on June 20, 1857, and, with the knowledge of Jabez W. Hayes, took care of the property in Pennsylvania and in Michigan.

Jabez W. Hayes resided in Newark, and proved the will and was appointed and qualified as executor thereof in the orphans' court of Essex county in New Jersey on August 4, 1857, and, with the knowledge of Wells, took care of the property in New Jersey.

On June 21, 1858, Wells and Pratt, together with Ferdinand J. Dreer, the former partner of the testator, and other citizens of Pennsylvania, were duly incorporated, under the general laws of Pennsylvania, as the Hayes Mechanics' Home, with the object of "the founding and providing of a retreat and home for disabled, aged or infirm and deserving American mechanics." Dreer was president and Pratt secretary of the

corporation from the beginning, and Wells was treasurer of the corporation from its organization until 1873, when he was removed and another treasurer chosen, and Pratt afterwards became treasurer.

On March 16, 1861, the legislature of Pennsylvania, at the instance of Wells as acting executor, passed an act, reciting that the Hayes Mechanics' Home had been incorporated as aforesaid "for the purpose of founding a home for disabled, aged or infirm and deserving American mechanics, and with the intention of carrying into effect the charitable objects provided for by the last will and testament of George Hayes, deceased, late of the city of Philadelphia;" ratifying and confirming its charter; and empowering it to take and hold the property devised and bequeathed by George Hayes as aforesaid. Penn. Laws of 1861, c. 117, p. 132.

Wells paid all the testator's debts and legacies, and, in 1864, settled in the orphans' court of Philadelphia the account of his administration of the property in Pennsylvania, and paid to the Hayes Mechanics' Home the balance of the personal estate in his hands, amounting to $13,789; and also, in obedience to an order of that court, (upon the petition of the corporation, stating that settlement and payment, the provision of the will, the charter of the corporation, and the act of the legislature,) conveyed to that corporation the land in Pennsylvania, valued by an examiner of that court at $12,000, and the land in Michigan, valued at $17,000. The property so received and the proceeds of sales thereof were afterwards invested so that, besides paying $10,000 in 1859 for a tract of sixteen acres of land as a site for a building, they amounted in May, 1884, (including $11,500 received from other persons,) to $92,000. The building was actually begun a few months after the filing of this bill.

Wells died in 1876, never having done anything about the real estate in New Jersey, although he knew of its existence.

There was in the city of Newark an institution called the Hospital of St. Barnabas, incorporated by an act of the legislature of New Jersey of February 13, 1867, c. 32, which provided that the object of the corporation should be "the care,

nurture and maintenance of sick, infirm, aged and indigent persons, and of orphan, half orphan and destitute children, the providing for their temporal and spiritual welfare, and the procuring or erecting a suitable building or buildings;" and that its members and trustees should be members of the Protestant Episcopal Church, and the moral and religious instruction of the inmates should be in conformity with the doctrine, discipline and worship of that church. New Jersey Acts of 1867, p. 51. Its by-laws and rules provided that patients in a condition to be discharged, or whose disease was incurable, should not remain in the hospital; and that all persons able to pay for their maintenance should do so.

Jabez W. Hayes often told his sons that he intended to devote the principal and income of the testator's property in Newark to the support of this hospital, and in 1870, and again in 1876, obtained the opinion of counsel that, under the provisions of the will of George Hayes, the executors would be authorized in their discretion to provide a permanent bed in this hospital for disabled or aged and infirm and deserving American mechanics. But he took no other steps in that direction, and died in January, 1882, without having rendered any account of his administration.

On December 12, 1882, the orphans' court of the county of Essex and State of New Jersey passed an order, reciting the probate of the will of George Hayes in that court, and that "Jabez W. Hayes, after having taken upon himself the execution of said will in this State, has departed this life, that due notice has been given of this application to Dundas Pratt, the only other surviving executor named in said will, and to all other parties in interest;" and appointing "Henry Hayes administrator of all and singular the goods, chattels and credits of the said George Hayes, deceased, in the State of New Jersey, left unadministered by Jabez W. Hayes, deceased, who is duly authorized to administer the same agreeably to said will."

Before this appointment, and after Pratt had received notice of the application therefor, a correspondence took place between him and Henry Hayes, in which Pratt, while acqui-

escing in the appointment, insisted that the testator's interest in the land in New Jersey (the existence of which had become known to him only since the death of Jabez W. Hayes,) should go to the Hayes Mechanics' Home; and Henry Hayes expressed a wish that it should be applied, as his father had hoped, to a bed for mechanics in the hospital at Newark. On June 25, 1883, Henry Hayes, in answer to a letter from Pratt about the sale of this interest of the testator, wrote to him that he would not, of course, make any disposition of the money but a legal one, and that he would not dispose of it in any way without giving Pratt an opportunity to show that the Hayes Mechanics' Home was the only institution entitled to it.

Henry Hayes soon afterwards sold this property, and received money from the sale and from previous income thereof; and in October, 1884, made an offer to the Hospital of St. Barnabas, which that corporation accepted, to appropriate to its use the greater part of this money; and on January 8, 1884, settled his account in said orphans' court, showing a balance in his hands of $5153.27; and declined to pay it to Pratt, as executor of George Hayes, or as treasurer of the Hayes Mechanics' Home; and in March, 1884, without any order of court, and without Pratt's knowledge or consent, paid this balance to the Hospital of St. Barnabas, informing it of Pratt's claim, and taking from it a bond of indemnity, secured by a mortgage on real estate; and the board of trustees of that corporation, on March 17, 1884, "resolved, that the Hospital of St. Barnabas consents to receive said fund, and it hereby agrees to use such fund solely for the purpose of furnishing a retreat and home for disabled or aged and infirm and deserving American mechanics, in accordance with the will of the late George Hayes;" and, on July 1, 1885, having meanwhile completed a new hospital building, "resolved, that a suitable part of the building be fitted up with two beds to be devoted especially to the purposes mentioned by the testator, and that a tablet be placed upon the walls as an indication of these uses and a memorial of the donor of the fund."

Argument for Appellant.

On May 10, 1884, in the orphans' court of Philadelphia, (as appeared by an exemplified copy of the record of the appointment, filed with the bill in this case,) "Jabez W. Hayes and Lewis E. Wells, two of the executors named in said will, being dead, letters testamentary were duly granted unto Dundas T. Pratt, surviving executor;" and Pratt was duly qualified "as the succeeding executor of the foregoing last will and testament of George Hayes, deceased." At that time, there was no estate of the testator, which had not been duly administered, except so far as the property in New Jersey could be so considered; and Pratt testified that his only object in being appointed was to sue for and recover that property, that he supposed that the Hayes Mechanics' Home could itself pursue that fund, but was advised that he, as executor, should claim it.

The Circuit Court "ordered, adjudged and decreed that the respondent, Henry Hayes, administrator of the estate of George Hayes, in the State of New Jersey, pay to the complainant, Dundas T. Pratt, treasurer of the Hayes Mechanics' Home, a corporation of the State of Pennsylvania, and for and in behalf of said corporation, the sum of $5153.27, with interest from January 10, 1884, being the balance in his hands, as administrator aforesaid, on settlement of his account in the orphans' court of Essex county, New Jersey," with costs.

Mr. A. Q. Keasbey for appellant.

I. The Hayes Mechanics' Home had no legal or equitable claim upon the defendant in this suit. He had assumed no trust relation with that corporation. Therefore that home had no standing in New Jersey to demand by suit anything from the defendant, as administrator of the estate of George Hayes in New Jersey, and the decree enforcing such demand directly in its favor should be reversed.

II. Dundas T. Pratt, in his capacity of succeeding executor in Pennsylvania, had no right to make any such claim.

The granting of letters testamentary to him twenty years after the estate had been settled and all the functions of the executor ended in Pennsylvania, was a work of super-

erogation. There was nothing in Pennsylvania for him to administer and could not be, for by the records of the orphans' court, it appears that the whole of the Pennsylvania property was administered and applied according to the will of the Pennsylvania executor in the discharge of his trust. In like manner all the New Jersey property had before his appointment been applied by the New Jersey executor in discharge of the same trust, so far as it was imposed upon him. The Pennsylvania executor took no title to the New Jersey real estate and acquired no right as to the disposition of it.

III. But even if the Pennsylvania executor was authorized to obtain the New Jersey fund by transmission from this jurisdiction, or to dispose of it at his own discretion, he had no power to bring suit in the New Jersey jurisdiction against the representatives of the estate there, but his only remedy was to apply to the orphans' court in New Jersey for such direction as to such transmission as that court at its discretion under the circumstances of the case might see fit to make. *Stacey* v. *Thrasher*, 6 How. 44; *Noonan* v. *Bradley*, 9 Wall. 394; *Johnson* v. *Powers*, 139 U. S. 156.

This foreign executor cannot demand as a right by a suit in the Court of Chancery, that the New Jersey executor shall account to him for the proceeds of the property in New Jersey devised to him by the will, or for the manner in which he has in his discretion disposed of that property.

IV. But even if the Pennsylvania executor had a right to sue the New Jersey administrator, or if he had applied to the probate court of New Jersey for an order directing its administrator to transmit the residue in his hands to Pennsylvania for administration there, he could not have recovered in a suit, nor would the orphans' court have been bound to make any order for such transmission. There is no obligation to make such transmission. It is only a matter of comity, and depends wholly upon the circumstances of the case, and in this case there are no circumstances which call for the exercise of such comity.

There is nothing left for the new executor, appointed in Pennsylvania, to do with respect to the subject matter of

George Hayes' estate. The executor appointed in Pennsylvania is *functus officio*, and all his duties were closed twenty years ago. No considerations of comity and no principles of equity require that the acts done in New Jersey by the executor appointed there in the exercise of his discretion should be undone at the instance of a new executor in Pennsylvania, in order that he may have the privilege of exercising the discretion over again and applying the fund to a different purpose. *Dent's Appeal*, 22 Penn. St. 514; *Mothland* v. *Wireman*, 3 Penn. 185; *S. C.* 23 Am. Dec. 71; *In re Hughes*, 95 N. Y. 55; *Hunter* v. *Bryson*, 5 G. & J. 483; *S. C.* 25 Am. Dec. 313; *Carmichael* v. *Ray*, 5 Iredell, (Eq.) 365; *Harvey* v. *Richards*, 1 Mason, 381; *Mackey* v. *Coxe*, 18 How. 100; *McLean* v. *Meek*, 18 How. 16; *Stacey* v. *Thrasher*, 6 How. 44; *Tourton* v. *Flower*, 3 P. Wms. 369; *Borden* v. *Borden*, 5 Mass. 67; *S. C.* 4 Am. Dec. 32; *Pond* v. *Makepeace*, 2 Met. 114; *Chapman* v. *Fish*, 6 Hill, 554; *Vaughn* v. *Northrup*, 15 Pet. 1; *Banta* v. *Moore*, 15 N. J. Eq. (2 McCarter,) 97; *Normand* v. *Grognard*, 17 N. J. Eq. (2 Green,) 425; *Mahnken's Case*, 36 N. J. Eq. (9 Stewart,) 518.

It follows that the Hayes Mechanics' Home, which has no interest in the estate itself, except that part of it which the Philadelphia executor has already chosen to give it, has no standing whatever in the Court of Chancery of New Jersey to recover another part of the estate which has already been bestowed upon another charitable corporation, nor has the Pennsylvania executor such an interest in the property in this State as to enable him to maintain such an action.

V. The property in dispute in this case is the proceeds of the sale of real estate. The disposition of real estate is governed by the law of the place where it is situated. This law would govern the descent of land undisposed of by will, and by this law the question of the due execution of a will would be decided.

It is the general rule that the disposition of real estate is governed by the law of the place where it is situated; and when a testator appoints an executor in that place, and gives him power to sell real estate, the presumption is that he in-

tends him to have power over his real estate there, and that he may sell it according to the laws of the place where it is, and may also dispose of the proceeds as well as of the land itself, under the directions of the will.

Even with respect to personal property there is a tendency to limit the rule that it is governed by the law of the domicil. The distribution of personal property in cases of intestacy is according to the law of the domicil, but yet so far as it concerns creditors it depends on the law of the country where it is situated. *Milne* v. *Moreton*, 6 Binney, 353; *S. C.* 6 Am. Dec. 466; *Farmers' & Mechanics' Bank* v. *Loftus*, 133 Penn. St. 97.

VI. It is the general result of the cases that the disposition of the residue of an estate in the hands of an ancillary executor or administrator is wholly a matter of discretion, and that there is no rule or principle which requires that the funds which were in the hands of this administrator with the will annexed, should have been sent into a foreign jurisdiction as against any proper claims here, whether of creditors, legatees named in the will, or objects of the testator's bounty and charity, selected by his executor here in pursuance of the power of the will; and all the cases show that the foreign executor or administrator has no right to meddle with the estate here or sue for it, unless such power is given, on proper application to the courts of this jurisdiction.

In this case such discretion ought not to be exercised in favor of sending the proceeds of real estate in New Jersey out of the State for the purpose of applying it to purposes not contemplated by the New Jersey executor who held the title to the property.

Mr. John R. Emery for appellees.

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

George Hayes, by his will, devised and bequeathed the residue of his estate, real and personal, to his executors, in trust to sell and invest at their discretion, "and to appropriate and use the principal or income thereof, for the purpose of

founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics."

The primary, if not the only, intention of the testator evidently was that his bounty should go to a single institution, "a retreat and home for disabled or aged and infirm and deserving American mechanics," either by founding, as well as supporting, a new institution, or by aiding in the support of one founded by others. The validity of the charitable trust is undoubted, notwithstanding that the trustees might appropriate the fund to an institution established after the testator's death. *Jones* v. *Habersham*, 107 U. S. 174, 191; *Curran's Appeal*, 4 Pennypacker, 331; *Taylor* v. *Bryn Mawr College*, 7 Stewart, (34 N. J. Eq.) 101.

The execution of this trust was committed by the testator to the executors named in the will, first, to Jabez W. Hayes and Lewis E. Wells, and next, in the event of the death of either or both of these, to Dundas Pratt and Horace H. Nichols, successively. So long as any one of the four is living, and has not declined the office of executor, or been shown to be unsuitable, no other person can execute the trust. And it is doubtful, to say the least, whether the trust is not such a personal confidence reposed by the testator in the persons named, that it would in no event pass to an administrator with the will annexed, but must, if all those named in the will should die before full performance of the trust, be executed by a trustee specially appointed for the purpose. *Ingle* v. *Jones*, 9 Wall. 486, 497, 498.

Of the two executors first named, Jabez W. Hayes being a citizen of New Jersey, and Lewis E. Wells a citizen of Pennsylvania, each proved the will and took out letters testamentary in his own State, and assumed the care and management of the property in that State, and Wells also took control of the property in Michigan. But such an arrangement, however convenient, cannot affect the duty of either or both of the executors, or of the court, to see that the trust is carried out according to the testator's intention.

The testator was born and for many years lived in New Jersey, but his domicil at the time of his death and for ten years before was in Pennsylvania. A small part only of his property was in New Jersey, and the greater part was in Pennsylvania and Michigan. The Hayes Mechanics' Home was incorporated within thirteen months after his death by his partner, by Wells, his Pennsylvania executor, by Pratt, now his executor, and by other citizens of Pennsylvania, under the laws of that State, for the purpose of founding and supporting "a retreat and home for disabled, aged or infirm and deserving American mechanics," as contemplated in his will. Wells settled his account as executor in the proper court of Pennsylvania, and paid over the balance of personal property in his hands to the Hayes Mechanics' Home, and also, by order of that court, conveyed to that corporation the lands in Pennsylvania and in Michigan; and the validity of the payment and conveyance has not been impugned. In short, the whole of the residue of the testator's property, real and personal, except the comparatively small amount now in controversy, has been appropriated, with the approval of the legislature and of the courts of his domicil, in a manner to carry out his charitable intent in accordance with the letter and spirit of his will.

Jabez W. Hayes, the executor appointed in New Jersey, died in January, 1882, having done nothing towards carrying out the charitable intent of the testator, beyond obtaining the advice of counsel that the executors (not that he alone) might lawfully appropriate the property in New Jersey to the support of the Hospital of St. Barnabas in Newark.

After his death, Henry Hayes was appointed by the orphans' court in New Jersey to be administrator of the unadministered "goods, chattels and credits" of George Hayes in New Jersey. As already indicated, it is difficult to see how this appointment could give him any title in or power over the real estate devised to the executors in trust. But if it can be treated as vesting in him the title to the real estate in New Jersey, it certainly did not authorize him to undertake the performance of the charitable trust created by the will, so

long as Pratt, one of the alternative executors and trustees therein named, was still alive, had never declined the trust, and had not even known, until recently, of the existence of any estate of the testator not already disposed of according to his will.

Moreover, to apply the fund, received by the defendant from the sale of the real estate in New Jersey, to the maintenance of a free bed in the Hospital of St. Barnabas under the charter and rules of that institution, would be much less in accord with the intention of the testator, as expressed in his will, than to add this fund to his other property already devoted to the foundation and support of the Hayes Mechanics' Home.

Both the original executors being dead, and Pratt, the successor next named in the will, having been appointed sole executor in their stead, he is the only person authorized to execute the charitable trust of the testator, so far as anything remains to be done with regard to it.

It was objected that Pratt, as executor appointed in Pennsylvania, could not sue in New Jersey without taking out letters testamentary in that State. But this objection is answered by the statute of New Jersey of 1879, c. 16, which enacts that "any executor or administrator, by virtue of letters obtained in another State, may prosecute any action in any court of this State, without first taking out letters in this State: provided such executor or administrator shall, upon commencing suit, file in the office of the clerk of the court in which such suit shall be brought an exemplified copy of the record of his or their appointment," which has been done in this case. New Jersey Acts of 1879, p. 28; *Lawrence* v. *Nelson*, 143 U. S. 215.

It was further objected that since the orphans' court had been vested by the statute of New Jersey of 1872, c. 340, with the power, upon allowing the accounts of executors, or of administrators with the will annexed, to order distribution of the residue in accordance with the will, application should have been made to that court. New Jersey Acts of 1872, p. 47. But the statutes of the State conferring jurisdiction upon

the orphans' court do not even affect the jurisdiction of the Court of Chancery of New Jersey over the settlement of estates. *Frey* v. *Demarest*, 1 C. E. Green, (16 N. J. Eq.) 236; *Coddington* v. *Bispham*, 9 Stewart, (36 N. J. Eq.) 224, 574; *Houston* v. *Levy*, 17 Stew. (44 N. J. Eq.) 6. Certainly, no such statutes can defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different States, the assets of a deceased person within its jurisdiction. *Green* v. *Creighton*, 23 How. 90; *Payne* v. *Hook*, 7 Wall. 425; *Lawrence* v. *Nelson*, 143 U. S. 215.

The defendant, as administrator with the will annexed of George Hayes, having received money from the income and sale of his real estate, and settled his account therefor in the court which appointed him, and having, without any order of court, and without right, and with notice of Pratt's claim, paid the money to the Hospital of St. Barnabas, taking from that corporation a bond of indemnity, was rightly held liable to account for it, with interest from the date when he so settled his account after having determined so to pay it.

There being no one in New Jersey having any right to or claim upon this fund, and no special reason being shown for administering it in New Jersey, it should, upon familiar principles, be transmitted to the executor appointed at the testator's domicil for distribution. *Wilkins* v. *Ellett*, 9 Wall. 740, 742; *Harvey* v. *Richards*, 1 Mason, 381, 412, 413; *Normand* v. *Grognard*, 2 C. E. Green (17 N. J. Eq.) 425, 428.

Pratt, being the executor appointed in the State of the testator's domicil, and the trustee charged with the administration of the charitable trust, is the only person entitled to maintain this suit. The joinder of the Hayes Mechanics' Home as a plaintiff was unnecessary, and perhaps improper; but not having been objected to, by demurrer or otherwise, in the court below, it affords no ground for refusing relief. The decree of the Circuit Court is irregular in that it directs payment to be made to Pratt as treasurer of the Hayes

Mechanics' Home, instead of to him as executor, and is therefore to be amended in that particular, and,

So amended, affirmed.

MR. JUSTICE SHIRAS, not having been a member of the court when this case was argued, took no part in its decision.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY *v.* HARMON'S ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 116. Argued January 18, 19, 1893. — Decided March 6, 1893.

In an action against a common carrier to recover damages for personal injuries, if the facts relating to contributory negligence are disputed, that question should be submitted to the jury; and, if the jury find for the plaintiff, the court is not required, in the exercise of judicial discretion, to set the verdict aside.

A railway company being bound to deliver a passenger, its failure to stop long enough to enable him to alight with safety is a neglect of duty which involves liability for injuries resulting therefrom.

When the evidence justifies a finding that future damages will result from an accident to a passenger caused by the negligence of a common carrier, the jury may estimate and include such damages in their verdict.

In the District of Columbia a judgment in an action of tort does not bear interest.

In this case the only error being in an allowance of interest, the court orders the judgment to be affirmed if the interest be remitted; otherwise to be reversed for that error.

THIS was an action brought by John H. Harmon to recover damages for a personal injury to him through the negligence of the railroad company. The Supreme Court of the District in special term rendered judgment on the verdict of the jury, on December 1, 1887, for $6500, and this judgment was affirmed by the court in general term on June 12, 1889, and judgment rendered against the railroad company and its

surety on appeal for the amount of the judgment of the court in special term, with interest thereon from December 1, 1887, when it was entered below, until paid, with costs. To review this judgment this writ of error was brought. The case is reported in 18 Dist. Col. 255.

The evidence is comprehensively given by James, J., delivering the opinion, as follows:

"The plaintiff testified, in his own behalf, that on the evening of the 28th of April, 1882, at about nine o'clock, he took passage in one of the defendant's cars on Pennsylvania Avenue to go to his home on 19th street; that he took his seat about two-thirds of the distance from the rear platform; that at or near 19th street he signalled to the conductor to let him off; that the conductor was then inside the car figuring up his accounts under the light; that, upon receiving the signal, the conductor rang the bell and the car began to slow up, and, as he supposed, was about stopping; that there were not many passengers inside, but the platform was crowded; that he made his way through the crowd on the platform and down on to the step which was occupied by a man and a boy, who held on to the railings on each end of the steps; that the car was, at that time, almost at a standstill; that he could neither swing off nor get back; that just as he had gotten on the step the bell was rung and the car started, and he was thereby thrown off on to the pavement and injured. He further stated that the conductor did not go out to the platform to assist him to get off. On cross-examination he said that, at the time of his attempting to get off, there were only six or eight passengers inside of the car, while the platform was so crowded that the man and boy referred to had to stand upon the step.

"On the part of the defendant the conductor testified that the plaintiff was in the habit of riding on defendant's cars and of getting off while the car was in motion; that when the plaintiff signalled on the night in question he, the conductor, rang the bell and the car began to slow; that he was then standing on the rear platform; that he and a small boy were the only persons then on the platform; that the plaintiff

'without waiting for the car to stop, after so signalling the conductor, immediately went out on the rear platform and stepped down upon the step, at the same time holding on to the iron railing on the car, and while the car was still in motion and moving at a slow rate of speed, nearly at a standstill, the plaintiff stepped off, and after he had let go of the car he, the conductor, pulled the bell to go on again, and as the plaintiff turned he fell; . . . that he did not ring the bell for the car to start until after the plaintiff had stepped on the street and let go of the car.'"

Upon the trial, the court gave the following instructions requested on behalf of the plaintiff:

"If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for him to get off, and that the car thereupon slowed, and that while plaintiff was waiting for the car to stop, and before it had fully stopped, the car started suddenly forward through the negligent act of the conductor or driver, and that the plaintiff was thereby and without any negligence on his part thrown from the car and injured, then he is entitled to recover."

"If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for plaintiff to get off, and that thereupon the car slowed and the plaintiff went out on the platform and, while the car was moving very slowly, stepped down on the step of the car to be in readiness to step off when the car should fully stop, and that instead of stopping fully the car moved suddenly forward in consequence of the negligent act of the conductor or driver and he was thereby thrown off and injured, it would be for the jury to say, under all the facts and circumstances of the case shown in evidence, whether the conduct of the plaintiff caused or contributed to his injury; and if they further believe that the plaintiff did under the circumstances what an ordinarily prudent man would have done, then he was not guilty of contributory negligence and would be entitled to recover."

"If the jury find for the plaintiff they will find for him such an amount of damages as will fully compensate him for the

suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will suffer in the future. In determining this as to the future they will consider plaintiff's bodily vigor and age as shown by the evidence adduced."

The defendant prayed the court to instruct the jury as follows:

"The burthen of proof is upon the plaintiff to satisfy the jury that he sustained the injury which is the subject of this action by reason of the negligence of the defendant and without contributory negligence on his part."

But the court refused to give the instruction as prayed, and modified it by striking out the words "and without contributory negligence on his part," and gave it as modified.

Defendant asked the court to give the following instruction:

"If the jury shall find that the platform was crowded, and that the plaintiff made his way through the crowd and got down from the platform and on to the step below and stood on the step without any means of support, with a person on each side and a crowd behind, and whilst the plaintiff was so standing a sudden movement of the car caused the plaintiff to fall from the step on to the pavement, whereby he received the injury alleged, then it will be for the jury to determine from the evidence whether or not the plaintiff is chargeable with contributory negligence through such acts; and if the jury shall find that he is so chargeable, then the plaintiff is not entitled to the verdict."

But the court refused to give the same without modification, and modified it by inserting after the word "chargeable," in the last line of the instruction, the following: "And that such negligence contributed to the injury."

Defendant also asked the court to give several instructions, which need not be repeated, and which were refused

or modified, and, among others, this, omitting the words in brackets:

"It was not the duty of the conductor of the street car from which the plaintiff was injured to exercise any physical control over the plaintiff in getting off the car, and if the jury shall find from the evidence that when the conductor rang the bell to stop the car and when the plaintiff passed out of the car upon the platform and upon the step the conductor was standing on the inside of the car, and that the platform was crowded with passengers, and that a boy was on the step next to the car and a man was also on the other end of the step in such a position as to prevent the plaintiff from supporting himself by either of the railings at the time the plaintiff stepped down upon the step, and that the car was in motion, and that while so on the step the plaintiff was thrown off the car by a sudden jerk or start of the car, caused by the ringing of the bell or otherwise, then it will be for the jury to determine whether or not the plaintiff is chargeable with contributory negligence [by such acts,] and if the jury shall find that he is so chargeable [and that said negligence contributed to the accident,] the verdict must be for the defendant."

But the court refused to give this instruction without modification, and modified it by the insertion of the words given above in brackets.

At defendant's request the court gave the following instructions:

"First. If from the evidence the jury shall find that the injury would not have occurred if the plaintiff had waited until the car stopped, and that the injury was caused by the plaintiff attempting to get off the car whilst in motion, then the plaintiff contributed to the injury, and is not entitled to recover.

"Second. If the jury shall be satisfied from the evidence that the plaintiff himself so far contributed to the accident by his own negligence or want of ordinary care and caution that but for such negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover, and the verdict must be for the defendant."

Statement of the Case.

The court also charged the jury as follows:

"This case suggests four theories as to the cause of this accident which is complained of under the declaration and as many propositions of law applicable to them. How far there is sufficient evidence in the case or any evidence to support any one of these theories I shall leave to you. In the first place, the testimony on the part of the defendant is to the effect that the plaintiff had descended from the car (in safety) and that he stepped and fell from some cause not attributable to the conduct of the defendant, but from some unforeseen accident. If you find that to be the case it is perfectly apparent that there is no ground of action at all. There is evidence in the case directly to that effect which is to be construed by you and weighed in connection with all the other evidence before you. If the plaintiff undertook, after requesting the conductor to stop the car, to descend from the car while it was still in motion, however slowly it might be going, that is an act involving necessarily some imprudence, so I take it, and if that act was the cause of his falling it would amount, in my judgment, to contributory negligence and would defeat his action. If you are satisfied that it was an act of carelessness on his part to come out on the crowded platform and step down on the step while it was already occupied by other people, so that he had to stand between them and had no means of supporting himself, and in consequence of that alone he fell from the car without any other cause — I say if you are satisfied that that was an act of carelessness on his part, and that it was the direct cause of his falling off the car, that would also amount to contributory negligence, which would defeat his right to recover. Fourthly, if you are satisfied that while he was upon the step, even though it might have been imprudent in him to go there, and yet if the conductor had allowed the car to stop he would have alighted in safety and no accident would have happened, but that instead of so doing the conductor either negligently failed to observe whether or not he had alighted, or, seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and in consequence of that a sudden jerk of

the car took place, and that threw him down and was the immediate cause of his falling, and that the accident would not have happened but for that fact, then I hold that the company is responsible."

Exceptions were duly taken by the defendant.

Mr. Walter D. Davidge and *Mr. Enoch Totten* for plaintiffs in error.

It was error to leave the question of contributory negligence to the jury. Whether there has been contributory negligence on the part of the plaintiff is a question for the jury under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. The rule, briefly, is that where the facts are undisputed and where but one reasonable inference can be drawn from them the question is one of law for the court; but where the facts are left by the evidence in dispute, or where fair minds might draw different conclusions from them, it must go to the jury to resolve the dispute in the one case or to draw the inferences in the other. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478; *Railroad Co.* v. *Jones*, 95 U. S. 439; *District of Columbia* v. *McElligott*, 117 U. S. 621; *State* v. *Baltimore & Ohio Railroad*, 73 Maryland, 374.

Whilst it is the duty of a street railroad company to provide safe and convenient means of entering and leaving its cars, there is a corresponding obligation on the part of the passenger to exercise ordinary care and prudence, and if in this respect he is negligent, and his negligence contributes to the injury of which he complains, he cannot recover.

The rule to be applied is ordinary care and caution — that degree of care which men of ordinary prudence would exercise under the circumstances — and the judge, in a case like the present, is quite as capable of applying that rule to plain and undisputed facts as a jury is.

While to ride upon the platform, or even upon the step with the support of the railing, may not be negligence in all cases, and much less negligence in law, it is submitted that to volun-

tarily ride upon the step of a moving car without any means of support is, in the absence of justification or excuse, necessarily negligence, according to any reasonable standard of care and prudence. *Wills* v. *Lynn & Boston Railroad*, 129 Mass. 351; *Jones* v. *Railroad Co.*, *supra*.

It cannot be doubted that a passenger voluntarily occupying an unsafe position in a car, and injured by reason of such position, is barred by contributory negligence from a recovery. In such a case the want of ordinary care is plainly a proximate cause of the injury. If the injury would have happened irrespective of the unsafe position, then such position would not be a proximate cause.

We concede that the burden of proof as to contributory negligence is, as a rule, upon the defendant. *Railroad Co.* v. *Gladmon*, 15 Wall. 401; *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 531. The question is whether the rule is applicable to the present case.

The evidence was closed. The right to recover depended exclusively upon the evidence of the plaintiff, and his relation to the case was double — that of party and sole witness. He could enlighten the court and jury by evidence in the ordinary sense of that term, and he could also bind himself by solemn admissions made under oath in a judicial proceeding. He testified fully as to the facts, including his own conduct, and a recovery could be claimed only upon his evidence. It is submitted that in such a case the ordinary presumption of law in favor of care and prudence on the part of the plaintiff has no place.

We do not dispute that a plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of the injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care and diligence for the purpose of avoiding injury to him. But this exception does not abrogate the general rule as to contributory negligence; and it is apparent that if the elements of time and opportunity do

Counsel for Defendant in Error.

not clearly exist, the application of the exception is simply to destroy the general rule and to substitute for it the rule of *comparative* negligence.

In Maryland there are two cases which very clearly draw the line between where the exception is and is not applicable. The first is *Northern Central Railway* v. *Price*, 29 Maryland, 420, where a person negligently walking on a railroad track was killed, and there was time and opportunity for the defendant to avoid the injury. The second is *Northern Central Railway* v. *Geis*, 31 Maryland, 357, where, under circumstances very similar to those of the present case, it was contended that the exception was applicable, as the negligence of the plaintiff was remote and that of the defendant proximate. Judge Alvey, delivering the opinion of the court in the latter case, draws the distinction between the two cases. He says: "It must appear that the defendant might by a proper degree of caution have avoided the consequences of the injured party's neglect. . . . This, however, implies *time* for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence. But where there is a concurrence of negligence of both in the production of injury to one of the parties, the causes are commingled and are regarded as equally proximate to the effect produced, and therefore not susceptible of apportionment. And if it be true that the deceased was guilty of negligence, it must, from the nature of the accident, have been of this latter character" (p. 366).

This case was followed by *Lewis* v. *Baltimore & Ohio Railroad*, 38 Maryland, 588, 598, 599, 600, 601; *Kean* v. *Baltimore & Ohio Railroad*, 61 Maryland, 154, 167, 168; and *Maryland Central Railroad* v. *Neubeur*, 62 Maryland, 391, 401, 402, in which the doctrine as laid down by Judge Alvey was discussed and affirmed.

Mr. W. A. Cook and *Mr. W. L. Cole*, (with whom was *Mr. C. C. Cole* on the brief,) for defendant in error.

Mr. Luther H. Pike and *Mr. A. St. C. Denver* also filed a brief for defendant in error.

Opinion of the Court.

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

It is contended that it was error to leave the question of contributory negligence to the jury. We do not think so. This was not a case where the facts were undisputed, and where but one reasonable inference could be drawn from them. The court was not obliged, in the exercise of a sound judicial discretion, to set aside the verdict because the evidence of contributory negligence was of such conclusive character that it could not be sustained. *Railroad Co.* v. *Converse*, 139 U. S. 469.

It was the duty of the defendant to safely carry and deliver the passenger, and in so doing not only to provide safe and convenient means of entering and leaving the cars, but to stop when the passenger was about to alight, and not to start the car until he had alighted. There was a conflict of evidence as to the condition of the platform, the position of the plaintiff, and the circumstances surrounding the accident. It is conceded that to be upon the platform, or even upon the step, might not be negligence in all cases, and certainly not negligence in law, but it is insisted that the plaintiff was voluntarily riding upon the step of the car, when moving, without any means of support, and that this, in the absence of justification or excuse, would necessarily be negligence. The difficulty is that this position assumes a condition of affairs which is controverted upon the case made.

It is further argued that, while the general rule is that the burden of proof as to contributory negligence is upon the defendant, that rule was not applicable, because the presumption that the plaintiff was not in fault was overcome by plaintiff's own evidence, and therefore that the court should have instructed the jury that the burden of proof was not only upon the plaintiff to satisfy the jury that he sustained the injury by reason of the negligence of the defendant, but also that this was without contributory negligence on his part. Testing this contention by the evidence of the plaintiff alone, without admitting that this should be done where the defend-

ant has gone into evidence and the ruling he asks must be given in view of all the testimony, the precise question was decided in *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 298, adversely to defendant's position. In that case the defendant adduced no evidence, and it was contended that plaintiff's evidence showed that the accident resulted from his negligence, and that, therefore, the trial court erred in charging that "The burden of proving contributory negligence rests on the defendant; and it will not avail the defendant unless it has been established by a preponderance of evidence." This court held the instruction correct, and said: "The court did not say that if such negligence were established by the plaintiff's evidence, the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence, coming exclusively from the party on whom rested the burden of proof. It is not improbable that the charge was so given by the court from an apprehension that the jury might, without it, be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof, or insufficient proof, on the subject, there was a fatal defect in his case. It was, therefore, eminently proper to say upon whom the burden of proof rested; and this was done without in anywise neutralizing the effect of the testimony the plaintiff had given, if there were any, bearing on the point adversely to him."

The defendant did not attempt to have the case taken away from the jury at the conclusion of plaintiff's evidence, and if it had, we do not think a motion to that effect could have been sustained. As a mere matter of law, the burden as to contributory negligence remained the same under the circumstances, and it would have been error if the court had given the instruction as requested.

It is urged with particular earnestness that the fourth branch of the charge was objectionable in stating that even though plaintiff was negligent in being upon the step before the car had stopped, yet if they were satisfied that the accident would not have happened if the conductor had allowed

the car to stop, but that instead of so doing the conductor either negligently failed to observe whether he had alighted or not, or, seeing him there, neglected to wait until he had alighted and gave the signal to go on, and in consequence of that a sudden jerk of the car took place which threw him down and was the immediate cause of the injury, and that the accident would not have happened but for that fact, then the plaintiff could recover. The argument is, that the rule applied in the instruction is that which obtains where the plaintiff's negligence exposes him to the risk of injury, and the defendant omits, after becoming aware of plaintiff's danger, to use ordinary care and diligence to avert the consequences; and it is said that whether a defendant is negligent or not, in failing to adapt his conduct to a condition of things caused by the negligence of the plaintiff, depends upon whether the defendant had time and opportunity to ascertain and avoid the injury. *Northern Central Railway* v. *Price*, 29 Maryland, 420, and *Northern Central Railway* v. *Geis*, 31 Maryland, 357, with other like cases, are cited to the point that the exception to the general rule as to contributory negligence is not otherwise applicable. The language of Judge Alvey, in the latter case, is quoted as follows: "It must appear, either that the defendant might, by a proper degree of caution, have avoided the consequences of the injured party's neglect, or that the latter could not, by ordinary care, have avoided the consequences of the defendant's negligence. This, however, implies time for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence. But where there is a concurrence of negligence of both in the production of injury to one of the parties, the causes are commingled, and are regarded as equally proximate to the effect produced, and, therefore, not susceptible of apportionment." But, as explained by Judge James in the opinion in this case, the omission to which the instruction refers was not the omission to observe that a person had placed himself in danger of being hurt by the defendant, whereby the latter was called upon to exercise care to avert that consequence, but it was the omission to

observe whether the passenger whom the defendant was setting down had actually alighted. The duty resting upon the defendant was to deliver its passenger, and that involved the duty of observing whether he had actually alighted before the car was started again. If the conductor failed to attend to that duty, and did not give the passenger time enough to get off before the car started, it was necessarily this neglect of duty that did the mischief. It was not a duty due to a person solely because he was in danger of being hurt, but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger. Viewed in this light, the instruction was unobjectionable. If the conductor negligently failed to observe whether plaintiff had alighted, or knowing that he had not, negligently started the car too soon, and in consequence of that, a sudden jerk of the car took place and threw him down and was the immediate cause of his falling, and the accident would not have happened but for that fact, we think it clear that such negligence as might be imputed to the plaintiff in being upon the step at all, could not, under the circumstances supposed, be properly held to have been contributory negligence. To hold so would be to determine that a carrier could defend his own negligence in the particulars named upon the ground that if the plaintiff had not been there he would not have been hurt. It may be said that he placed himself where he was in risk of falling off, but that was a risk he could not have anticipated as the result of a sudden start before he had got off, because he had a right to assume that the car would actually stop to allow him to get off, and if it had, as it should have done, upon the hypothesis of the instruction, no accident would have happened. Under the terms of the instruction the injury ensued directly from the defendant's negligence, and that was its proximate cause. *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 558.

The learned judge who tried the case, in explaining its various aspects, stated that it suggested four theories as to the cause of the accident, and whether there was sufficient or any

evidence to support any one of these theories, he should leave to the jury. He meant, of course, that the jury should consider the case from all the points of view presented, and exclude such of the contentions as were unsupported by the evidence. We see no ground upon which the defendant can complain of this. We cannot find upon exploring the evidence, all of which is given in the record, that it reasonably tended to show that the plaintiff was injured in getting off the car while it was in motion. The plaintiff denied it, and the conductor said that it was safe for the plaintiff to get off, and that he got off. Yet the court permitted the jury to pass upon the case as if the proofs raised an actual controversy upon the point. Perhaps such an inference might have been drawn, as plaintiff's claim was that he was about to get off, but, taking the opening passage of the charge in connection with what followed, we think that the defendant cannot complain that it was improperly deprived of the judgment of the court, and that thereby the door was open to mere conjecture on the part of the jury, to its injury.

Another error assigned is that the instruction in relation to damages was objectionable in permitting an award for the future effects of the injury; but there was evidence which justified a finding that future damages would inevitably and necessarily result, and this being so there was no error in the instruction upon that subject.

It appears to us that this case was carefully tried and properly left to the jury, and that no error warranting the reversal of the judgment was committed.

It is further urged that the court in general term erred in rendering a judgment for interest against the defendant and its surety, notwithstanding the judgment of the special term bore no interest. The question is whether by the law of the District of Columbia a judgment in an action of tort carries interest. In *McDade* v. *Washington & Georgetown Railroad*, 5 Mackey, 144, this subject was considered by the Supreme Court of the District, and the court concluded that such judgments did bear interest, Hagner, J., delivering an elaborate opinion to that effect. It is conceded that at common

law, judgments, whatever the cause of action, did not bear interest. *Perkins* v. *Fourniquet*, 14 How. 328. This was so in Maryland at the time of the cession of the District, with perhaps some exceptions, not embracing judgments in actions of tort. *Hammond* v. *Hammond*, 2 Bland, 306, 370; *Railway Co.* v. *Sewell*, 37 Maryland, 443. To change the common law in the District after the cession, of course required an act of Congress.

By the act of June 24, 1812, (2 Stat. 756, c. 106, § 6; Rev. Stat. Dist. Col., § 829,) it was provided as follows: "Upon all judgments rendered on the common law side of the Circuit Court of said District in actions founded on contracts, interest at the rate of six per centum per annum shall be awarded on the principal sum due until the judgment shall be satisfied, and the amount which is to bear interest and the time from which it is to be paid shall be ascertained by the verdict of the jury sworn in the cause."

By its terms this provision was confined exclusively to actions founded on contracts. As appears from *Newson* v. *Douglass*, 7 Harr. & Johns. 417; *Karthaus* v. *Owings*, 2 G. & J. 430; *City Railway Co.* v. *Sewell*, 37 Maryland, 443, and many other cases, only some causes of action carried interest at common law, in Maryland, as matter of right, its allowance otherwise being left to the jury to be decided according to the equities of the transaction, and, with few exceptions in cases of contract, no judgment in any form carried interest. This law applied the remedy, but it declared that, while interest was to be allowed on the principal sum due, the amount which was to bear interest and time from which the interest was to run should be ascertained by the verdict of the jury. Interest was not to be awarded upon a judgment for the aggregate of principal and interest, but interest was recoverable upon the principal sum due from the date ascertained as directed.

The 8th section of the act of August 23, 1842, (5 Stat. 516, 518, c. 188,) provided "That on all judgments in civil cases, hereafter recovered in the Circuit or District Courts of the United States, interest shall be allowed, and may be levied by

the marshal, under process of execution issued thereon, in all cases where, by the law of the State in which such Circuit or District Courts shall be held, interest may be levied under process of execution on judgments recovered in the courts of such State, to be calculated from the date of the judgment, and at such rate per annum, as is allowed by law, on judgments recovered in the courts of such State." This was carried forward into section 966 of the Revised Statutes. The purpose of this act was to bring about uniformity between the tribunals of the United States and of the States upon the subject of interest, and the Supreme Court of the District of Columbia is neither within its terms nor its object. It is wholly inapplicable. Whatever the law of the District of Columbia is, upon the subject of interest, controls of course.

On the 22d of April, 1870, an act was approved, entitled "An act to amend the usury laws of the District of Columbia," the first section of which read: "That the rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars, for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as hereinafter provided." The second section made it lawful, in all contracts thereafter to be made, for the parties to agree in writing for ten per centum per annum, or any less sum, of interest on money loaned or in any manner due and owing. The other sections related to the penalty for contracting to receive a greater rate; the recovery back of unlawful interest so received; and to the effect of the law upon the national banking act. 16 Stat. 91, c. 59. These sections constitute §§ 713, 714, 715, 716, and 717 of the Revised Statutes of the District.

This act related, as its title correctly stated, to the usury laws of the District, and the rate of interest at six per cent was to continue except as provided by the subsequent section, penalty being denounced for contracting in writing for a greater rate than ten or verbally for a greater rate than six per cent. Judgments and decrees, as well as the loan or forbearance of money, goods, or things in action, are referred to,

but the act does not say that they shall bear interest in the future if they did not in the past. On the contrary, that which had been was to continue, and the changes wrought by the statute were only in the rate and the consequences of transgression. There is nothing to indicate a legislative intention to declare that all judgments and decrees should thereafterwards bear interest by virtue of the statute, or to make any change in that respect. Such a view disregards the language of the act, which confines the exception to existing law to the enumeration of the succeeding sections. Judgments bore interest in actions founded on contracts as provided by the act of 1812, the award of interest being based upon the verdict and to be collected on the principal sum. Judgments in tort did not bear interest. The rule could, indeed, be altered or repealed by Congress, but the statute to that effect should be plain and unambiguous, or the repugnancy between the old law and the new, incapable of being reasonably overcome. We are unable to conclude that this act of 1870 comes within the settled rules of construction in this regard.

By section 997 of the Revised Statutes of the District, justices of the peace have jurisdiction where the amount claimed for debt or damages arising out of contracts or damages for injuries to persons or property does not exceed one hundred dollars, and by section 1007, justices' judgments bear interest from their date until paid or satisfied; but it does not follow that, because Congress intended to allow interest upon judgments in tort not exceeding one hundred dollars, therefore all judgments in tort bear interest.

Reference was made at the bar to certain rules of the Supreme Court of the District which are and have been, since 1869, as follows:

"51. A general verdict for the plaintiff shall be recorded thus: 'The jury, on their oath, say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises, is the sum of $——, besides costs.' If the action be founded on contract, the record of the verdict shall proceed: 'With lawful interest from the — day of ——, 18—, besides costs.'

"If the verdict be for the defendant, then: 'The jury, on their oath, say they find for the defendant,' unless, upon set-off pleaded, a balance is found due the defendant; and then the record of the verdict shall proceed: 'And that the money payable to him by the plaintiff, by reason of the premises, is the sum of $——, with interest from the — day of ——, 18—, besides costs.'

"If there be several counts in the declaration, and the jury find for the plaintiff on some and for the defendant on the rest, the verdict shall be entered thus: 'The jury, on their oath say, they find for the plaintiff on the (—) issues, and that the money payable to him by the defendant, by reason thereof, is the sum of $——, [with interest from the — day of ——, 18—,] besides costs; and for the defendant on the (—) issues.'"

"67. Whatever the cause of action may be, if the judgment be for the recovery of money, it shall be awarded generally without any distinction of debt from damages — thus: 'It is considered that the plaintiff recover against the defendant $——, [with interest as aforesaid,] being the money payable by him to the plaintiff by reason of the premises, and $—— for his costs of suit, and that he have execution thereof.'"

These rules are in conformity with the act of 1812. The jury find the principal sum and the time from which interest on the contract shall be given. In an action of tort the jury include interest, if given at all, in the damages assessed. The form of the judgment prescribed follows the verdict, discriminates between contract and tort, and recognizes that the judgments that carry interest do so by reason of the verdict to that effect. We think no support to the view that judgments in tort bear interest by force of law can be derived from these rules.

Nor is the contention sustained by reference to the rules of this court. By the 23d section of the Judiciary Act of 1789, now section 1010 of the Revised Statutes, it was declared: "Where, upon such writ of error the Supreme or a Circuit Court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay,

and single or double costs at their discretion." And by various rules of this court, promulgated from time to time, this jurisdiction has been regulated. Thus, in cases of affirmance, where the writ is for mere delay, ten per cent damages may be awarded in addition to interest, and interest is given at the same rate that similar judgments bear interest in the courts of the State where the judgment was rendered; and the same rule is applied to decrees for the payment of money, unless otherwise ordered by this court. (Rule 23.) But the question of interest is solely for the court to determine, as the act of 1842 did not repeal the 23d section of the Judiciary Act. *Boyce* v. *Grundy*, 9 Pet. 275; *Mitchell* v. *Harmony*, 13 How. 115, 149; *Perkins* v. *Fourniquet*, 14 How. 328, 331; *In re Washington & Georgetown Railroad*, 140 U. S. 91.

We are of opinion that error was committed in the judgment of affirmance in respect of the allowance of interest.

In *Keller* v. *Ashford*, 133 U. S. 610, which was a case of contract, the matter in dispute in the District Supreme Court in general term was, with interest accrued before the affirmance, largely in excess of the amount necessary to give jurisdiction to this court. A motion was made to dismiss, which was overruled, and Mr. Justice Gray, delivering the opinion of the court, pointed out that the promissory note sued on, by its express terms, bore interest at the rate of eight per cent yearly from its date until paid, and that, computing interest accordingly, the sum in dispute was much more than the jurisdictional amount; and as to *Railroad Co.* v. *Trook*, 100 U. S. 112, and *District of Columbia* v. *Gannon*, 130 U. S. 227, (which involved judgments rendered in cases in tort,) cited in support of the motion, he remarked that the judgment in special term for damages for an action sounding in tort "bore no interest, either by the general law, or by the judgment of affirmance in general term." In each of the cases referred to, the judgment of affirmance was only for the amount which the sum or value of the matter in dispute had to exceed in order to give us jurisdiction. Had the original judgments carried interest by force of law, jurisdiction would have attached. *Mass. Benefit Association* v. *Miles*, 137 U. S. 689.

But as the question was not fully discussed, we have thought it proper to reconsider it in the light afforded by the opinion of the Supreme Court of the District in McDade's case.

While, however, we are of opinion that there was error in this particular in the judgment of affirmance, we are not constrained to reverse it, if the interest be remitted. *Bank of Kentucky* v. *Ashley*, 2 Pet. 327; *Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646, 656; *Kennon* v. *Gilmer*, 131 U. S. 22, 29. In *Bank* v. *Ashley*, the remittitur was filed in this court. In *Construction Co.* v. *Seymour*, the remittitur was filed in the court below and a certified copy thereof filed here. If the defendant in error shall within a reasonable time during the present term of this court produce and file a certified copy of a remittitur of the interest in the Supreme Court of the District, the judgment, less the interest, will be affirmed; but if this is not done, it will be reversed. In either event the costs must be paid by defendant in error.

Ordered, that if the defendant in error shall, within a reasonable time during the present term of this court, produce and file a certified copy of a remittitur of the interest in the Supreme Court of the District of Columbia, the judgment, less the interest, will be affirmed; but if this is not done it will be reversed. In either event the costs must be paid by the defendant in error.

Mr. Justice Brewer did not hear the argument and took no part in the decision.

Syllabus.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY *v.* ESTILL; and *v.* LEONARD.

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

No. 127. Argued February 3, 1893. — Decided March 6, 1893.

Two suits at law against a railroad company, incorporated by New York, were brought in the Circuit Court of Saline County, Missouri, by two different plaintiffs, to recover damages for injury by the company, as a common carrier, through negligence, to live cattle transported by it. The damages occurred from a collision which took place in Ohio. The cattle were being transported from Massachusetts to Missouri. The process of the court was served in St. Louis, Missouri, on a city passenger agent of the defendant, in its business office there, who had charge of it at the time, no chief officer of the defendant being found in St. Louis at the time. By a petition in each suit by the defendant, which stated that it appeared only for the purpose of making the application, the suit was removed into the Circuit Court of the United States, because of diverse citizenship. The defendant then moved in the latter court, in each suit, to quash the process on the ground that it conferred no jurisdiction on the state court over the defendant. The motion was overruled. Both cases were then tried before the same jury. In one case the verdict was for $8750 damages, and $2362.50 interest thereon at 6 per cent per annum from the time the suit was brought, and in the other case for $44,000 damages, and $11,880 interest thereon. In the first case judgment was entered for $11,112.50, with interest from the date of the verdict, and in the second case for $50,000, and like interest, the plaintiffs having voluntarily remitted $5880, because the petition claimed only $50,000 damages. There was only one bill of exceptions, covering all matters in the two suits, and one writ of error, and one citation, and one supersedeas bond, and one transcript of record. This court took cognizance of the two cases.

The state court acquired jurisdiction of the cases, under subdivision 4 of § 3489 of the Revised Statutes of Missouri of 1879, and § 3481 of the same Revised Statutes.

The cases on that subject in the courts of Missouri reviewed.

Whether the defendant waived any objection to the service of the process in the state court by appearing therein and filing a petition for the removal of the cause into the Federal court, *quære.*

A large number of the cattle being cows with unborn calves, which were lost through their premature births, caused by the collision, the defendant was liable for deterioration in the value of such cows, caused by

Counsel for Defendants in Error.

such abortions, although it was not shown that the defendant knew that the cows were with calf.

Detached sentences in a charge to a jury cannot be selected as grounds of objection, but must be read in connection with the whole charge.

The cases having been tried in the court below on the theory that the value of the cattle at their place of destination in Missouri was the proper basis for fixing the damages, the point that their value at the terminus in Ohio of the defendant's road was the proper basis cannot be taken for the first time in this court.

It was proper to show that some of the cattle died, or lost their calves, after their final arrival in Missouri, from the effects of the collision.

The proper rule of damages was the difference between the market value of the cattle, in the condition in which they would have arrived but for the negligence of the defendant, and their market value in the condition in which, by reason of such negligence, they did arrive.

It was not material whether the plaintiffs intended to keep the cattle upon their farms, for breeding purposes, or to sell them upon the market, the depreciation in value of the cattle being the same in either case.

The court having instructed the jury that the burden was upon the plaintiffs to show that the abortions were the direct result of the collision, and the jury having found in favor of the plaintiffs on that question, and the bill of exceptions containing all the evidence in the case on either side, and there being sufficient evidence to sustain the verdict, this court cannot review it on the weight of the evidence.

There is no ground for holding that the plaintiffs ought to have traced each animal and to have shown the amount received for it when sold.

It was improper, under the statutes of, and decisions in Missouri, for the jury to allow interest on the damages from the time suit was brought; and as the jury stated, in each verdict, the amount of interest allowed, this court reduced the judgments by striking out the interest, and ordering judgments to be entered for the amounts of the damages, with interest from the entry, and costs; the costs of this court to be paid one-half by the plaintiff in error and the other half by the defendants in error.

THE case is stated in the opinion.

Mr. Garland Pollard for plaintiff in error. (*Mr. Percy Werner* was with him on the brief.)

Mr. W. M. Williams and *Mr. John Cosgrove* for defendants in error. (*Mr. O. Guitar* and *Mr. Samuel Boyd* were with them on the brief.)

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a single writ of error involving two suits, each of which was brought in the Circuit Court of Saline County, in the State of Missouri.

The first suit was commenced November 21, 1883, by Wallace Estill, Hugh W. Elliott, and William R. Estill, against the New York, Lake Erie and Western Railroad Company. The petition set forth that the plaintiffs were the owners of 70 head of polled Angus or Aberdeen cattle, imported from Scotland, and of the value of $35,000; that the cattle were intended for the Missouri market, and the defendant had full knowledge of their value and the purposes for which they were intended; that the defendant operated a railroad through the States of New York and Ohio, and was a common carrier of live stock and other freights over the line of its railroad in those States; that on or about September 12, 1883, the plaintiffs delivered to the defendant, as such common carrier, to be transported over its line of railway, the 70 head of cattle, and the defendant received them as such common carrier, well knowing their character, and the importance of transporting them with care and reasonable dispatch; that on the receipt of them, the defendant undertook and became bound to transport them safely over its railway, and to deliver them at the terminus thereof within a reasonable time; that the plaintiffs paid the usual freight and charges for transporting the cattle; that the defendant failed to transport them with reasonable dispatch and safety, but, about September 16, 1883, at Nankin, Ohio, negligently ran its train of cars, on which the cattle were being transported, into another train of cars, and by reason thereof, broke a large number of the cars in which the cattle were, threw the cattle violently against the cars and each other, and greatly jarred, bruised, maimed and injured them; that 55 of the cattle were cows in calf at the time of the accident, and about 20 of them had since the accident, and in consequence thereof, prematurely lost their calves; that the cattle were detained at the place of the accident for about 36 hours after it occurred, without suitable

food, water or attention, and in consequence were greatly reduced in value and damaged; that, in consequence of the injuries received by the cattle, the plaintiffs had been put to great trouble and expense in caring for them, and the value of the cattle had been greatly reduced; and that, by reason of the premises, the plaintiffs had sustained damages in $12,000, for which sum and costs of suit they asked judgment.

The other suit was commenced November 27, 1883, by Leverett Leonard, Charles E. Leonard, William H. Leonard and Abiel Leonard, against the same defendant, for a like cause of action. The petition contained substantially the same averments as that in the Estill suit, except that it was founded on damage to 306 head of imported polled Angus or Aberdeen and Galloway cattle, alleged to be of the value of $200,000. It averred that the defendant negligently ran the two trains, or sections of a train, upon which the cattle were being carried, into and against each other, so that about 16 of the cars, in which the cattle were at the time, were broken to pieces and demolished, and 7 of the cattle were killed or so badly injured that they were rendered worthless; and that about 250 of the cattle were cows in calf, and about 60 of them, since the accident and in consequence thereof, had prematurely lost their calves. Damages in the sum of $50,000 were alleged, and judgment was asked for that sum and costs of suit.

In each of the two cases, a writ of attachment was issued by the court to the sheriff of Saline County, and to the sheriff of the city of St. Louis, against the property of the defendant, each of which attachments contained also a direction that the sheriff summon the defendant to appear in the court, on a day specified, to answer the petition. The sheriff of the city of St. Louis made return on each of the writs issued to him, that he had executed it in the city of St. Louis, on January 7, 1884, by delivering a copy of the writ and petition to one W. E. Conner, city passenger agent of the defendant, "who was in its business office, and had charge thereof, at the time of said service," and that "the president or any other chief officer of said defendant could not be found in the city of St. Louis at the time of said service."

Opinion of the Court.

On the 11th of February, 1884, the defendant filed in the state court, in each of the two cases, a petition for the removal thereof to the Circuit Court of the United States for the Western Division of the Western District of Missouri. Each petition stated that the defendant appeared "only for the purpose of making this application;" that it was a corporation of the State of New York; and that the plaintiffs were, at the commencement of the suit, and still are, citizens of the state of Missouri. A proper bond was given in each case, and the state court approved the bond, granted the application, and made an order removing the cause.

A transcript of the record in each case was duly filed in the Circuit Court of the United States. The defendant then made a motion in that court, which was heard before Mr. Justice Brewer, then Circuit Judge, to quash the writ of summons issued to the sheriff of the city of St. Louis, and the return of that officer thereon, (which motion stated that the defendant appeared specially and only for the purpose of making it,) on the ground that the writ and return were void and conferred no jurisdiction over the defendant, because (1) being a foreign corporation, operating a railroad in New York and Ohio, which did not terminate opposite any point in Missouri, it could not be brought into the courts of Missouri by writ of summons; (2) the cause of action sued on did not accrue in Saline County, where the suit was brought, and the business office of the defendant at the time of the alleged service was not in that county, but in the city of St. Louis; and (3) the record failed to show that at the time of the service, or at any time, the defendant was engaged in business in Missouri. The Circuit Court overruled the motion, the defendant excepted to its order and decision, and the court signed and sealed a bill of exceptions setting forth those facts.

The defendant then filed an answer in each case, denying all the allegations of the petition. A stipulation was then made and filed, entitled in both suits, that they might be transferred for trial to the Eastern Division of the Western District of Missouri, and placed on the docket for trial at the next term of the court for that Division; that no question should

be raised as to the jurisdiction of the court to which the cases were to be transferred, at Jefferson City, Missouri, which could not be raised to the jurisdiction of the Circuit Court of the United States for the Western Division of the Western District; and that no question as to the jurisdiction of the latter court should be waived.

Both cases were duly tried at Jefferson City in April, 1888, before Judge Thayer, the District Judge for the Eastern District of Missouri, and the same jury. In the Estill case, the jury found the issues for the plaintiffs, and assessed their damages at $8750, and allowed interest in the sum of $2362.50, making the total damages assessed $11,112.50. In the Leonard case, the jury found the issues for the plaintiffs, and assessed their damages at $44,000, and allowed interest in the sum of $11,880, making the total damages assessed $55,880.

The defendant filed a motion for a new trial, entitled in both cases, setting forth as the grounds thereof (1) that the court gave improper instructions to the jury; (2) that it refused proper instructions asked by the defendant; (3) that it admitted improper and incompetent evidence; (4) that it made improper rulings on the evidence offered by the plaintiffs; (5) that it excluded proper and competent evidence offered by the defendant; (6) that the verdict was against the law and evidence; (7) that the damages were excessive; and (8) that the court erred in overruling the defendant's motion to quash the service of the summons in the cases. The motion for a new trial was heard before Judge Thayer, Judge Philips sitting with him; and on the 19th of November, 1888, each of the judges filed an opinion denying the motion. 41 Fed. Rep. 849, 853. On the 20th of November, 1888, an order was entered in the Estill case, overruling the motion for a new trial, and entering judgment in favor of the plaintiffs for $11,112.50, with interest at the rate of 6 per cent per annum from the date of the verdict, May 1, 1888, on the $11,112.50, until the same should be paid, and for costs. On the same day, an order was entered in the Leonard suit, stating that the plaintiffs had voluntarily remitted from the amount of their verdict $5880, so as to reduce the verdict to $50,000,

(the amount claimed in the petition,) overruling the motion for a new trial, and entering a judgment in favor of the plaintiffs for $50,000, being the damages assessed by the jury less the amount so remitted, and awarding to the plaintiffs interest at 6 per cent per annum from the date of the verdict, May 1, 1888, on the $50,000 until the same should be paid, and for costs and charges.

It was then stipulated between the parties, by a stipulation entitled in both suits and dated November 20, 1888, that one bill of exceptions, covering all matters that arose on the trial of the two causes, might answer for both; that the bill of exceptions, signed by Judges Thayer and Philips, might be incorporated in the record and used in this court as the bill of exceptions in either or both of the cases, without objections from either party; that one writ of error and one citation should be sufficient; and that one supersedeas bond might be given to cover both cases. There is one bond, reciting both judgments and referring to a single writ of error to reverse both judgments, and a single citation. There is only one citation, addressed to the plaintiffs in the two judgments, but referring to "the judgment." There is only one writ of error, but it refers to the two suits by name. The certificate of the clerk of the court below refers to the transcript as a transcript of the record and proceedings in both of the cases.

The assignment of errors is entitled in both cases, and alleges as error (1) that the Circuit Court erred in overruling the motion of the defendant to set aside the return of the sheriff on the original writs issued in the causes and to quash those writs; (2) that it erred in admitting improper and incompetent evidence offered by the plaintiffs; (3) that it erred in excluding proper and competent evidence offered by the defendant; (4) that the verdict was unsustained by the evidence; (5) that the court erred in charging the jury; (6) that it erred in refusing to charge the jury as requested by the defendant; and (7) that it erred in rendering judgments upon the verdicts in favor of the plaintiffs.

The Circuit Court (Judge Thayer) charged the jury as is set forth in the margin, the portions of the charge enclosed in

brackets, and numbered from 1 to 10, being the parts to which separately the defendant duly excepted.[1]

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[1] In these cases there is no controversy over the fact that the respective plaintiffs delivered to the defendant certain cattle to be by it transported over its railroad and delivered at the terminus of its line to plaintiffs or to some connecting carrier. Estill and Elliott appear to have delivered to the defendant 67 head of cattle, and Leonard Bros. appear to have delivered about 306 head of cattle.

[1. Having received the cattle for the purpose of transportation, the defendant was bound to deliver the respective herds of cattle at the terminus of its line in as good condition as it received the same.] The complaint made is that defendant did not deliver the property in question at the terminus of its line in the condition that it received the same, and damages are claimed by the respective plaintiffs on that account.

It is practically admitted (and you may take it as a conceded fact) that while these two herds of cattle were in defendant's custody and in transit to their destination a collision occurred at Nankin, Ohio, between two freight trains of the defendant in which the cattle were being transported. Now, the main and about the only question you will have to consider is the nature and extent of the injuries (if any) that were sustained by the cattle immediately in consequence of the collision. When you have settled those questions you will have practically decided the case, and it is to be hoped that you will give these questions a careful and fair consideration and decide the same according to the evidence and rules of law, which I will now state for your guidance.

The law is that a common carrier like the defendant must pay the market value at the point of destination of all property entrusted to it for transportation which through its fault is lost or destroyed and is not delivered. [2. The law also is that if a carrier receives property for transportation and delivers it at the end of its route, but, through its fault, it is damaged and it fails to deliver it in the same condition as when received, it must pay the difference between the value of the property in its damaged condition at the point of destination and what the value of the property would have been at that place if delivered in the same condition as when it was received for transportation. These are the general rules of law which must be applied in the assessment of the damages in the two cases now on trial.]

[3. The testimony tends to show that seven (7) head of Leonard Bros.' cattle (5 heifers and 2 bulls) were left at Nankin, Ohio, where the collision occurred, (either killed or very badly hurt,) and were never delivered at the point of destination or at the end of defendant's line. If you find such to be the fact you will allow Leonard Bros. for those seven (7) head their market value as shown by the evidence at the point of destination in Saline County at the time they should have arrived.]

The other damages claimed by Leonard Bros. may be conveniently divided into three classes. [4. In the first place, it is contended by Leonard Bros.

The defendant asked the court to instruct the jury as follows: "(1) The jury are instructed that plaintiffs are only

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that some of the cattle in question died after they reached the point of destination, of injuries received in the collision at Nankin, Ohio. Abiel Leonard claims that 3 Galloway bulls died from such cause on his place. William H. Leonard claims that 3 heifers died from such cause on his farm, and Leverett Leonard says that 7 heifers died on his place after their arrival. Now, if the evidence in the case satisfies you that any of the cattle did die, as stated by these witnesses, and that their death was the direct result of injuries sustained by the collision, then you will allow Leonard Bros. the market value in Saline County, as shown by the testimony, of the cattle that so died.]

[5. In the second place, it is claimed by Leonard Bros. that some of the other cattle received injuries of various kinds by the collision, which did not terminate fatally, but, nevertheless, lessened the market value of the cattle so injured. The class of injuries to which I now refer are strains, bruises, etc., which some of the cattle are said to have received. The plaintiffs themselves and Dr. Glover and Judge Sparks have spoken of about 48 head altogether that are said to have received such injuries, including no doubt, the 13 head that are said to have died. Dr. Glover and Judge Sparks say that they found 25 or 30 head of injured cows and heifers and 5 or 6 injured bulls. The plaintiffs themselves make the number of injured bulls somewhat greater. Abiel Leonard says he had 5 injured bulls in his portion of the herd. W. H. Leonard says he had 5 injured bulls in his herd. Leverett Leonard says that he had two bulls broken down in the back and loins and 8 others that were unserviceable for a year or more. You will recall their evidence on this branch of the case. I call your attention to this testimony for the purpose of saying that you should weigh it carefully and determine how many cattle, if any, received injuries by the collision of the character last described, and to what extent, if any, such injuries lessened their market value.

If you are satisfied by the evidence that any of the cattle received injuries such as strains, bruises, etc., which rendered them less valuable in the market at the point of destination than they would have been but for such injuries, then you may allow Leonard Bros. on that account such reasonable sum as will in your judgment, under all the evidence, make good such depreciation in value.]

[6. In the third place, it is claimed that certain cows and heifers that were with calf at the time of the collision, in consequence of the collision lost their calves, and damages are claimed on that account. There is evidence tending to show that about 94 or 95 head of the Leonard Bros. cows lost their calves after the collision. Abiel Leonard says that 25 head lost their calves on his place; William H. Leonard says that 27 head lost their calves on his place; and Leverett Leonard says that 43 head lost their calves on his farm. With reference to this matter I will say that if Leonard Bros.

entitled to recover in this case such damages as they have shown by the preponderance of the evidence were the natural

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have satisfied you by the evidence that any cows or heifers that were with calf when the collision occurred, as the direct result of that collision, lost their calves, and that such premature casting of their calves made the animals less valuable in the market than they would have been but for such loss, then they are entitled to recover the amount of the depreciation in value of any of the animals that so lost their calves.] In this connection I instruct you, however, that the burden is on them to show not only that the cattle sustained injuries, but to furnish the evidence as to the result of such injuries, and evidence that will enable you to assess the damages with reasonable accuracy. Inasmuch as the cattle came into their possession shortly after the collision, and they thereafter had the custody of the cattle, the rule should be strictly enforced requiring them to show by satisfactory evidence the nature of the injuries received, the result of the injuries, and to what extent the market value was thereby impaired.

What I have said about the assessment of damages in the case of Leonard Bros. applies equally well in the case of Estill and Elliott. This difference is to be noted in the two cases, however. None of the Estill and Elliott cattle appear to have been killed in the collision or to have subsequently died from injuries claimed to have been received in the collision. You will have no claim of that kind to consider in the Estill and Elliott case. In this case there is evidence tending to show specific injuries sustained by three bulls, one of which was injured in the testicles and two in the back or loins. W. N. Marshall and Benjamin E. Nance, who claim to have examined the Estill and Elliott cattle on their arrival, describe injuries to three bulls said to have been hurt in the back, loins, or testicles. They also say generally that from 10 to 15 cows and heifers were in very bad condition, and that one cow had lost an eye. The plaintiffs themselves have given some testimony as to the condition of their herd on arrival at Estill's. I call your attention to their testimony and ask you to consider it carefully.

[7. In the Estill and Elliott case there is also evidence tending to show that 5 of Estill and Elliott's cows aborted their calves before they reached Estill's; that 4 or 5 aborted their calves prior to October 26, 1883, when a portion of the herd was taken to Kansas City, and two afterwards, making 11 or 12 in all. With reference to these two kinds or species of injuries claimed to have been sustained by the Estill and Elliott cattle, I instruct you, as before, that if the evidence shows to your satisfaction that any of the animals sustained such injuries as the immediate result of the collision, and that the injuries so sustained lessened the market value of the stock so injured at the point of destination, then you will be authorized to allow Estill and Elliott such reasonable sum as in your opinion, under the evidence, will make good the depreciation in the value of any of the animals that you find to have been injured either by strains, bruises, etc., or by losing their calves.]

and proximate consequence of the acts complained of in the petition, and that they are not entitled to recover any damages

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Now, gentlemen, on the other side of this case you have testimony of Mr. Baldwin, Mr. McCullough, and Mr. Geagan, who claim to have examined the stock of Estill and Elliott and Leonard Brothers on the 27th and 28th days of September, 1883, (11 and 12 days after the collision,) with a view of ascertaining the injuries the stock had received. I will direct your attention to the salient points of their testimony: Mr. Baldwin says that among the Estill and Elliott cattle he found, in a lot of 49 cows and calves, one or two a little lame. In another lot, consisting of two bulls and one heifer, he found the heifer had a sore foot and the bulls were a little stiff, and that one other heifer was pointed out as having lost her calf. McCullough's testimony with reference to the same herd is to the effect that he found one bull a little stiff, one (1) cow very stiff, two other bulls (one in a stable and one in a pasture) both a little stiff, and one heifer with a sore foot.

In relation to the Leonard cattle, Mr. Baldwin says he found 3 stiff or lame heifers in a herd of 35 animals; one cow a little stiff in a herd of 29 cows, and three that were said to have lost their calves; one heifer also that was said to have lost her calf; one lame cow in a herd of 30 animals; one other cow in a herd of 32 animals that was said to have lost her calf; one bull in a herd of 17, lame in the fore leg; two other bulls in a herd of (9) animals, slightly injured, one lame or stiff and one with slight flesh wound; one other bull with hoofs swollen and wound in left hind leg. Mr. McCullough's testimony as to the same herd (that is, with reference to the Leonard cattle) is to the following effect, namely, that he found 3 footsore heifers (one very sore) in a herd of 35 animals; 3 heifers said to have lost their calves in a herd of 29 head; 2 lame bulls in a herd of 5 animals, one footsore, and one said to be not fit to serve cows; 2 lame cows in a herd of 26 cows and calves; 1 bull noticeably lame in a herd of 17 bulls; 1 bull with a slight wound in his thigh; and one other with a slight flesh wound.

All three of these witnesses say that the injuries to the two herds were not greater or different than might be expected to result from an ordinary long railroad journey, and that none of the injuries, in their judgment, were serious or liable to produce permanent disability.

From a summary of the evidence, as I have noted it, gentlemen, the testimony for the plaintiffs tends to show that about 48 animals in Leonard Bros.' herd, (18 bulls and about 30 cows) after their arrival in Saline County, showed visible evidence of having been injured in the collision, whilst according to the evidence for defendant there were only 10 animals (5 bulls and 5 cows and heifers) which bore any visible marks of having been hurt. In the Estill and Elliott case it appears from the plaintiffs' testimony that 3 bulls and from 10 to 15 cows sustained injuries, the injuries to the bulls being of a serious character, whilst according to the testimony of defendant's witnesses only 4 animals (3 bulls and 1 cow) bore

which could have been avoided or prevented by the plaintiffs by the exercise on their part of reasonable and proper care and

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any evidences of injuries. In the foregoing summary you will understand that I do not include cows or heifers that are said to have lost their calves. I refer only to animals that are said to have shown outward signs of injury.

[8. In the light of the testimony, both for the plaintiffs and defendant, to which I have alluded, and in the light of any other testimony in the case which you may recall, and bearing in mind that the burden of proof is on the plaintiffs to show that the cattle in question received injuries and the extent and result of such injuries, you will have to determine the following important questions of fact, namely: 1st. How many cattle in each herd were injured in any manner, in consequence of the collision, to such extent as to lessen their market value at the point of destination? 2d. How many of Leonard Bros.' cattle were killed or badly injured and left at Nankin, Ohio, in consequence of the collision, and what would have been the value of such cattle in Saline County, at the time they should have arrived, if they had been delivered in the condition in which the defendant received them? 3d. How many of Leonard Bros.' cattle (if any) died of injuries received by the collision after they had been delivered to Leonard Bros., and what was the reasonable market value in Saline County of those cattle if they had arrived uninjured? 4th. How many animals in each herd lost their calves as the direct result of the collision, and to what extent did such loss of their calves lessen their market value at the point of destination? 5th. What number of cattle in each herd, besides those that are said to have died or lost calves, were otherwise injured by the collision, by strains, bruises, etc., so as to materially lessen their market value, and what was the amount of such depreciation in value?] To arrive at a just and intelligent verdict in these cases you will have to determine from the testimony each of the foregoing questions.

There are one or two other matters to which I will refer briefly. There is testimony in the case tending to show that in the last days of August, 1883, some of Leonard Bros.' cattle (and possibly some few of Estill and Elliott's cattle) found some Paris green and ate it at Concord, Mass. The proof tends to show that 5 head of Leonard Bros.' cattle died of poison at Concord, and that about 30 other animals were made sick by it and were treated. You will understand, of course, that if any of Leonard Bros.' cattle that are said to have died after they reached Saline County, or if any of the cows in either herd that are said to have lost their calves, died or lost calves in consequence of eating Paris green, then the railroad company is not responsible for the loss so occasioned.

There is also some testimony tending to show that when one or more cows in a herd give birth to calves prematurely, or abort, as the saying is, other cows in the same herd, unless separated from the cows that have aborted, are liable to cast their calves through sympathy or contagion, although they have themselves received no physical injury. This is a mat-

prudence. (2) The jury are further instructed that before they can allow the plaintiffs damages on account of abortions, as claimed in the petition, they must be satisfied by a preponderance of the evidence that the abortions, if any, were caused

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ter that requires your attention. If it be true and you so find that cows will abort through sympathy or by contagion, then it was the plaintiffs' duty, if they could have done so, to have separated cows that had aborted from other pregnant cows, and to have done so with reasonable and ordinary diligence; and if plaintiffs failed to exercise reasonable and ordinary diligence and caution in that regard, and any cows lost their calves in consequence of such negligence, then the defendant is not liable for such losses, as they were not the immediate and direct result of the collision, but the result of plaintiffs' neglect.

I will also say that defendant cannot be held liable for losses occasioned by premature birth of calves, or by the death of stock, if such births or deaths were the result of overfeeding or the result of change of climate or fatigue or heat or of a long voyage on the ocean or by rail, or of all such causes combined. In other words, gentlemen, the defendant is only liable for such premature births and deaths as are shown by the testimony to have been directly occasioned by injuries sustained in the collision. [9. The question as to what causes led some of the animals in the two herds to lose their calves or to die after arrival is a question which you may find some difficulty in solving, as in the nature of things these are questions that do not admit of solution by positive or direct proof. I will only say that you must apply your best judgment and your experience to the solution of these questions, giving to all the testimony, including that of the experts, such weight as you think it fairly deserves.] If, upon a fair consideration of the subject, you deem the evidence insufficient to establish what was the cause of the abortions, then it will be your duty to disallow the plaintiffs' claims for damages on that account. If the evidence establishes to your satisfaction that some of the abortions were the direct result of the collision, but leaves you undecided as to the cause of other abortions, then you should allow damages for such as you are satisfied were the result of the collision and disallow the plaintiffs' claims as to the residue.

[10. When you have assessed the damages in each case you may compute interest on the damages in each case at six (6) per cent per annum from the time suit was brought — on November 21st, 1883, in the Estill case and November 27, 1883, in the Leonard case — to this date. I will further direct you to state in your verdict the amount of interest which you award in each case.]

In conclusion, I ask you to give the cases a careful and unbiassed consideration. Consider the evidence in behalf of both parties in the same spirit of fairness that you would have it considered if you were yourselves personally interested as plaintiffs or defendants in the result of the suit.

directly by the alleged collision. (3) If the jury are satisfied by a preponderance of the evidence that the cows or heifers mentioned in the petition were with calf at the time of the collision alleged in the petition, and that some of them aborted their calves in consequence of injuries received in said collision, and that ordinary care and prudence required that such aborting cow or cows should be separated from the other pregnant cows of plaintiffs, and that this was not done, but such aborted cow or cows was or were allowed to be and remain with the other pregnant cows, by reason of which such other pregnant cows or some of them aborted their calves by contagion or sympathy, they should not allow damages for or on account of abortions thus caused by contagion or sympathy. (4) If the jury find that the plaintiffs' cows aborted their calves after the alleged collision, and that some of said abortions were caused by said collision, and that some were the result of poison, fatigue, heat, exhaustion, or any cause other than the collision, and the jury are unable to determine from the evidence which cows and how many aborted in consequence of the collision and which from other causes, they should not allow damages on account of abortion from any cause. (5) The court instructs the jury that the burden is not upon the defendants to account for the abortions amongst cows and heifers of plaintiffs, if there were such abortions, but upon the plaintiffs to prove and establish by a preponderance of the evidence that such abortions were caused by the collision alleged in the petition, and if upon all the evidence the jury are not convinced that such abortions were caused by the injury, they should not allow damages for such abortions, although they may not be able to determine from the evidence what the real cause of such abortions was. (6) The court instructs the jury that unless the defendant knew that some of the cattle of the plaintiffs were cows or heifers in calf plaintiffs are not entitled to recover for abortions, though they may have been caused by the wreck, as in that event damages on account of abortion could not have been in the contemplation of the defendant at the time the cattle were received."

The bill of exceptions states that the court refused to give

to the jury instruction (6), and that the defendant excepted to the action of the court in refusing that instruction. It is to be inferred that the court gave to the jury the other 5 instructions asked for.

The case made by the evidence is in substance as follows: The plaintiffs bought in Scotland a large number of high-bred cattle and imported them to this country for sale for breeding purposes. Some were bulls, but the majority were heifers which were in calf at the time of the collision. The cattle were shipped from Liverpool to Boston, the ocean trip occupying twelve days. They reached Boston in good condition, and were kept for a while at Waltham, and then removed to Concord. While at Concord some of the Leonard cattle ate some Paris green, and five of them died from its effects. About thirty others were affected more or less by the poison, but after two days they were turned out with the rest of the cattle as having fully recovered. The Estill cattle did not have access to the poison, and were in a separate lot from the Leonard cattle which did. The cattle remained in Concord two or three weeks after the Paris green was eaten, and were then shipped to Missouri in good order and condition. On the journey, in Ohio, during the transportation over the railroad of the defendant, the train carrying the cattle was divided and run in two sections. On reaching Nankin, Ohio, the first section was put on one side, on a switch, and stopped; and the second section ran into it. Several of the cars were almost demolished by the collision; some were thrown from the track; and nine or ten of them were so badly damaged that the cattle in them had to be transferred to other cars. By the collision, some of the cattle were knocked down, the ropes by which some of them were tied were broken, and some were lying down with others standing upon them when they were found after the collision. Some were knocked against others and against the cars, and the shock of the collision was very great. The cattle were detained about thirty hours without suitable food or water. The collision occurred on a Sunday, between four and five o'clock A.M., and the train did not start west again until the

next day. The cattle were greatly bruised and injured, and the day after the collision the heifers began to abort or prematurely cast their calves. Five of them lost their calves, while on the cars, in the next two or three days; and from day to day, during the next several weeks, abortions occurred among them. The number of abortions and the character of other injuries are summarized by the court in its charge to the jury.

The evidence for the plaintiffs further showed that an ordinary railroad journey would not have caused the abortions, and that the aborting cattle were fed in the same way as those which did not abort. The plaintiffs also introduced some expert testimony to show that the abortions were the result of the collision. The testimony for the plaintiffs further showed that a cow which had once lost her calf prematurely was an uncertain breeder, and could not be sold in the market for a breeder, but was worth only what she would bring as beef; that the heifers were worth, in calf, $400 or $500 in the Missouri market, in the fall of 1883; but that a heifer which had prematurely lost her calf would not be worth more than $25 or $35, the price for beef. The evidence also stated in detail the injuries to others of the cattle and the nature thereof.

The defendant gave evidence tending to show that where one cow in a herd aborted, others would do likewise through sympathy or contagion; and that the aborted cow ought to be separated from the herd. This fact of abortion, through sympathy or contagion, was controverted by other witnesses. The plaintiffs showed that the cattle were cared for in the best manner possible. The defendant offered testimony as to the cattle that were injured and the extent of their injuries, and also examined some experts who stated that the abortions might not have been caused by the wreck.

(1) The first point urged for a reversal of the judgments is that the Circuit Court erred in overruling the defendant's motion to quash the writs issued by the state court to the sheriff of the city of St. Louis, and the returns of that sheriff thereon. It is contended that the fact that the defendant, at the time of the alleged services, had a business office in St. Louis, at which office the writs were served on its city passenger agent,

who had charge of such office at the time of the service, prevented it from being a non-resident of Missouri, within the meaning of the statutes of that State regulating the subject of jurisdiction and the service of process.

Writs of attachment were sued out in the suits, but no property was levied on, and hence the suits stand as if they had been instituted by summons alone. It has been held by the courts of Missouri that a non-resident corporation, which has a business office and an agent in the State, is amenable to the jurisdiction of its courts. *McNichol* v. *U. S. Mercantile Reporting Agency*, 74 Missouri, 457. In that case, it was held that service of a summons upon a non-resident corporation, having an office or doing business in Missouri, in the manner provided by the fourth subdivision of § 3489, Revised Statutes of 1879, has the effect of personal service, and gives the court jurisdiction to enter a general judgment; and that the legislature had power to pass an act authorizing the service of legal process upon any non-resident corporation having an office or doing business within the State, by leaving the same with an agent of the corporation within the State, and authorizing the rendition of a general judgment upon such service.

Said § 3489 provides that a summons shall be executed, except as otherwise provided by law, in any one of six different methods specified in the section, the fourth of which reads as follows: "Or, fourth, where defendant is a corporation or joint stock company, organized under the laws of any other State or country, and having an office or doing business in this State, by delivering a copy of the writ and petition to any officer or agent of such corporation or company, in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employé in any county where such service may be obtained."

In the case cited, the court held that the effect of the enactment, in 1879, of the fourth subdivision of § 3489, was to make all foreign corporations having an office and doing business in Missouri, or an agent or employé there, suable in precisely the same manner as any other defendant, by the delivery of a copy of the writ and petition, and that it must be presumed

that the legislature intended that the ordinary consequences should attend such service. See, also, *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Railroad Co.* v. *Harris*, 12 Wall. 65; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207; *Gibbs* v. *Queen Ins. Co.*, 63 N. Y. 114; 2 Morawetz on Corporations, § 977. The principle applicable under such circumstances is that, if the corporation does business in the State, it will be presumed to have assented to the statute and will be bound accordingly.

It is contended for the defendant, however, that, as its office was in St. Louis, it was a resident of that city; and that, under the statute of Missouri fixing the place of bringing suits, it could be sued only in a court of that city. But we are of the opinion that, under the statutes of Missouri, the Circuit Court of Saline County had jurisdiction of the present suits, although the agent and business office of the defendant were in St. Louis and not in Saline County; that the service in St. Louis of the summons issued by the Circuit Court of Saline County was valid; and that the defendant was within the provisions of the Missouri statute which made non-residents suable in any county of the State.

It is provided by § 3481 of the Revised Statutes of Missouri of 1879, that suits instituted by summons shall, except as otherwise provided by law, be brought in five specified ways, the fourth of which is that "when all the defendants are non-residents of the State, suits may be brought in any county." *Farnsworth* v. *Railroad Co.*, 29 Missouri, 75; *Stone* v. *Travellers' Ins. Co.*, 78 Missouri, 655; *Swallow* v. *Duncan*, 18 Mo. App. 622; *U. S. Mutual Accident Ins. Co.* v. *Reisinger*, 43 Mo. App. 571. The defendant, by establishing its business office in Missouri, subjected itself to suit in such of the courts of the State as had jurisdiction conferred upon them, and was suable in any county in the State.

If, under § 3481, suit may be brought against non-residents in any county, regardless of the county in which the defendants may be found, it follows necessarily that the court in which the suit is brought may send its summons to the county in which service can be obtained upon such non-residents.

Otherwise, if the summons could be issued only to the county wherein the court is held, suit could only be brought in the county where the defendant could be found; which was the provision of section 5 of Article 1 of the Revised Statutes of 1845, page 805, which provision was abrogated by § 1 of Article 4 of the Session Acts of 1849, page 76, providing that if all the defendants were non-residents of Missouri, and an action would lie against them, it might be brought in any county, which latter provision was continued in § 3481 of the Revised Statutes of 1879. This construction has been held by the courts of Missouri. *Stone* v. *Travellers' Ins. Co.*, 78 Missouri, 655; *U. S. Mutual Accident Ins. Co.* v. *Reisinger*, 43 Mo. App. 571. The city of St. Louis is placed by the statutes of Missouri on the same footing as a county.

It is further contended by the defendant that it was a resident of the city of St. Louis within the meaning of § 3481. But the Supreme Court of Missouri has held that a foreign corporation, doing business in the State, is a non-resident, and, under § 3481, is suable in any county. *Stone* v. *Travellers' Ins. Co.*, 78 Missouri, 665, 668. It is suggested that, in that instance, the defendant was a foreign insurance corporation, and its case was provided for by § 6013, which requires foreign insurance companies, doing business in Missouri, to appoint an agent upon whom service can be made in suits against the companies, and expressly authorizes such suits to be brought in any county; and that what was said in that case about § 3481 was merely *obiter dictum*. But § 6013 does not provide as to where suits may be brought against foreign insurance companies. It merely requires them to appoint an agent upon whom service may be made, and leaves the place of instituting suits to be determined by the general law; and regulates only the manner of service. Hence, it was necessary, in the case of *Stone* v. *Travellers' Ins. Co.*, for the court to determine, as it did, whether a foreign corporation, doing business in Missouri, was to be sued as a resident or as a non-resident, under § 3481; and it was held that such a corporation was a non-resident, within the meaning of § 3481. Section 6013 in no manner interferes with § 3481.

It is quite apparent from the case of *U. S. Mutual Accident Ins. Co.* v. *Reisinger*, 43 Mo. App. 571, that the case of *Stone* v. *Travellers' Ins. Co.* was regarded as holding that, as the defendant in that case was a non-resident, suit might have been brought against it in any county.

In *Farnsworth* v. *Railroad Co.*, 29 Missouri, 75, and in *Swallow* v. *Duncan*, 18 Mo. App. 622, foreign corporations were treated as within the statutory provisions relating to non-residents. This court will adopt the construction placed upon the statutes of Missouri by the courts of that State.

The ruling of the Supreme Court of Missouri, that corporations created by other States do not become residents of Missouri by engaging in business in that State, agrees with the rulings of the Federal courts. *Ex parte Schollenberger*, 96 U. S. 369; *Myers* v. *Murray*, 43 Fed. Rep. 695.

In the cases of *Farnsworth* v. *Railroad Co.*, 29 Missouri, 75; *Robb* v. *Chicago & Alton Railroad*, 47 Missouri, 540, and *Middough* v. *St. Jos. & Denver Railroad*, 51 Missouri, 520, there is nothing which militates against the foregoing views, or which holds that corporations created by other States become residents of Missouri by engaging in business in Missouri.

Not only did Mr. Justice Brewer overrule the motion to quash the writ of summons and the return of service by the sheriff, but Judge Philips, in his opinion on the motion for a new trial, 41 Fed. Rep. 853, held that a foreign corporation, having an office in Missouri, was to be treated, under the statute, as a non-resident defendant; that the provision of subdivision 4 of § 3481 applied; and that, therefore, the suit could be brought in any county. He said that the provisions of the statute invoked by the defendant must refer, and must be limited, to domestic corporations; and he quoted a remark made by the court in *Stone* v. *Travellers' Ins. Co.*, 78 Missouri, 655, 658, that "the defendant, being a non-resident of the State, was subject to suit in any county in this State, Rev. Stats. § 3481, and could be personally served in the manner pointed out by the section under consideration," that is, § 6013.

Opinion of the Court.

Judge Philips remarked also that there could be no question but that, if the suit had remained in the state court, and the defendant, after moving to suppress the sheriff's return, had pleaded and gone to trial on the merits, the defective service would have been waived, citing *Kronski* v. *Railway Co.*, 77 Missouri, 362, and *Scoville* v. *Glasner*, 79 Missouri, 454, 455, and adding that, where a party had thus removed the cause into the Federal court, tried it on its merits, had one new trial, and had again tried it on the merits, in its own approved jurisdiction, it would be trifling with the administration of justice to allow it to escape judgment on the ground that it had never been in court. Judge Thayer, in his opinion, 41 Fed. Rep. 849, stated that the views of Judge Philips were in accord with his own.

We conclude, therefore, that the defendant was a non-resident of Missouri; that the suits were properly brought against it in Saline County, under § 3481; and that service of process was properly made, under subdivision 4 of § 3489.

It is insisted by the plaintiffs that the defendant waived any objection to the service of the summons, by appearing in the state court and filing petitions for the removal of the causes into the Federal court. Each of the petitions for removal states that the defendant appears "only for the purpose of making this application," and the motion made in the Federal court, to quash the writ of summons and the sheriff's return, states that the defendant appears specially and only for the purpose of making that motion. The plaintiffs cite in support of their view the cases of *West* v. *Aurora City*, 6 Wall. 139; *Bushnell* v. *Kennedy*, 9 Wall. 387; and *Sayles* v. *Northwestern Ins. Co.*, 2 Curtis, 212.

The opposing view is that the removal statute provides that, after removal, the cause shall proceed in the Federal court in the same manner as if it had been originally commenced there.

To this it is replied that the exception to jurisdiction is a personal privilege of the defendant, and may be waived; that the construction contended for would enable the non-resident

defendant to remove the suit into the Federal court, and then, by there moving to dismiss it, defeat the jurisdiction of both courts; that the defendant is not in the Federal court against its consent, but is there by its voluntary action in view of the necessary statement in the petition for the removal that the suit is properly brought against it and is pending; that, as the state court had jurisdiction of the subject-matter, it is too late for the defendant, after appearing to the merits, to raise an objection to personal jurisdiction; that, although the petitions for removal state that the defendant appeared only for the purpose of making the application for removal, it could not make such application without admitting necessarily that the suit was properly pending; and that, therefore, the special appearance reserved nothing and amounted to nothing.

We do not find it necessary to decide this point, after holding that the Circuit Court of Saline County acquired jurisdiction. There are different decisions on the question referred to in the Circuit Courts of the United States. In *New York Construction Co.* v. *Simon*, 53 Fed. Rep. 1, it was held, in the Sixth Circuit, that a defendant who removes a cause to a Federal court will not there be allowed to say that he was not properly brought before the State court, when he failed to raise that point before applying for removal. On the other hand, in the Second Circuit, in *Bentliff* v. *London & Colonial Finance Assoc'n*, 44 Fed. Rep. 667, it was held, citing several cases, that a defendant could have a suit, of which the state court acquired no jurisdiction, dismissed on that ground, even after it had been removed by the defendant to the Federal court.

(2) During the trial, on the examination, as a witness for the plaintiffs, of John Cunningham, who came with the cattle from Scotland to the United States and accompanied them on the railroad journey, he was asked: "Judging from your experience as a shipper of this class and blood of cattle from Scotland to this country, would the trip across the ocean, and detention in quarantine, and shipment by rail to Missouri, cause cows to prematurely lose their calves or abort them, if no unusual accident had occurred to them?" The defendant

objected to that question, claiming that, under the circumstances, it was not liable for abortions, and was liable for nothing except injuries to the animals; that damage from abortions was too remote; that it was something that the defendant could not anticipate or know anything about; that it was not alleged in the petitions; and that, so far, there was no proof that the defendant knew that the cattle were in calf. The court, after hearing argument, ruled as follows: "My opinion is, that if a railroad company receives a cow or any other animal for transportation that is with calf, and such animal is of greater value at the point of destination by virtue of her being in such condition than she would otherwise be, and in the course of the journey, through the fault of the carrier, the animal receives an injury that is the direct and immediate cause of her losing her calf, that is an item of damage that is recoverable from the carrier. It stands upon the same footing as an ordinary physical injury to the animal. Of course, there may be some difficulty on both sides in proving or disproving the fact alleged that a particular injury sustained led to the loss of calves, but the fact that there is difficulty in making the proof don't alter the rule of law. The difficulty is one of fact and not a difficulty in the law. I shall allow you to proceed on both sides and try that issue of fact." The defendant then asked whether such ruling was without regard to the knowledge of the carrier. The court replied: "I don't think that has anything to do with it. The carrier had a right to make any inquiry it saw fit before it received the property, as to the condition the cows were in, and to make its arrangements accordingly. If no inquiries were made and the cattle were received, the rule stated applies." The defendant excepted to such ruling of the court. The witness answered to the question, "It would certainly not." Like rulings were made, under the objection and exception of the defendant, in regard to other questions of the same character.

We are of opinion that the evidence referred to was properly admitted, and that the above ruling of the court thereon was correct. Some remarks on the subject will be made further on.

The defendant objects to those parts of the charge of the court which are marked in brackets 1 and 2. But it is not proper to select detached sentences in the charge and predicate on them an objection. They must be read in connection with the whole charge, and for that reason we have set it forth in full. The court correctly told the jury that the defendant was liable only for the damages directly traceable to its negligence. There was nothing, in the two sentences complained of, which could have misled the jury. *Railway Co.* v. *Whitton*, 13 Wall. 270.

As to paragraph 3 in brackets, it is contended by the defendant that the court should have directed the jury that the value of the cattle when delivered at the western terminus of the railroad of the defendant, in Ohio, and not their value at the final destination of the cattle in Saline County and Howard County, Missouri, should be the basis on which to estimate the damages. But it does not appear that any such claim was made in the court below. Both parties introduced their evidence and tried the cases on the theory that the value of the cattle in Saline and Howard Counties was the proper basis for fixing the damages. No objection was made by the defendant to the evidence of value at the point of final destination, but it appears to have been conceded that it was proper to base the damages on the value of the cattle at that point. Evidence was introduced on the part of the plaintiffs, without objection, as to what the market value of the cattle would have been in the markets of Missouri, if they had arrived there in good order and condition. Various objections were made by the defendant to items in the evidence, but no objection was made on the ground that the testimony was not confined to the value of the animals at the terminus of the defendant's railroad; and the court said: "Inasmuch as the damage complained of consisted, in part, in the fact that certain of these cattle lost their calves, it appears to me to be competent to show what the difference in value was in the fall of 1883, when these cattle arrived in Saline or Howard County, between an animal that was then with calf and liable to have a calf within the next two or three months and one

that had aborted its calf." The counsel for the defendant then said: "I concede that; unless it appears they have the power to prove its value exactly." Both parties introduced their evidence on that theory; and no question was raised about it; and it does not appear anywhere that the defendant objected to that mode of trying the cause. Neither side offered any evidence as to the value of the cattle at the terminus of the defendant's railroad. The defendant introduced its own evidence on that basis, and asked one of its witnesses what, in his opinion, was the value of the cattle on Estill's farm or at Kansas City, assuming that they were in good order, and asked another what he would say was a fair price for the cattle per head, where they were, (*i.e.*, on Leonard's farm in Missouri,) or at Kansas City, assuming them to be in good condition and recovered from the effects of the trip. The opinions on the motion for a new trial do not show that any such question as is now made was then presented. The jury was authorized to infer from the evidence that the defendant knew that the cattle were to be transported to Missouri, and were intended for the market there.

It is further contended for the defendant that, if the proper measure of damages is the difference between the market value of the cattle, in the condition in which they would have arrived, but for the negligence of the defendant, and the condition in which they did arrive, that value must be fixed as of the time when the cattle first reached their destination, and the plaintiffs could not show that subsequently some of the cattle died. It is further contended that two rules for a recovery by the plaintiffs were adopted, first, the difference between the two market values of all the cattle, in the condition in which they arrived, and second, in addition thereto, the value of those that subsequently died.

The market value of the cattle at their destination would depend upon their condition when they reached it. Proof that the deaths subsequently resulted from injuries the cattle had received in the collision, would simply show their real condition when they reached their destination. It would not establish any new injury or any additional damage. The

plaintiffs were permitted to prove that some of the cattle had been so badly injured at the time of their delivery that they subsequently died from the effect of such injury, and, therefore, were of no value when delivered. There was, as to those animals, no double assessment of damages.

The charge of the court clearly pointed out the different items of damage. There is nothing in the record to show that the jury, under the charge, assessed the damages on the view that the value of the animals was depreciated, and afterwards allowed for the same animals on the ground that they became totally worthless. The evidence in question tended to show the condition and value of the cattle when they reached their destination. Judge Philips, in his opinion, 41 Fed. Rep. 853, 856, said: "The rule as to the measure of damages permits the plaintiff, up to the time of trial, to show the condition of the injured animal, merely as a means of ascertaining the result of the injury inflicted, so as to better enable the jury to fix the damages at the time and place of delivery. If the cows did subsequently abort, this is proof only of the extent of the injury inflicted; as much so as if they had subsequently died from the effect of the collision. The only known limit to the inquiry up to the trial is whether or not the subsequent development in the condition of the animal is traceable directly to the injury inflicted by the carrier;" citing *Kain* v. *Railroad Co.*, 29 Mo. App. 53, 61, 62, and *Sorenson* v. *Railroad Co.*, 36 Fed. Rep. 166, 167. To the same effect are *Missouri Pacific Railway* v. *Edwards*, 14 S. W. Rep. 607, and *Lake Erie & Western Railroad* v. *Rosenberg*, 31 Ill. App. 47. See also *Wilcox* v. *Plummer*, 4 Pet. 172.

The Circuit Court required the witnesses for the plaintiffs to describe the specific injuries to particular cattle, so that it might be seen that such injuries resulted from the collision, and also permitted both parties to show the condition of the animals after their arrival at their destination, in order to show how badly they were hurt by the collision.

The measure of damages was properly stated by the court in its charge to the jury. The difference between the market value of the cattle, in the condition in which they would have

arrived but for the negligence of the defendant, and their market value in the condition in which, by reason of such negligence, they did arrive, constituted the proper rule of damages. *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584; *Smith* v. *Griffith*, 3 Hill, 333; *Sturgess* v. *Bissell*, 46 N. Y. 462; *Cutting* v. *Grand Trunk Railway Co.*, 13 Allen, 381; *McCune* v. *Railway Co.*, 52 Iowa, 600; *Missouri Pacific Railway* v. *Fagan*, 72 Texas, 127; *Missouri Pacific Railway Co.* v. *Edwards*, 14 S. W. Rep. 607; Hutchinson on Carriers, 2d ed., §§ 221, 770*a*.

It was not material whether the plaintiffs intended to keep the cattle upon their farms, for breeding purposes, or to sell them upon the market. The depreciation in value of the cattle was the same in either case.

It was claimed by the plaintiffs that many of the cattle were heifers which were bred in Scotland, and were in calf when imported, and that a number of them prematurely cast their calves in consequence of the collision, and that the value of those heifers was thereby greatly depreciated. The court instructed the jury that the burden was upon the plaintiffs to show that such abortions were the direct result of the collision. The question was passed upon by the jury and found in favor of the plaintiffs; and we cannot review their verdict upon the weight of the evidence. The bill of exceptions states that it contains all the evidence offered in the case on either side, and there was sufficient evidence to sustain the finding of the jury. *Zeller* v. *Eckert*, 4 How. 289; *Express Co.* v. *Ware*, 20 Wall. 543; *Lancaster* v. *Collins*, 115 U. S. 222; *Chicago & Northwestern Railway* v. *Ohle*, 117 U. S. 123.

It was not necessary for the plaintiffs to show that the defendant had notice, at the time of the shipment, that the heifers were in calf, in order to render it liable for the depreciation in their market value, in consequence of the abortions which were caused by its negligence. It was not claimed by the plaintiffs that, on account of the heifers being with calf, any special care was necessary in transporting them; and the suits were not brought on account of the absence of any such special care. In *Hart* v. *Pennsylvania Railroad*, 112 U. S.

331, 340, it was said by this court: "As a general rule, and in the absence of fraud and imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them." See, also, *Railroad Co.* v. *Fraloff*, 100 U. S. 24; *Baldwin* v. *Liverpool & Great Western Steamship Co.*, 74 N. Y. 125; *McCune* v. *Railway Co.*, 52 Iowa, 600; *Stewart* v. *Ripon*, 38 Wisconsin, 584; 3 Sutherland on Damages, 191.

The Circuit Court gave the correct rule of damages as to the heifers which lost their calves. If, through the negligence of the defendant, the heifers lost their calves, the difference between their market value, if they had arrived in calf, and their market value after losing their calves, constituted the amount of the plaintiff's damages. *Missouri Pacific Railway* v. *Fagan*, 72 Texas, 127; *McCune* v. *Railway Co.*, 52 Iowa, 600.

There is no ground for applying a special rule to this case, or for holding that the plaintiffs ought to have traced each animal and to have shown the amount received for it when sold. The Circuit Court correctly held that it was competent for the plaintiffs to show what the difference in value was, in the fall of 1883, when the cattle arrived in Saline or Howard County, between a heifer that was then with calf, and liable to have a calf soon, and one that had lost her calf.

The plaintiffs may have received on the sale of the cattle more or less than their market value. The defendant might have brought out evidence as to what the animals were sold for by the plaintiffs, to contradict the evidence as to their market value; but the plaintiffs could not bind the defendant by the prices for which the animals were sold. The impracticability of adopting such a rule as is insisted upon by the defendant is pointed out in the opinions rendered on the motion for a new trial. Many of the cows were kept for months after their arrival in Missouri. Some of them were traded for ponies, and the ponies were sold at a loss. Others were sold

with a warranty that they would become breeders, and were afterwards taken back by the plaintiffs. Some were shipped from point to point in the West and sold. The suggested rule was, therefore, impracticable of application.

The Circuit Court refused to instruct the jury that, unless the defendant knew that some of the cattle shipped by the plaintiffs were cows or heifers in calf, the plaintiffs were not entitled to recover for abortions, although caused by the collision, as, without such knowledge, damages on account of abortions could not have been in contemplation of the defendant at the time it received the cattle. Exception was made to such refusal; but we have already remarked sufficiently on the proposition involved.

(3) The Circuit Court further instructed the jury that, when they had assessed the damages in each case, they might compute interest thereon at 6 per cent per annum, from the time suit was brought in each case, respectively; and the jury was directed to state in its verdict the amount of interest which it awarded in each case. In the Estill case, it awarded in its verdict, as interest, $2362.50, and in the Leonard case $11,880. The defendant excepted to that part of the charge which related to interest, and which is paragraph 10 contained in brackets in the margin. The defendant calls attention to the fact that interest was not claimed in the petitions, and that §§ 2126 and 2723 of the Revised Statutes of Missouri of 1879 do not, nor does any other statute of that State, authorize the recovery of interest in a suit for injury to property caused by negligence, and that the Supreme Court of Missouri has repeatedly so held. Section 2126 provides as follows: "The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure." Section 2723 allows interest on moneys due on written contracts, on accounts, and sundry other money demands.

In *Kenney* v. *Hannibal & St. Jo. Railroad*, 63 Missouri, 99, in 1876, the question arose whether, in a case of the loss of property set on fire by a locomotive engine on a railroad, the

jury were authorized to allow to the plaintiff, in addition to the value of the property destroyed, damages by way of interest on its value, not exceeding 6 per cent. The court said that it was not apprised of any statutory provision which allowed a jury to give interest for such damages; that there was no such provision in the statute concerning interest; and that § 7 of the act concerning damages, which allowed interest in cases of the unlawful conversion of property by the party sued would not, in terms or by analogous reasoning, embrace a case where no benefit could possibly have accrued to the defendant by the negligence which occasioned the destruction of the property. The judgment was reversed because of the allowance of interest.

In *Marshall* v. *Schricker*, 63 Missouri, 308, in 1876, it was held that, in actions *ex delicto*, based upon the simple negligence of a party to whom no pecuniary benefit could accrue by reason of the injury thereby inflicted, interest was not allowable.

The same ruling was made in *Atkinson* v. *A. & P. Railroad*, 63 Missouri, 367, in 1876.

In *Meyer* v. *A. & P. Railroad*, 64 Missouri, 542, in 1877, which was an action for damages for the killing of a heifer through the negligence of a railroad company, the court held, citing two of the cases in 63 Missouri, and Judge Norton delivering its opinion, that the jury could not allow interest on the damages from the time they accrued.

But, in 1878, in *Dunn* v. *Hannibal & St. Jo. Railroad*, 68 Missouri, 268, in an action to recover damages against a carrier, for negligence in transporting live stock, the court below having instructed the jury to allow interest on the damages at the rate of 6 per cent. from the institution of the suit until the verdict, the Supreme Court, Judge Norton delivering the opinion, held that the instruction was proper, citing the case of *Gray* v. *Missouri River Packet Co.*, 64 Missouri, 47, 50, in which, in a case to recover damages for negligence by a common carrier in transporting an animal, the court below had directed the jury to add 6 per cent interest from the time the animal was shipped to the damages found, and the judgment

was affirmed, he himself delivering the opinion, and saying that it was a general rule, that, when goods were not delivered by a common carrier according to contract, the measure of damages was the value of the goods with interest from the day when they should have been delivered, less the freight, if unpaid. No allusion was made in either case to the cases in 63 Missouri, or to § 2126.

In *De Steiger* v. *Hannibal & St. Jo. Railroad*, 73 Missouri, 33, in 1880, while Judge Norton was still a member of the court, it was held, in a suit for the destruction of hay by fire escaping from the defendant's locomotive through its negligence, that interest was not allowable in cases of that character, citing the three cases in 63 Missouri, and the case in 64 Missouri, above referred to.

In *Wade* v. *Missouri Pacific Railway*, 78 Missouri, 362, in 1883, reference was made to the two cases to that effect in 64 Missouri, and 73 Missouri, and it was said that interest was not allowable in actions for negligence.

In *Kimes* v. *St. Louis &c. Railway*, 85 Missouri, 611, in 1885, which was an action against a railroad company for damages for negligence in killing a horse and breaking a wagon by a train of cars at a public road crossing, the court below had instructed the jury to allow six per cent interest on the damages. The Supreme Court of Missouri, delivering its opinion by Judge Norton, held that the interest was not allowable, referring to the case in 73 Missouri; but, as the plaintiff remitted the amount of the interest, the judgment was affirmed, except as to the amount remitted.

In *The State* v. *Harrington*, 44 Mo. App. 297, it was held, referring to the cases above cited from 63, 64, and 73 Missouri, that where an action *ex delicto* is based upon the simple negligence of the defendant, to whom no benefit had accrued or could accrue by reason of the injury or wrong, interest was not allowable.

It may not, perhaps, be possible to reconcile with one another all of the foregoing cases; but, on the whole, we regard it as an established rule of the Supreme Court of Missouri, in the construction of the state statutes, that the jury is

not warranted in allowing interest in a case like the present, from the time suit was brought. When property is wrongfully injured or destroyed, it is supposed that the wrongdoer derives no benefit.

The defendant cites the case of *Shockley* v. *Fischer*, 21 Mo. App. 551, as holding that interest is not allowable when it is not claimed in the petition.

It is well settled as a general rule that the measure of damages in the case of a common carrier is the value of the goods entrusted to it for transportation, with interest from the time when they ought to have been delivered. *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584; *Gray* v. *Missouri River Packet Co.*, 64 Missouri, 47; *Dunn* v. *Hannibal & St. Jo. Railroad*, 68 Missouri, 268; Hutchinson on Carriers, 2d ed. § 771; 1 Sutherland on Damages, 629. But when the matter appears to have been regulated by statute in the State, and the statute has been interpreted by its highest court, the regulation of the statute will be followed in the courts of the United States.

We have considered all the questions raised by the defendant, and do not think it necessary to discuss them further.

The judgment in the Estill case is affirmed as to the $8750 damages; but it is not affirmed as to the amount of interest, or any part thereof, awarded by the verdict or judgment. That judgment is modified as to such interest, and the case is remanded to the court below, with a direction to enter a judgment for the plaintiffs for $8750, being the damages assessed by the jury, with interest on such judgment from the time it shall be entered until it shall be paid, and for the costs and charges of the plaintiffs in the Circuit Court.

The judgment in the Leonard case is affirmed as to the $44,000 damages; but it is not affirmed as to the amount of interest, or any part thereof, awarded by the verdict or judgment. The judgment is modified as to such interest, and the case is remanded to the court below, with a direction to enter a judgment for the plaintiffs for $44,000, being the damages assessed by the jury, with interest on such judg-

Syllabus.

ment from the time it shall be entered until it shall be paid, and for the costs and charges of the plaintiffs in the Circuit Court.

The costs of this court, of the plaintiffs in error and the defendant in error shall be paid, one-half of them by the plaintiffs in error and the other half by the defendant in error.

LOVELL MANUFACTURING COMPANY *v.* CARY.

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

No. 110. Argued January 17, 18, 1893. — Decided March 6, 1893.

Letters patent No. 116,266, granted to Alanson Cary, as inventor, June 27, 1871, for an improvement in modes of tempering springs, are invalid, in view of the state of the art, for want of patentable invention.

The invention appears, from the specification, to be a method of restoring steel wire which has been mechanically strained, by subjecting it to a temperature of 600°, more or less, and the claim limits the method to its application to "furniture or other coiled springs;" but the process, as applied to those springs, was not different, in method or effect, from the same process when applied to any mechanically strained wire, or to steel made in straight pieces or strips, or otherwise.

The invention was anticipated by the prior use of New England wire clock-bells and of blued hair springs, used in marine clocks. The treatment to which those articles were subjected was in all respects the same in the prior use, as in the patented process.

It does not amount to invention to discover that an old process is better in its results, when applied to a new working, than would have been expected, the difference between its prior working and the new working being only one of degree and not one of kind.

There was nothing more than mechanical skill in arriving at the alleged invention, in view of the state of the art.

The point considered that no one had used the former processes for the manufacture of furniture springs, and that as soon as Cary's process was made known, the art of making furniture springs was revolutionized.

The cases in this court on the subject of double use, considered as to whether it is a patentable invention to apply old and well-known devices and processes to new uses, in other and analogous arts.

THE case is stated in the opinion.

Mr. W. Bakewell and *Mr. Thomas W. Bakewell* for appellant. *Mr. James K. Bakewell* and *Mr. J. K. Hallock* were also on the brief.

Mr. William H. Kenyon for appellees. *Mr. W. C. Witter* was with him on the brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought March 14, 1885, in the Circuit Court of the United States for the Western District of Pennsylvania, by Alanson Cary and Edward A. Moen against the Lovell Manufacturing Company, Limited, an association under the laws of the State of Pennsylvania, to recover for the alleged infringement of letters patent No. 116,266, granted to Alanson Cary, June 27, 1871, for an improvement in modes of tempering springs.

The specification of the patent is as follows: "Be it known that I, Alanson Cary, of city, county, and State of New York, have invented a new and useful improvement in furniture springs; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same. This invention relates to spiral springs, usually made in a conical form, of steel wire, and extensively used in upholstering sofas and chairs and for bed bottoms, etc., and consists in subjecting the spring to a tempering process after it has been completed in the usual manner, whereby its strength, elasticity, and durability are greatly increased. The ordinary furniture spring is made of hard-drawn wire, coiled and forced to the proper shape, and when this is done the spring is considered finished, without having been subjected to any tempering process other than what is incidental to the drawing of the wire. To give them a finished appearance, however, copper or other material is frequently applied by suitable means. The metal being greatly condensed and hardened in the process of drawing the wire, a good degree of elasticity is given the wire thereby;

but in bending or coiling the wire into the proper shape the metal is unavoidably weakened, the outer portion of the wire coil is drawn or stretched, while the inner portion is crushed or shortened. When straight bars or wire is subjected to the bending process, the stretching or drawing of the outer and crushing of the inner portions are inevitable results. This greatly reduces the elasticity, strength, and durability of the spring. Being a manufacturer of furniture springs and aware of this difficulty, I have tried many experiments with a view of restoring the wire, after being bent or formed into springs, to its normal condition. This, I have discovered, can be done by subjecting the spring to a degree of heat known as 'spring-temper heat,' which is about 600°, more or less, and that a subjection to this temperature for about eight minutes is sufficient to produce the result desired. This temperature I have found to be sufficient to so far relax or produce a complete homogeneity of the metal of the spring as to add from twenty to thirty per cent to the value of the spring consequent on its increased powers of resistance. Thus treated the spring will bear much heavier pressure, and its strength and elasticity are much less impaired than the ordinary spring after long-continued use. For carrying out and putting in practice my discovery I have invented a tempering oven, for which I have an application for letters patent now pending."

The claim is as follows: "The method of tempering furniture or other coiled springs, substantially as hereinbefore described."

The answer set up various defences, and among them want of novelty and noninfringement. It averred that the process set forth in the specification of the patent was merely a method of increasing the elasticity of steel, applicable not only to furniture springs and other coiled springs, but also springs and other articles made of steel, whether coiled, bent, twisted or straight; that the same was old, well known and in common use or practice for many years prior to the alleged invention by Cary, and for more than two years before he filed his application for the patent; that said process or method had been so practised on coiled springs, uncoiled

springs, hard-drawn steel wire, and other articles of steel in various forms, for the purpose of increasing their elasticity; and that the patent was, therefore, void. It also set forth the names of many persons to whom the process described in the patent, whether considered as a restoring process or as a tempering process merely, was known, and by whom it was practised, prior to the alleged invention thereof by Cary; and it averred that by reason of such prior knowledge and use the patent was void. It also averred that it was a common practice to subject furniture springs and other coiled springs, made of hard-drawn steel wire, to 600° of heat, more or less, in the process of finishing such springs; that the same was practised long prior to the alleged invention by Cary, by sundry persons, whose names were given in the answer; that there was not, at the time of the grant of the patent or of the alleged invention by Cary, any patentable novelty in the process described and claimed in the patent, or in the application of the process to the tempering of coiled springs for furniture, and that the patent was, therefore, void. It also set up various United States and English patents, and various printed publications, in which the alleged invention of Cary was said to have been described prior to the making of his alleged discovery and prior to his application for the patent. A replication was filed to the answer, and proofs were taken.

Prior to the filing of the bill in this suit, the patent had been sustained by a decision made by Judge Wheeler, on February 7, 1885, in the Circuit Court of the United States for the Southern District of New York, in *Cary* v. *Wolff*, 24 Fed. Rep. 139. On the basis of that decision a preliminary injunction was granted in the present suit by Judge Acheson, on June 12, 1885, 24 Fed. Rep. 141. In *Cary* v. *Domestic Spring-Bed Co.*, in the Circuit Court for the District of New Jersey, on July 28, 1885, in a suit on the same patent, Judge Nixon, following Judge Wheeler and Judge Acheson, granted a preliminary injunction, 27 Fed. Rep. 299. On January 6, 1886, 26 Fed. Rep. 38, Judge Nixon dissolved the injunction in the New Jersey suit, on the presentation of new affidavits relating to the novelty of the invention, and on February 2,

1886, the preliminary injunction in the present suit was suspended on the giving by the defendant of a bond.

After the proofs were taken in the present suit, it was brought to a final hearing before Judges McKennan and Acheson, and they sustained the patent, following Judge Wheeler's decision. Their opinions are reported in 31 Fed. Rep. 344, 347. On August 3, 1887, the court entered an interlocutory decree, holding the patent to be valid and to have been infringed, awarding to the plaintiffs a recovery of profits and damages, with costs, referring it to a master to take the account of profits and damages, and granting a perpetual injunction. The master reported six cents damages and costs in favor of the plaintiffs. The plaintiffs excepted to his report, and the court, on a hearing of the exceptions, entered a final decree, on February 16, 1889, awarding to the plaintiffs a recovery of $8745.34, and costs. The opinion of the court on the exceptions is found in 37 Fed. Rep. 654. The defendant has appealed to this court.

The invention claimed, as appears from the specification, is a method of restoring steel wire which has been mechanically strained, by subjecting it to a temperature of 600°, more or less, whereby its disturbed and disarranged molecules are allowed to assume their normal relation. The claim limits the method to its application to "furniture or other coiled springs;" but it appears from the evidence that the process, as applied to those springs, is in no respect different, in method or effect, from the same process when applied to any mechanically strained wire, or to steel made in straight pieces or strips, or otherwise. The claim covers broadly the described method of tempering, applied to any coiled springs as well as coiled springs for furniture, and if the evidence shows that, prior to Cary's invention, the method had been used for the restoration of any springs of strained steel, or other articles of strained steel having the resiliency which is a well-known property of steel, the claim is substantially anticipated. Particularly, if the method claimed had been used by others to restore articles of coiled spring steel, even though they were not used for furniture springs, the claim is anticipated.

In the testimony for the plaintiffs, it appears to be contended that, in order to establish the charge of infringement, the patent is to be construed so as to cover the restoring of strained steel springs by the application of any temperature, less than a red heat, which will produce in the metal a blue color. If that be true, the patent must be so construed also in comparing it with the prior state of the art. Mr. Brevoort, an expert for the plaintiffs, says that if a coiled spring is attempted to be used, without further treatment, for a furniture spring, the wire will take a set and lose its resilient properties, and its usefulness will be lost. He adds: "To cure this defect the spring must be tempered, as it is called in the trade, and the way of doing this upon such springs constitutes the process of the Cary patent. The process described in the patent gives to the spring apparently the same qualities as would be imparted to steel by tempering. But I do not know that the process is really one of tempering strictly so called, although it produces like results."

The date of Cary's alleged invention is December, 1870, and the question is, what was the state of the art at that date. Mr. Brevoort explains "the ordinary tempering process" as follows: "Steel is ordinarily tempered substantially in the following way: The steel is first best heated to a cherry red; it is then suddenly cooled either in water or oil; it is then in a very brittle and exceedingly hard condition and is extremely liable to be warped or bent during the hardening as well as during the heating. The next step is to reheat the article carefully and gradually and watch the appearance of a bright portion of the surface of the article, when certain colors will be noticed following one another in succession; first a very light yellow, then a deeper yellow, shading into purple, then a deeper purple, until finally the purple merges into blue, and lastly a blue color, yellow, purple and blue being the three prominent colors; the colors indicate different degrees of hardness in the steel and act as guides, telling when the proper degree of temper has been reached for any desired article; thus, for example, when the yellow just begins to shade into the purple the proper degree of hardness for a penknife has been reached, and the

further drawing of the temper is stopped; thus, if a spring is to be made the temper is drawn until a blue color shows, when the further drawing of the temper is stopped; the above is an outline of the ordinary tempering process as I have known it for the last twenty years." The metal is partially restored to its original condition, by heating it to a blue heat, if the condition of spring temper is desired, or to a red heat if it is wished to have a perfect restoration of the metal. In making wire, the metal is rolled into the form of a rod, which is drawn, when cold, through successively smaller holes in a draw-plate. It is thus gradually reduced in diameter, and the effect of the strain is to compact it and make it very hard, increasing its elasticity up to a certain point, and finally weakening the material. For many years, in drawing wire to small sizes, it has been the practice to heat it to a red heat between successive drawings, and thus to completely restore it, rendering it less brittle and preventing the fracture of it by the strain of the drawing process. At the conclusion of the drawing operation, when the wire has passed through the dies several times, and is hardened and elastic, the wire is called "hard-drawn," and in that state it comes to the hands of the makers of furniture springs. It is shown by the evidence to have been well known in the art that wire weakened and strained by drawing, could be completely restored to its original soft state by heating it to a red heat and gradually cooling it, producing thus, by the operation of annealing, the opposite of the "hard-drawn wire," of which Cary speaks in his specification. It was also known that if such strained and weakened hard-drawn wire was heated to a temperature less than red heat, but sufficient to blue it, a partial process of restoration would be effected, which would add strength and elasticity to the wire and fit it for making springs and corset steels. The defendant's witnesses, Roberts and Booth, state that, prior to the date of Cary's alleged invention, they practised this method of blueing hard-drawn wire, so as to increase its strength and elasticity. The testimony shows the prior use of the Cary process applied to wire to effect the same results, and to correct the same undesirable consequences of mechanical strain, which are described in the Cary specification.

The two principal matters relied on by the defendant to show the invalidity of the patent are (1) the prior use of what are called the New England wire clock-bells; and (2) the blued hair-springs. It is clearly shown by the witnesses for the defendant that, prior to Cary's alleged invention, wire clock-bells and hair-springs had been subjected to heat in the manner described in the Cary specification, and with the same blueing effect. The treatment to which the articles were subjected was in all respects the same in the prior use as in the patented process. The only contention of the plaintiffs is that the purpose of the prior use was not the same, and that the results, so far as they were those of the patent, were accidental.

Higgins, a witness for the defendant, thus describes the way in which wire clock-bells were made, prior to Cary's alleged invention. He says that "the untempered steel wire was taken from the hank and straightened by machinery, cut off at the proper length, and then tumbled in sawdust to clean the oil from it. Then the brass collet was driven on to one end, a small coil of silver was put on for the purpose of brazing the steel and brass together, then borax and water were put on, and they were brazed together, and then were tumbled in sawdust to clean off the borax, and then was wound on a wooden block, then turned by a pair of plyers to the proper shape, then was blued and oiled, and then they were ready for use." He also says that the method of "blueing" was this: "They were put in piles of a hundred each, and then spread on to a sheet-iron pan, and then put into an oven and there kept until the heat blued them, and then taken out and oiled ready for use. They were cooled in the air;" that the object of the winding was to put them into a "bell" form; that the effect of the winding was to make the vibration — to give them the sound; that the blueing stiffened them and gave them the tone; and that the bell, when struck by a clock hammer before blueing had no sound, while after blueing it had a good tone.

Horton, a witness for the defendant on the same subject, says that he used to make bells of untempered steel wire, although some of it was drawn harder than others; that some of it was hard-drawn steel wire; and that the object of heat-

ing the coiled wire was to make it sound and to stiffen it. He also describes the manufacture by him, during the ten or twelve years succeeding 1846, of wire clock-bells of a spiral form, not helical, which were blued in the same way and for the same purpose.

Andrews, a witness for the defendant, gives testimony to the same effect, and says that the coiling of the wire, to give it the shape of a "bell," weakens the spring and causes it to lose its elasticity, while subjecting it to heat makes it more springy and elastic.

Thomas, a witness for the defendant, states that he had known the wire clock-bells for forty years; that they were made from hard, untempered steel wire, straightened, cut into lengths, then wound on a form, and subjected to the blueing process to make the spring; and that there was no spring to the wire until it was blued.

Warner, a witness for the defendant, states that the wire was steel wire, used just as it was drawn; that the coiling of the wire upon a block to give it the form of a wire bell stretched the outside and upset the inside, and weakened the wire; and that the blueing process restored it and gave it more elasticity.

Broomhead, a witness for the defendant, states that as early as about 1863 he saw hard-drawn steel wire used in the manufacture of clock-bells.

Higgins also testifies that he discovered, as early as 1866, that the blueing process made the steel stiffer than it was before; and that he had known since 1866 that the tendency of the spring to keep its shape, and to restore itself to its proper shape when the coils were drawn apart or pressed together, was increased by the blueing process.

Gardiner testifies that he knew that heating of strained bell steel stiffened it, making it stronger and more elastic, and that he would have known that the process of blue-heating steel wire in the form of furniture springs would have increased its stiffness and elasticity in a measure.

As to the hair-springs, they are used in marine clocks, to control the balance, and are steel springs made of steel wire,

rolled down. Hubbell, a witness for the defendant, made them as early as 1848. He describes the way in which they were made by him in 1848 as follows: "The first process was taking the wire in the coil and passing it between two steel rolls to a required thickness. They were cut up to the proper lengths, fastened to a hub, wound on a disc, and wound down solid. We wound them down according to the tension of the wire, so that when they were let loose the outside coils were of about or nearly the right diameter. The next process was twisting them into a snail of a required form and blueing them. I blued them on an iron placed over a fire. They were then removed from the snail. All the inequalities were remedied by bending and twisting by a pair of plyers into the proper shape. They were then ready for use." He says that he used steel wire, untempered; that the object of blueing the spring after it had been so wound, was to equalize the density — the elasticity; that the blueing process had that effect; and that he had repeatedly tested blued hair-springs and unblued hair-springs, to compare their elasticity with each other, and that the blued spring would sustain double the tension or strain that the unblued one would, without bending.

Wright, a witness for the defendant, describes the use of the same process by him on hair-springs for seven years following 1848; and says that the steel wire was untempered, just as it came from the wiremaker; and that the blueing increased its elasticity.

Testimony to the same effect was given by the witness W. B. Barnes, who said that the steel wire was hard-drawn and untempered; and that the blueing had the effect of keeping the spring near the shape of the snail, and also giving it temper or elasticity.

Hendrick, another witness for the defendant, testified to the same effect.

It is contended for the plaintiffs that the bell-making process was for a different purpose from that contemplated by Cary in his specification; that the results were not analogous; and that, therefore, the patent was not anticipated. But we are of opinion that in the Cary process and the bell-making

process the operations are precisely the same. In both, the operator is dealing with wire which is strained by being bent past the elastic limit, and is deadened thereby. The wire is blued by subjecting it to a degree of heat sufficient for the purpose, and is then allowed to cool. The result in both cases is the same, namely, the restoration, stiffening and equalizing of the wire, and the only difference is in the use to which the resulting article is put. In both, the wire is made stiffer and more spring-like, these qualities being utilized, in one case in a furniture spring, and in the other in a clock-bell. Cary observed that, in winding furniture springs, the wire, already weakened by the drawing process, was still further strained and deadened, so as to impair the quality of the spring. The question was, how to equalize and stiffen the mechanically strained steel wire. The same problem had been solved by the clock-bell makers, and the solution of the problem was merely the use of the knowledge possessed by those skilled in the art. The wire used in making the clock-bells was also hard-drawn wire; but it does not appear that the process of the patent acts differently, when applied to strained hard-drawn wire, from what it would if applied to strained wire that was not hard-drawn.

The difference contended for by the plaintiffs, between the process of blueing wire clock-bells and the process of blueing furniture springs, in that one deals with spiral articles and the other with articles of a helical form, is not a difference in the process, but is at most a difference in the articles to which the process is applied. If the straining of furniture springs is peculiarly aggravated because of their shape, the difference is merely one of degree, not of kind. Moreover, the Cary claim describes the process as applicable to the manufacture of furniture springs "or other coiled springs." A coiled wire bell, although not a furniture spring, is a coiled spring; and it appears from the evidence that any wire drawn through dies, although not coiled, is, when heated to a blue color, stiffened and its elasticity increased.

In rebuttal of the defendant's evidence as to wire clock-bells and hair-springs, it is admitted that the plaintiffs show that

sundry witnesses would not have known that the blueing process was applicable to the treatment of such heavy material as furniture springs, and that it was not used in tempering clock-springs of wide, flat steel, but there was applied to such springs what is called in the record the old process of tempering. But, in the first place, these witnesses were not manufacturers of furniture springs; and, in the second place, the reason why the old process of tempering is not used on furniture springs, is that their upright shape, like an hour-glass or the half of an hour-glass, precludes them from being heated to a red heat without their sagging and becoming distorted. The clock-springs can be laid flat upon a support, so as not to sag while heated, and there is no reason, in regard to them, for changing the old process of tempering for another. In addition, even some of the plaintiffs' witnesses admitted, on cross-examination, that they knew that the treatment of the wire bells stiffened the steel, and allowed its molecules to return to their proper relations, and that they would have expected the application of the blueing process to furniture springs to increase their elasticity to some extent. But it does not amount to invention to discover that an old process is better in its results, when applied to a new working, than would have been expected, the difference between its prior working and the new working being only one of degree and not one of kind. It has been often held that the mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee, is not a defence to a charge of infringement. It follows necessarily that the public cannot be deprived of an old process because some one has discovered that it is capable of producing a better result, or has a wider range of use than was before known.

In *Smith* v. *Nichols*, 21 Wall. 112, it was held that a mere carrying forward, or new or more extended application, of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, was not such invention as would sustain a patent; and in *Roberts* v. *Ryer*, 91 U. S. 150, it was held that

it was no new invention to use an old machine for a new purpose, and that the inventor of a machine was entitled to the benefit of all the uses to which it could be put, no matter whether he had conceived the idea of the use or not.

It is contended, as against the wire bells, that the evidence does not show the application of the patented process to an article designed to be used as a spring. But the clock hair-springs are quite as truly springs as the furniture springs, for they require the exercise and use of the resiliency of tempered steel. Both are subjected to the same strains in coiling; both for the same reasons need restoration; and in both the application of a blue heat produces the same desirable results.

Within the rule laid down by this court in *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59, there was nothing more than mechanical skill in arriving at the alleged invention, in view of the state of the art. Cary says, in his specification, that "in bending or coiling the wire into the proper shape, the metal is unavoidably weakened;" that "this greatly reduces the elasticity, strength, and durability of the spring;" that "being a manufacturer of furniture springs, and aware of this difficulty," he had made many experiments with a view to restoring the wire, after being bent or formed into springs, to its normal condition; and that he had discovered that that could be done "by subjecting the spring to a degree of heat known as 'spring-temper heat,' which is about 600°, more or less, and that a subjection to this temperature for about eight minutes is sufficient to produce the result desired."

It is contended, however, by the plaintiffs that the applicability of the former processes is contradicted by the fact that no one had used them for the manufacture of furniture springs, and that as soon as Cary's process was made known the art of making furniture springs was revolutionized. But, it was said by this court in *McClain* v. *Ortmayer*, 141 U. S. 419, 428: "That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility, is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the

market and large commissions to dealers, as by the intrinsic merit of the articles themselves;" and (p. 429) that while, "in a doubtful case, the fact that a patented article had gone into general use is evidence of its utility, it is not conclusive even of that, much less of its patentable novelty."

In the present case, it appears that it was not until a short time before 1870 that furniture springs began to be commonly made of steel wire. It was not until 1868, when the general introduction of Bessemer steel and open-hearth steel afforded a cheap substitute for iron, that the use of steel became general in the art in question. It was then natural that there should be introduced into that art methods of treatment which were well known as applied in allied arts. The method of the patent, already in use, thus occurred to Cary; but he was appropriating a method which was common property. When steel was adopted for the first time in any art, it was natural that existing methods of treating it should be applied to its new use in the given art. The case is merely one of a double use. Nor is it of force that experts expressed surprise that the process in question was applicable to furniture springs.

Cary was not the first to discover the process described in his specification, for the restoration of steel. He claims only the process; and the use made of the article after it is subjected to the process does not affect the nature of the process itself. As a process, there is nothing new in the subject-matter of the claim. The claim does not cover an improvement in furniture springs or other coiled springs, as a new article of manufacture; and the "coiled springs," to which, by the claim, the method of tempering is to be applied, include all such springs, irrespective of the use to which they are to be applied. The method or process claimed is substantially the old method of restoring mechanically strained steel.

The present case is covered by the cases of *Vinton* v. *Hamilton*, 104 U. S. 485; *Stow* v. *Chicago*, 104 U. S. 547; *Locomotive Truck Case*, 110 U. S. 490; *Blake* v. *San Francisco*, 113 U. S. 679; *Thompson* v. *Boisselier*, 114 U. S. 1; *Miller* v. *Foree*, 116 U. S. 22; *Dreyfus* v. *Searle*, 124 U. S. 60; *Brown* v.

District of Columbia, 130 U. S. 87; *Aron* v. *Manhattan Railway*, 132 U. S. 84; *Watson* v. *Cincinnati, Indianapolis &c. Railway*, 132 U. S. 161; *Marchand* v. *Emken*, 132 U. S. 195; *Royer* v. *Roth*, 132 U. S. 201; *Hill* v. *Wooster*, 132 U. S. 693, 701; *Burt* v. *Evory*, 133 U. S. 349; *Howe Machine Co.* v. *National Needle Co.*, 134 U. S. 388; *Florsheim* v. *Schilling*, 137 U. S. 64; *Consolidated Roller-Mill Co.* v. *Walker*, 138 U. S. 124; *Ansonia Co.* v. *Electrical Supply Co.*, 144 U. S. 11; *Ryan* v. *Hard*, 145 U. S. 241. The principle deducible from those cases is that it is not a patentable invention to apply old and well-known devices and processes to new uses, in other and analogous arts. The decision in *Ansonia Co.* v. *Electrical Supply Co.*, *supra*, is very pertinent. In the opinion in that case, the cases were reviewed which establish (1) that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result had not before been contemplated; and (2) that, on the other hand, if an old device or process be put to a new use, which is not analogous to the old one, and the adaptation of the old process to the new use is of such a character as to require the exercise of the inventive faculty to produce it, such new use will not be denied the merit of patentability.

In the case of *Cary* v. *Wolff*, 24 Fed. Rep. 139, Judge Wheeler remarked that the discovery of Cary was that the application of heat would restore the lost strength and elasticity of the wire, consequent on the displacement of its particles; that the application of heat for that purpose was not known until it was applied to that kind of springs in their peculiarly weakened state; that the discovery was of a new application of an old process, which produced a new and highly useful result; that wire bells for clocks were made to have sonorous properties by the same process in kind, but for a different purpose and with a different result; that what seemed to be the nearest to it was the method of shaping and spacing the coils of hair-balance-springs for marine clocks, by coiling the wire into a mould of the required shape, called a snail,

and subjecting it to heat while there in place, to make it retain its shape, but there was no displacement of the particles of which the wire was composed, by distortion, and the process was not a restoration of any lost quality, but a mere shaping of the wire into the article desired; that the discovery of that effect of restoration by Cary's mode was new; that experts called by the defendants admitted that they had not believed the result would be produced, until they saw the process tried in connection with that litigation; and that such production of a new and useful result, although by a new application of an old process, was patentable; citing *Crane* v. *Price*, 1 Webster's Pat. Cas. 393; *Smith* v. *Goodyear Vulcanite Co.*, 93 U. S. 486; and *Loom Co.* v. *Higgins*, 105 U. S. 580.

In the present case, in the opinion of Judge Acheson granting the preliminary injunction, 24 Fed. Rep. 141, the court cited and followed the decision of Judge Wheeler.

In the opinion of Judge Nixon in *Cary* v. *Domestic Spring-Bed Co.*, 26 Fed. Rep. 38, he stated that, in ordering the preliminary injunction, he had followed the decision of Judge Wheeler; and that is shown also by his opinion granting such injunction. 27 Fed. Rep. 299.

In the opinion of Judge Acheson in the present case, on final hearing, 31 Fed. Rep. 344, concurred in by Judge McKennan, 31 Fed. Rep. 347, it is stated that the process of the patent is based on the fact that the evils resulting from the distortion of hard-drawn steel wire, in the ordinary operation of coiling it into springs for furniture, can be removed by a single application of heat, as set forth in the specification, so as to result in a greatly improved spring; that furniture springs so treated came into immediate and very general use, on their introduction into the market, largely superseding springs not subjected to that treatment; and that experts and others practically familiar with the treatment and behavior of steel were greatly surprised at the result effected by the patented process, it being contrary to all their previous conception and experience. The opinion then cites and quotes from the opinion of Judge Wheeler, and states that the latter opinion held that the Cary process was new and patentable, although previously, in the

manufacture of wire bells for clocks, heat had been applied to them for the purpose of giving them the desired sound and tone, and hair-balance-springs for marine clocks were subjected to heat while coiled in the grooves of a metallic plate, for the purpose of permanently setting the coils in proper relation to each other. The opinion of Judge Acheson further said that, after giving to the subject-matter an independent investigation, the court saw no reason to doubt the correctness of Judge Wheeler's conclusions, and added: "The purpose, object, and result of the application of heat in the practice of the Cary invention are so entirely different from those aimed at and attained by the application of heat in the manufacture of wire clock-bells, hair-balance-springs for marine clocks, and the other shown instances of its prior use, that we do not hesitate to adopt the conclusion of Judge Wheeler upon this branch of the case."

But we are of opinion that the same principle set forth in the patent was developed in the manufacture of the wire bells for clocks and of the hair-balance-springs; that there was no patentable invention in applying that principle to the springs mentioned in the specification, and that the case is merely one of a double use.

It results that the decree of the Circuit Court must be

Reversed, and the case be remanded to that court with a direction to dismiss the bill, with costs.

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

TAYLOR *v.* BROWN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 112. Argued and submitted January 9, 1893. — Decided March 6, 1893.

In computing the time during which the alienation of public land acquired by an Indian under the provisions of § 16 of the act of March 3, 1875, c. 131, (18 Stat. 402,) is forbidden, the day of the issue of the patent should be included.

THIS was an action commenced by Taylor and Bidwell against Brown and Young, impleaded with others, in the District Court of the Fourth Judicial District of the Territory of Dakota, within and for the county of Moody, July 17, 1885, and in which an amended complaint was served March 1, 1886. The prayer of the complaint was that certain deeds should be adjudged and declared clouds on the plaintiff's alleged title to one hundred and sixty acres of land therein described, and be decreed null and void and of no effect, and that the plaintiffs should be decreed to be the legal owners of the property. Young and Brown were the only parties served. They answered separately, requested separate findings in their favor, and the court found separately, as to and against each of them, whereupon each moved for a new trial, and, their motions being overruled and judgment being entered against them, took separate appeals to the Supreme Court of the Territory.

The cause was tried by the District Court upon the admissions in the pleadings and the evidence adduced, and thereupon the court found, in brief, that on June 15, 1880, a patent issued to one Thomas K. West for the one hundred and sixty acres in question, and was duly recorded October 7, 1881; that on January 25, 1881, the patentee and his wife conveyed to defendant Young forty acres of the tract for valuable consideration, the receipt of which was acknowledged; and that Young entered into actual possession of the forty acres on

that date, and had ever since occupied, used and cultivated the land, using and claiming the same in his own right adversely to all the world and especially as against the plaintiffs, and had erected and made valuable, permanent improvements thereon.

That on August 13, 1881, West conveyed to his wife eighty acres of the tract by deed bearing that date, acknowledging the receipt of a valuable consideration, and recorded October 7, 1881; that on August 15, 1881, Mrs. West conveyed to defendant Brown the eighty acres in consideration of the sum of $300, paid to her on that date; that Brown entered into actual possession of the eighty acres August 15, 1881, claiming it in his own right and title thereto under the deed to him, and occupied, used and cultivated the land, using and claiming the same in his own right from that date adversely.

That on June 15, 1885, by deed recorded that day, West and his wife conveyed the whole one hundred and sixty acres to Young for a valuable consideration, the receipt of which was acknowledged, and on the last-mentioned date, Young entered into actual possession of the premises, claiming them in his own right and title thereto, and that since that date Young occupied and used the land, and had been in actual possession of the whole of it, using and claiming the same adversely.

That West and his wife on June 17, 1885, and from August 15, 1881, were not in the actual possession or otherwise of either the forty or the eighty acres; that West and his wife, on June 17, 1885, conveyed the land to C. E. Thayer, who, on June 19, conveyed the one hundred and twenty acres to the plaintiffs; that neither said Thayer nor his wife were on June 19, or at any other time prior to or since that date, and at the time of the delivery of the deed to the plaintiffs, in actual possession of the forty acres, nor were they in actual possession of any part of the said tract.

That Thomas K. West was a Sioux Indian who had arrived at the age of twenty-one years and who had abandoned his tribal relations and made satisfactory proof of such abandonment by taking an oath of allegiance to the United States

Counsel for Appellees.

government, and who was entitled, under sections 15 and 16 of chapter 131 of the Laws of the United States, passed March 3, 1875, entitled "An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30, 1875, and prior years, and for other purposes," to enter a homestead under the laws of the United States, and had entered said land under said laws and duly proved up on the same and received the patent referred to.

That the deeds to Young, Alfred Brown, and Sophia West, were made within five years from the date of the patent to West by the United States; that the adverse possession of Brown and Young was entirely founded on conveyances that were absolutely null and void; and that the possession of Brown and Young of the premises and the improvements made thereon were made with full notice that West was an Indian, as previously found.

The court stated the following conclusions of law:

"I. That the land described in said patent was absolutely inalienable prior to the 16th day of June, 1885; that the deeds from Thomas K. West to Timothy Young, of January 25, 1881, June 15, 1885, and from Thomas K. West to Sophia West, of August 13, 1881, and from Sophia West to Alfred Brown, of August 15, 1881, are null and void.

"II. That the deed from Thomas K. West and Sophia West to C. E. Thayer on the 17th day of June, 1885, and the deed from C. E. Thayer and wife to S. S. Taylor and S. A. Bidwell are good and valid conveyances, and conveyed the title of said premises to the said plaintiffs.

"III. That the plaintiffs, S. S. Taylor and S. A. Bidwell, are the owners of said premises."

The Supreme Court of the Territory reversed the judgment of the District Court and remanded the cause with directions to dismiss the plaintiffs' complaint. The opinion will be found in 5 Dakota, 335.

Mr. S. S. Burdett and *Mr. C. H. Winsor*, for appellants, submitted on *Mr. Winsor's* brief.

Mr. Robert J. Gamble for appellees.

Opinion of the Court.

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

By section 15 of the act of March 3, 1875, 18 Stat. 402, c. 131, any Indian born in the United States, who was the head of a family or who had arrived at the age of twenty-one years, and who had abandoned or might thereafter abandon his tribal relations, was, on making satisfactory proof of such abandonment, entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and acts amendatory thereof, "*provided, however*, that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor."

By section 16, in all cases in which Indians had theretofore entered public land under the homestead law and proceeded in accordance with the regulations of the Land Office, the conditions prescribed by law having been complied with, the entries so allowed were confirmed and patents directed to issue thereon, "subject, however, to the restrictions and limitations contained in the fifteenth section of this act in regard to alienation and incumbrance."

West came within the sixteenth section, and obtained his patent accordingly.

The question, upon the disposition of which the decision of the Supreme Court of the Territory was based, and which we are first to consider, arises upon the proper construction of the proviso to the fifteenth section. The restraint on alienation was to continue for a period of five years. Was it the intention that the computation of time should include the day of the issue of the patent? If so, the deed of June 15, 1885, was not invalid, and the decree must be affirmed.

In *Matthews* v. *Zane*, 7 Wheat. 164, 211, Mr. Chief Justice Marshall remarked that it was the known rule "that a statute for the commencement of which no time is fixed, commences

from its date;" and in *Arnold* v. *United States*, 9 Cranch, 104, 120, in which it was held that a statute providing that it should take effect "from and after the passing of this act" took effect immediately, Mr. Justice Story said that "it is a general rule that when the computation is to be made from an act done, the day on which the act is done is to be included."

But this cannot be said to be a universal rule either in England or this country. *Webb* v. *Fairmaner*, 3 M. & W. 473; *Robinson* v. *Waddington*, 13 Q. B. 753; *Sheets* v. *Selden*, 2 Wall. 177; *Calvert* v. *Williams*, 34 Maryland, 672; *Parkinson* v. *Brandenburg*, 35 Minnesota, 294; *Bemis* v. *Leonard*, 118 Mass. 502, where many cases are referred to and considered.

In *Hatter* v. *Ash*, 1 Ld. Raym. 84, it was argued that the words "from the date," when used to pass an interest, included the day; *aliter*, when used by way of computation in matters of account; and Powell, senior Justice, was of this opinion, but the other justices expressed none.

The distinction indicated was recognized by the Supreme Court of Pennsylvania in *Lysle* v. *Williams*, 15 S. & R. 135, where a *scire facias* was issued on the 22d of July, 1823, upon a bond dated the 22d of July, 1818, and payable in five years from the date, and the court held that, as upon the execution of the bond an immediate interest passed to the plaintiff, the first day should be included in the five years, and that the *scire facias* was properly issued.

While it is desirable that there should be a fixed and certain rule upon this subject, it must be conceded that the rule which excludes the *terminus a quo* is not absolute, but that it may be included when necessary to give effect to the obvious intention.

This was the view entertained by Lord Mansfield who ruled in *Pugh* v. *Duke of Leeds*, 2 Cowp. 714, that "the sense of the word 'from' must always depend upon the context and subject-matter, whether it shall be construed inclusive or exclusive of the *terminus a quo*."

In *Lester* v. *Garland*, 15 Ves. 248, it was held by Sir William Grant that, in computing time from an act or event, no

general rule of inclusion or exclusion should be laid down; that it depended on the reason of the thing according to the circumstances.

In *Griffith* v. *Bogert*, 18 How. 158, 163, the law of Missouri allowed the lands of a deceased debtor to be sold under execution, but prohibited it from being done until after the expiration of eighteen months from the date of the letters of administration upon his estate. The case involved a sale which took place on the first of May, 1821, the letters of administration being dated November 1, 1819, and it was held that the sale was valid as the *terminus a quo* should be included. Mr. Justice Grier, speaking for the court, discussed the vexed question of the inclusion or exclusion of the *terminus a quo* with great vigor, and said: "It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any *bona fide* transaction or title. The intention and policy of the enactment should be sought for and carried out." And, reasoning upon the case in hand, he added: "The object of the legislature was to give a stay of execution for eighteen months, in order that the administrator might have an opportunity of collecting the assets of the deceased and applying them to the discharge of his debts. The day on which the letters issue may be used for this purpose as effectually as any other in the year. The rights of the creditor to execution are restrained by the act for the benefit of the debtor's estate. The administrator has had the number of days allowed to him by the statute to collect his assets and pay the debts. The construction which would exclude the day of the date is invoked, not to avoid a forfeiture or confirm a title, but to destroy one, obtained by a purchaser in good faith under the sanction of a public judicial sale." And see *Dutcher* v. *Wright*, 94 U. S. 553.

It may also be observed that, as to the general doctrine that the law does not allow of fractions of a day, it is settled that when substantial justice requires it courts may ascertain the

precise time when a statute is approved or an act done. *Louisville* v. *Bank*, 104 U. S. 469.

The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeit his estate by violating it, (1 Prest. Est. 477,) and while such a result does not ensue in transactions with members of a race of people treated as in a state of pupilage and entitled to special protection, (*Pickering* v. *Lomax*, 145 U. S. 310; *Felix* v. *Patrick*, 145 U. S. 317, 330,) yet the proviso in question may fairly be held to have been adopted in view of general principles. If, when the patent issued, June 15, 1880, West could have conveyed but for a specific restriction taking effect at the same moment, then that date should be included in the period of five years prescribed. The proviso is that the title shall not be subject to alienation in the various ways described, and shall be and remain inalienable for a period of five years from the date of the patent. Possibly the language is susceptible of being construed to mean that the land should be inalienable on the day of the issue of the patent and for five years after that date, two periods of time, but we are of opinion that the more natural and the true construction is that only one period is referred to, and that the day the patent issued should not be excluded. The limitation on alienation was to be and to remain, that is to say, the land was to be on the first day not subject to alienation, and so to remain until the five years had expired. The protection of the Indian against the improvident disposition of his property was fully attained in the judgment of Congress by fixing the period of five years, and no reason is perceived why any more than that time should be assumed to have been within the legislative contemplation.

The power to alienate came with the patent and the restriction for the period named was carefully drawn to operate *eo instanti*, that is, to commence in its entirety coincidently with the possession of the power.

The decree of the Supreme Court of the Territory is affirmed, and the mandate will issue to the Supreme Court of South Dakota for further proceedings in conformity to law.

BAUSERMAN *v.* BLUNT.

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

No. 107. Argued January 6, 1893. — Decided March 6, 1893.

The construction given by the Supreme Court of a State to a statute of limitations of the State will be followed by this court, even in a case decided the other way in the Circuit Court before the decision of the state court.

The statute of limitations of Kansas, as construed by the Supreme Court of the State, does not run while the debtor is personally absent from the State, although he retains a usual place of residence therein, where a summons upon him might be served.

The statute of limitations of Kansas, as construed by the Supreme Court of the State, stops running at the death of the debtor, but for such a reasonable time only as will enable the creditor to have an administrator appointed.

THIS was an action brought February 13, 1886, in a court of the State of Kansas, by Elbridge G. Blunt, a citizen of Illinois, against Bauserman, a citizen of Kansas, and administrator of James G. Blunt, deceased, upon a promissory note for $3204.34, made by James G. Blunt at Chicago, Illinois, July 1, 1875, and payable to Elbridge G. Blunt in one day after date, with interest annually at the rate of ten per cent.

The petition, after setting forth the making of the note at the time and place aforesaid, alleged that James G. Blunt, at the time of making the note, and for a long time before and after, was a citizen and resident of Kansas, and died intestate in July, 1881, leaving property in that State; that no administrator of his estate was appointed until the defendant was appointed administrator on December 14, 1885; that James G. Blunt, after the making of the note and before his death, was absent from and out of the State of Kansas, as well as the State of Illinois, "for more than five years;" and that no part of the note or of the interest thereon had been paid, except $100 paid December 1, 1875, and indorsed on the note.

Statement of the Case.

The defendant demurred to the petition, and assigned for cause of demurrer, "that said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant, and that it appears by the said petition that the alleged cause of action therein stated is barred by the statute of limitations."

On March 13, 1886, the case was removed by the defendant into the Circuit Court of the United States, in which, on June 10, 1886, as appeared by its record, the following proceedings were had: "Demurrer herein came on to be heard, and was argued by counsel; on consideration whereof the court doth overrule said demurrer; to which ruling and decision of the court said defendant duly excepts. It is ordered by the court that the defendant have sixty days from this date to file answer."

On June 23, 1886, the defendant filed an answer, setting up the statute of limitations; and alleging that the debtor, from the making of the note until his death, had his home and usual place of residence, where his family lived, and where process on him might have been served, in the city of Leavenworth and State of Kansas, and that his absence from the State was only temporary and with the intention of returning to that home and residence. The plaintiff filed a replication, denying all the allegations of the answer, except as admitted in the petition; and alleging that the debtor, after the maturity of the note and before his death, was out of the State of Kansas and personally absent therefrom for spaces of time aggregating the full period of five years; and that this action was commenced within one year after the appointment of an administrator of his estate. The parties afterwards in writing waived a trial by jury, and agreed that the action might be tried by the court.

The evidence at the trial tended to prove the following facts: The plaintiff and James G. Blunt were brothers. The note sued on was given at its date in Chicago, in settlement for work previously done by the plaintiff for the maker; and the maker a few days afterwards left Chicago and went to Washington in the District of Columbia, and between that

time and his death was absent from the State of Kansas more than five years, but during all this time, and for many years before, kept and maintained his usual place of residence and home in Kansas, open and occupied by his wife and children, and at which service of a summons might have been made on him. He died intestate July 25, 1881, and the defendant was duly appointed and qualified as his administrator by a probate court in Kansas on December 14, 1885.

The plaintiff relied upon the following sections of chapter 80 of the Compiled Laws of Kansas of 1879 and 1885:

"SEC. 18. Civil actions, other than for the recovery of real property, can only be brought within the following period after the cause of action shall have accrued, and not afterwards: First. Within five years: An action upon any agreement, contract or promise in writing."

"SEC. 21. If, when a cause of action accrues against a person, he be out of the State, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the State, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the State, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

The defendant, to maintain the issues on his part, relied upon the following section of the same chapter:

"SEC. 64. The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day."

Also upon the following section of chapter 37 of those laws:

"SEC. 12. Administration of the estate of an intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled thereto in the following order, to wit:

"First. His widow, or next of kin, or both, as the court may think proper; and if they do not voluntarily either take or renounce the administration within thirty days after the

death of the intestate, they shall, if resident within the county, upon application of any one interested, be cited by the court or judge for that purpose.

"Second. If the persons so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect for twenty days after service of said citation, without any sufficient cause, to take administration of the estate, the court shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust.

"Third. If there be no such creditors, and the court is satisfied that the estate exceeds the value of one hundred dollars, the court shall commit administration to such other persons as it shall deem proper."

Thereupon the court, on November 26, 1888, "being of opinion that the personal absence of the debtor from the State of Kansas, notwithstanding his residence in the State, where service of a summons could be made on him, was sufficient to prevent the bar of the statute of limitations, and that the statute of limitations was suspended from the debtor's death until the appointment of his administrator," found and adjudged that the plaintiff recover of the defendant the sum of $7396.02, with interest at the yearly rate of ten per cent from that date; and allowed a bill of exceptions to that opinion and finding.

The defendant sued out this writ of error, and assigned as errors: First. That the petition and the matters therein contained were insufficient for the plaintiff to maintain his action. Second. That by the record it appeared that the findings and judgment were given for the plaintiff, whereas by law they ought to have been given for the defendant.

Mr. Frank Hagermann and *Mr. J. H. Gillpatrick* for plaintiff in error.

Mr. Samuel Shellabarger, (with whom were *Mr. Jeremiah M. Wilson* and *Mr. John L. Pendery* on the brief,) for defendant in error.

Opinion of the Court.

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

This is an action on a promissory note. The defence is the statute of limitations. The note was payable July 2, 1875. The debtor died in July, 1881. An administrator of his estate was appointed and qualified December 14, 1885. The action was brought February 13, 1886.

By the statute of limitations of Kansas, an action upon any agreement, contract or promise in writing must be brought within five years after the cause of action accrues; but it is provided that "if when a cause of action accrues against a person, he be out of the State," "the period limited for the commencement of the action shall not begin to run until he comes into the State;" "and if, after the cause of action accrues, he depart from the State," "the time of his absence" "shall not be computed as any part of the period within which the action must be brought." Compiled Laws of Kansas, c. 80, §§ 18, 21.

The statutes of Kansas also provide that a summons in a civil action may be served either upon the defendant personally, or by leaving a copy at his usual place of residence; and further provide that administration of the estate of an intestate may be granted as follows: first, to his widow or next of kin; second, if they do not apply, or are unsuitable, to one or more of his creditors; and third, if there are no creditors competent and willing to undertake it, to such other persons as the court shall deem proper. Compiled Laws of Kansas, c. 37, § 12; c. 80, § 64.

The two principal questions presented by the record and argued by counsel are: 1st. Whether the statute of limitations began and continued to run during the personal absence of the debtor from the State, retaining a usual place of residence therein, where a summons upon him might be served? 2d. Whether the running of the statute was suspended, after the death of the debtor, until the appointment of an administrator of his estate, more than four years and four months afterwards, although the plaintiff, as a creditor of the deceased,

could, at the end of fifty days from his death, have applied to have an administrator appointed?

Both these questions appear by the bill of exceptions to have been treated as arising upon the evidence at the trial, and to have been ruled upon in entering final judgment. The first one certainly was; and if the second was not unequivocally raised at that stage of the case, it was clearly presented by the demurrer to the petition, inasmuch as, by the practice in Kansas, the defence of the statute of limitations, when all the requisite facts appear on the face of the petition, may be taken advantage of by demurrer. *Zane* v. *Zane*, 5 Kansas, 134; *Bartlett* v. *Bullene*, 23 Kansas, 606, 613; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72. The defendant having answered over by leave and order of the court, reserving his objection to the overruling of the demurrer, the question whether the demurrer was rightly overruled is open on this writ of error sued out after final judgment against him. *Teal* v. *Walker*, 111 U. S. 242; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

Both questions depend upon the local law of Kansas. By a provision inserted in the first Judiciary Act of the United States, and continued in force ever since, Congress has enacted that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat. § 721. No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court. *Higginson* v. *Mein*, 4 Cranch, 415, 419, 420; *Shelby* v. *Guy*, 11 Wheat. 361, 367; *Bell* v. *Morrison*, 1 Pet. 351, 360; *Henderson* v. *Griffin*, 5 Pet. 151; *Green* v. *Neal*, 6 Pet. 291, 297–300; *McElmoyle* v. *Cohen*, 13 Pet. 312, 327; *Harpending* v. *Dutch Church*, 16 Pet. 455, 493; *Leffingwell* v. *Warren*, 2 Black, 599; *Sohn* v. *Waterson*, 17 Wall. 596, 600; *Tioga Railroad* v. *Blossburg & Corning*

Railroad, 20 Wall. 137; *Kibbe* v. *Ditto*, 93 U. S. 674; *Davie* v. *Briggs*, 97 U. S. 628, 637; *Amy* v. *Dubuque*, 98 U. S. 470; *Mills* v. *Scott*, 99 U. S. 25, 28; *Moores* v. *National Bank*, 104 U. S. 625; *Michigan Insurance Bank* v. *Eldred*, 130 U. S. 693, 696; *Penfield* v. *Chesapeake &c. Railroad*, 134 U. S. 351; *Barney* v. *Oelrichs*, 138 U. S. 529.

In *Patten* v. *Easton*, 1 Wheat. 476, 482, and again in *Powell* v. *Harman*, 2 Pet. 241, this court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the Supreme Court of the State, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in *Green* v. *Neal*, 6 Pet. 291, a judgment of the Circuit Court of the United States, which had held itself bound by those cases in this court, was reversed, because of more recent decisions of the state court, establishing the opposite construction.

In *Pease* v. *Peck*, 18 How. 595, it was because the statute of limitations of Michigan, as published by authority of the legislature and acted on by the people for thirty years, contained an exemption of "beyond seas," that this court declined to treat those words as not part of the act, although it was shown that they were not in the original manuscript preserved in the public archives, and that they had therefore been recently adjudged by the Supreme Court of the State to be no part of the act. The question there was not of the construction of the text of the statute, but what the true text was; and we are not now required to consider whether that decision can be reconciled with later cases, in which this court has held that an act of the legislature of a State, which has been held by its highest court not to be a statute of the State, because not duly enacted, cannot be held by the courts of the United States, upon the same evidence, to be a law of the State. *South Ottawa* v. *Perkins*, 94 U. S. 260; *Post* v. *Supervisors*, 105 U. S. 667. See also *Norton* v. *Shelby County*, 118 U. S. 425, 440.

In *Leffingwell* v. *Warren*, 2 Black, 599, 603, Mr. Justice Swayne, speaking for the court, laid down, and supported by references to earlier decisions, the following propositions:

"The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789. The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

In *Levy* v. *Stewart*, 11 Wall. 244, which arose in Louisiana, the question was not of the construction of the terms of a statute of limitations, but of an implied exception, by reason of the effect of the state of war existing during the rebellion, while the courts of the States held by the rebels were closed to the citizens of the rest of the Union; and this court declined to be bound by decisions of the courts of Louisiana restricting such effect, because they were inconsistent with its own earlier decisions in *Hanger* v. *Abbott*, 6 Wall. 532, and *The Protector*, 9 Wall. 687, which had dealt with that question as one of public and international law, upon which this court is never obliged to accept the opinion of the state courts. *Huntington* v. *Attrill*, 146 U. S. 657, 683.

In *Tioga Railroad* v. *Blossburg & Corning Railroad*, 20 Wall. 137, 143, this court, following the decisions of the Court of Appeals of New York, held that a foreign corporation could not avail itself of the statute of limitations of that State; and Mr. Justice Bradley, in delivering judgment, said: "These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles."

In *Amy* v. *Dubuque*, 98 U. S. 470, 471, Mr. Justice Harlan, summing up the result of the previous decisions in the very words of some of them, said that "it is not to be questioned that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for administer-

ing justice, one of the most sacred and important of sovereign rights;" and that it is as little to be questioned that "the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals."

Upon the question how far a saving clause as to married women in a statute of limitations is affected by a subsequent statute of the State enlarging the rights of married women, this court, in two comparatively recent cases, has come to differing conclusions by following in each case a single decision made by the highest court of the State since the case was brought to this court from the Circuit Court of the United States. *Kibbe* v. *Ditto*, 93 U. S. 674; *Moores* v. *National Bank*, 104 U. S. 625.

In *Kibbe* v. *Ditto*, which arose in Illinois, the course of decision in the highest court of the State was shown to be as follows: In *Emerson* v. *Clayton*, 32 Illinois, 493, in which the statute of limitations was not in question, the decision was that a married woman might maintain replevin for her chattels, without joining her husband, because, as the court said, the subsequent statute which gave her the right of sole control over her separate property "necessarily confers the power to do whatever is necessary to the effectual assertion and maintenance of that right." But in *Rose* v. *Sanderson*, 38 Illinois, 247, and in *Cole* v. *Van Riper*, 44 Illinois, 58, it was decided that the married woman's act did not affect an estate by the curtesy vested in a husband at the time of its passage; and it was directly adjudged in *Morrison* v. *Norman*, 47 Illinois, 477, and again distinctly asserted in *Noble* v. *McFarland*, 51 Illinois, 226, that as to real estate in which the husband had a tenancy by the curtesy, the statute of limitations did not run against the wife until after his death. Such was the state of the law in Illinois when the Circuit Court of the United States in *Kibbe* v. *Ditto* held that the statute of limitations ran against the wife in the husband's lifetime; and its judgment was affirmed by this court solely because of a subsequent decision of the Supreme Court of Illinois in *Castner* v. *Walrod*, (since

reported in 83 Illinois, 171,) reviewing and modifying or overruling the earlier cases in that State, and which, this court said, "establishes a rule of property in Illinois, which binds the courts of the United States and presents an insuperable bar." 93 U. S. 680.

In *Moores* v. *National Bank*, which arose in Ohio, a judgment of the Circuit Court of the United States holding, in accordance with a previous decision of the Superior Court of Cincinnati, that the saving clause in favor of married women in the statute of limitations of Ohio was repealed by a subsequent statute authorizing a married woman to sue alone in actions concerning her separate property, was reversed by this court, without any discussion of the merits of the question, because a subsequent decision of the Supreme Court of the State, holding that the statute of limitations did not, at the least, begin to run against a married woman until after the passage of the later statute, should be followed by this court. 104 U. S. 629.

What, then, are the decisions of the Supreme Court of Kansas upon the two questions presented by this record?

Upon the question relating to the debtor's personal absence from the State in his lifetime, it is to be observed that the saving clause of the statute speaks only of where the debtor is, and does not (like the statute of New York which governed *Penfield* v. *Chesapeake &c. Railroad*, 134 U. S. 351, and *Barney* v. *Oelrichs*, 138 U. S. 529,) use the word "reside" or "residence." The words of the Kansas statute are "if he be out of the State," "until he comes into the State," "if he depart from the State," and "the time of his absence." When this case was before the Circuit Court, it was clearly settled by a uniform series of decisions of the Supreme Court of Kansas, extending over a period of twenty years, that the words of the statute were to have their natural meaning, and that personal absence of the debtor, even if he retained a residence within the State at which process against him might be served, was sufficient to take the case out of the statute. *Lane* v. *National Bank*, 6 Kansas, 74; *Hoggett* v. *Emerson*, 8 Kansas, 181; *Morrell* v. *Ingle*, 23 Kansas, 32; *Conlon* v. *Lanphear*,

37 Kansas, 431. The later decisions of that court recognize the same rule. *Chicago &c. Railway* v. *Cook*, 43 Kansas, 83; *Bauserman* v. *Charlott*, 46 Kansas, 480, 482.

The Supreme Court of the adjoining State of Nebraska, indeed, as the plaintiff in error has pointed out, has held a precisely similar provision of its own statute of limitations not to include the case of a debtor temporarily absent from the State, and having a usual place of residence therein at which a summons to him might be served. Nebraska Code of Civil Procedure, § 20; *Blodgett* v. *Utley*, 4 Nebraska, 25; *Forbes* v. *Thomas*, 22 Nebraska, 541. But what may be the law of Nebraska is immaterial. The case at bar is governed by the law of Kansas, and the duty of this court to follow as a rule of decision the settled construction by the highest court of Kansas of a statute of that State is not affected by the adoption of a different construction of a similar statute in Nebraska or in any other State. *Shelby* v. *Guy*, 11 Wheat. 361, 367; *Christy* v. *Pridgeon*, 4 Wall. 196, 203; *Union Bank* v. *Kansas Bank*, 136 U. S. 223, 235.

It was therefore rightly held by the Circuit Court that the statute of limitations did not run while the debtor was personally absent from the State, notwithstanding that he continued to have a usual place of residence in the State, where service of a summons could be made on him.

The question whether the statute of limitations ceased to run from the death of the debtor until the appointment of his administrator, four years and more than four months afterwards, requires more consideration.

In the absence of express statute or controlling adjudication to the contrary, two general rules are well settled. 1st. When the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue. *Walden* v. *Gratz*, 1 Wheat. 292; *Mercer* v. *Selden*, 1 How. 37; *Harris* v. *McGovern*, 99 U. S. 161; *McDonald* v. *Hovey*, 110 U. S. 619. 2d. The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim. *Richards* v. *Maryland Ins. Co.*, 8 Cranch, 84; *Braun* v. *Sauerwein*, 10

Wall. 218; *United States* v. *Wiley*, 11 Wall. 508, 513, 514; *Kirby* v. *Lake Shore & Michigan Southern Railroad*, 120 U. S. 130, 140; *Amy* v. *Watertown*, 130 U. S. 320, 325.

But the Supreme Court of Kansas has always held that the death of the debtor suspends the operation of the statute of limitations. *Toby* v. *Allen*, 3 Kansas, 399; *Hanson* v. *Towle*, 19 Kansas, 273; *Nelson* v. *Herkel*, 30 Kansas, 456. In each of those cases it was said that the operation of the statute was suspended until an administrator had been appointed; and they were evidently the foundation of the ruling of the Circuit Court in this case that the statute of limitations was suspended from the debtor's death until the appointment of his administrator.

But those cases, when examined, do not disclose any intention to decide or to intimate that the operation of the statute of limitations would be suspended during a longer time, between the death of the debtor and the appointment of an administrator, than would be sufficient to enable the creditor to have an administrator appointed. In *Toby* v. *Allen*, and in *Hanson* v. *Towle*, there is nothing to show that an administrator was not appointed as soon as possible after the debtor's death. And in *Nelson* v. *Herkel*, although it appears in the statement of the case that four years and nearly nine months had elapsed between the debtor's death and the administrator's appointment, that fact does not appear to have been urged by counsel, or regarded by the court, which treated the case as governed by its previous decisions.

The cases of *Green* v. *Goble*, 7 Kansas, 297; *Carney* v. *Havens*, 23 Kansas, 82; and *Mills* v. *Mills*, 43 Kansas, 699, cited at the argument of the present case, related to the death of the creditor, not of the debtor, and have no important bearing on this case.

Since the judgment of the Circuit Court in the case at bar, the Supreme Court of Kansas, upon careful and elaborate examination of the question, has held that an action by another creditor against this defendant was barred by the statute, because the plaintiff had unreasonably delayed to apply for the appointment of an administrator. Chief Justice

Opinion of the Court.

Horton, (who had delivered the opinion in *Nelson* v. *Herkel*,) after referring to the cases, mentioned above, as holding that the "death of the debtor operates to suspend the statute," added: "But this court has never said, when the question was properly presented, that the creditor can indefinitely prolong the time of limitation by his own omission or refusal to act, or that the death of the debtor operates to suspend the statute of limitations indefinitely." He then referred to a number of authorities, and among others to the statement of Mr. Justice Bradley, speaking for this court, in *Amy* v. *Watertown*, above cited, that "when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim or instituting such proceedings as the law regards sufficient to preserve it;" and to the decisions in *Atchinson &c. Railroad* v. *Burlingame Township*, 36 Kansas, 628, 633, and in *Rork* v. *Douglass County*, 46 Kansas, 175, 181, as establishing that "a person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him" and that "to permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote." "Following these decisions," the Chief Justice concluded that the plaintiff's claim was barred by the statute; and said: "The reasonable time within which a creditor, having a claim against a decedent, and wishing to establish the same against his estate, should make application for administration would be, under the statute, fifty days after the decease of the intestate, or at least within a reasonable time after the expiration of fifty days. But a creditor cannot, as in this case, postpone the appointment for months and years, and then recover upon his claim. If he can do so for several months or several years, he can do so for any indefinite length of time, and then resort to administration and establish his claim. This is not in accord with the policy of the statutes, nor with our prior decisions." *Bauserman* v. *Charlott*, 46 Kansas, 480, 483–486.

That decision was evidently deliberately considered and carefully stated, with the purpose of finally putting at rest a question on which some doubt had existed; it is supported by satisfactory reasons, and is in accord with well settled principles; and there is no previous adjudication of that Court to the contrary. In every point of view, therefore, it should be accepted by this Court as conclusively settling that the operation of the statute of limitations of Kansas is suspended after the death of the debtor for the fifty days only, during which the creditor could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the fifty days.

It remains only to apply the rule thus established to the facts of this case, as alleged in the petition and admitted by the demurrer. Taking the statement of those facts as strongly as possible in favor of the plaintiff, the time which elapsed from the maturity of the note on July 2, 1875, to the commencement of this action on February 13, 1886, was ten years, seven months and eleven days; the allegation that the debtor before his death was absent from the State "for more than five years" cannot be treated as definitely describing a longer period than five years and one day; and after deducting that period there remain five years, seven months and ten days; from which, if we deduct the five years' period of limitation, as well as the fifty days next after the debtor's death, during which the creditor could not have applied for administration, there still remain five months and twenty days.

It is argued for the plaintiff that this was not more than a reasonable time within which he might have applied for the appointment of an administrator after the expiration of the fifty days from the death. To this there are two answers: First, the plaintiff did not so apply within that time, nor was any administrator appointed until almost four years afterwards; and it is hard to see how any reasonable time to enable the plaintiff to have an administrator appointed can be computed in his favor when he has taken no steps whatever to that end. Second, if a reasonable time for that purpose, although the plaintiff did not avail himself of it, can be com-

puted in his favor, and the case be treated as if the time during which he might have applied, but did not apply, for the appointment of an administrator, was five months and twenty days only, yet his delay for that time, being more than thrice the period of fifty days next after the debtor's death which was allowed for the next of kin to obtain administration, was, upon the facts appearing by this record, and without any suggestion that the plaintiff was ignorant of his brother's death, clearly unreasonable, and could not prevent or postpone the running of the statute of limitations.

The defendant below, the plaintiff in error here, is therefore entitled to judgment upon his demurrer to the petition, unless the Circuit Court shall see fit to allow an amendment of the plaintiff's allegations, so as to aver more definitely the length of time during which the debtor was absent from the State after the maturity of the note and before his death.

Judgment reversed, and case remanded to the Circuit Court for further proceedings in conformity with this opinion.

UNITED STATES *v.* TANNER.

APPEAL FROM THE COURT OF CLAIMS.

No. 335. Submitted January 3, 1893. — Decided March 6, 1893.

A marshal is not entitled to charge "travel in going to serve" process when taking a prisoner, under sentence, to the place of commitment.

The construction given to an act by the Department charged with the duty of enforcing it is material only in case of doubt.

THIS was a petition to recover for services as marshal of the United States for the Southern District of Illinois in executing certain warrants of commitment of prisoners to the penitentiary at Chester, Illinois. The claims were for travel fees in the service of the warrants, and were disallowed by the comptroller upon the ground that a claim for mileage had

already been allowed for as "transportation" for the deputies who executed the writs. The fifth finding of fact was that "prior to or about the first of October, 1885, it had been the usual practice of United States marshals to charge mileage in their accounts for going to serve writs of commitment within their respective districts, six cents a mile each, in addition to ten cents a mile each, for transportation of themselves or deputies, prisoners and guards; and such charge when made had been allowed by the accounting officers of the Treasury until the date named, when the practice was changed, and such mileage was thereafter not allowed."

Upon this state of facts the court found, as a conclusion of law that petitioner was entitled to recover the sum of $128.16. 25 Ct. Cl. 68. The United States appealed.

Mr. Solicitor General for appellants.

Mr. George A. King for appellee.

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

This is a claim by a marshal for travel fees in serving warrants of commitment to a penitentiary. The claim is made under that clause of Rev. Stat. § 829, which allows "for travel, in going only, to serve any process, warrant, attachment or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others." An allowance had already been made to petitioner under another clause of § 829, "for transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard." The effect of the allowance would be to give the marshal sixteen cents per mile for his own travel for going from the place where the court is held to the penitentiary.

The delivery of a warrant of commitment to a warden of a penitentiary is in no sense a service of a process, warrant, attachment or other writ, within the meaning of the clause first above cited. The word "process," as used in that clause, evidently refers to process for bringing persons or property within the jurisdiction of the court, and not to warrants of commitment, by virtue of which criminals are transported from the court to the place of commitment. This is evident not only from the inclusion of "writs of subpœna in criminal or civil cases," but from the provision that "where more than one person is served therewith," travel is allowed "to the place of service which is most remote, adding thereto the extra travel, which is necessary to serve it on the others." If a warrant of commitment can be said to be *served* at all upon any person, it is upon the criminal himself, who is transported by authority of such process, rather than upon the jailer, with whom it is simply deposited, and the fees of the marshal therefor are manifestly covered by the allowance for the travel of himself, his prisoners, and guards. Not only does the transportation of a prisoner imply a travel in company with him, but section 829 expressly allows a fee of fifty cents for "every commitment . . . of a prisoner," which implies the deposit of a warrant of commitment with the jailer. In some jurisdictions the prisoner is committed and held under a certified copy of the sentence, and no commitment at all is used.

This question was not involved in the decision of this court, or of the court below, in the case of *United States* v. *Harmon*, 147 U. S. 268; 43 Fed. Rep. 560.

If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States* v. *Graham*, 110 U. S. 219; *Swift Co.* v. *United States*, 105 U. S. 691. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.

The judgment of the court below must, therefore, be

Reversed, with directions to dismiss the petition.

UNITED STATES *v.* FLETCHER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 783. Submitted January 3, 1893. — Decided March 6, 1893.

When, for convenience in making up accounts, an outgoing marshal relinquishes to his successor his right to expenses incurred in endeavoring to arrest persons for offences against the United States, the incoming marshal may charge these fees in his accounts, and they should be allowed.

A marshal of a district into which an offender, who has committed a crime in another district, comes, may deputize the marshal of the district in which the offence was committed, or his deputy, to execute the warrant of removal, and relinquish to him the fees therefor.

The treasury officers have a right to require of a marshal items of expenses incurred in endeavoring to arrest persons charged with the commission of crime.

When claims against the United States are presented to the proper department for allowance, and the department suspends action until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken.

A marshal may charge mileage upon as many writs as he may have in his hands, where the writs are against different persons.

THE case is stated in the opinion.

Mr. Solicitor General and *Mr. Felix Brannigan* for appellant.

Mr. William W. Dudley, *Mr. Louis T. Michener*, and *Mr. Richard R. McMahon* for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This was an action to recover certain fees alleged to be due the plaintiff as marshal of the United States for the Eastern District of Arkansas. The court below directed judgment to be entered in his favor for $3069.16, 45 Fed. Rep. 213, and the United States appealed.

A part only of the items in controversy are included in the assignments of error. Those to which objection was made in this court are as follows:

1. Expenses incurred by a deputy of the plaintiff's predecessor while endeavoring to arrest persons for offences against the United States, $16.

This item was disallowed by the comptroller upon the ground that the same was due to the former marshal, and that the plaintiff was not authorized to pay expenses incurred by his predecessor. As a general rule, this is entirely true, but it appears in this case that the writs were issued before the plaintiff qualified for office, but were not returned until after he had qualified, and that, by an arrangement between the outgoing and incoming marshal, the latter was to have the fees earned upon all writs in the hands of the deputies of the former at the date the office changed hands. It further appeared that the outgoing marshal made no claim to these fees. Properly speaking, the outgoing marshal was entitled to these fees under Rev. Stat. § 790, which allows him to execute all such precepts as may be in his hands at the time of his removal or the expiration of his term. But if, for the convenience of making up accounts, the outgoing marshal is content to relinquish his right to these fees, we see nothing but a technical objection in the way of the incoming marshal charging them up in his accounts. Did the outgoing marshal claim these fees as a debt justly due him, a different question would arise, but in view of his relinquishment of them, we think they should have been allowed to his successor, the plaintiff.

2. An item of $1804.73, for travel and other fees in pursuing into other judicial districts, and there arresting persons charged with crime in the Eastern District of Arkansas, and bringing the persons so arrested into the latter district, was disallowed by the comptroller upon the ground that the marshal had no authority to arrest a prisoner in any district but his own.

It appears, however, that where arrests were so made, the marshals of the foreign districts deputized the plaintiff or his deputy to execute the orders of removal to the Eastern District of Arkansas, and relinquished in favor of the plaintiff all

claim against the United States for the mileage or fees so accrued. It appears to have been the custom for the marshals of this district to pursue fugitives from justice into other districts, to procure a deputation from the marshals of such other districts, and in such cases it was the practice of the Treasury Department up to 1885 to allow the mileage and other fees to the pursuing marshal, when the marshals of the foreign districts relinquished their claims for the same in his favor. When a person is arrested in one district for an offence alleged to have been committed in another, Rev. Stat. § 1014 requires the judge of the district within which he is arrested to execute a warrant to the marshal for his removal to the district where the trial is to be had. No good reason is perceived why the marshal of that district may not deputize the marshal of the district within which the crime was committed, or his deputy, to execute such warrant of removal, and relinquish to him his legal fees therefor.

Under such circumstances, we think the latter may properly charge these fees in his own account to the government, and that they should be allowed to him.

3. Expenses incurred to the amount of $130.50 in endeavoring to arrest in his own district persons charged with crime therein. The sum did not exceed the rate of $2 per day, the maximum amount allowed by law, and was not disallowed by the accounting officers in the settlement of his accounts, but was merely *suspended* for an itemized statement of the expenses.

Objection was made to this item upon the ground that the account was still in process of settlement in the department, and had not been finally passed upon or disallowed. Rev. Stat. § 829 allows to a marshal "for expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day." The finding of the court was that the services had been performed, and that the expenses equalled the amount charged, and sometimes exceeded the $2 a day allowed by law. The Comptroller, however, had a right to require items of these expenses to be furnished. The

smallness of the amount allowable under the statute does not affect the principle, unless at least a showing be made that it is impossible to furnish the particulars.

With regard to the power of the court to allow these items pending the settlement of the marshal's account by the officers of the Treasury Department, Rev. Stat. § 951 provides that "in suits brought *by* the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part," etc. This was, prior to the establishment of the Court of Claims, the only method provided by law for obtaining a judicial allowance of claims against the government. It is true that it was held by this court, under the Court of Claims act, in *Clyde* v. *United States*, 13 Wall. 38, that a rule of that court, requiring parties to present their claims to an executive department before suing, was unauthorized and void, the court holding that this was a jurisdictional requirement which Congress alone had the power to establish, and, inferentially at least, that no action of the executive department was required before suit could be begun in that court under the act establishing it. This was also the ruling in *United States* v. *Knox*, 128 U. S. 230, 234, which was a suit in the Court of Claims by a commissioner of the Circuit Court for fees. In delivering the opinion of the court, Mr. Justice Miller remarked: "We understand the court to have decided," (in *Clyde* v. *United States*,) "in substance, that the action of the auditing department, either in allowing or rejecting such a claim, was not an essential prerequisite to the jurisdiction of the Court of Claims to hear it." But if such claims are presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. So long as the claim is pending and awaiting final determination in the department, courts should not be called upon to interfere, at least, unless it ignores such claim or fails to pass upon it within a reason-

able time. This was the rule applied by this court with respect to a pending survey of lands in *New Orleans* v. *Paine*, 147 U. S. 261.

4. The last assignment of error relates to a claim of $1565.16, for more than one mileage on the service of two or more writs against different persons for different causes, when the service was made in the course of one trip; and also for mileage on more than one writ where more than one writ was served at the same time and place upon different persons. Rev. Stat. § 829 allows six cents a mile for travelling in the service of process, with a proviso that, "when more than two writs of any kind required to be served in behalf of the *same* party on the *same* person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs." There is here a clear implication that there is no restriction upon the right of the marshal to charge mileage upon as many writs as he may have in his hands where the writs are against *different* persons.

The proviso in the act of February 22, 1875, § 7, 18 Stat. 334, that no person shall be entitled to an "allowance for mileage or travel not actually and necessarily performed," evidently refers to cases where process is sent by mail to a deputy to be served at a place remote from the office whence the process has issued. The reasons for this allowance, however, are fully stated in *United States* v. *Harmon*, *ante*, 268, and this item is allowed upon the authority of that case.

This disposes of all the questions raised by the assignments of error, and the judgment of the court below is, therefore,

Reversed, and the case remanded, with instructions to enter a new judgment in conformity with this opinion.

UNITED STATES *v.* PITMAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 699. Submitted January 9, 1893. — Decided March 6, 1893.

Marshals are entitled to per diem fees for attendance when attending under §§ 583, 584, 671, 672 and 2013 Rev. Stat., the same as if the judge were present and business were transacted.

This was a petition for per-diem fees as clerk of the Circuit and District Courts of the United States for the District of Rhode Island. Petitioner claimed for 108 days' attendance under Revised Statutes, sections 672 and 583, and averred that, notwithstanding the rendition of the services claimed and the approval of his account by the court, and notwithstanding that the marshal, the crier and one of the bailiffs had received pay for attendance upon a portion of the days enumerated in his petition, to which fact the attention of the First Comptroller was called, the accounting officer of the Treasury declined to allow the same. With respect to certain of the days the court found that they "were days on which sessions of the said Circuit Court were appointed to be holden by the presiding judge thereof, and that the said Pitman attended on said days at the time and place of holding said court accordingly, and that no judge was present to preside at said court on said days, and that said court on said days was adjourned by and pursuant to a written order signed by one of the judges of said court and directed alternatively to the marshal and in his absence to the clerk, to a day and time fixed and limited in said order;" and that certain other days "were days on which sessions, terms, and sittings of the said District Court were appointed to be holden by the presiding judge thereof," and that otherwise the facts were the same as in the former case. Upon this state of facts the court entered a judgment for the petitioner in the sum of $495, (45 Fed. Rep. 159,) and the United States appealed.

Mr. Solicitor General and *Mr. Felix Brannigan* for appellants.

Mr. Henry Pitman in person.

Mr. Justice Brown delivered the opinion of the court.

This case depends upon the construction to be given to Revised Statutes, § 828, wherein there is allowed to the clerk "five dollars a day for his attendance on the court while actually in session," taken in connection with § 583, which provides that "if the judge of any District Court is unable to attend at the commencement of any regular, adjourned or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct;" and with § 672, which contains a similar provision with regard to the absence of the judges of a Circuit Court. The practice in the District of Rhode Island is stated in the opinion of the court below, to be "that the courts shall meet at the time fixed by law and transact such business as may then appear, and thereafter shall hold by successive adjournments and appointments at short intervals a substantially continuous session until the next succeeding day for the commencement of a regular term. During the continuance of these sessions the judges have attended in court here whenever their engagements did not take them elsewhere, and on the occasion of their absence or expected absence, for a time which might be definitely fixed, or which was indeterminate by reason of the doubtful exigencies of business elsewhere, they have sometimes, as in this case, made provision for adjournments according to the terms of sections 583 and 672."

Whether this practice be conducive to the convenient dispatch of business or not, is a question for the judge to determine. After the term of a court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be opened for incidental business after

the regular business of the term has been concluded, is a matter which rests in the discretion of the presiding judge. It is presumed that he will act in this particular in what he conceives to be the interest of the public, and that he will put the government to no unnecessary expense. It is clearly the duty of the officers of the court to be present at the adjourned day, and to obey the written order of the judge with respect to any further adjournment, and there is no reason why they should not receive their per-diems therefor as if the judge were actually present. It was held by this court in the case of *McMullen* v. *United States*, 146 U. S. 360, that when the court is open, by its order, for the transaction of business, it is in session within the meaning of this section, "but that if the court, by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or during those days, although the current term has not expired."

We think the court should be deemed "actually in session" within the meaning of the law, not only when the judge is present in person, but when, in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge. That this was the construction placed upon these sections by Congress is evident by the civil appropriation act of March 3, 1887, 24 Stat. 509, 541, c. 362, which provided as follows: "Nor shall any part of any money appropriated be used in payment of a per-diem compensation to any attorney, clerk or marshal for attendance in court except for days when the court is open by the Judge for business, or business is actually transacted in court, and when they attend under sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which fact shall be certified in the approval of their accounts."

Attendance upon the days when the court is opened under the provisions of these numbered sections is put by Congress

upon the same footing as if the judge were actually present, and business were actually transacted. The restriction of per-diems to days when the court is actually in session was probably intended to be construed and explained in connection with section 831, which provides that no per-diem or other allowance shall be made for attendance at rule days.

There was no obligation on the part of plaintiff to prove that the District Court was not in session on the days allowed for attendance at the place of holding the Circuit Court; or that the Circuit Court was not in session on the days allowed for attendance at the place of holding the District Court. The findings of fact, however, show that the plaintiff is entitled to but 98 days' attendance, instead of 99, and the judgment should, therefore, be reduced $5.

This deduction being made, the judgment of the court below is

Affirmed.

UNITED STATES *v.* JONES.

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

No. 312. Submitted January 6, 1893. — Decided March 6, 1893.

A clerk of a District Court is entitled to charge for entering orders approving marshals' accounts. *United States* v. *Van Duzee*, 140 U. S. 169, approved.

He is also entitled to charge for certifying copies of such orders to be forwarded to the department with the accounts, but not for the seals affixed to such copies unless such authentication is required by the Treasury Department.

He is also entitled to charge for copies of orders for marshals to pay supervisors of elections, without regard to the necessity for such orders, or the power of the court to make them.

He is also entitled to a fee for filing a marshal's account with vouchers attached, but not to a separate fee for filing each voucher.

He is also entitled to fees for recording, after the determination of a prosecution, all the proceedings relating to it, including the order of commitment.

United States v. *Harmon*, 147 U. S. 268, affirmed to the point of the power of the Treasury to determine whether the several allowances increase his salary beyond the maximum compensation.

THE case is stated in the opinion.

Mr. Solicitor General and *Mr. Felix Brannigan* for appellants.

Mr. William W. Dudley, *Mr. Louis T. Michener* and *Mr. Richard R. McMahon* for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This was an action for fees alleged to be due the petitioner Jones for services rendered by him as clerk of the District Court for the Southern District of Alabama, the items of which were set out in a bill of particulars annexed to his petition. Judgment having been rendered in favor of the petitioner for $292.35, 39 Fed. Rep. 410, the United States appealed to this court.

The government assigns as error in this case the allowance of certain items —

1. For entering orders of the court approving marshals' accounts, making copies thereof, and attaching certificates under seal to such copies.

2. For copies of orders for marshals to pay supervisors of election.

3. For filing marshals' accounts current with vouchers thereto attached.

4. For making final records, recording bonds and commitments.

1. Charges for entering orders approving marshals' accounts were allowed in the case of *United States* v. *Van Duzee*, 140 U. S. 169, 171, and we have seen no reason to change the opinion there expressed. The labor of preparing one's own accounts for services or fees is a mere incident to the rendition of the service, and is universally assumed by the creditor as his own burden; but the approval of the account of another

stands upon a different footing, and if performed at the request of the government, or under a statute requiring it to be performed for the protection of the government, there is no reason why the clerk should not receive such fees therefor as he receives for analogous services in other matters.

We are referred to Revised Statutes, § 1765, as expressly inhibiting compensation for such services. This section provides that "no officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation in any form whatever, . . . for any other service or duty whatever, unless the same is authorized by law," etc. It is sufficient to observe of this that the service charged by the clerk in entering these orders is strictly in the line of his duty as clerk; that his per folio fees for such orders are expressly allowed by section 828, and are not "additional pay, extra allowance or compensation in any form whatever."

The clerk is also entitled to charge for certifying copies of such orders to be forwarded to the department, with the accounts, but not for seals affixed to such copies, unless, as was held in *Van Duzee's case*, page 174, the Treasury Department required the copy of such order to be authenticated, not only by the signature of the clerk, but under seal. The charge for seals does not seem to have been allowed.

2. The charge for copies of orders for marshals to pay supervisors of election is objected to on the ground that there is no law authorizing courts to issue orders to the marshal to pay supervisors of election or special deputies. The act of February 22, 1875, 18 Stat. 333, c. 95, does require, however, that "before . . . any account payable out of the money of the United States shall be allowed . . . in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same . . . to a United States Circuit or District Court, . . . and the court shall thereupon cause to be entered of record an order approving or disapproving the account," etc. The account in question is clearly within this section. Supposing it, however, to be a question of doubt,

if the court assumed jurisdiction to make such order, and the clerk obeyed it by entering it upon the journal, he is entitled to his fee therefor, irrespective of the necessity for such order being made. In fact, he would be guilty of contempt in refusing to make such entry. The government cannot, in this collateral proceeding, attack the power of the court to make this order.

3. The charges for filing marshals' accounts current, with vouchers attached thereto, was objected to upon the ground that the filing of each voucher separately was not only unnecessary, but improper, since vouchers belong to and are part of the account to which they pertain. The act of 1875, above cited, requires the accounts and vouchers of marshals and other judicial officers to be made in duplicate, one copy of which must be forwarded by the clerk to the accounting officers of the Treasury, and the other is to be retained in his office. Of course, he is entitled to his fee for filing this account, but not for filing the vouchers, which are usually attached to the account, or, if not physically attached to it, are deemed to be a part of it, and as constituting, with the account, one paper. The clerk would be as much entitled to a separate fee for recording each coupon attached to a bond as for recording each voucher to an account as a separate paper.

4. The items for making final records, recording bonds and commitments. The court below held it to be the duty of the clerk to record, after the determination of any prosecution, all the proceedings of the court relating thereto. This record includes the indictment and other pleadings, the processes, journal entries, and we think it also includes the order of commitment, which, as held by the court below, is an important part of the proceedings in a criminal case, and should be made a matter of record, where, by the rules or practice of the court, a record of criminal cases is made up. As the court held the remainder of the charges included in these items, for the recording of bail bonds and justification of sureties, to be no part of the proceedings of the court, and their entry upon the record as unauthorized and unnecessary,

and as no appeal was taken by the petitioner, we are not called upon to express an opinion with regard to them.

5. The judgment is further claimed to be erroneous upon the ground that it does not appear that the amount of the judgment, together with the compensation already paid to petitioner as clerk of the court, would increase his emoluments beyond the limits prescribed by law for his office. This objection, however, does not apply to any particular item, but is a matter to be considered by the officers of the department when the whole account is stated and settled. If the maximum compensation has already been allowed and paid, perhaps it might be matter of defence to be pleaded and proven by the government, but we are clearly of the opinion that it cannot be raised in this manner, and so held in the case of *United States* v. *Harmon*, *ante*, 268, decided at the present term.

The judgment of the court below is, therefore,

Reversed, and the case remanded, with directions to reduce the judgment in conformity with this opinion.

UNITED STATES *v.* KING.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 628. Submitted January 9, 1893. — Decided March 6, 1893.

A clerk of a Circuit Court is not entitled to a per-diem pay for services in selecting juries in connection with the jury commissioner.

When a statute increases the duties of an officer by the addition of other duties germane to the office, he must perform them without extra compensation; but if he is employed to render services in an independent employment, not incidental to his official duties, he may recover for such services.

When a clerk of a Circuit Court attends the court personally at one place within the district, and appoints a deputy to attend it at another place or in a different division of the same judicial district, he is entitled, under Rev. Stat. § 831, to make a per-diem charge for attendance at each.

Opinion of the Court.

A clerk of a Circuit Court is not entitled to charge for docketing and indorsing an order for the removal of a prisoner for trial in another district.

Charges by a clerk for making separate reports of the amount of fees due each juror and witness and filing separate orders for their payment are disallowed: also charges for making separate recognizances for witnesses in a criminal case, it not appearing that the witnesses could not have conveniently recognized together.

The clerk of a Circuit Court is not entitled to a fee for entering upon the final record the proceedings before a committing magistrate, as, although they may be properly filed, and a fee charged for the filing, they form no part of the record.

THIS was a petition by H. H. King, whose Christian name is not given, to recover certain fees as clerk of the Circuit Court of the United States for the Southern District of Georgia. To his petition was annexed a schedule of 23 items, running through four years of service, which had been disallowed by the accounting officers of the Treasury, amounting in the aggregate to $595.65. The case was tried upon an agreed statement of facts, and a judgment rendered against the United States for $586.15 and costs. See *Erwin* v. *United States*, 37 Fed. Rep. 470. The United States appealed.

Mr. Felix Brannigan and *Mr. Solicitor General* for appellants.

Mr. Charles C. Lancaster for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The agreed statement of facts shows that petitioner was appointed clerk on March 17, 1883, and has continued to hold that office until the present time; that his accounts were duly presented and approved by the court; that the accounting officers disallowed some of the items charged; that the claimant made up an account for these disallowances from the date of his appointment, including therein similar items for services rendered, which had not been included in his accounts,

because of adverse rulings upon the legality of the charges. This account was presented and sworn to in open court for the purpose of bringing this suit. The several items, the allowance of which is assigned by the government as error, will be considered in their order.

1. Per-diem charges of $5 for services as clerk in selecting juries in connection with the jury commissioner are objected to upon the ground that no compensation is provided by law for such services.

Prior to 1879, juries to serve in the courts of the United States were, under Revised Statutes, § 800, designated by ballot, lot or otherwise, according to the mode of forming such juries practised in the several States, and the courts were authorized to adopt rules conforming the method of designating and impanelling juries to the laws and usages of the State. By the act of June 30, 1879, however, (21 Stat. 43, c. 52,) a new system was inaugurated, and it was provided in substance that the names of not less than 300 persons should be placed in the jury box by the clerk of the court and a commissioner to be appointed by the judge, who should be of opposite politics to the clerk, and that the clerk and commissioner should each place one name in the box alternately, without reference to party affiliations. The clerk was not by this statute made a jury commissioner, but a new duty was imposed upon him as clerk, and no provision was made for his compensation. That Congress has the right to impose additional duties upon a public officer without additional compensation is not denied, but it is insisted that under the sundry civil appropriation bill of March 3, 1885, (23 Stat. 478, 511, c. 360,) and under subsequent appropriation bills, a provision for "compensation for jury commissioners, five dollars per day, not exceeding three days for any one term of court," should be equitably held to include the clerk, who performs the same duties as a jury commissioner. As the clerk is not a jury commissioner *eo nomine*, it is difficult to see how he could be paid out of an appropriation for jury commissioners, or how these appropriation bills enlarge his rights, and unless he is entitled to extra compensation *as clerk* for these duties, there

would seem to be no appropriation from which he could be paid. While the duties of the clerk are similar to those of the commissioner, there is nothing in the language to indicate that the clerk did not act as clerk in performing such duties, or that he became *ex officio* a jury commissioner.

The question of compensation for extra services has been the subject of considerable discussion in this court and of some legislation by Congress. The ordinary rule, in the absence of legislation, is that, if the statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation; but if he is employed to render services in an independent employment, not incidental to his official duties, he may recover for such services. Mechem on Public Officers, secs. 862, 863. Acting upon this principle, it was held by this court in 1833 that, in an action brought by the United States against a public officer, the court might allow by way of offset an equitable claim for the disbursement of public moneys and other services rendered to the government under orders of the head of a department, though there were no act of Congress providing for the case. *United States* v. *Macdaniel*, 7 Pet. 1; *United States* v. *Ripley*, 7 Pet. 18; *United States* v. *Fillebrown*, 7 Pet. 28. See also *Gratiot* v. *United States*, 15 Pet. 336; *S. C.* 4 How. 80.

Apparently in consequence of these decisions, Congress, on March 3, 1839, passed an act, (5 Stat. 339, 349, c. 82, § 3,) which, as amended August 23, 1842, (5 Stat. 508, 510, c. 183, § 2,) provided "that no officer in any branch of the public service, or any other person whose salary, pay or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance or compensation." This provision was subsequently carried into the Revised Statutes, § 1765. Of this statute, it was said by this court in *Hoyt* v. *United States*, 10 How. 109, 141: "It cuts up by the roots these claims by public officers for extra

compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation." This language was somewhat limited by Chief Justice Taney in *Converse* v. *United States*, 21 How. 463, 471, wherein he says of these provisions: "They can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law." An allowance was made by the court in this case (three of its members dissenting) to a collector of customs as commission for the purchase of supplies for the light-house service throughout the United States, so far as such purchases were made for light-houses outside of his district, and beyond the limits to which his duties extended. See also *United States* v. *Brindle*, 110 U. S. 688.

Further construing this statute, it was held in *United States* v. *Shoemaker*, 7 Wall. 338, that a collector of customs was not entitled to offset, in a suit against him by the United States, compensation for disbursements made for building a custom-house and marine hospital at the port where he was collector. See also *Hall* v. *United States*, 91 U. S. 559, wherein items for set-off for extra services and expenses were excluded; and *Badeau* v. *United States*, 130 U. S. 439, in which a retired army officer accepting pay under an appointment in the consular service was held to be precluded from receiving salary as an officer in the army.

In *United States* v. *Saunders*, 120 U. S. 126, it was held that this act had no application to two distinct places, offices or employments, each with its own duties and compensation, but both held by one person at the same time. In delivering the opinion of the court, in this case, Mr. Justice Miller observed that "the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which

is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds."

We think that the construction given to this section in these cases is conclusive against the claim of the clerk for per-diem services in the drawing of juries, or for such services as are not taxable, as orders, certificates or the like, under sec. 828, fixing the compensation of clerks. These services are not rendered in a distinct capacity as jury commissioner, but are incidental and germane to his regular duties as clerk.

2. An item for attendance on the Circuit Court at Macon by deputy for several days was disallowed by the Comptroller upon the ground that the clerk had been allowed a per-diem for his personal attendance upon the court at Savannah upon the same day, the Comptroller holding that the clerk was entitled to but one per-diem for any one day, although the court might be in session at two or more places, and the clerk be represented at one of those places by a deputy. By Revised Statutes, § 624, the Circuit Court is authorized to appoint deputies of the clerk upon his application, and provision is made by sections 626 and 839 for compensation to such deputies to be paid by the clerk, and allowed in the same manner as other expenses of his office are paid and allowed. By section 796 the legal responsibility of the clerk for the acts of his deputy is recognized. Under such circumstances, when the law provides expressly for the appointment of a deputy, and authorizes the clerk to pay his compensation as a part of his office expenses, there can be no question that his acts as such deputy should be recognized as the acts of the clerk himself, and that the clerk is entitled to like fees for the performance of such acts. It would not be claimed that the clerk would not be entitled to his fee for clerical services in entering orders, etc., performed by his deputy. No valid distinction can be made in this particular between such charges and the ordinary per-diem charges for attendance.

Among the fees provided for the clerk by section 828 are $5 a day for his attendance upon the court "while actually in session," with a qualification contained in section 831, that "when the Circuit and District Courts sit at the same time, no greater per-diem or other allowance shall be made to any such officer than for an attendance on one court." As the Circuit and District Courts are ordinarily held together at the same time and place by the District Judge sitting both as judge of the District and of the Circuit Court, and cases in both courts are disposed of indifferently, and without reference to the court in which they are pending, the obvious purpose of this proviso was to limit the officials to a single per-diem for attendance upon both courts. Where, however, the two courts are held in different places, or, as in this case, in different divisions of the same judicial district, upon the same day, or where a court is held by the regular District Judge at one place, and a different branch or division of the same court is held at another place by the Circuit Judge or a District Judge designated under the statute for that purpose, the reason of the rule does not apply. In such a case a separate staff of officers is necessary for each place, and equitably each is entitled to fees for attendance. We think the last clause of section 831 should be limited to cases where the court sits not only at the same time, but at the same place. It is unnecessary to decide whether, when the district consists of two divisions, and courts are held in both divisions by the same judge and officers, they are one court or two. It is sufficient for the purpose of this case to hold that the sessions are separate, and that the clerk is entitled to charge for his own attendance at one place and for that of his deputy at another.

3. The eighth item relates to the case of one Clayton, who was removed under Revised Statutes, sec. 1014, by order of the judge to the Northern District of Georgia for trial. No objection is made to the particulars of this item, except to the charge for docketing and indexing, which cannot be allowed, as the proceeding is not a "cause" within the meaning of section 828, providing for docket fees. The application to the judge is a summary one, and accompanied by a copy of the

indictment, information or commitment of the commissioner before whom he has been examined, and ordinarily no evidence is required except as to the identity of the accused, when the judge issues a warrant for his removal, and no papers are required to be filed with the clerk.

4. Items 10 and 11, for entering orders approving the accounts of marshals and other officers, are allowed upon the authority of *United States* v. *Jones*, *ante*, 672, just decided.

5. Item 13 is for making reports of the amount of fees due by the United States to jurors and witnesses for travelling and attendance, and for filing orders of the court to pay the same. The practice in the Southern District of Georgia, with regard to the payment of fees due by the United States to witnesses and jurors is stated by the court below to be as follows: (*Erwin* v. *United States*, 37 Fed. Rep. 470, 483.) "When a case has been disposed of and the witnesses are discharged by the district attorney from further attendance, they report to the clerk's office. The clerk then ascertains the exact amount due them for attendance and mileage, by examination of their subpœnas, questioning them as to the place from which they have travelled, and comparing their statements with a table of distances kept in his office for that purpose, and the witness is sworn on a jurat drawn on his subpœna ticket to the correctness of his claim. If any doubtful question arises it is referred to the presiding judge for his decision. The days attended, mileage and amounts due the respective witnesses are then entered on a report, which is signed by the clerk and submitted to the court for its approval." If the court adjudge the report correct, he endorses upon it an order for the payment of the witnesses and jurors. The only criticism to be made upon this practice is in requiring separate orders to be made in each case.

The practice in most districts allows the witness or juror to appear before the clerk, make oath to his mileage and attendance, and receive a ticket or memorandum of the amount due him, which he presents to the marshal, who takes his receipt upon a large roll opened for the signature of all such jurors and witnesses as are paid off during the term. One order is

then made to pay all persons whose names are on the roll, and the expense of a separate order in each case is thereby avoided. In the Southern District of Georgia the practice seems to have been for each witness or juror, as he was discharged, to appear separately or in small numbers before the clerk, who administered the oath, for which he charged 10 cents; drew a report, for which he charged 30 cents; entered an order on the minutes, 30 cents; filed copy of the same, 10 cents; made a copy of the same to accompany the marshal's accounts, 20 cents; and annexed his certificate thereto, 15 cents. The clerk's charges thus aggregated $1.15 for the payment of a witness, whose fees may not have exceeded $1.50, or of a single juror, whose fees may not have exceeded $2. Any practice which puts the government to such an expense is burdensome, vexatious and oppressive. In the present case, a separate report seems to have been made, and a separate order issued whenever a juror or witness was discharged, or a small number were discharged together; and the item contains charges for drawing 332 reports at 30 cents each, and filing 358 orders at 10 cents each, the Comptroller allowing the items for entering the orders and making copies of the same for the marshal. In view of the petty character of these claims, if the clerk be competent, it would seem that the practice usually pursued would sufficiently protect the government, and would render unnecessary a scheme which seems to have been skilfully devised for the multiplication of fees. This charge must be disallowed.

6. Item 18 is for drawing three recognizances in a single criminal case, and was disallowed by the Comptroller upon the ground that one recognizance for all the witnesses would have been sufficient. We agree with this conclusion, and the item will, therefore, be disallowed, unless it be made to appear that the witnesses could not conveniently have recognized together.

7. Item 17 is for entering upon the final record the proceedings before the committing magistrate, namely, affidavit, warrant of arrest, marshal's return, and finding of the commissioner of probable cause of defendant's guilt, upon which the information is founded; commitment to jail in default of

bond, recognizance where given, and justification of surety, and waiver of homestead exemption, where it is waived; petition and order for subpœnas on part of defendant at the expense of the government, commitment under sentence, and marshal's return $60.75.

While we held in the case of *United States* v. *Van Duzee*, 140 U. S. 169, 170, ¶ 1, that the clerk was entitled to a fee for filing papers sent up by the commissioner, they evidently form no part of the record in the Circuit Court and the clerk is not entitled to a fee for entering them. The record proper begins with the indictment or information and ends with the sentence and commitment. The proceedings before a commissioner are principally for the information of the district attorney. In *United States* v. *Van Duzee*, 140 U. S. 169, 176, ¶ 9, the clerk was allowed to recover for so much of the record as included the order of the commissioner binding the party to appear before the grand jury, on account of a rule of the court in that case requiring this order to appear in the final record.

This disposes of all the questions raised in the brief of the Attorney General, and the judgment of the court below will, therefore, be

Reversed, and the case remanded, with directions to reduce the judgment in conformity with this opinion.

UNITED STATES *v.* ERWIN.

APPEAL FROM THE COURT OF CLAIMS.

No. 1194. Submitted January 3, 1893. — Decided March 6, 1893.

A District Attorney is entitled to charge a per-diem for services before a United States commissioner upon the same day that he is allowed a per-diem for attendance upon the court.

THIS was a petition by the District Attorney of the United States for the Southern District of Georgia for services rendered

in conducting examinations of persons charged with crime before United States commissioners upon the same days that attendance upon the Circuit or District Courts was charged. The court found as a conclusion of law that the plaintiff was entitled to recover, and awarded judgment in his favor for $215. The United States appealed.

Mr. Felix Brannigan for appellants.

Mr. William W. Dudley, *Mr. Louis T. Michener* and *Mr. Richard R. McMahon* for appellee.

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

This case depends upon the single question whether a District Attorney is entitled to charge a per-diem for services before a United States commissioner upon the same day that he is allowed a per-diem for attendance upon the court.

By Rev. Stat. § 824, he is allowed $5 "for each day of his necessary attendance in a court of the United States, on the business of the United States, when the court is held at the place of his abode, . . . and for his attendance when the court is held elsewhere, $5 for each day of the term," and also "for examination by a District Attorney before a judge or commissioner, of persons charged with crime, $5 a day for the time necessarily employed." There is certainly no necessary incompatibility between these two clauses. In neither case is it required that he spend the entire day in attendance. If his attendance before the court be necessary, he is entitled to his per-diem, though it may only be necessary to remain a few minutes; and if he attend before a United States commissioner, and the case be disposed of without requiring his presence the entire day, there is no reason why he is not as much entitled to his fees as the commissioner. *United States* v. *Jones*, 134 U. S. 483. In neither event can he draw more than $5, though he be engaged for the entire day, unless a case be in some manner finally disposed of by the court, when

he becomes entitled, under another clause of the section, to an additional fee of from $5 to $50.

It is insisted, however, that Rev. Stat. § 831, prohibiting a double per-diem or other allowance for attendance "when the Circuit and District Courts sit at the same time," should be construed as indicating that Congress intended to legislate against double per-diems in all cases, and that it should be extended to cases like this where the per-diem is claimed for services before a commissioner on the same day that it is allowed for attendance upon the court. Upon the contrary, we think it clear that Congress did not intend to forbid a double per-diem in such cases, and that the maxim, *expressio unius est exclusio alterius*, should apply. Indeed, we have just held in *United States* v. *King*, (*ante*, 676,) that this statute should be limited to Circuit and District Courts sitting not only at the same time, but at the same place; and that where the Circuit Court was sitting at one place in the district and the District Court at another, the clerk was entitled to his per-diem in the one case, and his deputy to a per-diem in the other. The relative importance of the service rendered by the District Attorney in court and before a commissioner is of no significance. In the one case the per-diem is for attendance though no service be rendered; in the other there must be an examination conducted or a proceeding taken incidental thereto, as was held in *United States* v. *King*, last above cited.

The judgment of the court below is, therefore,

Affirmed.

UNITED STATES *v.* PAYNE.

APPEAL FROM THE COURT OF CLAIMS.

No. 673. Submitted January 9, 1893. — Decided March 6, 1893.

A clerk of a Circuit or District Court is entitled to fees for making dockets and indexes, taxing costs, etc., in suits upon manufacturers' bonds under the internal revenue law where issue was joined and testimony given:

also for entering orders of court for *alias fi. fa.* and for *venditioni exponas*, one folio each: also for making record entries of recognizances of defendants, or of entering and filing such recognizances, but not for both: also for making docket entries and indexes in cases of *sci. fa.* and other proceedings where issue was joined: also for entering orders approving the accounts of officers of the court, and filing duplicate accounts: also for entering separate orders of court excusing jurors, entering orders of court to issue subpœnas, and entering an order for *alias capias* when such orders are made by the court and the fees allowed; and also for drawing recognizances of defendants.

He is not entitled to fees for filing vouchers: nor for making dockets and indexing where no indictment is found: nor for attendance upon the District Court as a jury commissioner in drawing jurors.

This was a petition for fees by the clerk of the District and Circuit Courts of the United States for the Western District of North Carolina. The petition averred that the accounts had been duly presented to the accounting officers of the Treasury, and payment thereof refused, although such accounts had been duly presented and approved by the court in accordance with law. The court found the facts in favor of the petitioner and directed judgment in his behalf for $538.50, and the United States appealed. As the court found a large number of items in favor of the petitioner, the allowance of which is not now disputed, it is unnecessary to set forth the finding in full.

Mr. Felix Brannigan and *Mr. Solicitor General* for appellants.

Mr. Charles C. Lancaster for appellee.

Mr. Justice Brown delivered the opinion of the court.

The assignments of error in this case relate to several petty items claimed to have been illegally allowed by the court below.

1. For making dockets and indexes, taxing costs, etc., in various suits, upon manufacturers' bonds under the internal revenue law, where issue was joined and testimony given, for which petitioner claimed $3 in each case. Revised Statutes,

§ 828, allows a fee of $3 "for making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given," and $2 for similar services "in a cause where issue is joined, but no testimony is given," and $1 "in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue." Objection is made to the taxation of three dollars in this case upon the ground that it does not appear that the testimony was given "on the trial or argument" of the cause. If the allowance depended upon the first clause alone, it might be claimed with reason that it would be no hardship upon a public officer, who is entirely familiar with the statute, to bring himself within its terms, and to make it clearly appear that the services were rendered on the trial or argument of the cause; but as the second clause is limited to cases where issue has been joined, but *no* testimony is given, and as, in this case, the issue was joined and testimony *was* given, we think it a reasonable inference that it was the intention of Congress to allow $3 in such case, or that it may be assumed that the testimony was given upon the trial or argument of the case, as required by the first clause. This item should, therefore, be allowed.

2. For entering orders of court for *alias fi. fa.*, and for *venditioni exponas*, one folio each. While a writ of *alias fi. fa.* is ordinarily issued upon a simple precipe, it is perfectly competent for the district attorney to apply to the court for an order for that purpose, and, if such an order be made, the clerk is clearly bound to enter it, and is entitled to his fee therefor, whether such order be necessary or not, or, indeed, whether the court had any right to enter it or not. The propriety of such an order cannot be tested upon the application of the clerk for his fee for entering it.

3. For making record entries of recognizances of defendants and entering and filing said recognizances. Recognizances may be taken either in open court, in which case a record entry of the fact is made upon the journal, or by a separate instrument, signed and acknowledged before a proper officer. In the one case the clerk is entitled to a fee

for making the entry, and in the other for drawing and filing the recognizance, (*United States* v. *Barber*, 140 U. S. 164, 166, ¶ 3,) but not for both. A deduction should, therefore, be made from this item.

4. For making docket entries and indexes in cases of *sci. fa.* and other proceedings, where issue was joined but no testimony given. This item was disallowed upon the ground that docket fees were only taxable in "causes," and that a *scire facias* is not "a cause" within the meaning of the section.

While a *scire facias* to revive a judgment is merely a continuation of the original suit, (*Frierson* v. *Harris*, 94 Am. Dec. 223, notes,) a *scire facias* upon a recognizance, or to annul a patent, or for other similar purposes, is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annul a patent. *Winder* v. *Caldwell*, 14 How. 434, 443; *United States* v. *Stone*, 2 Wall. 525, 535.

5. Items 8 and 9 are for entering orders approving the accounts of officers of the court, filing duplicate accounts and vouchers. All of these are allowable under *United States* v. *Jones*, just decided, (*ante*, 672,) except the fees for filing vouchers, which should be disallowed.

6. Per-diem fee for attendance on the District Court with the jury commissioner in drawing jurors, is disallowed upon the authority of *United States* v. *King*, just decided. *Ante*, 676.

7. For entering separate orders of court excusing jurors, entering orders of court to issue subpœnas, entering order for *alias capias*. As these orders appear to have been made by the court, and the fees for entering them allowed by the court, the charges must be sustained.

8. Item 15, for making dockets and indexing, where no indictment is found, but the same is ignored by the grand jury, should be disallowed. "A cause" in a criminal case is begun by filing an indictment which has been found, but not by one which has been ignored.

9. Item 20, for drawing recognizances of defendants, is allowed upon the authority of *United States* v. *Barber*, 140 U. S. 164, 166, ¶ 3.

This disposes of all the items involved upon this appeal, and the judgment of the court below is, therefore,

Reversed, and the case remanded, with instructions to reduce the judgment in conformity with this opinion.

UNITED STATES *v.* HALL.

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

No. 459. Submitted January 3, 1893. — Decided March 6, 1893.

On the authority of *United States* v. *Ewing*, 140 U. S. 142, the charges of a commissioner of a Circuit Court for docket fees are disallowed, and the charges for acknowledgments of sureties on recognizances of defendants in prosecutions brought by the United States reduced to a fee for a single acknowledgment.

This was an action by a commissioner of the Circuit Court of the United States for the Northern District of Ohio for docket fees, and for fees for taking the acknowledgment of sureties upon recognizances. The court rendered a judgment in favor of the petitioner for $336.75, and the United States appealed.

Mr. James H. Nixon and *Mr. Solicitor General* for appellants.

Mr. Charles C. Lancaster for appellee.

Mr. Justice Brown delivered the opinion of the court.

This case involves but two items —

1. The charge for docket fees must be disallowed upon the authority of *United States* v. *Ewing*, 140 U. S. 142, 147, ¶ 7.

2. The claim for acknowledgments is based upon the allegation of the petition, that the plaintiff " took and certified

103 acknowledgments of sureties on recognizances of defendants in prosecutions brought by the United States, for each of which acknowledgments plaintiff was entitled by the statutes of the United States to receive the sum of twenty-five cents." This item must also be reduced to a fee of twenty-five cents for taking a single acknowledgment in each case, since it was held in the case of *United States* v. *Ewing*, above cited, p. 146, ¶ 2, that the taking of an acknowledgment in a criminal cause by the accused and his sureties is a single act, for which only one fee can be charged. If, for any reason, it was necessary to take them separately, that fact should have been made to appear. The burden of proof was upon the plaintiff.

The judgment of the court must, therefore, be

Reversed, and the case remanded, with instructions to reduce the judgment in conformity with this opinion.

UNITED STATES *v.* McCANDLESS.

APPEAL FROM THE COURT OF CLAIMS.

No. 900. Submitted January 9, 1893. — Decided March 6, 1893.

There is no legal objection to the same person holding the offices of clerk and of commissioner of a Circuit Court, and the person so holding them is entitled to the fees and emoluments of both.

The court disallows the following charges by a clerk of a District Court:

(1) Docket fees where the grand jury returned "not true bill;"

(2) Docket fees where the case is not finally disposed of;

(3) A charge for miscellaneous fees, entering orders of court, making copies, certificates, and seals, as being too general;

(4) A charge for issuing commitments to jail in addition to copy of order of removal, as being too indefinite;

(5) An item for entering orders of court, approving accounts of officers, and copies of certificates and seals.

THIS was a petition by the clerk of the District Court for the Western District of Pennsylvania for payment of certain fees which had been disallowed in the settlement of his

accounts by the officers of the Treasury. Petitioner averred the approval of his accounts by the court, and that his whole compensation, if said fees were paid, would not exceed the maximum compensation of $3500. The court directed a judgment to be entered in his favor for $171.15, and the United States appealed.

Mr. Felix Brannigan and *Mr. Solicitor General* for appellants.

Mr. Charles C. Lancaster for appellee.

Mr. Justice Brown delivered the opinion of the court.

Objection was made to the following items, which will be considered in their order:

1. Sixteen days' attendance on court when in session, at $5 per day, not allowed because same days were charged and allowed in his accounts as a commissioner of the Circuit Court "for hearing and deciding on criminal charges." In the case of Erwin, just decided, (*ante*, 685,) we held that a district attorney was entitled to his per-diem for services before a commissioner, notwithstanding he was allowed a per-diem for his attendance upon the court on the same day. The reasons for double allowance in this case are much stronger than in the case of Erwin, since the commissioner acted in a double capacity, first, as clerk of the court, and second, as a commissioner of the Circuit Court. There is no incompatibility between these offices, and as Congress has never legislated against their being held by the same person, the practice has obtained in most of the districts of appointing the clerk a commissioner. It was held by this court in the case of *United States* v. *Saunders*, 120 U. S. 126, that sections 1763, 1764, and 1765 had no application to the case of two distinct offices, places, or employments, each with its own compensation and duties, held by one person at the same time. We think that, within the rule laid down in that case, there is no legal objection to the same person holding the

offices of clerk and commissioner; and that the person so holding them is entitled to the fees and emoluments of both.

2. Docket fees in cases where the grand jury returned "not true bill." This item is disallowed upon the authority of *United States* v. *Payne*, just decided. *Ante*, 687.

3. Docket fees in cases where trial was had, verdict and sentence, or jury failed to agree and case was continued. We think that a docket fee is not taxable until the case is finally disposed of. In the three clauses of § 828, allowing docket fees, the words "taxing costs and all other services" are used, indicating that it is not to be allowed until the costs are taxed and the case is finally disposed of. It does not appear in this item that the cases in which the jury disagreed had reached that point where costs are taxed, or where the cause had been terminated. This item must, therefore, be reduced by rejecting cases in which the jury disagreed.

4. Miscellaneous fees, entering orders of court, making copies, certificates and seals. This item was properly objected to as too general. While the clerk is undoubtedly entitled to his fees for entering orders of court, he is not entitled to fees for making copies, certificates and seals, unless such copies, certificates and seals are required by law or the practice of the department.

5. The sixth item is for issuing commitments to jail in addition to copy of order of removal. This item is also objectionable on account of its indefiniteness. By Revised Statutes, § 1030, "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal." Before this item can be allowed, we think it should be made to appear that the commitments were issued in cases not falling within the above section, and hence that they were a proper charge under the circumstance of each particular case. It is entirely possible that the clerk may be entitled to the fees charged; at the same time we think he should make it appear in the

rendition of his accounts that the commitment was made in a case where it was necessary.

6. An item for entering orders of court approving accounts of officers, and copies of certificates and seals, is controlled by the opinion of this court in the case of *United States* v. *Van Duzee*, 140 U. S. 169, 171, ¶ 3; *United States* v. *Jones*, *ante*, 672; *United States* v. *King*, *ante*, 676.

The judgment of the court below is, therefore,

Reversed, and the case is remanded for further proceedings in conformity with this opinion.

UNITED STATES *v.* TAYLOR.

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

No. 795. Submitted January 9, 1893. — Decided March 6, 1893.

Only one fee is allowed for taking the acknowledgment of a defendant and his sureties unless it be made to appear that it was necessary to take them separately.

A clerk may charge for copies of the orders of the court directing the marshal to pay witnesses and jurors, but not for affixing seals to such copies.

No charge can be made for filing orders from the district attorney discharging witnesses from attendance.

A fee may be charged for an affidavit of a witness as to his mileage and attendance; but this affidavit need not be filed.

The rule, settled in *United States* v. *King*, *ante*, 676, that proceedings before a commissioner form no part of the record, applies to affidavits.

Generally anything not necessary to support the validity of the judgment is presumptively no part of the record, however material it may have been in the progress of the case.

The comptroller cannot prescribe the length of capiases or bonds, or limit a clerk to a certain number of folios.

THIS was a petition by the clerk of the Circuit Court of the United States for the Eastern District of Tennessee for fees earned between July 1, 1887, and December 23, 1889, which

had been disallowed in the settlement of the accounts rendered by him to the Treasury Department. The court directed judgment to be entered in his favor for $1066, (45 Fed. Rep. 531,) and the United States appealed.

Mr. Felix Brannigan and *Mr. Solicitor General* for appellants.

Mr. George A. King for appellee.

Mr. Justice Brown delivered the opinion of the court.

The government objected to the allowance by the court below of the following items:

1. For taking acknowledgments in criminal cases of defendants and their sureties to appeal bonds. It appears by the petition that these acknowledgments were taken jointly, and under the case of *United States* v. *Ewing*, 140 U. S. 142, 146, ¶ 2, but one fee can be allowed for taking the acknowledgment of a defendant and his sureties, at least unless it be made to appear that it was necessary to take them separately. See also *United States* v. *Hall*, *ante*, 691.

2. For certificates of the clerk and seals to copies of orders of the court directing the marshal to pay witnesses and jurors. Charges for copies of orders and certificates thereto are allowable, but the charge for seals is disallowed upon the authority of *United States* v. *Van Duzee*, 140 U. S. 169, 174, ¶ 6.

3. Filing orders from the district attorney discharging witnesses from attendance, at ten cents each, $119.80. By Revised Statutes, § 877, "witnesses who are required to attend any term of a Circuit or District Court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney." While it is proper that the clerk should be informed officially by the district attorney of the discharge of witnesses, it is difficult to see why the discharge should be filed. It is a piece of information for the clerk upon which he acts in computing the

amount due the witnesses for mileage and attendance, and when this is done the discharge is *functus officio*. It has accomplished all that it was ever required to do, is not needed as a voucher, and no advantage is gained by cumbering the files of the court with it. The magnitude of this incumbrance may be judged by the fact that the clerk charges for filing in less than two and half years 1198 of these discharges, (243 were filed in a single term,) at a useless expense of $119.80. In *United States* v. *King*, *ante*, 676, the clerk's charges for the payment of a witness aggregated $1.15, not including the affidavit of the witness, or this item for filing the discharge. If these be added, it is made to cost the government $1.40 in clerk's fees to pay off a witness, — a tax out of all proportion to the service rendered, or to the usual amount of the witness's compensation. This practice of multiplying fees for the simple service of paying a witness compensation, which may not exceed the amount of a single day's attendance, should not be permitted, and the item in question will be disallowed.

4. There is an additional claim in items 12 and 16 of $95.85 for affidavits of witnesses as to their mileage and attendance. The clerk is entitled to a fee of ten cents for administering the oath to witnesses respecting their mileage and attendance, but there is no reason for preserving the affidavit as a part of the records of the court. This item should be reduced accordingly. It is but just to say that no charge is made for filing these affidavits.

5. Item 9 includes charges for papers entered by the clerk upon the final record of the cases, and disallowed by the Comptroller as forming no proper part of the judgment record, and unnecessarily burdensome to the government. When the practice of a particular State or district requires a judgment record to be made up in each case, of course the clerk is entitled to his fees for services actually and necessarily performed in that connection. *United States* v. *Van Duzee*, 140 U. S. 169, 176, ¶ 9. But as to what shall be incorporated in such record, there is no settled practice and some diversity of opinion.

A record is substantially a written history of the proceedings from the beginning to the end of the case, but nothing which is not properly matter of record can be made such by inserting it therein. In several of the States the matters properly incorporated in judgment rolls are enumerated by statute. New York Code of Civil Procedure, § 1237; Wisconsin Code, § 191; California Civ. Code, § 670.

In *Mandeville* v. *Perry*, 6 Call, 78, the Court of Appeals of Virginia, in answering the question "what this court will consider as constituting the record of which it is to take notice in cases of common law," says: "I answer, the writ for the purpose of amending by, if necessary, the whole pleadings between the parties. Papers of which a profert is made, or oyer demanded. And such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules or in court, until the rendition of the judgment, constitute the record in any common law suits, and are to be noticed by the court, and no others." Mr. Chitty, in his work upon Criminal Law, says, (1 Chitty Cr. Law, 720,) that "the record in case of felony, states the session of oyer and terminer — the commission of the judges — the presentment by the oath of the grand jurymen by name — the indictment — the award of the *capias* or process to bring in the offender — the delivery of the indictment into court — the arraignment — the plea — the issue — the award of the jury process — the verdict — the asking the prisoner why sentence should not be passed on him — and judgment of death passed by the judges." Perhaps the most satisfactory definition of a common law record in a criminal case under the American practice is found in *McKinney* v. *People*, 7 Illinois, 540, 551, wherein it is said: "In a criminal case, after the caption stating the time and place of holding the court, the record should consist of the indictment properly endorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court. This in general is all

that the record need state." And in *Dyson* v. *State*, 26 Mississippi, 362, 383, it is stated that "the record must affirmatively show those indispensable facts, without which the judgment would be void — such as the organization of the court; its jurisdiction of the subject-matter and of the parties; that the cause was made up for trial; that it was submitted to a jury sworn to try it, (if it be a case proper for a jury;) that a verdict was rendered, and judgment awarded."

Mr. Freeman, in his work upon Judgments, section 79, thus summarizes from the authorities "the matters which are not (unless made so by bill of exceptions or by consent, or by order of the court) matters of record," namely: "Matters of evidence, written or oral, including note, bond or mortgage filed in the case, and upon which suit is brought; an agreed statement of facts not in nature of special verdict; all motions, including motions to quash the writ, to amend the pleadings, for extensions of time, for continuances; for bonds, for prosecution, for bills of particulars; pleas stricken from the files, notices of motions, affidavits of claimants; bonds for trial of rights of property, affidavits in relation to conduct of jurors; all affidavits taken during the progress of the cause, memorandum of costs; power of attorney to confess the judgment, and affidavit in relation to the death of the maker thereof; report of judge of proceedings at the trial, reasons for his opinion in rendering judgment or in deciding application for a new trial; rulings of the court upon the admission of evidence; the instructions to the jury; statement of facts made by the judge for the purpose of taking the advice of the appellate court; and the ruling of the court upon an application to strike out a portion of the pleadings."

The extent to which a judgment record should go in its recital of the proceedings depends largely upon the purpose for which it is to be used. If it is designed for use in the review by the appellate court of the rulings of the court below, upon the introduction of testimony, or of the validity of the charge to the jury, it must contain in a bill of exceptions so much of the testimony or charge as is necessary to a clear understanding of the questions involved. But if,

upon the other hand, it be designed only for the purpose of preserving a record of the conviction *in perpetuam rei memoriam*, little more is necessary than to set forth the process and return thereto, the pleadings, journal entries, verdict and judgment. All the authorities agree that, in a criminal case, it should show what the prisoner is charged with, that the court had jurisdiction of the case, that the defendant was duly convicted and the sentence. It may be said, in general, that anything which is not necessary to support the validity of the judgment is, presumptively at least, no part of the record, however material it may have been in the progress of the case. It is entirely clear that it is unnecessary to set forth matters merely incidental to the charge, and which had no immediate bearing upon the result of the case, or of the validity of the judgment. Thus, in *Inglee* v. *Coolidge*, 2 Wheat. 363, it was held by this court that the report of the judge who tried the case at *nisi prius*, containing a statement of the facts, is not to be considered a part of the record. It was formerly held that, even in writs of error to a state court, the opinion of the court below was not a part of the record, (*Williams* v. *Norris*, 12 Wheat. 117, 119; *Rector* v. *Ashley*, 6 Wall. 142; *Gibson* v. *Chouteau*, 8 Wall. 314,) but the inconvenience of this rule became so great that it was subsequently changed, (*Murdock* v. *Memphis*, 20 Wall. 590,) and, finally, the eighth rule of this court was so modified, in 1873, as to require a copy of the opinion to be incorporated in the transcript. This court has also held, in *Suydam* v. *Williamson*, 20 How, 427, that the evidence and the exceptions thereto constitute no part of the record, unless incorporated in a bill of exceptions signed and sealed by the presiding judge. See also *Pomeroy* v. *Bank of Indiana*, 1 Wall. 592.

We have already held, in *United States* v. *King*, *ante*, 676, that, in the absence of a rule requiring them to be incorporated, the proceedings before a commissioner form no part of the record, and we think the same rule applies to affidavits, *England* v. *Gebhardt*, 112 U. S. 502, warrants, subpœnas, capiases, except the one upon which the arrest was made, but

that the other charges included in item 9, including the bonds taken after indictment, captions of terms and days upon which journal entries were made, were properly allowed. We are also of the opinion that the Comptroller cannot prescribe the length of capiases or bonds, or limit the clerk to a certain number of folios. This is a matter to be determined by the practice of the court.

This disposes of all the questions raised upon the assignment of errors, and the judgment of the court below is, therefore,

Reversed, and the case remanded for further proceedings in conformity with this opinion.

APPENDIX.

I.

In Memoriam.

RUTHERFORD BIRCHARD HAYES, LL.D.

DIED JANUARY 17, 1893.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

WEDNESDAY, January 18, 1893.

Mr. Attorney General Miller addressed the court as follows:

It is my painful duty to announce to the court the death of Rutherford B. Hayes, ex-President of the United States. At his home in Fremont, Ohio, after a brief illness, at the ripe age of threescore years and ten, this eminent public servant last night passed from the life that now is into the life hereafter. This is not the time for eulogy, yet I am constrained to say that in his death the country has lost one who was a good citizen, a good soldier, a good President, and, above all, a good man.

THE CHIEF JUSTICE responded:

The Court receives the announcement of the death of ex-President Hayes with the sensibility due to his eminent public services and his private virtues; and as a mark of respect to his memory will now adjourn until to-morrow at the usual hour.

FRIDAY, January 20, 1893.

This being the day appointed for the funeral of the late ex-President of the United States, Rutherford B. Hayes, the court, out of respect for his memory, suspended business for the remainder of the day.

II.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

ORDER.

There having been an Associate Justice of this Court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.

For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.

For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.

For the Fifth Circuit, HOWELL E. JACKSON, Associate Justice.

For the Sixth Circuit, HENRY B. BROWN, Associate Justice.

For the Seventh Circuit, MELVILLE W. FULLER, Chief Justice.

For the Eighth Circuit, DAVID J. BREWER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

Monday, March 13, 1893.

INDEX.

ADMIRALTY.

1. A collision occurred, in Vineyard Sound, between the steam yacht A., at anchor, owned by V. of New York, and the steamship D., owned by a Massachusetts corporation. The A. sank. The corporation filed a libel against V., to limit its liability in the District Court for Massachusetts, under §§ 4283 and 4284 of the Revised Statutes, alleging that the D. was lying at Boston, and averring no negligence in the D., and negligence in the A., and praying for an appraisement of the value of the D. and her pending freight at the time of the collision, and offering to give a stipulation therefor. It was alleged that the A. was worth over $250,000, and that the value of the D. and her freight was less than $150,000. The court appointed three appraisers, who made the appraisement *ex parte*, and reported the value of the D. at $80,000 and of her freight at $2395.33, and a stipulation was given for those amounts. A monition was then issued for notice to V. and all persons concerned to prove their claims for loss by a day named. The monition was duly published but was not personally served on V. in the Massachusetts District. The court made an order enjoining V. and all other persons from suing the corporation or the D. in respect of any claims arising out of the collision "except in these proceedings." Afterwards, M., the master of the A. filed a libel in the District Court for the Southern District of New York, against the corporation, the D., V., and all persons claiming damages from the collision for apportionment of limited liability, charging the fault wholly on the D., alleging that the loss of V. was $305,000, and that of M. over $1300; and that the value of the D. was over $200,000. Under process the D. was attached, and it was served on the corporation, and V. duly appeared. On motion of the D. and the corporation the District Court in New York, on a hearing of all parties made an order vacating the process issued on the libel of M., setting aside the service thereof on the corporation, releasing the D. from the attachment, and dismissing the libel. The court held that M. had notice, before he filed his libel, of the proceedings in Massachusetts, and of the injunction order issued there. On applications by M. to this court, for a mandamus to the District Court in New York, to vacate its order and reinstate the libel of M., and for a prohibition to the District Court

in Massachusetts from proceeding further on the libel filed there; *Held*, (1) The District Court in New York dismissed the libel of M. on a hearing on the merits; (2) If the jurisdiction of that court was in issue before it, the remedy of M. was by a direct appeal to this court, on that question, under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 827; (3) If otherwise, the remedy of M., as against the order dismissing the libel, was by an appeal to the Circuit Court of Appeals, for the Second Circuit, under § 6 of the same act; (4) The mandamus is refused; (5) The District Court in Massachusetts acquired prior jurisdiction of the proceedings; (6) That court did not lose its jurisdiction by the fact that the D. subsequently went to New York; (7) In order to sustain the proceeding it was not necessary that M. or V. should have been personally served with notice thereof within the District of Massachusetts, or that the D. should have been taken and held by the Massachusetts Court; (8) The filing of the libel by the corporation, with the offer of a stipulation, gave jurisdiction, and no subsequent irregularity in procedure could take it away; (9) The *ex parte* appraisement was not void; (10) The District Court in Massachusetts can order the giving of a new or further stipulation, and, on a failure to comply with such order, can stay the further proceedings of the corporation, deny it all relief, and dismiss its libel; (11) The provision of Rule 54 in Admiralty, for the giving of a stipulation, instead of making a transfer to a trustee, is valid, and the value involved may be judicially ascertained primarily without a hearing of the persons interested adversely. *In re Morrison*, 14.

2. In construing the act of February 16, 1875, 18 Stat. 315, c. 77, so far as it relates to admiralty suits, it is settled: (1) That the facts found by the court below are conclusive; that a bill of exceptions cannot be used to bring up the evidence for a review of the findings; that the only rulings upon which this court is authorized to pass are such as might be presented by a bill of exceptions prepared as in an action at law; and that the findings have practically the same effect as the special verdict of a jury; (2) That it is only the ultimate facts which the court is bound to find; and that this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained; (3) That if the court below neglects or refuses to make a finding one way or the other, as to the existence of a material fact which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. *The City of New York*, 72.

3. Applying these rules to the findings in the present case, *Held*, (1) That there was gross negligence on the part of the steamship in failing to run at moderate speed in a fog, and in failing to take the proper precautions when the proximity of the sailing vessel became known;

(2) That so far as the barque was concerned there was evidence to support the findings of the Circuit Court, and that these findings justify the conclusion that its change of course was made *in extremis*. *Ib.*

4. The probability that a steamer or a vessel sailing with a free wind will pursue the course customarily pursued in that vicinity by vessels bound from and to the same port is so strong, that a deviation from that course without apparent cause will not be considered as established without a clear preponderance of testimony. *Ib.*
5. There is no such certainty of the exact position of a horn blown in a fog, as will justify a steamer in speculating upon the probability of avoiding it by a change of helm, without taking the additional precaution of stopping until its location is definitely ascertained. *Ib.*
6. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. *Ib.*

See JURISDICTION, A, 5.

ADVERSE POSSESSION.

See UNITED STATES, 5.

APPEAL.

See MANDAMUS.

APPRAISERS.

See EMINENT DOMAIN, 6, 7, 8.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

An assignment of all his property, made for the benefit of his creditors with preferences, by a citizen of Utah to another citizen of Utah which is valid by the laws of Utah and valid at the common law, is valid in Idaho against an attaching creditor, as to property in Idaho of which the assignee has taken possession, notwithstanding the provision in the Revised Statutes of Idaho that no assignment by an insolvent debtor otherwise than as therein provided is binding on creditors, and that creditors must share *pro rata*, without priority or preference. *Barnett* v. *Kinney*, 476.

ATTACHMENT.

See JURISDICTION, A, 6.

BANKRUPT.

A creditor of a bankrupt caused execution to be levied, before the bankruptcy, on goods of the bankrupt to satisfy the debt. The levy

was afterwards set aside, as an illegal preference within the purview of the bankrupt act, in consequence of knowledge of the debtor's condition by the plaintiff's attorney. *Held*, that the creditor was not thereby precluded from proving his debt against the bankrupt; and that an endorser of the note of the bankrupt to the creditor, on which the judgment was founded, was not discharged from his liability as endorser by reason of the levy being declared in fraud of the provisions of the bankrupt law, Rev. Stat. § 5084, and § 5021, as amended by the act of June 22, 1874, 18 Stat. 178, 181. *Streeter* v. *Jefferson County Bank*, 36.

See MARRIED WOMAN, 3.

BOUNDARY.

See INTERSTATE BOUNDARY.

CASES AFFIRMED.

See CONSTITUTIONAL LAW, 1;
COSTS, 9, 14, 23.

CASES DISTINGUISHED.

1. The cases of *Manhattan Life Ins. Co.* v. *Smith*, 44 Ohio St. 156; *Whitehead* v. *New York Life Ins. Co.*, 102 N. Y. 143; and *Garner* v. *Germania Life Ins. Co.*, 110 N. Y. 266, distinguished. *Miles* v. *Connecticut Mutual Life Insurance Co.*, 177.
2. *Huse* v. *Glover*, 119 U. S. 543, and *Sands* v. *Manistee Improvement Co.*, 123 U. S. 288, each distinguished from this case. *Harman* v. *Chicago*, 396.
3. *Gardner* v. *Risher*, 35 Kansas, 93, distinguished from *Kennett* v. *Fickel*, 41 Kansas, 211. *Clement* v. *Field*, 467.

See UNITED STATES, 3.

CHARITY.

See EXECUTOR AND ADMINISTRATOR.

CIRCUIT COURTS OF APPEALS.

See JURISDICTION, A, 5;
MANDAMUS.

CLAIMS AGAINST THE UNITED STATES.

1. By sec. 7 of the act of October 2, 1888, 25 Stat. 505, 523, c. 1069, in regard to the building for the Library of Congress, which provided that all contracts for the construction of the building should be made by the Chief of Engineers of the Army, and repealed so much of the act

of April 15, 1886, 24 Stat. 12, c. 50, as required the construction of the building according to the plan submitted by John L. Smithmeyer, and enacted that "hereafter, until otherwise ordered by Congress, no work shall be done in the construction of said Library except such as is herein provided for, and all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded," it was provided that "all loss or damage occasioned thereby or arising under said contracts, together with the value of the plan for a Library building," so submitted by Smithmeyer, "may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated." Smithmeyer and his partner afterwards brought a suit in the Court of Claims against the United States, to recover $210,000 as the value of plans and drawings made by them for a building for the Library, which were delivered to and accepted by the United States, and used in constructing the building. The Court of Claims *held*, that the acts of the parties indicated that the services of the plaintiffs should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the American Institute of Architects, and that they were entitled to recover $8000 a year for six years' services. *Held*, that that was a proper and reasonable decision. *Smithmeyer* v. *United States*, 342.

2. The treasury officers have a right to require of a marshal items of expenses incurred in endeavoring to arrest persons charged with the commission of crime. *United States* v. *Fletcher*, 664.

3. When claims against the United States are presented to the proper department for allowance, and the department suspends action until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. *Ib.*

CLERK OF A CIRCUIT COURT.

See COSTS, 15 to 20, 22, 23, 24, 25 to 29, 31.

CLERK OF A DISTRICT COURT.

See COSTS, 9 to 14, 22, 25, 31.

COLLISION.

See ADMIRALTY, 1, 3, 5.

COMMON CARRIER.

1. In an action against a common carrier to recover damages for personal injuries, if the facts relating to contributory negligence are disputed, that question should be submitted to the jury; and, if the jury find for the plaintiff, the court is not required, in the exercise of judicial

discretion, to set the verdict aside. *Washington & Georgetown Railroad Co.* v. *Harmon*, 571.

2. A railway company being bound to deliver a passenger, its failure to stop long enough to enable him to alight with safety is a neglect of duty which involves liability for injuries resulting therefrom. *Ib.*
3. When the evidence justifies a finding that future damages will result from an accident to a passenger caused by the negligence of a common carrier, the jury may estimate and include such damages in their verdict. *Ib.*
4. Two suits at law against a railroad company, incorporated by New York, were brought in the Circuit Court of Saline County, Missouri, by two different plaintiffs, to recover damages for injury by the company, as a common carrier, through negligence, to live cattle transported by it. The damages occurred from a collision which took place in Ohio. The cattle were being transported from Massachusetts to Missouri. The process of the court was served in St. Louis, Missouri, on a city passenger-agent of the defendant, in its business office there, who had charge of it at the time, no chief officer of the defendant being found in St. Louis at the time. By a petition in each suit by the defendant, which stated that it appeared only for the purpose of making the application, the suit was removed into the Circuit Court of the United States, because of diverse citizenship. The defendant then moved in the latter court, in each suit, to quash the process on the ground that it conferred no jurisdiction on the state court over the defendant. The motion was overruled. Both cases were then tried before the same jury. In one case the verdict was for $8750 damages, and $2362.50 interest thereon at 6 per cent per annum from the time the suit was brought, and in the other case for $44,000 damages, and $11,880 interest thereon. In the first case judgment was entered for $11,112.50, with interest from the date of the verdict, and in the second case for $50,000, and like interest, the plaintiffs having voluntarily remitted $5880, because the petition claimed only $50,000 damages. There was only one bill of exceptions, covering all matters in the two suits, and one writ of error, and one citation, and one supersedeas bond, and one transcript of record. This court took cognizance of the two cases, and *Held*,
   (1) The state court acquired jurisdiction of the cases, under subdivision 4 of § 3489 of the Revised Statutes of Missouri of 1879, and § 3481 of the same Revised Statutes: The cases on that subject in the courts of Missouri reviewed;
   (2) Whether the defendant waived any objection to the service of the process in the state court by appearing therein and filing a petition for the removal of the cause into the Federal court, *quære;*
   (3) A large number of the cattle being cows with unborn calves, which were lost through their premature births, caused by the collision, the defendant was liable for deterioration in the value

of such cows, caused by such abortions, although it was not shown that the defendant knew that the cows were with calf;

(4) The cases having been tried in the court below on the theory that the value of the cattle at their place of destination in Missouri was the proper basis for fixing the damages, the point that their value at the terminus in Ohio of the defendant's road was the proper basis cannot be taken for the first time in this court;

(5) It was proper to show that some of the cattle died, or lost their calves, after their final arrival in Missouri, from the effects of the collision;

(6) The proper rule of damages was the difference between the market value of the cattle, in the condition in which they would have arrived but for the negligence of the defendant, and their market value in the condition in which, by reason of such negligence, they did arrive;

(7) It was not material whether the plaintiffs intended to keep the cattle upon their farms, for breeding purposes, or to sell them upon the market, the depreciation in value of the cattle being the same in either case;

(8) The court having instructed the jury that the burden was upon the plaintiffs to show that the abortions were the direct result of the collision, and the jury having found in favor of the plaintiffs on that question, and the bill of exceptions containing all the evidence in the case on either side, and there being sufficient evidence to sustain the verdict, this court cannot review it on the weight of the evidence;

(9) There is no ground for holding that the plaintiffs ought to have traced each animal and to have shown the amount received for it when sold;

(10) It was improper, under the statutes of, and decisions in Missouri, for the jury to allow interest on the damages from the time suit was brought; and as the jury stated, in each verdict, the amount of interest allowed, this court reduced the judgments by striking out the interest, and ordering judgments to be entered for the amounts of the damages, with interest from the entry, and costs; the costs of this court to be paid one-half by the plaintiffs in error and the other half by the defendant in error. *New York, Lake Erie & Western Railroad Co.* v. *Estill*, 591.

COMPUTATION OF TIME.

See INDIAN.

CONFLICT OF LAW.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS;
EXECUTOR AND ADMINISTRATOR.

CONSTITUTIONAL LAW.

1. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, affirmed to the point that a provision in a state law for the assessment of a state tax upon the face value of bonds instead of upon their nominal value violates no provision of the Constitution of the United States. *Jennings* v. *Coal Ridge Improvement & Coal Co.* 147.

2. It is within the constitutional power of Congress, in legislating for the creation of a commission charged with public duties, to provide that some members of it shall be appointed by the President, by and with the advice and consent of the Senate, and that other members of it shall consist of officers in the service of the United States, who had been appointed by the President and confirmed by the Senate, when the duties of the new office are germane to those of the offices already held by the latter. *Shoemaker* v. *United States*, 282.

3. Congress may increase the duties of an existing office without rendering it necessary that the incumbent should be again nominated, confirmed and appointed. *Ib.*

4. The ordinance of the city of Chicago, imposing a license tax for the privilege of navigating the Chicago River and its branches upon steam tugs licensed by the United States authorities under the provisions of Rev. Stat. § 4321, is an unconstitutional exercise of municipal authority, and is invalid. *Harmon* v. *Chicago*, 396.

5. The Fifth Amendment to the Constitution operates exclusively in restriction of Federal power and has no application to the States. *Thorington* v. *Montgomery*, 490.

6. A controversy as to the good faith of a transaction by which the title to the property which forms the subject of this litigation was transferred to the plaintiff in error is *held* to involve no Federal question. *Ib.*

See JURISDICTION, A, 3, 4; C, 4;
TAX AND TAXATION, 3, 4.

CONTRIBUTORY NEGLIGENCE.

See COMMON CARRIER, 1, 3.

COSTS.

1. In a suit brought by a marshal against the United States, under the act of March 3, 1887, c. 359, (24 Stat. 505,) to recover $1770.60 as fees and disbursements of the marshal, from March, 1886, to October, 1888, the items having been disallowed by the First Comptroller: *Held*, that the Circuit Court of the United States, had jurisdiction to review items disallowed by the First Comptroller before March 3, 1887, although, by § 2 of the act, jurisdiction was withheld of claims which had theretofore "been rejected, or reported on adversely, by

any court, department or commission authorized to hear and determine the same." *United States* v. *Harmon*, 268.

2. Items for marshal's fees for distributing venires; and for amounts paid for blanks for United States attorney; and for amounts charged for marshal's travel to attend court on days when the courts were held by adjournment over an intervening day, and were not held on consecutive days, and to attend special courts or special terms of court; and for expenses in endeavoring to make an arrest; and for travel to serve precepts, where he had in his hands for service, several precepts against different persons for different causes, and made service of two or more of such precepts in the course of one trip, making one travel to the most remote point of service, but charging full travel on each precept; and for amounts paid for hack hire in transporting prisoners to and from court; allowed. *Ib.*
3. Whether the payment of the amount of the judgment in favor of the marshal will exceed the maximum compensation of the plaintiff as marshal, and the proper expenses of his office, is a matter still open for adjustment at the Treasury Department. *Ib.*
4. A marshal is not entitled to charge "travel in going to serve" process when taking a prisoner, under sentence, to the place of commitment. *United States* v. *Tanner*, 661.
5. When, for convenience in making up accounts, an outgoing marshal relinquishes to his successor his right to expenses incurred in endeavoring to arrest persons for offences against the United States, the incoming marshal may charge these fees in his accounts, and they should be allowed. *United States* v. *Fletcher*, 664.
6. A marshal of a district into which an offender, who has committed a crime in another district, comes, may deputize the marshal of the district in which the offence was committed, or his deputy, to execute the warrant of removal, and relinquish to him the fees therefor. *Ib.*
7. A marshal may charge mileage upon as many writs as he may have in his hands, where the writs are against different persons. *Ib.*
8. Marshals are entitled to per diem fees for attendance when attending under §§ 583, 584, 671, 672 and 2013 Rev. Stat., the same as if the judge were present and business were transacted. *United States* v. *Pitman*, 669.
9. A clerk of a District Court is entitled to charge for entering orders approving marshal's accounts. *United States* v. *Van Duzee*, 140 U. S. 169, approved. *United States* v. *Jones*, 672.
10. He is also entitled to charge for certifying copies of such orders to be forwarded to the department with the accounts, but not for the seals affixed to such copies unless such authentication is required by the Treasury Department. *Ib.*
11. He is also entitled to charge for copies of orders for marshals to pay supervisors of elections, without regard to the necessity for such orders, or the power of the court to make them. *Ib.*

12. He is also entitled to a fee for filing a marshal's accounts with vouchers attached, but not to a separate fee for filing each voucher. *Ib.*
13. He is also entitled to fees for recording, after the determination of a prosecution, all the proceedings relating to it, including the order of commitment. *Ib.*
14. *United States* v. *Harmon*, 147 U. S. 268, affirmed to the point of the power of the Treasury to determine whether the several allowances increase his salary beyond the maximum compensation. *Ib.*
15. A clerk of a Circuit Court is not entitled to a per diem pay for services in selecting juries in connection with the jury commissioner. *United States* v. *King*, 676.
16. When a statute increases the duties of an officer by the addition of other duties germane to the office, he must perform them without extra compensation; but if he is employed to render services in an independent employment, not incidental to his official duties, he may recover for such services. *Ib.*
17. When a clerk of a Circuit Court attends the court personally at one place within the district, and appoints a deputy to attend to it at another place or in a different division of the same judicial district, he is entitled, under Rev. Stat. § 831, to make a per diem charge for attendance at each. *Ib.*
18. A clerk of a Circuit Court is not entitled to charge for docketing and endorsing an order for the removal of a prisoner for trial in another district. *Ib.*
19. Charges by a clerk for making separate reports of the amount of fees due each juror and witness and filing separate orders for their payment are disallowed: also charges for making separate recognizances for witnesses in a criminal case, it not appearing that the witnesses could not have conveniently recognized together. *Ib.*
20. The clerk of a Circuit Court is not entitled to a fee for entering upon the final record the proceedings before a committing magistrate, as, although they may be properly filed, and a fee charged for the filing, they form no part of the record. *Ib.*
21. A District Attorney is entitled to charge a per diem for services before a United States commissioner upon the same day that he is allowed a per diem for attendance upon the court. *United States* v. *Erwin*, 685.
22. A clerk of a Circuit or District Court is entitled to fees for making dockets and indexes, taxing costs, etc., in suits upon manufacturers' bonds under the internal revenue law where issue was joined and testimony given: also for entering orders of court for *alias fi. fa.* and for *venditioni exponas*, one folio each: also for making record entries of recognizances of defendants, or of entering and filing such recognizances, but not for both: also for making docket entries and indexes in cases of *sci. fa.* and other proceedings where issue was joined: also for entering orders approving the accounts of officers of the court, and

filing duplicate accounts: also for entering separate orders of court excusing jurors, entering orders of court to issue subpœnas, and entering an order for *alias capias* when such orders are made by the court and the fees allowed; and also for drawing recognizances of defendants. He is not entitled to fees for filing vouchers: nor for making dockets and indexing where no indictment is found: nor for attendance upon the District Court as a jury commissioner in drawing jurors. *United States* v. *Payne*, 687.

23. On the authority of *United States* v. *Ewing*, 140 U. S. 142, the charges of a commissioner of a Circuit Court for docket fees are disallowed, and the charges for acknowledgments of sureties on recognizances of defendants in prosecutions brought by the United States reduced to a fee for a single acknowledgment. *United States* v. *Hall*, 691.
24. There is no legal objection to the same person holding the offices of clerk and of commissioner of a Circuit Court, and the person so holding them is entitled to the fees and emoluments of both. *United States* v. *McCandless*, 692.
25. The court disallows the following charges by a clerk of a District Court: (1) Docket fees where the grand jury returned "not true bill;" (2) Docket fees where the case is not finally disposed of; (3) A charge for miscellaneous fees, entering orders of court, making copies, certificates, and seals, as being too general; (4) A charge for issuing commitments to jail in addition to copy of order of removal, as being too indefinite; (5) An item for entering orders of court, approving accounts of officers, and copies of certificates and seals. *Ib.*
26. Only one fee is allowed for taking the acknowledgment of a defendant and his sureties unless it be made to appear that it was necessary to take them separately. *United States* v. *Taylor*, 695.
27. A clerk may charge for copies of orders of court directing the marshal to pay witnesses and jurors, but not for affixing seals thereto. *Ib.*
28. No charge can be made for filing orders from the District Attorney discharging witnesses from attendance. *Ib.*
29. A fee may be charged for an affidavit of a witness as to his mileage and attendance; but this affidavit need not be filed. *Ib.*
30. The rule in *United States* v. *King*, *ante*, 676, that proceedings before a commissioner form no part of the record, applies to affidavits. *Ib.*
31. The comptroller cannot prescribe the length of capiases or bonds, or limit a clerk to a certain number of folios. *Ib.*

See COSTS AGAINST THE UNITED STATES.

COSTS AGAINST THE UNITED STATES.

The Circuit Court had a right, under § 15 of the act of March 3, 1887, c. 359, 24 Stat. 505, 508, c. 359, to award certain costs to the plaintiff, considering the frivolous and vexatious nature of the objections taken to the greater part of this claim. *United States* v. *Harmon*, 268.

COURT AND JURY.

It is not reversible error in a judge of a Federal Court to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jurors are given to understand that they are not bound by such expressions of opinion. *Doyle* v. *Union Pacific Railway Co.*, 413.

CUSTOMS DUTIES.

Knit woollen undershirts, drawers and hosiery are subject to duty as "wool-wearing apparel," under paragraph 396 of section 1 of the act of October 1, 1890, 26 Stat. 567, 597, c. 1244, and not as "knit fabrics made on frames," under paragraph 392 of the same act. *Arnold* v. *United States*, 494.

DAMAGES.

A railroad corporation is not liable to exemplary or punitive damages for an illegal, wanton and oppressive arrest of a passenger by the conductor of one of its trains, which it has in no way authorized or ratified. *Lake Shore & Michigan Southern Railway Co.* v. *Prentice*, 101.

See COMMON CARRIER, 3, 4, (4) (6).

DISTRICT OF COLUMBIA.

1. The proviso in the Maryland act of cession of the District of Columbia, that nothing therein contained should be "so construed to vest in the United States any right of property in the soil, as to affect the right of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States," has no reference to the power of eminent domain which belongs to the United States as the grantee in the act of cession. *Shoemaker* v. *United States*, 282.
2. The United States possess full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia. *Ib.*
3. In the District of Columbia a judgment in an action of tort does not bear interest. *Washington & Georgetown Railroad Co.* v. *Harmon*, 571.

EMINENT DOMAIN.

1. Land taken in a city for public parks and squares by authority of law, is taken for a public use. *Shoemaker* v. *United States*, 282.
2. The extent to which such property shall be taken for such use rests wholly in legislative discretion, subject only to the restraint that just compensation must be made. *Ib.*
3. The approval by the President of the price to be paid by the United States for private land, condemned for public use in the exercise of the right of eminent domain, is not a judicial act. *Ib.*

4. An intention expressed by Congress not to go beyond a sum named as the aggregate, in condemning land for a park in Washington, is not a direction to appraisers to keep within any given limit in valuing any particular piece of property. *Ib.*
5. It is competent for the legislature, in providing for the cost of a public park, to assess a proportionate part of it upon property specially benefited. *Ib.*
6. In condemning lands for a public park, it is competent for the court, in the absence of a legislative direction prescribing the form of the oath to be administered to appraisers, to direct them to take an oath to "faithfully, justly and impartially appraise the value or values of said parcels of land, and of the respective interests therein, to the best of their skill and judgment." *Ib.*
7. In determining the values of lands so taken appraisers should exercise their own judgment, derived from personal knowledge and inspection of the lands, as well as their knowledge derived from the evidence adduced by the parties. *Ib.*
8. An appellate court will not interfere with the report of commissioners, (or appraisers,) in such case, to correct the amounts reported, except in case of gross error showing prejudice, corruption or plain mistake. *Ib.*

See ROCK CREEK PARK.

EQUITY.

1. The verdict of a jury upon an issue submitted to it by order of a Court of Chancery is advisory only, and is binding upon the court only so far as it chooses to adopt it. *Kohn* v. *McNulta*, 238.

See FRAUD;
RAILROAD, 2;
TAX AND TAXATION, 2.

ESTOPPEL.

See MUNICIPAL BOND, 10.

EVIDENCE.

1. When the genuineness of a paper sued on is put in issue, papers not otherwise competent may be introduced in Oregon for the purpose of enabling the jury to make a comparison of handwritings. *Holmes* v. *Goldsmith*, 150.
2. A witness who has sworn to the genuineness of a disputed signature to a note, may be further asked if he would act upon it if it came to him in an ordinary business transaction. *Ib.*
3. The admission of evidence of a collateral fact, which might have been rejected by the trial court without committing error, does not consti-

tute error which will of itself justify reversal of the judgment below if the case of the plaintiff in error was not injured by it. *Ib.*

See ADMIRALTY, 6;
COMMON CARRIER, 4 (8).

EXCEPTION.

1. In view of the requirements of Rev. Stat. § 953, respecting the authentication of bills of exceptions, it will be assumed, where a bill is certified by a District Judge holding Circuit Court, that the Circuit Justice and Circuit Judge were not present at the trial, unless the record clearly and affirmatively shows the contrary. *Cooke* v. *Avery*, 375.
2. Detached sentences in a charge to a jury cannot be selected as grounds of objection, but must be read in connection with the whole charge. *New York, Lake Erie & Western Railroad Co.* v. *Estill*, 591.

EXECUTIVE.

1. A decision of the Secretary of the Interior, in exercise of the powers conferred upon him by the act of March 3, 1875, c. 152, 18 Stat. 482, that a designated railroad company is entitled to a right of way over public land, cannot be revoked by his successor in office. *Noble* v. *Union River Logging Railroad Co.*, 165.
2. Whether a railroad company applying for such a grant is a company which the statute authorizes to receive a grant of a right of way is a quasi judicial question, which, when once determined by the Secretary, is finally determined so far as the executive is concerned. *Ib.*

See JURISDICTION, C, 2.

EXECUTOR AND ADMINISTRATOR.

A citizen of Pennsylvania, born in New Jersey, devised and bequeathed the residue of his estate, real and personal, consisting mostly of property in Pennsylvania and in Michigan, with some real estate in New Jersey, to his executors, in trust to sell and invest at their discretion, "and to appropriate and use the principal or income thereof for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics;" and appointed as his executors H, a citizen of New Jersey, and W, a citizen of Pennsylvania, "and in the event of the death of either or both of them, first, P, and next, N, to supply vacancy." W took out letters testamentary in Pennsylvania, and there administered the property in Pennsylvania and in Michigan, and, with the approval of a Pennsylvania court, appropriated it to found a home for such mechanics, incorporated by the legislature of Pennsylvania to carry

out the testator's charitable intention. H took out letters testamentary in New Jersey, and took care of the real estate there, and died having done nothing beyond obtaining the opinion of counsel that the executors would be authorized, in their discretion, to provide a bed for such mechanics in a hospital, incorporated in New Jersey, for "the care, nurture and maintenance of sick, infirm, aged and indigent persons, and of orphan and destitute children," and whose by-laws provided that patients in a condition to be discharged, or whose disease was incurable, should not remain in the hospital, and that those able to pay for their maintenance should do so. After the deaths of H and W, a son of H took out letters of administration with the will annexed of the unadministered goods, chattels and effects of the original testator in New Jersey; and, after having assured P that he would not dispose of the real estate in New Jersey without giving him an opportunity to show that the Pennsylvania corporation was entitled to it, sold it, and, without any order of court, and without P's knowledge or consent, paid the proceeds to the New Jersey corporation taking a bond of indemnity. *Held*, that P, on taking out letters testamentary in Pennsylvania, was entitled, as executor, and upon filing a copy of those letters, to maintain a bill in equity against the New Jersey administrator in the Circuit Court of the United States for the District of New Jersey to recover those proceeds, with interest, and costs. *Hayes* v. *Pratt*, 557.

FRAUD.

1. Where the defendant in a suit in equity answers under oath denying charges of fraud, and no other evidence is offered, the charges are not sustained. *Monroe Cattle Co.* v. *Becker*, 47.
2. Charges of fraud made upon information and belief and not sustained by proof must be treated as not sustained. *Ib.*

HUSBAND AND WIFE.

See MARRIED WOMAN.

ILLINOIS.

See INTERSTATE BOUNDARY.

INDIAN.

In computing the time during which the alienation of public land acquired by an Indian under the provisions of § 16 of the act of March 3, 1875, c. 131, 18 Stat. 402, is forbidden, the day of the issue of the patent should be included. *Taylor* v. *Brown*, 640.

INJUNCTION.

See JURISDICTION, C, 2;
TAX AND TAXATION, 2.

INSURANCE.

A policy of life insurance was issued, insuring the life of a husband for the benefit of his wife, for $5000, for life, a premium named to be paid annually, and, if not paid, the policy to cease. It was made at the instance of the husband, he paid with his own money all the premiums which were paid, being nine, the policy remained always in his possession, and the wife had nothing to do with it. Before the tenth premium became due, the husband advised the company that he could not pay that premium, and wished to take out a paid-up policy, under a provision therefor. The company advised him not to do so but to have so much of the $5000 released as would enable him, with the sum allowed for such release, to pay what would be due as a premium on the remainder. He agreed to do so, and presented to the company what purported to be a receipt signed by his wife for $82.39, as a consideration for the release of $700 of the $5000, the $82.39 being applied towards the premium on the $4300 policy. Thereupon the husband received a policy for $4300 insurance on his life, for his wife's benefit, bearing the same number as the $5000 policy, with a less annual premium. A year later he advised the company that he could not pay the premium on the $4300 policy, and took a paid-up policy for $1195 on his life for the benefit of his wife, having first given the company what purported to be a receipt signed by his wife for $583.24 as a consideration for all claims on account of "policy No." so and so, released, the $583.24 being applied in payment of a premium on a participating paid-up policy for $1195. The wife's name on both receipts was written by the husband without her assent. In a suit on the $5000 policy brought by the wife, the company set up the non-payment of any premium on it after the date of the $4300 policy. *Held*, that that was a good defence, and that there was nothing to justify the failure to pay the premiums. *Miles* v. *Connecticut Mutual Life Insurance Co.*, 177.

INTEREST.

See COMMON CARRIER, 4, (10); PRACTICE;
DISTRICT OF COLUMBIA, 3; ROCK CREEK PARK, 3.

INTERSTATE BOUNDARY.

1. The true line, in a navigable river between States of the Union which separates the jurisdiction of one from the other, is the middle of the main channel of the river. *Iowa* v. *Illinois*, 1.
2. In such case the jurisdiction of each State extends to the thread of the stream, that is, to the "mid-channel," and, if there be several channels, to the middle of the principal one, or rather, the one usually followed. *Ib.*
3. The boundary line between the State of Iowa and the State of Illinois

is the middle of the main navigable channel of the Mississippi River. *Ib.*

4. As the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings cross the Mississippi River, it is ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two States, and that such commission be required to make the proper examination, and to delineate on maps prepared for that purpose, the true line as determined by this court, and report the same to the court for its further action. *Ib.*

IOWA.

See INTERSTATE BOUNDARY.

JUDGMENT.

The extent to which a judgment record should go in its recital of the proceedings depends largely upon the purpose for which it is to be used; but generally anything not necessary to support the validity of the judgment is presumptively no part of the record, however material it may have been in the progress of the case. *United States* v. *Taylor*, 695.

See JUDICIAL SALE;
JURISDICTION, A, 2, 8;
RES JUDICATA.

JUDICIAL SALE.

A sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings. *United Lines Telegraph Co.* v. *Boston Safe Deposit and Trust Co.*, 431.

JURISDICTION.

A. OF THE SUPREME COURT.

1. A writ of error does not lie to a judgment of the Supreme Court of the District of Columbia, denying a writ of mandamus to the Postmaster General to compel him to readjust the salary of a postmaster when the additional amount to become due him would be less than $5000; and this is not affected by the fact that many similar claims for relief exist, in which the aggregate amount involved is over $100,000. *Trask* v. *Wanamaker*, 149.

2. An order of the Circuit Court of the United States, appointing commissioners to assess damages for land in New Jersey taken by the North River Bridge Company for the approaches to a bridge across the North or Hudson River between New York and New Jersey, under the act of July 11, 1890, c. 669, § 4, is not a final judgment, upon which a writ of error will lie. *Luxton* v. *North River Bridge Co.*, 337.

3. The mere construction by the highest court of a State of a statute of another State, without questioning its validity, does not deny to it the full faith and credit which the Constitution and laws of the United States demand, in order to give this court jurisdiction on writ of error. *Glenn* v. *Garth*, 360.

4. This is especially true when there are no decisions of the highest court of the latter State in conflict with the construction made by the court of the former State. *Ib.*

5. This court cannot, by mandamus, review the judicial action of a Circuit Court of Appeals in refusing to receive further proofs offered by an appellant, in an admiralty cause pending in that court on appeal. *In re Hawkins*, 486.

6. A statute of the State of Nebraska authorizes a creditor in certain cases to bring an action on a claim before it is due and to have an attachment against the property of the debtor. A citizen of Ohio brought an action in the Circuit Court of the United States for the district of Nebraska against a citizen of Nebraska, to recover $530.09 which was overdue, and $1664.04 which was to become payable in the following month, and an attachment was issued under the statute against the defendant's property. The Circuit Court sustained its jurisdiction and gave judgment in plaintiff's favor for both sums. *Held*, (1) That the Circuit Court had jurisdiction, notwithstanding the fact that a part of the sum sued for was not due and payable when the action was commenced, and the amount actually due and payable was less than $2000; (2) That if there were any error in the decision, on which this court expresses no opinion, the defendant, if desiring to have it reviewed should have taken the case to the Circuit Court of Appeals. *Schunk* v. *Moline, Milburn & Stoddart Co.*, 500.

7. There must be at least color of ground for the averment of a Federal question in a case brought here by writ of error to the highest court of a State, in order to give this court jurisdiction. *Hamblin* v. *Western Land Co.*, 531.

8. In executory process, according to the Civil Code of Louisiana, in the Circuit Court of the United States, an order, made without previous notice, for the seizure and sale of mortgaged land to pay the mortgage debt, under which the sale cannot take place until the debtor has had notice and opportunity to interpose objections, is not, at least when he does interpose within the time allowed, a final decree, from which an appeal lies to this court. *Fleitas* v. *Richardson*, No. 1, 538.

See COMMON CARRIER, 4; MANDAMUS;
CONSTITUTIONAL LAW, 6; UNITED STATES, 1, 6.

B. OF CIRCUIT COURTS OF APPEAL.

See MANDAMUS.

C. Of Circuit Courts of the United States.

1. The maker of a promissory note signed it entirely for the benefit of the payee, who was really the party for whose use it was made. The maker and the payee were citizens of the same State. A citizen of another State discounted the note, and paid full consideration for it to the payee, who endorsed it to him. The note not being paid at maturity, the endorsee, who had not parted with it, brought suit upon it against the maker in the Circuit Court of the United States. *Held*, that the court had jurisdiction, notwithstanding the provision in the act of August 13, 1888, 25 Stat. 433, 434, c. 866, that such court shall not have cognizance of a suit to recover the contents of a promissory note in favor of an assignee or subsequent holder, unless such suit might have been prosecuted in such court if no assignment had been made. *Holmes* v. *Goldsmith*, 150.
2. The general rule is that the judicial power will not interpose, by mandamus or injunction, to limit or direct the action of departmental officers in respect of matters pending, within their jurisdiction and control. *New Orleans* v. *Paine*, 261.
3. A Circuit Court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments, in separate counties, no one of which amounts to $2000, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined in the bill and make an aggregate of over $2000. *Walter* v. *Northeastern Railroad Co.*, 370.
4. When it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States. *Cooke* v. *Avery*, 375.
5. When a party, on the first trial of a cause in a Circuit Court sets up such a right as the ground of Federal jurisdiction, and the jurisdiction is sustained, he cannot be permitted, on the second trial to oust the jurisdiction by contending that no such right is in controversy. *Ib.*
6. Where a plaintiff's title rests upon the validity of a lien claimed to have been acquired under a judgment of a Circuit Court of the United States, the disposition of the issue depends upon the laws of the United States and the rules of its courts, and a Federal court has jurisdiction. *Ib.*

See Claims against the United States, 3;
Public Land, 4;
United States, 1, 6.

D. Jurisdiction of the Court of Claims.

Although the United States did not appeal, this court considered the question of the jurisdiction of the Court of Claims, and *held*, that as the

right of action of the plaintiffs accrued in 1886, and the Court of Claims from that time had full jurisdiction over it, under its general jurisdiction, and as the general jurisdictional act of that court was not repealed by the act of 1888, to the extent of this case, the plaintiffs could waive the benefit of the additional method of adjustment provided by the act of 1888, and the general jurisdiction of that court and such additional method could both of them well stand together. *Smithmeyer* v. *United States*, 342.

See CLAIMS AGAINST THE UNITED STATES.

LANDLORD AND TENANT.

1. An agreement between a railroad company and an individual that the latter shall occupy a section-house of the company, and shall board there the section-hands and other employés of the company at an agreed rate, the company to aid in collecting the payment out of the wages of the employés, does not create the relation of master and servant between the company and the individual, but does create a tenancy terminable at the will of the company. *Doyle* v. *Union Pacific Railway Co.*, 413.
2. In the absence of fraud, misrepresentation or deceit, a landlord is not responsible for injuries happening to his tenant by reason of a snow-slide or avalanche. *Ib.*

LIBRARY OF CONGRESS.

See CLAIMS AGAINST THE UNITED STATES.

LICENSE TAX.

See CONSTITUTIONAL LAW, 4.

LIEN.

1. The courts of the United States enforce grantor's and vendor's liens, if in harmony with the jurisprudence of the State in which the action is brought. *Fisher* v. *Shropshire*, 133.
2. The doctrine of a vendor's lien, arising by implication, seems to have been generally recognized in the State of Iowa. *Ib.*
3. If a suit to enforce a vendor's lien upon land in Iowa is pending at the time when the vendee conveys the land to a third party, no presumption can arise that that lien has been waived, as against the grantee of the vendee, whatever may be the general rule in that State as to the presumption of the waiver of a vendor's lien, in case of a conveyance of the tract by the vendee. *Ib.*
4. The filing of the petition in this case to assert and enforce a vendor's lien was notice of its assertion and prevented third parties from

acquiring an interest in the subject-matter against and superior to the lien. *Ib.*

5. It does not appear to be necessary in Iowa to exhaust the remedy at law before proceeding to enforce a vendor's lien. *Ib.*
6. Under the circumstances of this case, as detailed in the opinion; *held*, (1) That a vendor's lien existed on the property for the complainants' benefit which could be enforced by them for the balance due them on the purchase money; (2) That George Lyle was not a necessary party to the proceedings to enforce it; (3) That there was an error in the master's computation, which made it necessary to remand the case. *Ib.*

LIMITATION, STATUTES OF.

1. The construction given by the Supreme Court of a State to a statute of limitations of the State will be followed by this court, even in a case decided the other way in the Circuit Court before the decision of the state court. *Bauserman* v. *Blunt*, 647.
2. The statute of limitations of Kansas, as construed by the Supreme Court of the State, does not run while the debtor is personally absent from the State, although he retains a usual place of residence therein, where a summons upon him might be served. *Ib.*
3. The statute of limitations of Kansas, as construed by the Supreme Court of the State, stops running at the death of the debtor, but for such a reasonable time only as will enable the creditor to have an administrator appointed. *Ib.*

See UNITED STATES, 4.

LIMITED LIABILITY.

See ADMIRALTY, 1.

LOCAL LAW.

1. During the ninety days allowed by the statutes of Texas concerning the purchase of school lands to a purchaser to make his first payment, (Laws of 1879, special session, p. 23, Laws of 1881, p. 119,) it is not competent for the surveyor to permit a person who had filed an application for a designated tract to treat the application as withdrawn and abandoned, and to make another application for the same tract in the name of a different person. *Monroe Cattle Co.* v. *Becker*, 47.
2. During that period of ninety days the land is in the position of reserved lands under railroad grant acts, to which it is well settled that the grant does not attach if the land is in any way segregated from the public lands. *Ib.*
3. Under the laws of Texas regulating the sale of the school lands, a purchaser who makes the first payment called for, who executes the obligations for subsequent payments as called for, and complies with those obligations as they mature, is protected against forfeiture. *Ib.*

4. The act of the legislature of Texas of April 14, 1883, concerning purchases of school lands, had no effect upon the vested rights of the plaintiff in this case. *Ib.*

5. An index to an abstract of judgments in Texas, made under its laws for acquiring judgment liens, is sufficient, which gives the defendant's name or names correctly, and the names of the plaintiffs by a partnership title. *Cooke* v. *Avery*, 375.

6. In Texas, in trespass to try title, the defendant cannot question the validity of his grantor's title at the time of the conveyance to him when the plaintiff claims under the same grantor, unless he claims under a paramount title. *Ib.*

7. If the defendant in such an action pleads his title specially, he waives the general issue, and is confined to the defence specially pleaded. *Ib.*

8. The defendant in such an action, not having been in possession of the land in dispute for twelve months next before the commencement of the action under written evidence of title, offered to show that immediately after concluding his bargain for the property he entered into possession, and commenced making improvements, and erected improvements of great value on the property before he knew of the plaintiff's lien. This was done in order to enable him to get the benefit of the provisions in the Texas statutes relating to improvements. *Held*, that the offer was too vague. *Ib.*

9. A married woman was codefendant in an action of trespass to try title in Texas. Her interest was a community interest in the property by virtue of a conveyance to her husband. *Held*, that a personal judgment in damages for use and occupation, and for costs, could not be rendered against her. *Ib.*

Idaho: *See* ASSIGNMENT FOR BENEFIT OF CREDITORS.

Iowa: *See* LIEN.

Kansas: *See* LIMITATION, STATUTES OF, 2, 3; RES JUDICATA.

Louisiana: *See* JURISDICTION, A, 8; MARRIED WOMAN, 3.

Missouri: *See* COMMON CARRIER, 4 (1), (10); MUNICIPAL BOND, 5, 9; RAILROAD, 2.

Nebraska: *See* JURISDICTION, A, 6.

Ohio: *See* MARRIED WOMAN, 1, 2.

Oregon: *See* EVIDENCE, 1.

Texas: *See* LOCAL LAW, 9; PATENT FOR INVENTION, 3.

LOTTERY.

1. Certain bonds issued by the government of Austra, *held* to represent a "lottery or similar scheme," within the meaning of § 3894 of the Revised Statutes, as enacted by the act of September 19, 1890, c. 908,

26 Stat. 465; and a given circular *held* to be a "circular concerning any lottery, so-called gift, concert or other similar enterprise offering prizes dependent upon lot or chance," within the meaning of said § 3894; and the said circular *held* to constitute a "list of the drawings at any lottery or similar scheme," within the meaning of said § 3894. *Horner* v. *United States*, 449.

2. What is a lottery, considered. *Ib.*
3. Cases in the United States and England, considered. *Ib.*
4. Although, by the bonds in question, Austria attempted to obtain a loan of money, she also undertook to assist her credit by an appeal to the cupidity of those who had money, and offered to each holder of a bond a chance of obtaining a prize dependent upon lot or chance, the element of certainty going hand in hand with the element of lot or chance, but the former not destroying the existence or effect of the latter. *Ib.*

MANDAMUS.

Under § 7 of the act of March 3, 1891, c. 517, 26 Stat. 826, 828, which provides for an appeal to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction on a hearing in equity, the granting of a stay of the operation of the injunction during the pendency of the appeal, by the court which granted or continued it, is not a matter of right, but is a matter of discretion; and such discretion of that court cannot be controlled by a writ of mandamus from this court. *In re Haberman Manufacturing Co.*, 525.

See ADMIRALTY, 1;
JURISDICTION, A, 5; C, 2.

MARRIED WOMAN.

1. In Ohio the separate property of a married woman is not charged, either in law or in equity, by her contracts executed previous to its existence. *Ankeney* v. *Hannon*, 118.
2. The cases in Ohio, in New York, and in England on this subject, examined. *Ib.*
3. The liability of a husband to his wife for her paraphernal property, secured by legal mortgage of his estate, under the law of Louisiana, is extinguished by his discharge in bankruptcy; her mortgage, therefore, cannot attach to land acquired by him after the discharge; and a subsequent mortgagee from the husband may set up the discharge in bankruptcy against the wife. *Fleitas* v. *Richardson*, (No. 2,) 550.

See LOCAL LAW, 9.

MARSHAL.

See CLAIMS AGAINST THE UNITED STATES, 2;
COSTS, 1, 2, 3, 4, 5, 6, 8.

MASTER AND SERVANT.

See LANDLORD AND TENANT, 1;
RAILROAD, 1.

MORTGAGE.

The question of priority between two mortgages on lines of telegraph, considered. *United Lines Telegraph Co.* v. *Boston Safe Deposit & Trust Co.*, 431.

See MARRIED WOMAN, 3.

MUNICIPAL BOND.

1. When negotiable bonds of a municipality, issued in aid of a railroad company, are void as between the railroad company and the municipality, the burden is upon the holder to show that he, or some one through whom he obtained title to them, was a *bona fide* purchaser for a valuable consideration. *Lytle* v. *Lansing*, 59.
2. The settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but also at the time of the payment of the purchase money, applies to the purchase of negotiable municipal bonds. *Ib.*
3. It is the duty of one who purchases municipal bonds, knowing that the municipality is contesting its liability on them, to make inquiries, and the failure to do so will be held to be a wilful closing of his ears to information. *Ib.*
4. The several holdings of the bonds which form the subject of this litigation since they passed out of the railroad company, examined, and *held* to be either as collateral for a debt which has been paid, or as fictitious, for a real owner who is affected with notice of their invalidity. *Ib.*
5. The question under what statute of Missouri the bonds were issued which form the subject of this controversy was properly determinable in a suit on the bonds. *Knox County* v. *Ninth National Bank*, 91.
6. Decisions of state courts upon the requirements of state statutes for validating issues of municipal bonds in the State, when made subsequent to an issue of such bonds, are not controlling in litigations in Federal courts, involving the validity of such issue. *Ib.*
7. When the matter in dispute is whether a particular issue of municipal bonds was made under one statute of the State in which the municipality is situated or under another, the whole conduct of the municipality, both before, at the time, and after the issue of the bonds, may be shown to aid in determining the question. *Ib.*
8. In a subscription by a municipal corporation to aid in the construction of a railroad, it is sufficient if the route is designated, leaving to the municipal authorities to designate the particular corporation to be the recipient of the subscription. *Ib.*

9. The bonds issued by Knox County, Missouri, to the Missouri and Mississippi Railroad Company, were issued in pursuance of the general laws of the State, and not under the act of the legislature of Missouri, of February 20, 1865, to incorporate that company, and the county powers of taxation are not limited by the provisions of section 13 of the act incorporating the company. *Ib.*

10. Where the constitution and a statute of a State forbid any county to issue bonds to such an amount as will make its aggregate indebtedness exceed a certain proportion of the assessed valuation of taxable property in the county; and the statute requires the county commissioners to publish, and to enter on the public records of the county, semi-annual statements showing the whole amount of the county debt; a purchaser for value and before maturity, of a bond issued in excess of the constitutional and statutory limit, is charged with the duty of examining the record of indebtedness; and the county is not estopped, by a recital in the bond that all the provisions of the statute have been complied with, to prove, by the record of the assessment and the indebtedness, that the bonds were issued in violation of the constitution. *Sutliff* v. *Lake County Commissioners*, 230.

NAVIGABLE RIVER.

See INTERSTATE BOUNDARY.

NEGLIGENCE.

See COMMON CARRIER, 1, 3.

OATH.

See EMINENT DOMAIN, 6.

OFFICER.

See CONSTITUTIONAL LAW, 2, 3.

PATENT FOR INVENTION.

1. A patent for an invention issued to the inventor, "his heirs or assigns," after his death, is a valid patent, and should be construed in the alternative as a grant to him, or his heirs or assigns. *De la Vergne Refrigerating Machine Co.* v. *Featherstone*, 209.

2. Such a construction would include a grantee or grantees in being capable of taking the patent and to whose benefit the grant would enure. *Ib.*

3. In such case an executor *de son tort* may, in Texas, make an assignment of an interest in the patent which will convey a valid title to the assignee, if not repudiated by the executor or administrator of the inventor when duly appointed, or by his children. *Ib.*

4. An inventor agreed with an associate to give him an interest in a patent for the invention when issued, and the associate agreed to procure its issue. The patent was issued after the inventor's death to the inventor by name, "his heirs or assigns." His administratrix conveyed to the associate the promised interest, and subsequently the remaining interest, and all persons interested in the estate acquiesced in the conveyances. *Held*, that the patent should be construed as a grant to the associate as assignee, and should be held to have been obtained by the authority of the administratrix as well as of the associate. *Ib.*
5. Failure, in such case, to record title papers in the Patent Office, it appearing that the administratrix and the in-part equitable owner had obtained the patent, cannot make the patent void. *Ib.*
6. When an inventor makes oath to an application for a patent, filed in his lifetime, an amendment to it within the scope of the original oath and of the invention described in the original specification, made after his death without filing a new oath or a new power of attorney, is valid, and does not render the patent void. *Ib.*
7. Claims 1 and 3 of letters patent No. 213,323 granted to William Coupe, March 18, 1879, for an improvement in hide-stretching machines, construed. *Weatherhead* v. *Coupe*, 322.
8. The principal feature of the Coupe machine, covered by claim 1, and of his method of stretching hides, covered by claim 3, is, that the hide is stretched longitudinally and transversely at the same time; and a single passage of the hide through the machine is supposed to give it sufficient stretching transversely as well as longitudinally. *Ib.*
9. The defendant's machine has no stretcher bar, substantially such as that of the patent, giving a transverse stretch to the hide simultaneously with the giving of the longitudinal stretch; and, therefore, does not infringe the patent. *Ib.*
10. Letters patent No. 116,266, granted to Alanson Cary, as inventor, June 27, 1871, for an improvement in modes of tempering springs, are invalid, in view of the state of the art, for want of patentable invention. *Lovell Manufacturing Co.* v. *Cary*, 623.
11. The invention appears, from the specification, to be a method of restoring steel wire which has been mechanically strained, by subjecting it to a temperature of 600°, more or less, and the claim limits the method to its application to "furniture or other coiled springs;" but the process, as applied to those springs, was not different, in method or effect, from the same process when applied to any mechanically strained wire, or to steel made in straight pieces or strips, or otherwise. *Ib.*
12. The invention was anticipated by the prior use of New England wire clock-bells and of blued hair springs, used in marine clocks. The treatment to which those articles were subjected was in all respects the same in the prior use, as in the patented process. *Ib.*
13. It does not amount to invention to discover that an old process is better in its results, when applied to a new working, than would have

been expected, the difference between its prior working and the new working being only one of degree and not one of kind. *Ib.*

14. There was nothing more than mechanical skill in arriving at the alleged invention, in view of the state of the art. *Ib.*
15. The point considered that no one had used the former processes for the manufacture of furniture springs, and that as soon as Cary's process was made known, the art of making furniture springs was revolutionized. *Ib.*
16. The cases in this court on the subject of double use, considered as to whether it is a patentable invention to apply old and well-known devices and processes to new uses, in other and analogous arts. *Ib.*

PLEADING.

It is bad pleading to describe a party by the initials only of his Christian name, but, when no advantage is taken of the defect in the court below, it will not be considered here. *Monroe Cattle Co.* v. *Becker*, 47.

PRACTICE.

In this case the only error being in an allowance of interest, the court orders the judgment to be affirmed if the interest be remitted; otherwise to be reversed for that error. *Washington & Georgetown Railroad Co.* v. *Harmon*, 571.

See ADMIRALTY, 1 (11);
EXCEPTION, 1;
JURISDICTION, C, 5;
LOCAL LAW, 7, 8;
PLEADING;
PRESUMPTION;
PUBLICATION;
UNITED STATES, 2.

PRECIOUS METALS.

See ROCK CREEK PARK, 1.

PRESUMPTION.

Where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act. *Knox County* v. *Ninth National Bank*, 91.

See EXCEPTION.

PROHIBITION, WRIT OF.

See ADMIRALTY, 1.

PROMISSORY NOTE.

See JURISDICTION, C, 1.

PUBLICATION.

An order of court, directing a notice of an election which was to take place in thirty-four days to be given by publication in a designated newspaper for five weeks, must be construed to mean a publication in each of the five weeks. *Knox County* v. *Ninth National Bank*, 91.

PUBLIC LAND.

1. The issue of a patent of public land to a person who is not equitably entitled to it does not preclude the owner of the equitable title from enforcing it in a court of equity against claimants under the patent. *Monroe Cattle Co.* v. *Becker*, 47.
2. When a person makes a homestead entry of a tract of public land, and enters into occupation of it with his family, and dies a widower, and without acquiring a patent, the right to complete the proofs and acquire the patent passes, under Rev. Stat. § 2291, to all his children equally as well those who are adults as those who are infants; and not, under Rev. Stat. § 2292, to such children only as are minors at the time of his death, to the exclusion of those who had then attained their majority. *Bernier* v. *Bernier*, 242.
3. Section 2292 of the Revised Statutes was only intended to give to infant children the benefit of the homestead entry and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in § 2291, and to allow a sale of the land within a prescribed period for their benefit. *Ib.*
4. While the location of the boundary lines of a land grant is pending before the Land Department, and the proper officers are bringing to bear upon it their own judgment and discretion, the courts have no right to interfere with their action by injunction. *New Orleans* v. *Paine*, 261.
5. When a line of a land grant railroad as located does not satisfy the terms of the granting act, whether the Land Department may not consider it as a temporary and provisional one, *quære*. *Hamblin* v. *Western Land Co.*, 531.
6. A valid homestead entry could not be made upon indemnity lands of the Sioux City & St. Paul Railroad Company after the patent from the United States to the State of Iowa, issued June 17, 1873, under the act of May 12, 1864, 13 Stat. 72, c. 84. *Ib.*
7. A reservation of public land from entry, made by the Department of the Interior, as coming within the limits of a railroad grant, operates to withdraw the land from homestead entries, even if found afterwards not to come within such limits. *Ib.*

See EXECUTIVE, 1;
INDIAN.

PUNITIVE DAMAGES.

See DAMAGES.

RAILROAD.

1. A servant of a railroad company, employed in coupling freight cars together, who is well acquainted with the structure of the freight cars of his employer, and also with those of other companies sending freight cars over his employer's road differing from his employer's cars in structure and in the risk run in coupling them, assumes, by entering upon the service, all ordinary risks run from coupling all such cars. *Kohn* v. *McNulta*, 238.

2. A bill was filed against a railroad company in Missouri by the owner of a building on a public street in St. Louis, on which the company was about, under competent municipal authority, to lay down tracks at grade for use in running cars drawn by steam power. The bill prayed to restrain and enjoin the company from commencing or carrying out the proposed construction, or from taking possession of the street for that purpose. The injuries to result to the complainant's building from the proposed construction were set forth, but without any demand for compensation other than that contained in the prayer for general relief. The statutes of Missouri provide for the assessment of compensation for the taking of property for public use, but not for such assessment where property is merely damaged. *Held*, that the complainant had an adequate remedy at law for the injuries complained of, and was not entitled to the relief prayed for. *Osborne* v. *Missouri Pacific Railway*, 249.

See COMMON CARRIER; DAMAGES; LANDLORD AND TENANT, 1; MUNICIPAL BOND, 1, 4.

REMOVAL OF CAUSES.

See COMMON CARRIER, 4, (2).

REPLEVIN.

See RES JUDICATA.

RES JUDICATA.

In Kansas, in an action of replevin to enforce a chattel mortgage of a machine sold to the defendant by the plaintiff, and mortgaged back to secure the purchase money, the defendant may set up, as a defence, failure of the machine to do the work guaranteed and damage to him from delay in the delivery; and if the jury pass upon these issues, the judgment on their verdict is a bar to a subsequent action by the purchaser of the machine against the vendor, to recover damages for such failure and such delay. *Clement* v. *Field*, 467.

See EXECUTIVE, 1.

ROCK CREEK PARK.

1. If there were any deposits of gold in the land condemned for the Rock Creek Park in Washington, those deposits were the property of the United States. *Shoemaker* v. *United States*, 282.
2. The filing of a map of the land proposed to be taken for the Rock Creek Park, made under § 3 of the act of September 27, 1890, 26 Stat. 492, c. 1001, was not a finalty, and did not commit the commissioners to taking all the tracts included in it. *Ib.*
3. The owners of the tracts condemned for that park are not entitled to interest upon the respective sums assessed as damages for the taking. *Ib.*

SERVICE OF PROCESS.

See ADMIRALTY, 1 (7);
COMMON CARRIER, 4, 2.

SECRETARY OF THE INTERIOR.

See EXECUTIVE.

SET OFF.

See RES JUDICATA.

STREET.

See RAILROAD, 2.

STATUTE.

A. CONSTRUCTION OF STATUTES.

The construction given to an act by the Department charged with the duty of enforcing is material only in case of doubt. *United States* v. *Tanner*, 661.

See INDIAN.

B. STATUTES OF THE UNITED STATES.

See ADMIRALTY, 1, (2), (3), 2;
BANKRUPT;
CLAIMS AGAINST THE UNITED STATES, 1;
CONSTITUTIONAL LAW, 4;
COSTS, 1, 8, 17;
COSTS AGAINST THE UNITED STATES;
CUSTOMS DUTIES;
EXCEPTION, 1;
EXECUTIVE, 1;
INDIAN;
JURISDICTION A, 2; C, 1; D;
LOTTERY, 1;
MANDAMUS;
PUBLIC LAND, 2, 3, 6;
ROCK CREEK PARK, 2.

C. STATUTES OF STATES AND TERRITORIES.

Idaho: *See* ASSIGNMENT FOR THE BENEFIT OF CREDITORS.
Illinois: *See* TAX AND TAXATION, 3.
Kansas: *See* LIMITATION, STATUTES OF, 2, 3.
Maryland: *See* DISTRICT OF COLUMBIA, 1.
Missouri: *See* COMMON CARRIER, 4 (1);
MUNICIPAL BOND, 5, 9.
Texas: *See* LOCAL LAW, 1, 3, 4.

TAX AND TAXATION.

1. When a statute requires property to be assessed for taxation at its cash value, a bill to enjoin the collection of a tax solely on the ground that the property of other persons is assessed below its cash value cannot be maintained by a person whose property is also assessed below that value. *Albuquerque Bank* v. *Perea*, 87.
2. In order to procure an injunction restraining the collection of a tax, it is necessary to pay, or offer to pay, such parts of the sum assessed as are not disputed. *Ib.*
3. The provisions in Section 22 of the act incorporating the Illinois Central Railroad Company, (Private Laws, Ill. 1851, 61, 72,) exempting it from taxation, do not exempt it from the payment of a municipal assessment upon its land within a municipality in the State, laid for the purpose of grading and paving a street therein. *Illinois Central Railroad Company* v. *Decatur*, 190.
4. An exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay special assessments, imposed to pay the cost of local improvements, and charged upon contiguous property upon the theory that it is benefited thereby. *Ib.*

TEXAS.

See LOCAL LAW.

TIME.

See INDIAN.

TORT.

See DISTRICT OF COLUMBIA, 3.

TRESPASS TO TRY TITLE.

See LOCAL LAW, 6, 7, 8.

TRUST.

See EXECUTOR AND ADMINISTRATOR.

UNITED STATES.

1. For purposes of jurisdiction there is no distinction between suits against the government directly, and suits against its property. *Stanley* v. *Schwalby*, 508.
2. Where property of the United States is involved in a litigation to which they are not technically parties under authority of an act of Congress, the attorney for the United States may intervene by way of suggestion, and in such case the court will either stay the suit or adjust its judgment according to the rights disclosed on the part of the government. *Ib.*
3. *United States* v. *Lee*, 106 U. S. 196, distinguished from this case. *Ib.*
4. When the United States becomes a party defendant to an action brought by a citizen the bar of the statute of limitations is a valid defence, if set up and maintained. *Ib.*
5. The defence of adverse possession may be set up by the United States in an action to try title to real estate, and, if supported by the proof, is a valid defence. *Ib.*
6. When an officer of the United States, in possession under their authority of real estate claimed by them, is sued in a state court in trespass to try title to the real estate, and sets up that claim and that authority as a defence in the action, an adverse judgment in the highest court of the State draws in question the validity of an authority exercised under the United States, and gives this court jurisdiction to review that decision on writ of error. *Ib.*

See EMINENT DOMAIN;
ROCK CREEK PARK.

VENDOR'S LIEN.

See LIEN.

VESSEL.

See ADMIRALTY.

WILL.

See EXECUTOR AND ADMINISTRATOR.

WRIT OF MANDAMUS.

See ADMIRALTY, 1;
JURISDICTION A, 1, 5; C, 2;
MANDAMUS.

WRIT OF PROHIBITION.

See ADMIRALTY, 1.